



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kituyi v Republic (Criminal Appeal E051 of 2022)  
[2023] KEHC 24344 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24344 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E051 OF 2022  
KW KIARIE, J  
OCTOBER 24, 2023**

**BETWEEN**

**SIMON PETER KITUYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. case NO. E003 of 2022 of the Principal Magistrate's Court at Kaloleni by Hon. R.M Amwayi– Senior Resident Magistrate)*

**JUDGMENT**

1. Simon Peter Kituyi, the appellant herein, was convicted of the offence of defilement contrary to section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between the 6<sup>th</sup> day of November 2021 and 31<sup>st</sup> December 2021 in Kaloleni Sub County within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of ENK, a child aged 15 years.
3. The appellant was sentenced to twenty (20) years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant raised grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and facts by failing to consider that the prosecution did not prove their case against the appellant beyond reasonable doubt as required by the law in violation of sections 109 and 110 of the *Evidence Act*.
  - b. That the learned trial magistrate grossly erred in both law and facts by failing to consider discrepancies and irregularities in the entire prosecution case in violation of section 163 (1) of the *Evidence Act*.



- c. That the learned trial magistrate grossly erred in both law and facts by failing to consider that there was no cogent evidence to connect the appellant to the commission of the alleged offence in question.
  - d. That the learned trial magistrate erred in both law and facts by failing to consider DNA test was conducted to ascertain the paternity of the born child in breach of section 36 (1) of the *Sexual Offences Act* No.3 of 2006.
  - e. That the learned trial magistrate erred in both law and facts by failing to adequately consider my defence evidence.
5. The appeal was opposed by the state through M/S Ngina Mutua, learned counsel. She contended that the prosecution proved their case to the required standards.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
7. Section 163 (1) of the *Evidence Act* provides:

The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—

- a. by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
- b. by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
- c. by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;
- d. when a man is prosecutrix for rape or an attempt to commit rape, it may be shown that the prosecutor was of generally immoral character.

Though the appellant claimed that this section was violated, the record does not reveal any instances of the alleged breach.

8. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:

- a. That there was penetration of the complainant's genitalia;
- b. That the accused was the perpetrator; and
- c. The age of the complainant was below eighteen years.

These ingredients were restated in *Fappyton Mutuku Ngui v Republic* [2012] eKLR as follows:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the



complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients that the prosecution must prove against an accused person.

9. A copy of the certificate of birth of the complainant that was issued on the 2<sup>nd</sup> day of May 2018 indicates that she was born on the 13<sup>th</sup> day of September 2006. At the time of the alleged offence she was aged 15 years. This is what she testified was her age. The issue of the age of the complainant was therefore proved.
10. The other issue that was proved and requires no arguments is that of penetration. For a woman to conceive, there must be penetration by a male. When she was presented before Mwangolo Chigulu (PW1) on the 10<sup>th</sup> day of January 2022, a senior clinical officer, for examination she was found to be less than four weeks pregnant. I am aware that conception can occur even where penetration is partial.
11. ENK (PW2) in her evidence testified that in October 2021 while in school, the appellant who was her teacher called her and invited her to visit him on a Sunday. When she visited as requested, the appellant defiled her. Later on, on the 31<sup>st</sup> day of December 2021 on her own accord, she went to visit the appellant and they again had sex. When she was leaving the premises, she met with her sister who informed her that she was required at the chief's office. She said that one M, a boda-boda rider was the one who had reported to the chief that she had been seen coming from the appellant's house.
12. When the complainant was examined, it was established that she was pregnant.
13. This was the only evidence against the appellant.
14. On his part the appellant contended that he was falsely implicated by a group of boys who were living nearby.
15. There is nothing on record to suggest why he would be falsely implicated by a group of boys in an area where he was new and why the complainant would side with them and falsely implicate a teacher she said she was fond of.
16. The proviso to section 124 of the *Evidence Act* states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
17. The learned trial magistrate observed that the complainant was consistent in her evidence and that there was nothing to dent her credibility. I agree with this finding.
18. From the foregoing analysis of the evidence on record, I find that the prosecution proved its case against the appellant to the required standards. I accordingly dismiss the appeal.

**DELIVERED AND SIGNED AT HOMA BAY THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023.**

**KIARIE WAWERU KIARIE**

**JUDGE**

