



REPUBLIC OF KENYA



**KENYA LAW**  
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**JB v Republic (Criminal Appeal E050 of 2024)  
[2025] KEHC 14021 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E050 OF 2024  
WM KAGENDO., J  
OCTOBER 2, 2025**

**BETWEEN**

**JB ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from original conviction and sentence (SOA) MSCO NO. E051 of 2023 in the Magistrate Court at Mombasa on a judgment dated and delivered on 21st day of August 2024)*

**JUDGMENT**

**Background**

1. The appellant was charged with the offence of Defilement contrary to section 8 (1) as read with Section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006 and faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 6 of 2006.
2. The particulars of the offence on the main charge are that on diverse days between 1st April 2022 to 3rd July 2023 at Dibwini area in Likoni Sub County within Mombasa County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of D.S a child aged 16 years. And, in the alternative count, on the same dates and intentionally touched the vagina of D.S a child aged 16 years with his penis.
3. The appellant was after full trial found guilty under the main count and was thereby sentenced to fifteen (15) years imprisonment. Being, aggrieved by the conviction and sentence, and he preferred the present appeal.
4. He based it on grounds that the learned trial magistrate erred in matters of both law in failing to consider his defence under section 8 (5) of the [sexual offences act](#) and putting the burden of proof on him, and also failing to take note of the demeanor of D.S which failed to meet the criteria and section



124 of the *evidence act* . He also submitted that crucial witnesses were not called and the case was not proved beyond reasonable doubt.

5. The appeal was canvassed by way of written submissions.

### **Duty of the Court**

6. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic (1957) EA 336*).

Whether the prosecution established its case against the appellant beyond reasonable doubt?

7. Section 8(1) of the *Sexual Offences Act* provides as follows:

“ 8. A person who commits an act which causes penetration with a child is guilty  
(1) of an offence termed defilement.

.....

(4) A person who commits an offence of defilement with a child between the age 16 and 18 years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

8. From the foregoing the offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients must each be proven for a conviction to issue. (See *George Opondo Olunga vs. Republic [2016] eKLR.*)
9. I will consider the 8 grounds of appeal together as they are intertwined.

### **Analysis**

10. The Appellant and the complainant (D.S) were married and they lived together as husband and wife. A result of that union was the child, S, who provided the DNA sample which nailed the Appellant. The government analyst report PEXT 2, which was produced by PW2, proved that the was the father to the minor, S, the child to D. S.
11. The appellant did not dispute the paternity nor the fact that he was in a sexual relationship with D.S. He readily owned up to the marriage and he brought it up from the start. That they were a man and wife.
12. From the record, it appears that for around one year, the couple had no problems. That is throughout the pregnancy and even after the child was born. Then 3 months down the line something disturbed the union. The record does not show what triggered the differences but the testimony of Victor PW 3, the clinical officer from Likoni Sub-County, shows that the complainant visited their facility on 4/7/2023 at 6.45am. She gave the history reproduced herein below as extracted from the treatment card...”staying with Juma who is the father of my child for one year now and we have been having sex and out of it, I have one child with him called S who is now 3 months. The card has a further note:  

NB. Hist Associated physical violence when bitten (sic) and left herself with no food at time.
13. It is however noted that She had no injuries on the head, neck, cheeks, abdomen and both upper and lower limbs to support this history.



14. The medical notes also show she was on a contraceptive; Norplant.
15. As pointed out above, the Appellant readily admitted that he was married to the complainant. He testified that he had told her that he had another wife who had travelled to Saudi Arabia to look for employment. That is when he decided to remarry and he met the complainant DS in 2022.
16. That he seduced her, and she agreed. He then visited her home with wazees (elders) and the parents to D.S told him she was 19 years old. That he married DS formally. They lived together happily until June 2023 when he alerted her that his wife in Saudia had called intending to return back. That is how the complaint started and he indeed up with two convictions with a total of 45 years imprisonment.
17. The starting point is that marrying a minor is an offence under Section 8(1) of the *Sexual Offences Act*. So if the complainant D.S was a minor, the marriage whether approved by the parents or not, was tinted with criminality.
18. The appellant however raised the defence under Section 8(5) of the *Sexual Offences Act*: That he knew or had been told that D.S was 19 years old. He attributed this information to both her parents and D.S herself.
19. The parents to D.S were not called to give evidence and this is one of the few cases where there was no parent or guardian to minor called to support the case. Not even a neighbour or village leader gave evidence. The investigator told the appellant he may call them and these are some of the complaints he has raised. That crucial witnesses were not called and the burden of proof was shifted to him.
20. Let us focus on the age.
21. When the evidence started, at page 7 of the Record of appeal the court asked D.S. “How old are you?  
She responds – 19 years”.
22. This was before the witness was sworn. She was then sworn and she stated that she was living in children’s home and prior to going to the children’s home, she was staying in Likoni at Juma’s.
23. At page 8 she states:  
“I personally made the decision to stay with Juma”.
24. At this point, the prosecutor applied to have the witness declared as hostile. The court allowed the prayer and declared her hostile and recorded the prosecution was at liberty to cross examine her.
25. She then stated: -  
“I confirm I reported at Likoni police station on 3/7/2023. I did not tell police that my parents forced me to get married to the accused. I confirm I was staying with the accused”.
26. She then remained mute and did not respond to further questions. The prosecution then applied to have her remanded in custody for 14 days and the court remanded her at Likoni Children’s Remand Home for 14 days. This was on 6/12/2023.
27. On 7/12/2023, one Kinaro, a Children’s Officer prayed that the complainant be remanded at Kebene young Mother’s Home in Kwale because she had a young child. He also added that the survivor had confided in her that she was hostile because the accused had influenced her and advised her to lie in court.



28. She eventually gave evidence on 20/12/2022 and she said she moved to the appellant's home voluntarily. That it's a lie for the accused person to say she was 19 years and he did not inquire her age. That she knows she is 16 years old.
29. Now this age of 16, is picked from the age Assessment form, PEXT 1, from the Coast Provincial General Hospital. It shows approximate age – 16 years. This document was produced by the Investigating Officer and so its maker did not come for cross examination in court. The Appellant however did cross examine PW 3, the Clinician (not the one who prepared PEXT1) who stated as hereunder;
- “I ascertained her age by examining her and also got history from herself. I ascertained her age to be 16 years. You can ask the police about her exact age”.
- For me, I examined her and placed her at 16 years. We check the number of teeth and whether one has public hair or hair in the armpits to detect age. Page 14 of the record of appeal.
30. I have gone into details as the age was a critical factor in this case. The complainant started off by telling the trial court that she was 19 years old. The record shows that DS had never attended school and there was NO other document prior to this report to prove her age.
31. We only have the medical assessment but that had some problems. To start off , we do not know how the maker of PEXT 7 arrived at this age of 16. Can a number of teeth and presence or absence of public hair be a definite indication of age? I think not. What of different growth patterns? Nutrition? An Xray or a more scientific explanation could have sufficed.
32. The accused person's defence was that the parents to the D.S told him she was an adult. The investigating officer testified that indeed the Complainant told her that her parents betrothed her to the Appellant. (page 16 and 17 of the record.)
33. This age factor is tied with the credibility of the key witness – PW1. We note that she stated she was 19 then later 16 years. This evidence of 16 came after she was kept in custody for some time from 6/12/23 to 20/12/23.
34. The record shows that her explanation for the contradictions was that she was influenced by the appellant.
35. The fact of a witness being influenced is possible. But one must ask when and how? The record shows that of the appellant was arrested on 3/7/2023 and he remained in custody. At what point did he influence her?
- As earlier pointed out, the cause of the complaint was not so clear. Even the ob number is not clearly set out in the p3 form. It also appears that D. S went to report the other complaint as regards the appellant's daughter. The PRC shows she was seen at 1.00am. She went to hospital on 4/7/23 at 7.00am.
36. I have gone into great details as this issue is tied to the 7 grounds of Appeal raised. The first one being the defence under Section 8(5) of the *Sexual Offences Act* which is tied to ground 5 on the burden of proof.
37. As regards the age we have note there was no document like a birth certificate or health record. In the case of Daniel Kamau vs R [2019] eKLR where the Court of Appeal cited with approval the case of Fappyton Mutuku Nguvi vs R [2014] eKLR thereby holding that:“...that ‘conclusive’ proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might



be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

38. This particular case this was a borderline case.
39. The appellant in his defence stated that he believed that PW1 was an adult aged 19. As noted above, Section 8(5) and 8(6) of the Sexual Offence Act, No 3 of 2006 avails a defence to a person who is charged with the offence of defilement.

### The Law

40. The said provisions provide that

“Section 8(5) of the sexual offence Act “It is a defence to a charge under this section if- (a) It is proved that such child deceived the accused person into believing that he or she was over the age of 18 years at the time of the alleged commission of the offence; and (b) the accused reasonably believed that the child was over the age of eighteen years.” Section 8(6) of the [Sexual Offences Act](#) also provides that ;

“The belief referred to in subsection 8(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”

41. In the case of Irene Atieno Ochieng vs Republic (2017) the High Court in Migori held that: - “whenever the accused opts to rely on the defence under section 8(5) of the [Sexual Offences Act](#), the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that:
  - a. That it was the child who deceived the accused person into believing that he/she was over the age of 18 years at the time of the alleged commission of the offence;
  - b. That the accused person reasonably believed that the child was over the age of eighteen years; and
  - c. That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.
42. The appellant will first have to prove deception by the child in respect of the child’s age. That deception can be by way of words or action on the part of the child.
43. Similarly, the Court of Appeal in the case of Eliud Waweru Wambui vs Republic (2019) eKLR had the opportunity to discuss the issue of the defence provided under section 8(5) and (6) of the [Sexual Offences Act](#) and stated thus;

“Subsection (5) states that it is a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it is rather curious provision in so far as it sets in conjunctive as opposed to disjunctive terms which seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to the require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection 5(b) that separates it from the belief proceedings from deception in subsection (5)(a). We would therefore opine that the elements constituting a defence should be read disjunctively if the



two sub sections are to make sense...we would find merit in the Applicants contention that in all circumstances of the case he reasonably believed that the complainant was over the age of 18 years.

44. The burden of proving that deception or belief fell upon the Appellant, but the burden is on a balance of probabilities as is to be assessed on the basis of the appellant's subjective view of the facts. Thus whereas indeed the complainant was still in school in form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is germane to point out that a child need not deceive by way of actively telling a lie that she is over 18 years. We would give the term deceive the ordinary dictionary meaning which is to; "Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to" (As per the concise oxford English Dictionary, 12th Edition). So understood, we would think that had the two courts below properly directed their minds to the Appellants defence and the totality of the circumstances of this case, they would have in all likelihood have arrived at a different conclusion on it .It was a non-direction that they did not do so, rendering the conviction unsafe. We need to add as we dispose off this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of an age younger than 16 years old.
45. We think it is rather unrealistic to assume that teenagers and maturing adults in the since employed by the English house of lords in *Gillick Vrs West Norefolk & Wisbech Area Health Authority* (1985) 3 ALL ER 402, do not engage in, and often seek sexual activities with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process and not a series of disjointed leaps. As Lord Scarman put it in that case (at page 421); "if the law should impose on the process of, "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and lack of realism in an area where the law must be sensitive to human development and society change." At page 422 The law also referred to the judgment of chief justice Lord Parker in *R vs Howard* (1965) 3 ALL ER 684 ".... Where he ruled that in the case of prosecution charging rape of a girl under the age of 16 the crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that, "there are many girls who know full well what it is all about and can properly consent". Where to draw the line for what is elsewhere serious and open discussion. In England for instance, only sex with persons of less than the age of 16 years, which is the age of consent, is criminalized and even then the sentences are much less stiff at a max of 2 years for children between 14 to 16 years of age. See Archbold criminal pleadings Evidence and Practice (2002) page 720. The same goes for a great many jurisdictions.
46. We will get to the effect of this later.
47. The other issue was the credibility of the key witness D.S. As noted above she was treated as both hostile and refractory witness.
48. The term "hostile witness" is defined in the Black's Law Dictionary 2nd Edition as "a party that the Court feels is hostile against the party they are supposed to testify for". On its part, Merriam Webster dictionary defines the term as, "a witness in a legal case who supports the opposing side."
49. Under Section 161 and 163 of the [Evidence Act](#), the Court is given discretion to allow cross examination of own witness and impeachment of the credit of such witness. Indeed, Section 161 of the [Evidence Act](#) provides that: "The Court may in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross examination by the adverse party."



50. Section 152 of the Criminal Procedure Code sets out who a refractory witness is and also gives guidance on how to handle such a witness. It provides as follows:- “152. (1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence (a) refuses to be sworn; (b) Having been sworn, refuses to answer any question put to him; or (c) Refuses or neglects to produce any document or thing which he is required to produce; or (d) refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him. (2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him. (3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.
51. In the case of *Alowo vs. Republic* (1972) EA, the Court stated the following: “The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.”
- From the foregoing, it is evident that a “hostile witness” can be cross examined and can be impeached by his own credibility.
- In this case however, the Prosecution successfully applied to cross-examine the complainant after which she declined to testify. The prosecutor applied to have her locked up and she was locked up for 8 and she indeed returned to the stand after 14 days and concluded her testimony.
- Be that as it may, having been declared a “hostile witness”, witness, the complainant’s testimony would, to a great extent, be deemed as worthless. In saying so, I cite the case of *Batala vs. Uganda* [1974] E.A. 402 in which it was held as follows: “The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.”
- Such evidence should not therefore be heavily relied upon by the party calling that witness.
52. In that respect, the Court of Appeal in *Maghanda vs. Republic* [1986] KLR 255 held that: “The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court.”
53. The Court of Appeal, in the case of *Daniel Odhiambo Koyo v Republic* [2011] eKLR, also held as follows: “There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them. Normally a Court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify”.
54. Hon. J. Lesiit, J (as she then was), in the case of *Abel Monari Nyanamba & 4 Others vs. Republic* [1996] eKLR, guided as follows: “The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no Court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.”
55. In line with the above authorities, it has been said that a “hostile witness” is not just a person whose evidence is unfavorable to the party calling him, but a witness who appears to be biased or unwilling to



tell the truth, and that a “hostile witness” is the one who, from the manner in which he gives evidence, shows that he is not desirous to telling the Court the truth. Needless to state, if a witness is unreliable, his evidence, too, is unreliable, and although such evidence may still be considered, it would bear only little weight, if any.

56. In the case of *Batala v. Republic* (1974) EA. 402 the court held that:- “The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight.
57. PW1 as stated earlier, was treated by the Court and the prosecution as both a hostile and refractory witness. Her evidence therefore needed to be treated with circumspection because of her conduct. In certain cases, however, such evidence may be accepted as corroborative of other evidence if the Court is satisfied that it cannot be but true and is consistent with other evidence adduced and which the Court has accepted.
58. Pw1 gave contradicting evidence as as regards her age when she said she was 19. She later changed her mind. Her parents were not called to testify. There was no school or church document and the maker of the medical document was not called to to explain his methodology. Apart from the age of D.S evidence was also not credible and it was not corroborated. The fact that she told the Children’s Officer she had been influenced, shows she can lie. Therefore under Section 124 of the *evidence act*, her evidence alone was not satisfactory. Further as pointed the evidence of either a hostile or refractory witness needs corroboration. This was not done.
59. I must also point out that it was wrong for the court to lock her up for 14 days. Sections 152 of the Criminal Penal Code provides for 8 days only at the first instant . the court should also have taken into account that it was alleged she was a minor and worse still she also had a 3 month old child with her. Could this incarceration be what caused her to change her mind as to her age? It was not ruled out.
60. As regards the burden of proof, the trial court was right, it was upon the accused person to prove his belief that DS was not a minor.
61. The standard is however on a balance of probability. In this case, D.S was not a school going child and the Appellant stated he consulted the parents. This was confirmed by the Investigating Officer.
62. As such, the court finds that his belief was genuine and therefore his defence should not have been ignored.  
  
The court therefore finds that the prosecution case had too many holes that were not sealed. It was not built on solid land.
63. The court is of course aware of the need to protect under age children from early marriages. That protection should however not only be hinged on hasty prosecution.
64. In this particular case, I sadly note that the state lost track of both D.S and the young child, barely 9 months down the line. There should be proper Social Support Systems for such cases.
65. For now, I find that the Appeal succeeds. The conviction is quashed aside and the sentence set aside.
66. I however note that the appellant had another related matter. His release to await the outcome of the other matter.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 2ND DAY OF OCTOBER 2025**



**HON. LADY JUSTICE W. K. MICHENI**  
**JUDGE**

In the presence of: - Appellant...in person....

Mr Sirima... for the state

Bebora court Assistant

**HON. LADY JUSTICE W. K. MICHENI**  
**JUDGE**

Signed by/for:

**HON. LADY JUSTICE WENDY MICHENI**

