



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kumali (Sexual Offence 035 of 2022)
[2025] KEMC 123 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 123 (KLR)

**REPUBLIC OF KENYA
IN THE VIHIGA LAW COURTS
SEXUAL OFFENCE 035 OF 2022**

JA AGONDA, PM

MAY 23, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

ELISHA OKIYA KUMALI ACCUSED

JUDGMENT

1. The accused Elisha Okiya Kumali is charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. Particulars are that on diverse dates between 25th August, 2020 to 22nd April, 2022 at Emmaloba sub location, Maseno location, Luanda Sub County within Vihiga County intentionally and unlawfully caused your penis to penetrate the vagina of R.N a child aged 7 years.
3. The accused is also charged with an alternative count of committing indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. Particulars are on diverse dates between 25th August, 2020 to 22nd April, 2022 at Emmaloba sub location, Maseno location, Luanda Sub County within Vihiga County intentionally and unlawfully touched the vagina of R.N with his penis a child aged 7 years.
5. The accused denied both the charges. The prosecution called five witnesses in support of their case. The accused gave sworn statement and called two witnesses
6. R.N testified as Pw1 the complainant. She testified that she attended [particulars withheld] school in grade 4. She stated that she began in PP2 in that school and that the accused was teaching grade 7 and 8 pupils. She was seated next to a teacher from [particulars withheld] . She stated that she used to see the accused in the office at their school when she was in grade 2 at [particulars withheld] in 2020. She averred that in 2020 she had gone for tuition at [particulars withheld] Primary school, Ekwanda and she



saw two children D and M. She stated that her teacher was the accused who taught her Mathematics. She said that she would go in the morning and return in the afternoon for tuition. That after classes, they would play. She averred that during lunch time, the accused did “tabia mabya” on her. He raped her. He took his thing ‘kitu yake’ and inserted into her private part. She said that she was wearing a dress. He lifted it then unzipped his trousers. He then removed her panty. He was not wearing a pant. The act took place in a classroom. He was seated and placed her on his thighs. Then he raped her. He told her not to tell anyone. She said that he did the act on several occasions. In 2021 when she was in grade 3 at [particulars withheld] school, he did it again in his office. He took his thing and inserted in her thing. She was wearing her uniform. He was wearing a trouser. He lifted her dress. He was seated, he unzipped his trousers and placed her on his thigh. He inserted his penis into her vagina. He told her not to tell anyone. That E her friend told their teacher Regina as she was also raped. Teacher Regina took them to hospital in Kima where she was treated. They then went to Luanda police station. She averred that the headteacher was the accused at the time. She stated that her mother knew the accused. She got angry with the accused after this case. She identified the accused in court.

7. Regina Angatia testified as Pw2 project director and child protection since 1992. It was her evidence that the organization took care of needy children and that there were 383 children . She stated that she knew the accused who used to be a part time teacher since 2012. He was stopped pending this case. She stated that there was a case relating to R.N aged 8 years who was in grade 3 went to her office with other children complaining about the accused. They were S, L, D, G, M, MO, R and P went to her office on 24th May, 2022. They said that their teacher the accused was abusing them sexually. R.N said that the accused called her for tuition and arranged plastic chairs and inserted his penis in her vagina while she was in grade 2. That the accused continued to do this act while in school when the case was reported. The other children came up and said the teacher the accused used to do the same act to them. She reported at Luanda police station. She averred that 6 files were investigated and statements recorded. The police officers accompanied her to Coptic hospital with 12 children including R.N.. The doctor examined them and gave police the reports. That R.N. had been taken to Emuhaya but it was congested and they were referred to Coptic hospital free of charge. She averred that Emuhaya hospital did not complete the treatment. She said that the accused was a teacher at [particulars withheld] program and a teacher at [particulars withheld]. She said she was surprised as she had good relation with the accused.
8. Dr. Paul Muturi testified as Pw3 based at Coptic hospital since 2009 to date. It was his evidence that on 26th May, 2022 he examined the victim who had P3 form by request from OCS, Luanda and the victim was 8 years old. She had been defiled by a teacher on diverse dates. That she had been defiled by the head teacher “Alinifanyia tabia mbaya.” She said that the teacher carried her to his office and put her on his thigh and placed her on his desk and took her home and told her not to tell anyone what had happened. She did not recall the dated and time when the act was done. On examination, hymen was absent and there was no physical injuries. She had changed her clothes and had taken bathe. He tested her for STIs that were negative. He filled P3 form and signed it. He said that the probable cause was human organ that is penis. He also signed PRC form on 26th May, 2022. The victim was calm during examination well oriented with time and place. She felt intimidated when explaining what had happened. He produced P3 form and PRC form dated 26th May, 2022 “PEXh.2” and “PEXh.3” respectively.
9. PC Hellen Okumu [10XX87] testified as Pw4 the investigating officer from Luanda police station. It was her evidence that on 25th May, 2022 she was on duty when one Regina went to the station with 12 children from [particulars withheld] Academy. They had alleged that they were defiled. She booked the case vide OB No.35/25/5/2022. She interrogated the children with assistance and their statements were recorded. She interrogated R.N who said that since 2020 while grade 2 her teacher the accused had defiled her on several occasions and she was warned not to tell anyone and he instilled



- fear in her. That the act went on until 2022 when their teacher Regina told them to reveal the story. She escorted the complainant to Coptic hospital where she was examined and the doctor confirmed that the complainant was defiled as hymen was broken and issued with P3 form that was filled. She visited the scene at [particulars withheld] Academy and the school accused was teaching in Ekwanda. She tendered a copy of birth certificate that showed the child was born on 20th March, 2013. She stated that the first time the complainant was defiled she was 7 years old. The accused was traced and arrested and charged with the offences herein. She produced a copy of birth certificate “PEXh.4.”
10. The accused Elisha Okiya Kumali gave sworn statement and called three witnesses. Dw1 testified that he was charged with offence of defilement of R.N who was his pupil since primary school until 2020. He stated that he joined and worked for the school for ten years from 2010 and that the school was under [particulars withheld] and money for [particulars withheld] was not used. He started having problem with the director of the project Regina Pw2 the initial manager was paying NSSF and NHIF. That in February, 2022, the teachers wanted to know the status of NSSF and NHIF that had not been paid since 2017 and a copy of NHIF dated 1st September, 2013 to 2017 “DEXh.1.” He stated that he had differed with the manager Pw2 and the issue of defilement arose. He stated that the children performed well and they were to join High school. He testified that Regina Pw2 reported the defilement case and left 250 pupils but currently there were 15 pupils and the parents were not happy. He stated that MO was his witness. He said that Regina’s statement was recorded in April, 2022 and he saw the minutes that was suspending him from employment as per copy of the minutes “DEXh.1.” He stated that the charges were fabricated when he knew there were financial issues at the school. He told the manager Pw2 as teachers were not being paid. He stated that the area chief valued him and sponsored the children through donors. He stated that Regina recorded three statements, whatsapp and amended statements. That due to bad blood at work place, he was charged with the offences herein.
 11. MOO testified as Dw2 after Voire Dire examination. It was her evidence that she was 16 years and she attended [particulars withheld] Secondary school. She stated that the accused was a teacher at [particulars withheld] Academy. That in 2022 he was a pupil at [particulars withheld] Academy. That on 24th My, 2022 she was attending that said school and in 2020 she was still in that school. She never had intimate relation with the accused. That Regina Angatia was manager at [particulars withheld] in that school. That on 24th May, 2022 she never went to the accused’s office to tell her that accused had defiled her that it was not true as she was not defiled. That Regina Pw2 told them she was taking them for lunch in Luanda. They were many pupils who were taken for lunch at a hotel. She was called each pupil to say what each one was needed to record at the police. She refused and she told her to say that Mr. Elisha had defiled her. She did not record her statement at the police station.
 12. DA testified as Dw3 after voire examination. It was her evidence that in 2022 she was schooling at [particulars withheld] Academy in grade 6 and there was no Junior school. She stated that the accused was her teacher at [particulars withheld] Academy. That the accused did not defile her. She said that Regina Angatia was dealing with [particulars withheld] . She said that the accused did not defile her as alleged. That Regina Pw2 went in search of her and asked her if she would go and sleep with the accused. She told her that there was nothing the accused did with her. Regina tried to convince her to go for tour but she refused to accompany her.
 13. JOO testified as Dw4. It was his evidence that he was father to F the biological father to R.N. who is his granddaughter to her elder son. He stated that he knew the accused who was a teacher to his granddaughter R.N. He averred that he did not understand why R.N. went to police station. He stated that even R.N’s father did not know about this matter but they heard rumours. He called the girl and the father and she told them that there was nothing the teacher did to her. She said that they (pupils) were selected in school and taken to police station and that the teacher did not defile her.



Issues & Determination

14. I have carefully evaluated the evidence on record. I have also given due consideration to the written submission furnished to the court by the accused person. I have now to decide whether or not the prosecution has proved to the required standard either of the counts preferred against the accused person herein. Starting with the main count, the main issues that calls for my determination are as follows:-
- i. Whether or not the complainant was a minor between 25th August,2020 to 22nd April, 2022 when the alleged offence was committed.
 - ii. Whether or not the complainant was penetrated on her private part (anal/vagina) as particularized in the charge sheet on the material day.
 - iii. Whether the complainant properly identified her assailant.
 - iv. If the answers to (i) and (ii) above are all in the affirmative, then who penetrated her?
15. In determining this case, I will refer to ingredients as set out in the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:
- “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
16. Section 2(1) of the *Sexual Offences Act*, 2006 defines penetration to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another.”
17. On the first issue, the age of the complainant, Pw1 stated that in 2020 she was in grade 2 at [particulars withheld] but did not disclose her age during her chief examination. The teacher Regina Angati stated that R.N was aged eight (8) years. She was in grade 3. The teacher’s evidence was corroborated by the investigating officer Pw4 on this aspect as per the copy of the birth certificate “PEXh.4” which shows that the complainant was born on 20th March, 2013. As the defilement is said to have occurred on 25th August, 2020, it is clear that the child was eight (8) years meaning that at the time of the offence, she was indeed a child. Thus, a person of eight (8) years falls under the definition of a child, both under Sexual offence Act and Children’s Act. The prosecution evidence with regard to the age of the child was not challenged and I find that the first ingredient has thus been established.
18. This leads to the second issue, as regards to penetration, the complainant stated in 2020 that the accused was her teacher who conducted tuition. That at lunch time they would play with other girls. That one lunch, the teacher Dw1 called her raped her by removing his thing and placed into her thing. He removed her clothes and his clothes and placed her on his thighs and did tabia mbaya to her. That teacher Regina took her to hospital for treatment. The teacher Pw2 in her evidence stated that on 24th May, 2022 the children S, L, D, G, M, MO and RM were sexually abused by the accused. He used to place them on the plastic chairs and inserted his penis into her vagina while she was in grade 2. That other children opened up that the accused had defiled her. She reported at police station and there were 6 files were investigated. The clinical officer stated that he examined the victim on 26th May, 2022 and the girl was 9 years and she gave history that she was defiled by the teacher on diverse dates, he clothes were not torn or stained. As per P3 form “PEXh.2” the hymen was broken, no cervical or vaginal lacerations, labia majora and minora were normal. According to the PRC form “PEXh.3” the clinical officer Pw3 stated that there was no physical injuries, no vaginal discharge, hymen was absent, anus was normal and other significant orifices were normal. Further clinical officer Pw3 from Coptic hospital



confirmed that the victim was examined there were no external injuries, hymen was absent. She also confirmed that the said information was similar in the P3 form and PRC form “PEXh.2” and “PEXh.3” respectively.

19. From the above evidence, it is not clear whether the complainant was defiled in 2020 or 2022. Though prosecution witnesses gave their evidence. I note that the medical evidence did not support the complainant’s evidence. Further, the complainant’s evidence was fortified by the evidence of the investigating officer and clinical officer Pw3. Further the post rape care form was filled by the clinical officer who physically examined the complainant and there were no physical injuries. Thus, P3 form produced showed there were no injuries on her external genitalia or in labia majora and minora except that hymen was absent. There was no link that connected the accused as the culprit who defiled the complainant.
20. This leads me to the third issue herein i.e. as to identity of the assailant, the complainant was categorical that it was the accused person who had defiled her, being her tuition teacher, the prosecution must prove beyond reasonable doubt that the accused is the one who penetrated the complainant. The complainant Pw1 testified that she was defiled by the accused on several occasions when she had gone for tuition and he forcefully defiled her. The scene of crime was a school that had several pupils in the compound. Of great evidentiary importance, however, is that in criminal cases, defilement or rape has to be proved. Nonetheless, such must be proved through circumstantial evidence as required. As the prosecution laid the scene of crime to be a school, I ask myself how was the accused daring to defile more than 6 girls in the same manner in the school compound without anyone detecting. Further, even the 6 girls not even one of them reported to any teacher in secrecy the heinous act that the accused was allegedly subjecting them to.

I hold that the complainant identifying the accused as the man who defiled her is cast into doubt. Based on the evidence of Dw2 who was a pupil in the same school and same class confirmed that Pw2 lured them i.e female pupils by buying them food at in a hotel. She tried convincing them to go record their statements at the police station that the accused had defiled them and some of them went and recorded their statements that the Dw1 had defiled them.

The accused stated that Pw2 recorded three statements in this case. Pw2 was using the school children to fix the accused who was a part time teacher at [particulars withheld] because him and other teachers enquired about their remittances to NHIF and NSSF that had not been remitted as statutory deductions for two years. She then knew she was going to be in trouble and she diverted the attention by accusing the teacher Dw1 of defiling the school children. A fact that is disproved by Dw2 a child who was lured by same teacher Pw2 to record her statement at the police station but she refused to do so as the teacher was innocent. Nobody witnessed the defilement. Nobody saw accused in the company of the complainant. I find that pertinent and genuine doubts remain regarding whether the act was indeed committed by the accused goes in favour of the accused. I am of the view that once a witness is found to have been untruthful in one aspect of her testimony, then the entire testimony of that witness is cast into doubt. I find that Pw1 and Pw2’s testimonies were wanting. The benefit of such doubt must be awarded to the accused.

21. I am of the considered view that there was no other evidence that was adduced that indicated that the accused had defiled the complainant. Thus, all the medical evidence and the prosecution evidence absolve the accused from having sexual intercourse with the complainant herein. It is the onus of the prosecution to properly tie or connect through evidence, the penetration of the complainant herein to the accused. I am aware of the proviso to section 124 of the *Evidence Act* which permits conviction on the sole evidence of a child who is the victim of sexual assault as long as the court has recorded the reasons of believing the child. I have found that the medical documentary evidence excluded the



accused as the main culprit routs the core of the testimony by the complainant Pw1 which was to the effect that she had been defiled by the accused severally in 2020 and 2022. What begs the question is that more than 6 children were defiled by the accused and all the children did not report to the school administration but only confided to Pw2 after taking them for lunch. I tend to believe what the child Dw2 who confirmed that she was approached by Pw2 to record statement against the accused but she refused. In addition, there was no other cogent and strong evidence which proved any other penetration of the victim by the accused. I wonder why no efforts were made to establish the root cause of several female pupils from [particulars withheld] Academy alleged that one teacher the accused was defiling them with no action being taken. This glaring evidence cast doubt on whether the accused defiled the complainant. It also cast doubt on the credibility of the evidence by the complainant. Such is reasonable doubt which should be resolved in favour of the accused.

22. The accused stated that he never defiled the complainant on the alleged date. He told the court that he joined [particulars withheld] Academy that was receiving donor funds from [particulars withheld]. He stated that the funds were not used for its intended purposes. He began having problem with the director of the project Pw2. That the initial manager used to remit the teachers' NSSF and NHIF. That in February, 2022 teachers wanted to know the status of their NSSF and NHIF deductions had not been remitted since 2017 as per copy of NHIF records dated 1st September, 2023-2017 "DEXh.1." That he was suspended from employment when he questioned the director's integrity after it emerged that their statutory deductions were not being remitted to relevant Government agencies. I find that Pw2 being the director had control of the school management and decided to fabricate such heinous act against the accused Dw1 who was only following up on their dues that had not been remitted. But convene a meeting to discuss the removal of the accused who was vocal. Though there are minutes dated April, 2022 "PEXh.2" I hold the meeting was meant to tarnish the accused's name. Dw2 a hit the nail on the head, when she averred that the teacher did not defile the pupils but the girls recorded their statements having been bribe by being taken for lunch and taken to police station to record statements against the accused regarding the defilement acts. I note that due to bad blood between the accused Dw1 and the director Pw2 led to the accused being arrested for an offence he never committed. It was unfortunate that the director could frame the accused with such heinous act. Dw2 proved this position. I find that the prosecution did not lead cogent evidence that the accused defiled the complainant herein.
23. On the second offence of committing indecent act with a child, I find that the accused having been absolved by the medical examination as the only evidence that was adduced in P3 form and PRC form, it was only the hymen that had been broken. But this would have been occasioned with other activities apart from the sexual act. I find that the prosecution has not proved this court beyond reasonable doubt.
24. On the whole therefore and based on all the reasons I have advanced hereinabove I hold and find that the prosecution has not proved its case i.e. the main and alternative counts herein against the accused person to the required standard. I hereby do find him not guilty as charged and therefore proceed to acquit him on both counts accordingly in terms of Section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.

Orders accordingly

DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 23RD DAY OF MAY, 2025.

J.A.AGONDA

PRINCIPAL MAGISTRATE

On: 23.05.2025



Before: J.A. Agonda PM

C/A: Francis

C/P: Muchiri

Accused: Present

Counsel for Accused: Obwatinya h/b Mr. Ondieki

Court: Judgment delivered, signed and dated in the open court.

J.A. AGONDA

PRINCIPAL MAGISTRATE

