



**Director of Public Prosecutions v Kaingu (Criminal Case
E046 of 2022) [2024] KEMC 68 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEMC 68 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E046 OF 2022
ZK KAGENYO, RM
JANUARY 15, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

ROBERT MTAWALI KAINGU ACCUSED

JUDGMENT

1. The accused person who was arraigned in court on the 29th day of August 2022 to face an indictment of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006 is said that on unknown dates during the month of April 2021, at 1200 hrs in [Particulars withheld] village, Kibandaongo location, Kinango subcounty within Kwale county intentionally and unlawfully caused his penis to penetrate the vagina of MMM a child aged 15 years. It is said that in the alternative, the accused committed an indecent act with a child contrary to section 11 (1) of [Sexual Offences Act](#) No. 3 of 2006 where it is said that on unknown dates during the month of April 2021 at 1200 hrs in [Particulars withheld] village Kibandaongo location, Kinango subcounty within Kwale county intentionally and unlawfully touched the vagina of MMM a child aged 15 years with his penis.
2. The accused denied the charges terming them as strange and a trial ensued. He conducted his case while out on cash bail of Ksh. 50, 000/=. He conducted the case on self-representation and was in court in all the sessions of the trial. The matter was conducted in Kiswahili and English languages, the languages of choice by the accused.

The Prosecution's case

3. According to the prosecution, Robert Mtawali Kaingu, a teacher by profession was a teacher at the school where the complainant was a pupil. He was married and her wife and the complainant were very close friends, indeed, family friends. The complainant used to visit the accused's wife at her house and would spend most of the times, particularly during the weekends. One day, the complainant made such



an impromptu visit. Unbeknown to her, the accused's wife was absent on that day. The complainant found the accused person only who took advantage of the isolation and had sex with her leading to a pregnancy. One day while at school. A teacher noticed that the complainant was pregnant and this realization sparked the investigations, the complainant pointing at the accused person as the person responsible.

4. At the end of the case by the prosecution, the accused person was placed on his defence under section 210 of the Criminal Procedure Code, and section 211 of the Criminal Procedure Code and Article 50 (2) (i) of *the Constitution* having been explained to the accused person, he, in person, elected to exercise his right to remain silent.
5. The parties invited this court to make its finding, which I hereby make as follows;

Analysis and Determination

6. Section 8(1) of the *Sexual Offences Act* provides the key elements of the offence of defilement. The said elements were also stated in the case of *George Opondo Olunga -v- Republic* [2016] eKLR where the court held thus;

the critical ingredients forming the offence of defilement are;

- a. Age of the complainant;
 - b. Prove of penetration; and
 - c. Positive identification of the assailant.
7. About the standard of proof of these elements, it was said by the Court of Appeal in *John Mutua Munyoki -v- Republic* [2017] eKLR that the prosecution must prove each of them beyond reasonable doubt.

a. Age of the Complainant

8. Rule 4 of the Sexual Offences Rules of Court, 2014 states that;

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

9. By way of a Certificate of Birth produced as P. Exh 1, indicating the Date of Birth as 18th June 2006 and its holder as M daughter of MMM and M.S.M, the element of age was proved beyond reasonable doubt. The authenticity of the said document or any entry within it was not attacked by the defence. Through it, it can therefore be safely said that, as at 30th day of April 2021 the complainant was just but 15 years and 2 months old and hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the operational *Children Act*, 2022.

b. Penetration

10. By way of medical evidence adduced orally by PW 4 and also documented evidence at the Post Rape Care Form (PRC) dated 17th November, 2021 and produced as P. Exh 2, Medical Examination Report (Police Form P3) and produced as P. Exh 3, a Medical Treatment Notebook bearing various dates and produced as P. Exh 4 and a Government Analyst Report dated 17th July 2023 and produced as P.Exh 8, the element of penetration was proven beyond peradventure.



c. Positive identification

11. The complainant said that the accused caused his penis to penetrate her vagina. Voluntarily and without even the question being put to her, the complainant pierced her protection under section 34 (1) of the *Sexual Offences Act*, 2006 and informed this Court that the accused was the only man who had and have ever had sex with her. She said that the accused was the father of her child.
12. The accused person vehemently denied and said that he was carrying a burden which ought to have been carried by one known as Butcher who worked at a local butchery.
13. A quick look at the Police Form P3, informs one that the complainant informed the medical practitioner that the person who defiled her was a butcher.
14. The complainant's insistence that the accused is the father of her child was negated by the Government Analyst Report dated 17th July 2023, that excluded the accused as the biological father of the said issue. I am well guided that the issue on trial was not the paternity or the maternity of the issue born by the complainant, but the complainant's exclusion of every other man or process as the father of her child but only the accused, and the subsequent exclusion of the accused as such father, coupled with the initial statement by the complainant while at the hospital, I find it that there is doubt, reasonable doubt for that matter, that the accused defiled the complainant as alleged.
15. Before I pen off, I wish to make a comment on the information tabled by the investigating officer when she testified on 18th May 2023 where she told this court thus,

On 22/09/2021, while at school, her teacher saw her and observed her. The teacher called for an assembly and she announced that M.M was pregnant. The teacher announced this at the assembly.

I must confess that in the entire file, this is one statement that shredded my heart out and wished that that was not the truth, but it was just a wish and the damage had been done. What purpose was such broadcast intended to serve? What did the teacher intend to achieve by humiliating the innocent child among her schoolmates? Such a habit should be called out and never countenanced within our institutions and communities. I had hoped that the gospel against secondary victimization and continuous revictimization of victims of Sexual and Gender Based Violence had reached all the corners of our beloved nation, and at the bare minimum, to those who we have trusted to take care of our children, but it appears that I was all wrong. Public humiliation of a child has irreversible psychological abuse on children, and it is my hope that the said teacher shall be informed as much and to this extent I urge the Kwale County Court Users Committee to take the necessary steps to ensure that our teachers and other primary caregivers entrusted by the parents with their children are sensitized on how to handle survivors of Sexual and Gender Based Violence. To facilitate this, I do direct this Court's Court Administrator to, within 30 days of delivery of this judgment, have this request placed before the Kwale County Court Users Committee with a view of developing a strategy and approach to be deployed.

Disposition

16. Having analyzed the evidence, I find that there is doubt, reasonable doubt for that matter, the accused person touched the complainant as alleged or committed the offences alleged to have been committed, and consequently this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the Criminal Procedure Code for both the main count of defilement of a child aged 15 years proscribed under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*,



2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11 (1) of the *Sexual Offences Act*, 2006.

17. The accused person who has been on the trial while on a cash bail of Ksh. 50, 000/= that was deposited in court on the 27th day of September 2022, is discharged forthwith. Consequently, the aforesaid cash bail deposited in court shall forthwith be refunded to the depositor.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 15TH DAY OF JANUARY, 2024.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 29th day of January, 2024, by Hon. C. K. Auka in accordance with the provisions of section 200 (1) (a) of the Criminal Procedure Code, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

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In the presence of:

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

