



**Republic v BMK (A Minor) (Sexual Offence E018 of 2023)
[2024] KEMC 95 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEMC 95 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SEXUAL OFFENCE E018 OF 2023
AT SITATI, SPM
MAY 28, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

BMK (A MINOR) SUBJECT

RULING

1. B.M.K. (initials) denied the main charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars were that in diverse dates between 14th December, 2023 and 16th December, 2023 within Imenti Central Sub-County of Meru County, he unlawfully and intentionally caused his penis to penetrate the vagina of B.K. (A Minor) aged 13 years old.
2. In the alternative Count, he denied the charge of committing an indecent act with a Minor contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that in diverse dates between 14th December, 2023 and 16th December, 2023 within Imenti Central Sub-County of Meru County, he unlawfully and intentionally touched the vagina of B.K. (A Minor) aged 13 years old.
3. The Subject was represented by MS. Judith Chepkoech, Advocate on a Pro Bono basis.

TheDPP'S Case

4. PW1 B.K. told the court that she was born in March 2010 as per the birth certificate in court. She told the court that the subject herein B.M.K. was her boyfriend and that on 3 consecutive days starting 14th December, 2023 to 16th December, 2023 she went by herself to the house of B.M.K wherein she and B.M.K had carnal knowledge of each other. She told the court that she left the house by herself and returned to her parents' home where she was questioned and taken back to the subject's house before he was arrested and brought to court as presently.



5. In cross-examination, she admitted that the Subject herein B.M.K was her boyfriend and that she voluntarily went to his house, stayed there for 3 days and had repeated sexual acts with him before she returned by herself to her parents' house. She affirmed that the sexual acts between herself and BMK were voluntary.
6. PW2 M.K. (initials) mother to PW1 told the court that her daughter went missing for 3 days causing her to report to the police. When PW1 resurfaced, she was questioned by PW2 whereupon she disclosed that she had been to her boyfriend's house for the 3 days. This made PW2 to report to the police.
7. PW3 Senior Clinical Officer Peter Mbogori produced the treatment notes and P3 Form confirming that there were no obvious injuries observed in the genitalia of PW1. In cross-examination, S.C.O Mbogori stated that under laboratory tests, no spermatozoa were seen in the genitalia.
8. PW4 S/no. 91707 PC John Mbura testified as the investigating officer. He told the court that PW2 escorted PW1 to the station and lodged the complaint of alleged defilement. After recording the report, PC Mbura had PC(W) Kioko escort the minor and her mother to the Githongo Sub-County Hospital for medical examination and the filling of the P3 Forms. He then arrested the Subject herein BMK on 21st December, 2023 and preferred the present charges. PC Mbura produced the Birth certificate as P.Ex.1 confirming that she was 13 years old as at the time of the alleged sexual events.
9. At the end of his testimony, the DPP closed their case whereupon the court was called to determine whether or not a prima facie case had been established against the Subject herein.

Determination

10. From the material placed before the court, the ingredients of the age of the complainant and being penetrated were proved by her truthful testimony but this is subject to the overriding question of the legality of the preference of the charge in the first place.
11. Before delving into the (de)merits of the DPP's case, the court noted that the Subject herein himself was about 16-17 years old at the time of the alleged sexual interaction between himself and the complainant herein who was 13 years old at the time. She was 3 years younger but both of them were teenagers and therefore minors within the meaning of the Children's Act. That being so, neither the boy nor the girl had legal capacity to consent to sexual intercourse by or with the other minor.
12. From the facts established in this case arising out of the cross-examination, the female minor affirmed on oath that she regarded the subject BMK as her boyfriend with whom she had repeated sexual intercourse. In the result, from a legal standpoint both the male minor and female minor ought to have been charged but as it is apparent the DPP has not against the male minor.
13. From the material placed before the court, it has been proved that the Female minor voluntarily left her parents' home and went to the Male minor's house which was more than 5 kilometres away.
14. Further, the Male Minor voluntarily received and hosted the Female Minor at his quarters for 3 days. It was established that they mutually agreed to have sexual intercourse for 2 of the 3 days and on the last day the female left the male's quarters voluntarily and returned to her parents' house. On being questioned about her whereabouts for the last 3 days, she readily disallowed that she had been with her boyfriend.
15. In the totality of this scenario, both Minors shared an equal degree of blameworthiness for the sexual transactions and therefore, both ought to have been charged for the offence.



16. In the authority of *POO (a Minor) v DPP & anor* [2017] eKLR it was held that:

“As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted...the person penetrated might be the offender...Obviously...there will be wide variations in the blameworthiness of the behavior...both prosecutors and sentencers will have to make careful judgements about who should be prosecuted and what punishment if any is appropriate.”

17. In this Court’s considered view, where the degree of blameworthiness is shared and equal, charging the male minor and leaving out the female minor has been held to be unlawful and unconstitutional in the authority of *G O v Republic* [2017] eKLR

“It is an illegal sentence, and should not have been imposed against the appellant at all. I find no justification of the trial court in imposing a sentence against the appellant to serve 15years for an offence of defiling a girl who was older than the appellant as she was 17 years.

18. In this case, the court should have noted that both the appellant and the complainant were minors and both deserved to be placed under the care of a qualified counsellor or the court should have found the appellant needed guidance instead of ordering him to be imprisoned for 15 years.

19. The court erred in failing to note that the appellant was a minor and deserved to be sentenced as provided by law. I find that the appellant was discriminated against on the basis of sex in that he was arrested, charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement (see Article 27 of *the Constitution* of Kenya, 2010).

20. In the instant case, I find that at the time of the commission of the offence, both the appellant and the complainant were minors; I find indeed the complainant was senior to the appellant and the blame should not have been wholly shifted to the appellant but should have been apportioned against both the complainant and the appellant, and both being minors, they need protection against harmful sexual activities and none should have been sent to prison.

21. By the application of the preceding authority the court finds that the Minor herein was a concurrent victim of the alleged sexual transaction and he has no case to answer. He has no case to answer and is acquitted of the charges under section 210 of the *Criminal Procedure Code*. Right of appeal is 14 days.

DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28TH DAY OF MAY, 2024

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

PRESENT

JUDY CHEPKOECH ADVOCATE FOR THE SUBJECT

DPP KIBITI

RONNY

