



Director of Public Prosecutions v KDM (Child in conflict with the Law) (Sexual Offence E002 of 2022) [2023] KEMC 284 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEMC 284 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E002 OF 2022
ZK KAGENYO, RM
JULY 17, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTION

AND

KDM (CHILD IN CONFLICT WITH THE LAW) SUBJECT

JUDGMENT

1. The child in conflict with the law, hereinafter the Subject, was on 3rd November 2022 presented before this Court over an indictment for defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence *Act No. 3 of 2006*.

The particulars were that on the diverse date between 2018 and 23rd October, 2022 at [Particulars withheld] village, Golini location, Matuga subcounty, Kwale county within Coast region, intentionally and unlawfully caused his penis to penetrate the anus of ENW a boy child aged 11 years.

2. In the alternative, he faced a charge of the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

The particulars were that on the diverse date between 2018 and 23rd October, 2022 at [Particulars withheld] village, Golini location, Matuga subcounty, Kwale county within Coast region, intentionally and unlawfully caused his penis to touch the anus of ENW a boy child aged 11 years.

3. The Subject could not plead on that date due to lack of legal representation on his part and on the 4th day of November 2022, when Ms. Vidzo, Advocate, was appointed to represent the Subject on a pro bono basis, the Subject denied responsibility in the main count and the alternative count herein.

4. The subject was present in court all through the trial. The matter was conducted in Kiswahili and/or its interpretation, the language of choice by the subject. He conducted his case partly while in custody and partly while out on personal surety bond.



5. The DPP to prove their case lined up a total of 4 witnesses while upon being placed on his defence, the Subject gave his sworn evidence without calling any witness for the defence.

The Prosecution's Case

6. According to the prosecution, both the Subject and the complainant, even though are not related by blood, they have grown up knowing each other to be a cousin to the other.
7. The complainant was abandoned by his mother while a younger child and he has never seen her again, similarly to his father. It was the case by the prosecution that both the complainant and the Subject have been raised by the lady they know as their common grandmother.
8. According to the complainant, the subject had been sodomizing him since the year 2018 to 2022. One day, in October 2022, their Social Studies teacher, in one of his lessons taught them that nobody should ever touch their private parts. This lesson opened up the mindset of the complainant who went ahead and disclosed his over 4 years ordeal to a friend who then led him to the Social Studies' teacher and the information got to their Class teacher, PW 1, who as protocol would require, reported to the headteacher who advised her to report the matter to the police station.
9. Upon the lodgment of the report, the complainant was then taken for medical examination which showed that there was no penetration into his anus as PW 3, the medical practitioner, would testify in court.
10. After the evidence of the investigating officer who testified as PW 4 on how she compiled the evidence and ultimately proposed the charges against the subject who was said to have many cases at the Children Officer's office, the prosecution closed its case.

The defence case

11. The subject was put 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 Subject, he, in person and upon consulting his counsel, elected to defend himself by way of tendering sworn evidence without calling any witnesses.
12. The Subject denied the commission of the offence as charged. Just as the life story of the complainant was, the Subject informed this court that on his part, upon the divorce of his parents, the parents abandoned him while he was of very tender age and he has been raised by the common grandmother as the complainant. He maintained his innocence and denied the commission of such offences as he is charged with. After his testimony, the defence closed its case.
13. The Court invited the parties to put in their closing arguments, but both parties opted to rely on the record.
14. Having heard both parties at their full lengths, the court retired to make its decision.

Analysis and Determination.

15. The subject has been charged with the offence of defilement of a child aged 11 years which is proscribed by section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. In the alternative count he is charged with the offence of committing an indecent act with a child which is proscribed by section 11 (1) of the *Sexual Offences Act*, 2006.



16. 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 identity of the assailant.
17. These elements were said that the Prosecution must prove each of them beyond reasonable doubt, by the Court of Appeal in *John Mutua Munyoki -v- Republic* [2017] eKLR.

Age of the victim

18. 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.

19. In this case, the DPP produced an Age Assessment Report date-stamped 4th November 2022. The minor told the court that he was 11 years old and that her mother took with her his Certificate of Birth to Murang'a and has never returned the same. The issue of age was not contested by the defence and was not part of their defence. Without any such contestation and with the oral evidence of the child and by observation by this court, I take the age as stated in the Age Assessment Report which in my opinion falls under the category of similar document and make a finding that the complainant was at the range of 11 years old as at 4th November 2022.
20. However, at this juncture, I won't hesitate but say that it would be more prudent if the age assessment to be relied on satisfies threshold of such assessment by showing the method used and the basis of the inference thereof other than just indicating a figure on the piece of paper that may cast doubts on the process said to be an age assessment.

Penetration

21. On the element of penetration, the court was faced by a hard task and a set of facts that are verily challenging in arriving at a finding. The court was called upon to believe two divergent versions of the two children. On one hand, while on oath, the complainant informed this court that the Subject penetrated his anus and on the other hand, the Subject while on oath told the court that he did not even touch the anus of the complainant.
22. PW 3 the medical practitioner told this court that upon examination of the complainant, there was no evidence of penetration into his anus. I take note that the complainant stated that the subject had been sodomizing him since 2018 and 4 years later, the medical practitioner did not observe any such penetration. As such, I make a finding that indeed there was no penetration into the anus of the complainant.
23. Having established that there was no penetration, the court proceeded to interrogate on whether there was any contact between the penis of the complainant and the penis of the subject.



24. While on oath, the complainant told this court that the Subject would take advantage of him whenever they were together and sodomize him. He further added that sometimes, the Subject would be too rough with him by blocking his mouth by use of a piece of cloth, by hand or even at times cover him by the blankets. This was in equal measure denied by the subject. Which version does the court believe?
25. Firstly, I must state that both the Subject and the complainant are 2 children faced with apparent vulnerabilities and are children who are in extreme need of protection and care. Their teacher, PW 1, observed that they are among the few pupils in her school whose parents or guardian hardly attend any meeting. On their part, their respective vivid descriptions of how they lived and how they were abandoned is a clear indication of their vulnerabilities and extreme need as children.
26. When the complainant was testifying, the court assessed him and had no reason to doubt his evidence. He explained how his grandmother was hostile to him when he reported the matter to the teacher and told him not to go back to their home. The complainant further stated that he had earlier on reported the matter to the grandmother who swept the issue under the carpet and let the boys continue sharing the room as before. On that first instance, the grandmother was not as agitated as the way she was when she learnt that the teachers had been informed. On her part, their teacher stated that she had observed the complainant to appear stressed and mentally disturbed. The complainant further testified that he had been suffering from being overworked and commandeered at home. These factors, when assessed holistically, vouches for the credibility of the complainant.
27. On his part the Subject informed the court that they were living well with his cousin, the complainant, and they did not have any grudge against any other. This fact demonstrates that the complainant did not lodge the complaint under the motivation of vengeance or ill-will, but it must have had a well-founded genuine genesis.
28. It is my finding that even though the medical practitioner confirmed to this court that there was no penetration, I make a finding that the subject touched the anus of the complainant with his penis. In his mind, he could have thought that he was actually having actual penetration but for other factors beyond his comprehension, there was no actual penetration.
29. Regarding the defence by the Subject, I find it to be a denial, him having known that the cat had been let out of the bag.

What are the appropriate Orders in the circumstances.

30. From the foregoing, the court has made a finding that the subject is responsible for having done an indecent act with a child. The court has further made an observation on the nature of the persons before it. They are children, who up until the day the two were separated as a result of this case, had been living together as cousins with shared vulnerabilities. The Subject before court is a child with a whole future ahead of him. He is a victim of a broken marriage, divorced parents and neglect that landed him under the parentage of his old grandmother. If this court proceeds to convict him, in my opinion and in the circumstances of the case, then it would be piling a stack of clouds of misfortunes over him that would lead to adversely affecting his mental development. It is my finding that the Subject verily needs a treatment plan through guidance and counseling which will help boost his esteem as opposed to a conviction that is highly likely to be highly injurious to his wellbeing. He is too vulnerable that the State is called upon to intervene and for that reason, he does not deserve to earn the title “convicted.”
31. It is for the foregoing that the court communicates its intention to invoke section 4 (1) (b) of the *Probation of Offenders Act*. For this reason, the Court shall require a Probation Officer’s Report to enable it make its determination.



32. The matter shall be mentioned on the 31st day of July 2023 for such further directions upon receipt of the report of the probation officer that shall incorporate among others, the views of the complainant and recommendations on a suitable treatment plan, if in the view of the probation officer, such treatment is a viable recommendation from his findings.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 17TH DAY OF JULY 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Archibald Kimbada - Court Assistant.

Ms. Mwaura, Principal Prosecution Counsel, for the State

Ms. Vidzo, Advocate for the Child in Conflict with the Law

KDN - Child in Conflict with the Law

