



**Director of Public Prosecution v HC (Sexual Offence 71 of 2020)  
[2023] KEMC 279 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEMC 279 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE 71 OF 2020  
ZK KAGENYO, RM  
NOVEMBER 1, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTION ..... REPUBLIC**

**AND**

**HC ..... ACCUSED**

**JUDGMENT**

1. On 13<sup>th</sup> day of March 2020, the government of the Republic of Kenya, in a televised press briefing confirmed the fears that every Kenyan and ever member of the human race in general that COVID-19 had struck the country. Consequently, to fight with this invisible but ruthless enemy, a raft of measures was put in place by the government including the closure of the schools. The social life of the children under the protective wings of their teachers was to be cut short and for the next 10 months, the children were to be at their homes, most advised, with minimum movement and interactions with others.
2. To date, COVID-19 has caused and continues to cause suffering, inconveniences and streams of unending tears have been shed due to the disease. Some of these adverse effects could and are still directly seen such as deaths and agony on hospital beds while others were a little bit remote to be related to the virus but nonetheless had far reaching effects such us shuttered dreams for even the most innocent and blameless in the society, the children.
3. M.N, the complainant in this case did not survive these to be perceived the indirect negative effects of the COVID–19. Before the virus struck the world and caused the schools in the country to close, she was a school going child, in class 5 in pursuit of her dreams.
4. However, after the closure of the schools, a person who was working for her grandmother as the groundman stopped viewing the complainant herein as a school going child with dreams ahead to achieve, and sadly converted her to a wife for all purposes and intents. This person was supposed to be taking care of her and not exploiting her naivety and innocence sexually. This person is the accused



herein. The prosecution led evidence that the accused used to have sex, unprotected sex, with the complainant that led to the pregnancy of the complainant and by God's grace and blessings of a good health, she was able to carry the pregnancy to term and gave birth to a baby boy.

5. One day, as PW 1 had visited the complainant's mother, she noted the observable physical changes on the body of the complainant and after subjecting her to a pregnancy test, she confirmed her fears and the complainant disclosed all that had been done in the dark by the accused person. Ultimately, this matter found its way to the police and to this court with the present charges against the accused person of defilement contrary to section 8 (1) as read with sub section 8 (3) of the Sexual Offence [Act No. 3 of 2006](#) with the particulars that on the diverse dates between 1<sup>st</sup> April 2020 and 22<sup>nd</sup> September 2020 at [particulars withheld] village, Vigurungani location in Kinango subcounty within Kwale county intentionally and unlawfully caused his penis to penetrate the vagina of NM a child aged 13 years. In the alternative, he was charged for the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act No. 3 of 2006](#) in that on the diverse date between 1<sup>st</sup> April and 22<sup>nd</sup> September 2020 at [particulars withheld] village Vigurungani location in Kinango subcounty within Kwale county, intentionally and unlawfully touched the vagina of NM a child aged 13 years with your penis.
6. When put on his defence, the accused, in his sworn statement confirmed that indeed he was having sex with the complainant and that that sex resulted to a pregnancy and delivery of a child but contended that the complainant was not a school going child and on his part, he was a 17 year old juvenile.
7. It is trite law that in a case of defilement, the state has to prove beyond reasonable doubt as against the accused person the three elements of the offence of defilement being;
  - i. Age of the survivor/ victim;
  - ii. Penetration; and
  - iii. Positive identification.
8. It would appear that the accused was not attacking the elements of penetration or positive identification but what he endeavored to put forth the argument that he did not have sex with a school going child which to him that is the offence and further that on his part, he is merely a 17-year-old juvenile.
9. Having heard both parties at their full lengths, the court retired to make its decision.

### **Analysis and Determination**

10. As pointed out earlier, the DPP was required to prove as against the accused person the three elements for the offence of defilement, being, age, penetration and identification.

#### **a. Age**

11. By way of a Certificate of Birth produced as P. Exh 6, indicating the Date of Birth as 15<sup>th</sup> August 2007 and its holder as M.N daughter of P.M.G and M.M.K, 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 accused. Through it, it can therefore be said that, as of 22<sup>nd</sup> September 2020 the complainant was 13 years and 1 month old.



## **b. Penetration**

12. By way of oral evidence by the PW3, the complainant, and DW1, the accused, they said that they had sex with each other. The period of such sexual intercourse as stated in the charge sheet was not challenged. The Medical Practitioner, PW 6, stated that he examined the complainant and produced a Medical Examination Report, Police Form P3, as P. Exh 1 and the Medical Treatment Notes, P.Exh 2, documents whereat he made his observations. After the examination, he concluded that there had been penetration into the vagina of the complainant.
13. As a result of the penetration, there was observed to have been a pregnancy, of which the accused person took credit of. On 12<sup>th</sup> May 2022, an application for conducting a DNA test was made by the state and allowed by the court and by way of a Human Identification Report produced by the Government Analyst, PW 2, as P.Exh 3, it was confirmed that indeed the accused person had the likelihood of 99.99+ % of being the father to the born issue. This corroborated by the evidence of the complainant and the accused himself, seals it to a hundred percent paternity and I find that the DPP proved the element of penetration beyond reasonable doubt.

## **c. Positive identification**

14. The complainant stated that the accused had been working at her grandmother's homestead. She stated that she knew the accused. she further stated that the accused had sex with her on many occasions. On his part, the accused did not deny and the much he did was to confirm that indeed he had sex with the complainant. It is my view therefore that identification of the accused by the complainant as the person who defiled her was free from error.
15. The court at this juncture is satisfied that the offence of defilement was committed. The court having listened to the defence mounted by the accused person notes that the accused argues that firstly, the complainant was not a school going child and that he was charged for having sex with a school going child.
16. In my view, that was not the charge that he is facing but the charges he is facing and which the court informed him of on the 24<sup>th</sup> day of September 2020 was of having sex with a child aged 13 years which is proscribed by the law. The law was cognizant to the fact that being a school going person is not a criteria to a free consent making capacity as even adults still go to school, a living example is that of legend Kimani Ng'ang'a wa Maruge, a uniform wearing pupil at the age of 84 years.
17. Secondly, I note that the accused raised an issue over his age. I note that the charge sheet indicated him to have been an adult and further that he never informed the court of his age therebefore and hence an afterthought. In any case, the court afforded him all the requisite protection at trial as the most favored child in the criminal justice system.
18. In my most considered view, the accused was not prejudiced in any way all along the trial and that the finding of guilt of the accused, which I do enter, is safely so entered.

## **Disposition**

19. From the foregoing, I make a finding that the Prosecution has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person defiled the minor victim initialized as M.N and I thus find him guilty of the same and convict him under section 215 of the Criminal Procedure Code for the main count of defilement of a child aged 13 years which is proscribed by section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#).



20. Turning on to the alternative count, having made a finding in the main count, the alternative count rests determined.
21. On the issue of the produced birth certificate, noting that it was in its original form, I direct that the same be returned to the complainant's family but a certified true copy of the same be placed in the file in its place.
22. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court within 14 days from today's date if dissatisfied with this court's finding.

**JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

This Judgment has been Delivered in Open Court at Kwale on this 9<sup>th</sup> 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 11<sup>th</sup> September 2023.

.....

In the presence of:

Mr. Khamis, the Prosecutor

Mr. Hud, the Court Assistant

The accused

