



**Director of Public Prosecutions v Kamande (Criminal Case
E031 of 2021) [2023] KEMC 263 (KLR) (29 December 2023) (Judgment)**

Neutral citation: [2023] KEMC 263 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E031 OF 2021
ZK KAGENYO, RM
DECEMBER 29, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

MICHAEL NGURE KAMANDE ACCUSED

JUDGMENT

1. The accused person was on the 21st day of June 2021 arraigned for the offence of defilement contrary to section 8 (1) as read with sub section 8 (4) of the Sexual Offence [Act No. 3 of 2006](#)

The particulars of the offence were that on the 17th day of June, 2021 at around 2200 hours at [Particulars Withheld] in Kwale county within Coast region intentionally and unlawfully caused his penis to penetrate the vagina of D.N a girl child aged 16 years.
2. 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.

The particulars were that on the 17th day of June, 2021 at around 2200 hours at [Particulars Withheld] in Kwale county within Coast region intentionally and unlawfully caused his penis to touch the vagina of D.N a girl child aged 16 years.
3. He was facing another count of assaulting another but he was acquitted under section 210 Of the Criminal Procedure Code.
4. The accused denied the charges and a trial ensued. He conducted his case while in custody even though he had been granted personal bond of Ksh. 500, 000/= with one surety of similar amount.
5. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili language, or its interpretation, the language of choice by the accused.



The Prosecution's case

6. To prove the guilt of the accused, the prosecution marshalled a total of 5 witnesses.
7. It was the Prosecution's case that on the night of 17th June 2021, the accused person who was a fellow one-month-old tenant at the same plot as the complainant, was caught red-handed by the landlord's son while defiling the complainant. When the landlord's son saw this, he swung into action and proceeded to rescue the complainant whereat he was stabbed by the accused by use of a knife that the accused had. In the end, despite struggles and barricades placed by the accused person, the matter was reported at Kwale police station and investigations and subsequent arraignment ensued therefrom.

Defence case

8. 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) having been explained to the accused person, he, in person, elected to defend himself by way of tendering sworn evidence without calling any witness.
9. It was the defence case that on the fateful night, everything had been normal until later in the night as he was scrolling through his phone whose battery charge was draining and he decided to charge it from the adjacent vacant room. As he was heading to that room, he heard moans therefrom, moans that were denoting pleasure as opposed to pain and his curiosity drew all his attention to whatever business was happening in there. While at it, he saw the landlord's son walk out of that room wrapped in a lesa and walked direct to the toilet and in a split of a second he was out of the toilet. The accused suspecting that going to the toilet was not aimed at answering a call of nature but rather a diversionary tactic over something more sinister, he held the landlord's son by the lesa and confronted him. The latter tried to plead for understanding from the accused but the accused insisted that there was foul play and a crime had been committed that needed to be investigated and reported to the children office. In the midst of the confrontation, the complainant's mother cum the plot's caretaker walked out of her room and joined the duo and shortly thereafter, the complainant walked out of the eventful room and dashed to her mother's room. Thereafter, the matter was reported to the police and the accused was arraigned, blaming the accusations against him as a fabrication by the complainant, her mother and the landlord's son, to cover up the evils done by the landlord's son.
10. Both parties having closed their respective cases, the Court invited them to put in their closing arguments, but none opted to put in any, each placing their reliance on the record in the court file and invited the court to make its judgment based on the material available in the file.
11. Having heard both parties at their full lengths, the court retired to make its decision.

Analysis and Determination

12. 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.



13. 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.

Age of the Complainant

14. 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.

15. By way of a Certificate of Birth produced as P. Exh 1, indicating the Date of Birth as 25th July 2005 and its holder as D.N daughter of N.M and M.L.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 accused. Through it, it can therefore be safely said that, as at 17th day of July 2021 the complainant was just but 8 days shy to clocking 16 years and hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the current *Children Act*, 2022. The fact that it was indicated that she was 16 years old did not prejudice the accused and in any case, the same would be in his favour at the sentencing stage as she falls at the bracket with the least proposed sentence well aware that the Court's discretion on such sentencing has not been taken away.

Penetration

16. The complainant testified that the accused had sex and more particularly forceful sex with her. She narrated how the accused dragged her into his room, blocked her mouth and gagged her screams and in the end had sex with her.
17. The prosecution led medical evidence to prove that indeed there was penetration. At the Medical Examination Report, police form P3, produced as P.Exh 4, the Medical Practitioner did not say that they made a finding of penetration. However, a look at the Post Rape Care Form Form (PRC) produced as P. Exh 6, the hymen was described as old broken hymen – no trauma/ bleeding noted. In his evidence, the Medical Practitioner said that there was spermatozoa deposited at the vaginal canal of the complainant. I shall not assume that spermatozoa can only be deposited by way of penile penetration but even if I was to assume so, I take note that on analysis by the Government Analyst and evinced by way of the Report of Government Analyst dated 3rd August 2021 and produced as P. Exh 2, the same was negated as being a male DNA profile, in essence, not spermatozoa. What was it then? It was said to be a female DNA profile and it remains as such.
18. As such, given the statement in the form PRC, there was evidence of penetration but the recency or age of the same could not be determined. I note that the act was said to be so recent, the time of the alleged act and the time of examination, being barely 3 hours but yet medical tests gave every suspicious tests a clean bill of health save as for a scratch at the buttocks that was said to have pus cells and by the mere fact that there was pus, unless otherwise directed, I deem it to be older than the 3 hours.

Positive identification

19. The complainant said that the accused caused his penis to penetrate her vagina. As observed earlier, even though there was proof of penetration into the vagina of the complainant, the age of such penetration could not be determined. The medical evidence described the genital organs in a manner that suggested that there was no notable recent interference by external forces.



20. I am well guided that Section 124 of the *Evidence Act* enjoins me to take note that survivors of Sexual and Gender Based Violence and more particularly rape and defilement experience the horrendous acts in the absence of other people who cannot corroborate their version.

21. However, in this case, there were telltales that made me not believe in entirety the version of the minor and caused doubt in my mind.

22. Firstly, I noticed that as the mother to the minor was testifying before Court, she told the Court that she was asleep in her room and she was awoken by the screams of her other children who were calling for attention that the landlord's son was being killed. It is those screams that made her get out of her bed and walked outside where she found the accused struggling with the landlord's son. This version was closely alike to the version of the accused. However, what did the complainant tell the court. She said that,

I was screaming and he was ordering me to stop as he was slapping me. The landlord came and stood at the window. He then went and called my mother.....Michael raped me.....he had removed the leso from my body. The landlord came with my mother. The landlord when he opened, the accused who had a key the like of a knife stabbed the landlord by the cheek. The landlord was called Bariki. Then my mother decided to call police officers.....

23. Clearly, there cannot be two versions of the same incident and therefore I am torn between believing the mother or the daughter and amidst the 2 contradictory accounts I choose to believe none.

24. The accused said that it was the landlord's son who had sex with the complainant. It could be true or not true. However, I note that the complainant said that the accused pulled her into his house whereat he raped her. After the ordeal, the complainant said that the clothes that she was wearing were left at the accused's room. However, as her mother was testifying, she told the Court that,

At the landlord's house, there was a biker trouser and leso. I was told by the landlord that he got them from your house.....

25. How had the clothes gotten from the accused's room to the other room, of a fellow suspect according to the accused person?

26. Thus far, it can be seen that the landlord's son, the alleged victim of assault and the alleged fellow suspect according to the accused is a very crucial witness in these proceedings. He ought to have been presented, even if not as a witness for the defilement case, at least as a witness cum complainant in the assault charges that had been preferred against the accused. However, the prosecution chose not to present this witness. There could be too many reasons why the prosecution chose not to present the said son to the landlord but none of the many possible reasons was offered to the Court and in such absence, the only inference that I could make is that the evidence by the said son to the landlord would have been adverse to their case. On that basis, I make such an adverse inference against the prosecution's case and the accused being the most favored child in the criminal justice system benefits from the adverse inference.

27. As regards the defence by the accused person, in my view, it brings out patches of truth as to the happenings of that night but veiled in a manner that it conceals some material facts. For instance, why would moans of pleasure from another room by others in a rented house bother him? Why would he be poking his nose into other people's business if he did not have either stakes or jealousy? How did he know that a crime had been committed and that the landlord's son had to be investigated even before seeing the complainant dash out of that room? How did he know that the person the landlord's son was having pleasure with was a child even before seeing her or is sex an offence that need to be



investigated on the face of it when one hears others having it? In my view, there is a truthful narrative that the accused has, which he however chose to give the only bits that could be seen to be favoring and kept at bay the other bits that could incriminate him in one way or another.

28. Before I pen off, I wish to express myself on something that bothered me and that is the need to be compliant with the law when doing investigations. In that regard, based on the evidence by the investigating officer and the accused himself, I will pose a question, did the investigating officer comply with the dictates of Section 122A-D of the Penal Code as she collected the materials from the accused? Would such evidence pass the admissibility test? On the need to treat others in a humane way, after the investigating officer took away the pants the accused was wearing, was leaving him naked on the police cells the best option viable in the assessment of the investigating officer and the entire Kwale Police Station and letting the accused spend 3 days naked on the floor? In my view, sometimes it is good to ask oneself the question,

How would I wish to be treated if the positions changed in a circumstance?

I believe that if the positions were interchanged, the treatment the accused was accorded would be the last that any officer would wish to be accorded.

Disposition

29. From the foregoing, 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 16 years proscribed under section 8 (1) as read with section 8 (4) 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.
30. Accordingly, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF DECEMBER, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 15th 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.

In the presence of :

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

