



**Director of Public Prosecutions v Wambua (Sexual Offence  
E045 of 2021) [2022] KEMC 35 (KLR) (14 September 2022) (Judgment)**

Neutral citation: [2022] KEMC 35 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE E045 OF 2021  
ZK KAGENYO, RM  
SEPTEMBER 14, 2022**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... PROSECUTION**

**AND**

**ONESMAS MUTUNE WAMBUA ..... ACCUSED**

**JUDGMENT**

1. The accused person was arraigned on 15<sup>th</sup> June 2021 for the offence of Defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.

The particulars were that on diverse dates between 23<sup>rd</sup> December 2020 to 17<sup>th</sup> of August 2021 at [Particulars withheld] area in Diani location of Kwale county within coast region, unlawfully and intentionally caused his penis to penetrate into vagina of M.N.M a girl aged 16 years.

2. In the alternative, he was charged with 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 diverse dates between 23<sup>rd</sup> December 2020 to 17<sup>th</sup> of August 2021 at [Particulars withheld] area in Diani location of Kwale county within coast region, unlawfully and intentionally caused his penis to come into contact with the virgina of M.N.M a girl aged 16 years

3. The accused denied the charges and a trial ensued.
4. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili Language, the language of choice by the accused.
5. If the practice in criminal trials would have adopted the practice in civil trials in its entirety in that parties were to be allowed to file a list of agreed issues and that of disputed issues, this case would be the best candidate to fit in that category of cases.



6. 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.
7. All along this case, it would appear that the accused was not attacking the elements of penetration or positive identification but what he endeavored to dispute was the age of the survivor.

#### **DPP'S CASE**

8. The DPP, to discharge their duty under section 107 of the *Evidence Act* called a total of 6 witnesses.
9. The theory of the DPP's case was that, for two seasons, one ranging between 23<sup>rd</sup> December 2020 and June 2021 and the other between 4<sup>th</sup> August 2021 and 17<sup>th</sup> August 2021, the accused herein had taken the complainant as his wife and they were living as such for the entire period of time within those two seasons. They had lived at two places, for the first season, at Shimba Hills where the complainant would attend to the duties assigned to her by the accused as his husband and also take care of the accused's siblings as their sister in law and for the second time, they were living at Mvindeneni where the accused had rented a house for the two.
10. Out of this, the complainant dropped from her school and when her flames to rejoin back were reignited, they were abruptly put off by her realization of a pregnancy that was developing in her womb. In order to run away from public ridicule on her family and on her own self from neighbours and her peers at school, she decided to run to what she perceived at that time as her safe haven, to the accused's place.
11. Her sister, PW 1, in a bid of rescuing her younger sister managed to locate the place at which the victim was living with the accused, and on the night of 18<sup>th</sup> August 2021, the accused was arrested while the complainant was rescued and both were taken at Diani Police Station.
12. From the evidence by the prosecution witnesses, it emerged that, the complainant was under the age of 18 years, she had sex frequently with the accused which resulted to a pregnancy and she knew the accused in great details not to occasion any mistaken identity.

#### **DEFENCE CASE**

13. 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 unsworn evidence without calling any witnesses.
14. DW 1, the accused himself told the court that on the 23<sup>rd</sup> December 2020 at around 1100 hours, the complainant and her friend approached her and required him to take them at their homes by his tuk tuk. This was business to him and there is no way he could turn down such an offer. He obliged and took them to their desired destinations and on arrival, as they parted ways, the two girls asked him to give them his contacts.
15. From this first meet up, he said that a relationship developed and the complainant indeed introduced the accused to her siblings and mother while the accused in equal measure introduced the complainant to his family.



16. He said that they lived as husband and wife until their unceremonial arrest.
17. He maintained that he knew and believed that the complainant was not a child at all but rather an adult who was ready to raise her a family of her own.
18. After the testimony of DW 1, the Accused closed his case.
19. The Court invited the parties to put in their closing arguments but none opted to put in any, relying on the record in the court file.
20. Having heard both parties at their full lengths, the court retired to make its decision.

## **ANALYSIS AND DETERMINATION**

21. 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**

22. By way of a Certificate of Birth produced as P. Exh 4, indicating the Date of Birth as 7<sup>th</sup> May 2005 and its holder as M.N.J.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 said that, as at 23<sup>rd</sup> December 2020 the complainant was 15 years and 7 months while as at 17<sup>th</sup> August 2021, she was aged 16 years and 3 months.
23. This consequently brings the charges against the accused under both section 8 (3) and 8 (4) of the *Sexual Offences Act*, which influence the sentencing if one is found guilty.

### **b. Penetration**

24. By way of oral evidence by the PW3, the complainant, and DW1, the accused, they said that they had sex with each other as they lived as husband and wife. The period of such sexual intercourse as stated in the charge sheet was not challenged. The Medical Practitioner, PW4, stated that she examined the complainant and produced the Medical Treatment Notes, P.Exh 1, Form P3, P.Exh 2 and a Post Rape Care Form (PRC), documents whereat she made her observations. After the examination, she concluded that there had been penetration into the vagina of the complainant.
25. As a result of the penetration, there was observed to have been a pregnancy, of which the accused person took credit of. Out of abundance of caution, the DPP insisted on conducting a DNA test and by way of a Human Identification Report produced by the Government Analyst, PW5, as P.Exh 6, 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**

26. The complainant stated that they had been living as husband and wife. This fact was confirmed by the accused himself. The arresting officer and her team found the two together in their rented house. I find this element as proven beyond reasonable doubt.
27. The court at this juncture is satisfied that the offence of defilement was committed. However, when called upon to give an explanation, the accused pleaded for the statutory defence under section 8(5) and 8(6) of the *Sexual Offences Act*. The said subsections provide that;



Section 8 (5):

It is a defence to a charge under this section if:-

- a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- b. the accused reasonably believed that the child was over the age of eighteen years.

Section 8 (6)

The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

28. A reading of these parts of the statute clearly places a burden on any person in the society who have intentions of having sex with another to satisfy himself or herself that that other person is not a child. If it turns out that his test satisfies him or her that the said other person is not a child, and it turns out that the long arm of the law catches up with him and alleges that that other is a child, it is upon him to now demonstrate the steps he took to satisfy himself that the other was not a child.
29. The standard placed on the accused under section 8 (5) is just one, that the accused in a bid to do his due diligence was misled by the child.
30. In *Eliud Waweru Wambui v Republic* [2019] eKLR the Court of Appeal guided that, Subsection (5) states that it is a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two sub-sections are to make sense. We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.
31. The question that this court asks itself is, was the defence as raised by the accused person plausible enough to exonerate him from the web the prosecution evidence has entangled him into?
32. Justice Mrima in *Irene Atieno Ochieng v Republic* [2017] eKLR held thus,  
The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child.
33. On her part, Justice Gitari in *Royton Muriungi Kirimi v Republic* [2020] eKLR guided that,  
This section requires that an accused person raises this defence at his trial. Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under Section 5 & 6 of *Sexual Offences Act* the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the



circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond. The appellant did not raise the defence during the trial. He has raised this defence on appeal. This ground is an afterthought. His defence was that he was framed. He cannot allege on appeal that he was deceived by the complainant. The defence cannot be considered at this stage. It is an afterthought.

34. I use these principles while well aware that the accused was unrepresented and hence some technical aspects of raising a defence could be beyond his reach. However, in the spirit of discerning the truth and justice, the court analysed the evidence as a whole.

35. Firstly, I notice that the accused when they met with the complainant, during the cross examination, the complainant was candid on the answers she offered to the questions posed to her by the accused. During her cross examination, it emerged that the accused person when he was wooing the complainant to fall in love with him, the accused told the complainant that her body did not look like that of a student but rather appeared as she was done with the school. This was after the complainant told the accused that she was still a pupil.

36. Secondly, it emerged that when the accused wanted a thing done by the complainant, he had his way of exploiting her innocence and desperation on the circumstances. This fact came out when the complainant testified before court during cross examination thus;

When you told me to go with you at Shimba Hills at your parents' home, I first declined but later you blackmailed me that if I don't go, you will end up being arrested by the police. I never wanted to be married.....

37. From this piece of evidence that came out during cross examination, it is evident that the accused person over and above abusing the complainant emotionally by exploiting her naivety, he as well knew that what he was doing was wrong. Otherwise, why would he be afraid that he would be arrested by the police? The answer to this was that the accused knew of the repercussions of his actions. During the examination in chief, the complainant had told the court in part thus,

The chief asked me where I have been. I told her that I had been living in the wild and streets eating garbage and wild fruits. I lied this because Onesmus had told me to lie as he did not want to be imprisoned.

38. Another instance of such abuse would emerge when the accused asked the complainant on what transpired at Shimba Hills. The complainant testified in part

You introduced me to your parents as your wife. You brought the issue of husband and wife for the first time when at Shimba Hills. You told me to lie to your parents that our parents are poor and cannot afford my education and that I am not in school. You told me not to say that I am not a student. You told me that when I go home and be pressed by the parents or chief to say anything, I just don't mention your name .....

39. I am convinced beyond any doubt that the accused is the one who was misleading the complainant and not the other way round. Indeed, the accused would not only mislead the complainant but hatch a scheme to mislead those who would advise and protect him and also those who would advise and protect the complainant. Needless to say, the accused risked having his parents stand at the dock as



accomplices if they were known to be harboring the complainant herein and worst, their own children being attended to by the complainant under the directions of their son who acted as owning and controlling the complainant through the emotional abuses.

40. The accused did not grant the prosecution an opportunity to cross examine him and challenge his defence. I find his defence as just a way of clutching to a straw when he verily knew from the onset when she was living with the complainant the repercussions of his actions.
41. The accused tried to paint the complainant as a girl who was clingy and needy on 23<sup>rd</sup> December 2020 and in particular when the complainant is said to have asked him, in the company of her friend to look for a house for them. This allegation he raised it only during the unsworn defence which he was not cross examined on. The stage at which he raised this allegation and given that the complainant during her evidence had mentioned her friend Mwaka Mwaega Karimbo, from the conduct of the said Mwaka, I am convinced to find that indeed she had acted as a hooker and her mission was to hook up the accused to the complainant.
42. In any case, the complainant testified that the first time they had sex with the accused was on the night of the day they met, that is to say the 23<sup>rd</sup> December 2020 at the tuk tuk when the accused called the complainant through her friend's phone. On the other hand, the accused told the court, and wanted the court to believe him, that the first sexual intercourse they had was post the Christmas celebrations, a proposition which I decline to believe.
43. Lastly, the court finds the reasons given by the accused for believing that the complainant to be an adult as fallacious and untenable. The accused told the court that he believed the complainant to be an adult as the complainant had a phone and students should not be having phones. Even though this was the case which is not the case anyway as even children as young as 5 years possess phones depending on the social and economic set up of an individual, I don't find how having a phone, merely on ones hand can be seen to amount to deception. If at all it would be deception, it would be as a result of the limited discernment attributable to either ignorance or complacency on the part of the deceived and not attributable to any action or inaction on the part of the alleged deceiver. Sections 8 (5) and 8 (6) contemplates of the latter to amount as a defence and not the former.

## **DISPOSITION**

44. From the foregoing, I make a finding that the DPP has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person defiled the minor victim initialized as MNJM 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 16 years which is proscribed by section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#).
45. Turning on to the alternative count, having made a finding in the main count, the alternative count rests determined.
46. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court at Mombasa within 14 days from today's date if dissatisfied with this court's finding.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**



In the presence of:

Mr. Felix- Court Assistant.

Ms. Faith Luseno for the DPP.

Onesmas Mutune Wambua-The Accused person

### **SENTENCING SUBMISSIONS**

#### **DPP**

I have no records against the accused person.

#### **ACCUSED**

I pray for leniency. I pray for a sentence that will not split me from my family, I pray to be released. I also pray in the alternative, the sentence to run from the date of arrest.

#### **Court**

The court has taken note of the submissions by the DPP and those by the accused person. However before sentencing given the nature of the case, the complainant and the accused, the court shall under sections 215 and 329A-E shall require a victim impact statement in the matter. Matter shall come up for sentencing on 29<sup>th</sup> September 2020

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

KWALE SPM'S COURT-MCSO NO. E045 of 2021-JUDGMENT	Hon. Kiongo Kagenyo
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