



**Director of Public Prosecution v AKT (Sexual Offence E030 of 2021)  
[2022] KEMC 33 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEMC 33 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE E030 OF 2021  
ZK KAGENYO, RM  
DECEMBER 15, 2022**

**BETWEEN**

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

**AND**

**AKT ..... ACCUSED**

**JUDGMENT**

1. The minor in conflict with the law herein, the subject, was arraigned on 17<sup>th</sup> June 2021 for the offence of Defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.  
  
The particulars were that on 4<sup>th</sup> day of June 2021 at [Particulars withheld] area Diani location in Kwale county within coast region intentionally and unlawfully caused his penis to penetrate the vagina of PFO a child aged 17 years old.
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 4<sup>th</sup> day of June 2021 at Mkwakwani Diani location in Kwale county within coast region intentionally and unlawfully touched the vagina of PFO a child aged 12 years with his penis.
3. The subject denied responsibility and the matter proceeded to full trial.
4. The subject was represented by Mr. A. O Aminga, advocate, who in his absence Mr. Dominic Oliech, advocate, held fort. 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 while out on a cash bail of Ksh. 20, 000/=.



5. The DPP to prove their case lined up a total of 5 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. It was the Prosecution's case that on the 4<sup>th</sup> day of June 2021, as the complainant herein was playing with her friends, the subject came over once her friends left and while holding her hand, he forced her into their house where he stripped her naked and laid on her and had sex with her while the volume of the radio was full blast thus neutralizing her screams for help.
7. In the evening when her mother came, she narrated the ordeal to her and was later taken to the police station where she further narrated the ordeal to the investigating officer and later taken to hospital for medical examination.

### **The Defence Case**

8. 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) having been explained to the subject, he, in person and upon consulting his counsel, elected to defend himself by way of tendering unsworn evidence without calling any witnesses.
9. DW 1, the subject told this court that the charges before him were just but a means of settling scores from a series of repeated false accusations against him by the complainant's family. He denied ever committing this offence and gave a detailed schedule of activities for the 4<sup>th</sup> day of June 2021. He invited the court to see that the complainant and her family were out to settling a long-standing vendetta.
10. After the testimony of DW 1, the defence closed its case.
11. The Court invited the parties to put in their closing arguments, the DPP opted to rely on the record in the court file while the defence put in their written submissions.
12. Having heard both parties at their full lengths, the court retired to make its decision.

### **Analysis and Determination.**

13. The subject has been charged with the offence of defilement of a child aged 12 years which is proscribed by section 8 (1) as read with section 8 (3) 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.
14. Before delving into the merits of the case, this court wishes to address a preliminary issue raised by the defence in their submissions touching on the propriety of arraigning the subject with the present charges. Counsel for the subject was of the view that the manner in which the subject was handled and taken through the trial process offended among others Articles 21 (3) and 53 (1) and (3) (sic) of *the Constitution* of Kenya, the *Children Act* No. 8 of 2022 (sic) and the unnamed International Conventions. I note that Article 53 does not have the sub-article (3). Be that as it may, counsel did not point out how the process breached *the Constitution*. He only ended up by stating that the minor ought to have been treated as a child in need of care and protection.
15. While that is the belief by the defence, I respectfully differ with the counsel. The law and in particular section 14 of the *Penal Code* only gives immunity from criminal prosecution only to a minor aged below 8 years. The only other statutory bracket is what appears to be created under section 2 of the *Children Act*, 2022 when it defines a "child in conflict with the law" as a person who is above the age of



twelve years, but below the age of eighteen years, who has been dealt with or punished in accordance with Part XV of this Act or any other written law for contravention of the law. In any case, that was not the law when the subject was apprehended and arraigned before this court.

The only other immunity from criminal prosecution is to be found in Article 143 (1) of *the Constitution* of Kenya against a Sitting President of the Republic of Kenya. Clearly, the subject did not fall within these 2 brackets.

16. Counsel for the defence further suggested to this court that the subject ought to have been dealt with by way of a Care and Protection but he did not demonstrate before this court the special circumstances that would persuade this court to find that the circumstances of the offence made the subject fall within section 119 (1) of the retired *Children Act*, 2001.
17. I therefore find that by the police officers investigating and arresting the subject, the DPP preferring the present charges, the arraignment and the subsequent trial did not in any way infringe on the rights of the subject. The court assigned him an advocate and during trial, the court among others observed his school calendar not to interfere with the same. He was treated well. The same law being said that was breached is the law that ensured that as a child he was held with kid gloves and did not face the usual tight grip of the criminal justice system.
18. Section 107 of the *Evidence Act* places the burden of proof of all the accusations against the subject on the DPP. This burden hardly shifts to the subject who on the other hand is to be presumed innocent until the contrary is proven.
19. The standard to which the DPP is to discharge the burden of proof is beyond reasonable doubt as was restated in *Joan Chebichii Sawe -v- Republic* [2003] eKLR, that the prosecution must prove the guilt of the subject beyond reasonable doubt. This Court however reminds itself that beyond reasonable doubt does not mean that the DPP must prove every single element or accusation to perfection beyond a shadow of doubt. In his undoubted wisdom, Lord Denning shed light in this in the case of *Miller -v- Minister of Pensions* [1947] 2 ALL ER 372 where he held that;

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt but nothing short of that will suffice.

20. 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.

21. 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**

22. 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.

23. By way of a Certificate of Birth produced as P. Exh 1, indicating the Date of Birth as 29<sup>th</sup> March 2009 and its holder as PFO the daughter to G.O.A and I.N.M and through the oral testimony of the mother to the complainant, 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 defence. Through it, it can therefore be said that, as at 4<sup>th</sup> day of June 2021 the complainant was 12 years and 3 months hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the *Children Act*, 2022

### **Penetration**

24. The medical evidence adduced by the DPP suggested that there was penetration on the genitalia, that is the vagina, of the complainant. The medical practitioner qualified this and noted that the recency of such penetration could not be determined but noted that it was not freshly broken. This was a test done less than 12 hours post the alleged ordeal.

25. The medical evidence provided by the DPP therefore demonstrated that there was interference of the vagina of the complainant by an external force, whether intentionally inflicted by another person, activity or such other external force as any other injury, and the inference of penetration by virtue of the hymen that was not intact could not be overruled and invited for the overhaul analysis of the evidence to support the inference therein.

### **Positive identification of the assailant**

26. The question that this court is called upon to determine is who caused the unusual interference of the vagina of the child complainant herein? Is it the subject?

27. The chronology of the events as they happened were that the complainant complained of having been defiled by the subject during the day and narrated the same to her mother in the evening, then to the investigating officer and lastly to the court.

28. I have looked at the various versions of the evidence as adduced which I wish to reproduce as hereinbelow.

29. When the minor was testifying, she told this court, paraphrase in part,

As I was lighting the jiko, the subject came and held my right hand and pulled me. I screamed but he ordered me to keep quiet. He was pulling me towards their house. He pushed me inside the house and inside the house he turned on the radio to a high volume making my screams inaudible from outside.....he pushed me to the sofa which was at the wall at the sitting room. While on the couch, he laid over me. I laid there facing up. He lifted my dress, removed my tight and then pushed me to the bedroom. He then removed his trouser jeans and the boxer he was wearing. He inserted his penis into my vagina. After inserting his penis into my vagina, I tried to push him away but he was strong and therefore he had sex with me. After he was done, he gave me my clothes and told me to wear and leave.....



30. That was her version to the court. What about her version according to her mother? The mother testified in this court which I wish to reproduce by rephrasing in part,

That the subject came and called her but she declined. The subject then went closer and held her breasts. The subject then chased away those other children who were playing there and pushed her to their house. Inside the house, the subject set the radio at high volume and then pushed her to the bedroom. He undressed her and had sex with her. After sex, the subject held the complainant and ordered her to suck his penis. The complainant refused but the subject forced his penis into her mouth. When she was about to vomit, the subject removed the penis and ordered the complainant to walk out and ordered her not to tell anyone.

31. According to the investigating officer, the complainant narrated to her that,

On the material day, as she was playing outside the plot, the subject came, held her hand and dragged her towards the corridor. At the corridor he kissed her on her lips then the complainant protested this move. Later, he came again grabbed her hand and dragged her into their house. In that house, the subject undressed her and then gave her his penis and told her to suck. It choked her and she begged him to stop. he then pushed her on the bed. He laid her there and penetrated into her vagina using his penis. After that he told her to go home.

32. It is apparent that there exists glaring contradictions in the evidence adduced by the complainant and the people who reported what she told them. What is the source of the narratives?

33. When the advocate for the subject drew her to the glaring contradictions, she abandoned the previous version that she told the investigating officer and taken as her evidence with the police and maintained what she told the court to be the truth.

34. It would be too much of expectations of this court if it was to expect a witness to remember everything to its minutest details. This court does not expect a witness to act as if he or she has photographic memory but some facts are too humongous not to be forgotten. For instance, is commandeering a 12-year-old child to suck the penis of a man a fact too minute to be forgotten? I don't think so.

35. At this juncture, the court noting the major variances between the evidence of the complainant and that of the subsequent witnesses over what is said to be the same transaction, the court endeavored to assess whether the prosecution witnesses meet the criteria of the reliability minimum standard threshold of a witness in a criminal case that was set by the Court of Appeal in *Joseph Ndungu Kimanyi v Republic* [1979] eKLR thus,

In our opinion the evidence of the complainant does not come up to the minimum standard which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

36. While doing so, the court is alive to the position on inconsistencies as was laid down in *Philip Nzaka Watu v Republic* [2016] eKLR where the Court of Appeal held thus,

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must



be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question. (emphasis mine).

37. From the analysis of the evidence presented by the prosecution, I find that it would be difficult for me to select which version to believe and which one not to.

38. The mother testified that when the subject came where the complainant was playing with her friends, he chased those other children away. Were these children interrogated? It is my humble view that a child's memory can forget too many other things but it is quite hard for a child to forget the incidence of being scattered unceremoniously from a game. Did the investigating officer interrogate these children? There was no indication that she did so, and it is hoped by this court that their information could make or break the reasonable doubt.

39. Turning on to the credibility of the mother. I note that she said that,

There was commotion and one boy by the name Ibrahim threw a stone to PFO. He was angry that PFO had reported ...

40. The mystique that this court is called upon to demystify was, why did Ibrahim throw a stone if at all he did?

41. The answer to that is to be found at the evidence of PFO when she says,

At this point my father rose up to hold the subject by hand. One of the subject's friend, threw a stone, at him and asked him, "do you know who we are"? my father walked out to take a fimbo. He came with a fimbo and struck the subject.

42. How did the mother to the complainant read the mind of Ibrahim that he threw the stone because PFO had disclosed and not because the father to the complainant had turned hostile and was at the verge of beating their friend? Could this biased inference have been fueled by the bad blood the two families had and hence an indication of a continued bias? Could this bad blood have fueled the initiation of this case? These questions linger in my mind and I undoubtedly, the more they do, the more I find it unsafe to find against the subject.

43. In Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR, Mativo J, as he then was reminded this court thus,

The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.

44. Similarly, the doubts that are arising from the prosecution's case goes in favour of the Subject.

## Disposition

45. Having found so, this court hereby dismisses the case against the subject and forthwith acquits him under Section 215 of the *Criminal Procedure Code* for both the main count of defilement proscribed under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*, 2006 and for the alternative



count therein of committing an indecent act with a child which is proscribed under section 11 (1) of the *Sexual Offences Act*, 2006.

46. The subject who has been out on a cash bail is hereby discharged from this court. The cash bail of Ksh. 20, 000/= deposited in court on the 17<sup>th</sup> day of June 2021 shall be refunded to the depositor.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 15<sup>TH</sup> DAY OF DECEMBER 2022.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of:

Mr. Archibald Kimbada- Court Assistant.

Mr. Khamis Mahdi, Prosecution Counsel, for the State

Mr. Dominic Oliech for the subject

A.K.T -Minor in conflict with the law

