Ruwa v Republic (Criminal Appeal E064 of 2024)
[2025] KEHC 15143 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15143 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E064 OF 2024

JN NJAGI, J

OCTOBER 24, 2025

BETWEEN

GABRIEEL AMANI RUWA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from original conviction and sentence by Hon. R. Amwayi, PM, in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E021 of 2023 delivered on 5/2/2024)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 10 years imprisonment. The particulars of the offence were that on diverse dates of March 2023 to 17th June 2023 at Kinagoni sub-location Kinagoni location in Kaloleni Sub County within Kilifi County he unlawfully and intentionally caused his penis to penetrate the vagina of J.K.K. (herein referred to as the complainant), a child aged 16 years.

2. Aggrieved by the conviction and the sentence of the trial court, the Appellant lodged an appeal on the following grounds:

    1. That the trial court erred in law and facts by failing to find that the defence under Section 8(5) of the *Sexual Offences act* was available to the appellant.

    2. That the trial court erred in law and fact by failing to take into account the pre-trial custody period in his sentence, pursuant to section 333(2) of the Criminal Procedure Code.

3. The case for the prosecution was that the complainant was at the material time aged 16 years and was in primary school in class 6. She was living with her grandmother. That sometimes in the month of March 2023 she met the appellant on the road. He requested for her phone number. She gave him the phone

number of her grandmother. He called her in the evening but he did not get her. She called him on the following evening. He told her that he wanted to see her. She agreed. He went to her home at 9 pm and picked her. He took her to his house. There was nobody else in the house. They sat on a bed. He told her that he loved her. They then undressed and had sexual intercourse whereby he inserted his penis into her vagina. She then went home. Subsequently they engaged in sex 5 times which used to take place in the appellant`s house at night. She missed her periods in the month of March 2023 and realized that she was pregnant. Her grandmother suspected that she was pregnant and informed her mother, PW3. The village elder received the report and took her to the chief. Her mother took her to Gotani police station on 17/6/2023. PC Ndinyo PW4 of the said station received her report. He interrogated her and she mentioned the appellant as the one who was responsible for her pregnancy. He issued her with a P3 form and escorted her to Mariakani sub county hospital where she was examined. She was found to have a missing hymen. A pregnancy test was done that turned out positive. A scan was done that confirmed that she was 24 weeks pregnant. The P3 form was filled by a clinical officer, PW1 of the said hospital. After investigations were complete, the appellant was arrested and charged with the offence.

4. During the hearing of the case in court the clinical officer PW1 produced the P3 form. the treatment notes, Post Rape Care form, laboratory request form, scan report, the GBV form and the minor`s latest report as exhibits, P.Exh. 1 – 7 respectively. He also produced the minor`s Health Clinic Card as exhibit, P.Exh.8. It showed that the minor was born on 27/11/2007.

5. It was further evidence of the clinical officer PW1 that on 26/7/2023 the minor was taken back to hospital while on labour and she delivered a premature baby boy who at the time the clinical officer testified in the case on 31/7/2023 was in incubator at the hospital.

6. In his defence the appellant stated in a sworn statement that the complainant was not known to him. That he hailed from K village while she was from V village. That he came to know her in June 2023 when he saw her at V shopping centre but he never had a chance to talk to her.

7. He further said that he on the 28/4/2023 received a phone call from his mother asking him to go to Gotani police station. He went there. He met his mother and a lady who was unknown to him. The subject minor went there. The police asked him whether he knew her. He said he did not. They beat him up and he admitted that he knew her. He recorded a statement and he was placed in the cells. He denied that he defiled her and impregnated her.

Submissions

8. The appellant submitted that the evidence of the complainant before the trial court showed that she presented herself to him as an adult who fully appreciated what was going on between them. That she adduced evidence that she could go to his place at any time when he called her and could even spend a night at his house.

9. The appellant submitted that the clinical officer indicated that the expected date of delivery was October 2023. He wondered how this could be so if he had sexual intercourse with her in the month of March 2023 which would put the expected date of delivery as December 2023. Therefore, that the complainant must have had other sexual relationships with other men. That the defence in section 8(5) of the *Sexual Offences Act* was available to him.

10. The respondent did not file any submissions in the appeal.

Analysis and determination

11. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In the case of Okeno vs Republic [1972] EA 32 the Court of Appeal set out the duty of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] E.A 424."

12. I have considered the grounds of appeal, the record of the trial court, the judgment and the submissions. There are two grounds of appeal: that the trial court failed to consider that the defence in section 8(5) of the *Sexual Offences Act* was available to the appellant and that the court failed to take into account the pre-trial custody when sentencing the appellant.

13. On the first ground of appeal, Section 8 (5) of the *Sexual Offences Act* provides as follows:

    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.

14. It is to be noted that the section requires that it be proved that the child deceived the accused person into believing that she was above the age of 18 years and that it is shown that the accused reasonably believed that the child was above the age of 18 years.

15. The appellant in his defence never raised any defence as contained in section 8(5) of the *Sexual Offences Act*. His defence before the trial court was that he never knew the complainant and only saw her once when she was coming out of a shop. He cannot now during the appeal raise a defence that the complainant deceived him into believing that she was an adult. That ground of appeal is therefore dismissed.

16. On the second ground of appeal that the trial court did not consider the period spent in custody during the trial, I have noted that the appellant was in remand custody during the entire period of the trial. Section 333(2) of the criminal Procedure Code requires the court in sentencing an accused person who has been in custody during the trial to take into account such period when sentencing the accused. I have perused the record of the trial court and noted that the trial magistrate did not take into account the period spent in custody when sentencing the appellant. The provisions of the said section are mandatory. The trial court therefore erred in not complying with the mandatory provisions of section 333(2) of the Criminal Procedure Code.

17. The appellant was arrested 28/6/2023 and arraigned in court on 30/6/2023. He was sentenced on 5/2/2024. He was therefore in remand custody for a period of over 7 months before he was sentenced. That period ought to have been considered when passing sentence on him. This ground of appeal is therefore merited. I order that the sentence meted out on the appellant commences from the date of his arrest, i.e, on 28th June 2023. Save for that the appeal is dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 24TH DAY OF OCTOBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Republic

Appellant - present virtually at GK Prison Malindi

Court Assistant – Jumaa