

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAROK**  
**HIGH COURT CRIMINAL APPEAL NO. E019 OF 2024**  
**(CORAM: CHARLES KARIUKI – J)**

**JOHN KARIUKI MWANGI .....**  
**APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with an offence of defilement contrary to Section 8(1) as read with Section 8(4) Sexual Offences Act No. 3 of 2006.
2. Particulars being that between 26/1/2024 and 12/2/2024 at Basabra area Narok Central Subcounty Narok County intentionally and unlawfully caused his penis to penetrate the vagina of EWW a child aged 17 years. Alternatively, he faced indecent act but was convicted on main count. Accused denied charge and matter to full trial. He was subsequently convicted and sentenced to 15 years imprisonment.
3. Being aggrieved by the verdict, Appellant lodged instant appeal which is essentially the core issue that: -
4. *Whether ingredients of offence were proved beyond reasonable doubt.*
5. *Whether trial court ought to have considered defence under Section 8(5) Sexual Offences Act.*
6. The parties were directed to canvass appeal via submissions which they did.

**a. APPELLANT SUBMISSIONS**

7. **Age of the Complainant**

8. There were birth certificates or any documents to prove the age. Only clinical officers estimate. Complainant said she was 16 years. Father said he knew the age of complainant thus PW 3 could not have concluded of age of the victim. **Condition count stand.**
9. **Penetration**
10. 2<sup>nd</sup> Ground: Penetration was not established. PW 3 clinical officer. long standing broken hymen. Absence of sperm cells. No link of loss hymen to the Appellant.
11. PW 4 admitted that victim had confessed to have sired with other 4 men. Some record on in absence of DNA. Appellant involvement link. Conviction is not save.
12. 3<sup>rd</sup> Grounds – this case was full contradictions. Inconsistences. 26/1/2024 and 4/2/2024. None of the witnesses. clear of date. The victim says he slept in accused place for 2 weeks but no specified dates. Investigating officer says she had said she slept for a month with Appellant.
13. PW 3 said she said she was staying with Celina (her friend) she said sex happened once but not stated when and where. This impeaches the testimony of prosecution.
14. Ground four – Section 8(5) defence: where Appellant believed victim was of age. Complainant was living independently after being chased from home.
15. PW 2, Grandfather of the victim said he did not know where victim was sleeping. She had admitted, she had been arrested .... Adult. She had multiple sexual relationships sharing maturity. The fair trial related for not being considered.
16. Trial court failed to consider which motive. PW 2 – Grandfather admitted there was financial dispute. PW 2 he did not want Appellant to be arrested. This was informed by trial court in sum the conviction is unjust.

**a. RESPONDENT SUBMISSIONS**

17. In *Ezekiel Kiplagat Tangus Vs. Republic [2018] KEHC 7677 (KLR)* the Appellant had been convicted and sentenced to serve 15 years imprisonment for defiling a girl

child aged 15 years by the trial court. The High Court sitting at Eldoret while upholding the trial court's decision identified the main ingredients of defilement to be as follows:

**18. Age Assessment**

**19. Penetration**

**20. Corroboration and**

**21. Identification**

22. It is submitted that the above ingredients were satisfied by the Respondent during the trial of the Appellant as discussed below.

**a. Age Assessment**

23. The 'age' is defined in Section 2 of the children act as follows:

*“age” means the actual chronological age of the child from conception or the child’s apparent age as determined by a Medical Officer in any case where the actual age of the child is unascertainable.*

24. During trial, the Respondent called PC Richard Konana as PW 5 who told the court that he arrested the Appellant in his house where he also found the victim PW 1. Further, PW 5 testified that he took both the Appellant and PW 1 to the hospital where also the victim's age was determined by a medical officer to be 17 years as indicated in the age assessment report prepared the doctor produced as PEXH – 1.

25. In the case of *Dismas Wafula Kilweke Vs. Republic [2019] KECA 5 (KLR)* the Court of Appeal while sitting at Kisumu held that the age of the victim was confirmed to be 14 years as shown in the age assessment report prepared by a dental specialist at Bungoma District Hospital.

**i. Penetration**

26. Section 2 of the Sexual Offences Act defines penetration as:

***“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”***

27. PW 1 told the court that she had sexual intercourse with the Appellant in his house. She further testified that she the Appellant inserted her penis into her vagina during the intercourse. (See page 6 paragraph 1 of the proceedings).

**ii. Corroboration and Identification**

28. Section 124 of the Evidence Act provides that where in a Criminal Case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

29. PW 1 told the court during trial that she knew the Appellant as he was living in London Estate where she was also staying with her grandfather, PW 2 and Grandmother. She further told the court that the Appellant moved from London Estate to Basabra where he took her and they had sex in his new house.

30. PW 2 testified that he is the grandfather to PW 1 and the Appellant was his neighbour at London Estate. Further, that he had warned the Appellant to step relations with her granddaughter PW 1 when he caught her coming from his house.

31. PW 5 PC Richard Konana told the court that it is PW 1 who took him to the Appellant’s house at Basabra where he arrested him.

32. It is submitted that, the PW 1 knew the Appellant very well from the time he was residing at London Estate where she was also living with her grandparents.

33. That the Appellant knew very well that PW 1 was a minor and school going. He even admitted talking to her after buying her food because she had been chased by PW 2

from home, hence the defence in Section 8(4) of the Sexual Offences Act cannot suffice.

34. That the Appellant denied in toto ever defiling PW 1 and has never raised any defence during trial.

35. The ulterior motive factor between the Appellant and OW 2 was not brought up during cross examination. The issue of Kshs.50,000.00 only arose during defence hearing, when the Appellant gave his evidence and as such it is deemed and afterthought. The defence by the Appellant did not shake the watertight evidence by the Respondent.

36. In the upshot the Respondent prays that the Appellant's appeal be dismissed.

### 37. ISSUES ANALYSIS AND DETERMINATION

38. After going through the proceedings and the parties' submissions, I find the issues are; *Whether ingredients of offence were proved beyond reasonable doubt.*

39. *Whether trial court ought to have considered defence under Section 8(5) Sexual Offences Act.*

40. The duty of first appellate court in CRIMINAL CASES appeals Kenya the **first appellate court** (the Court of Appeal for High Court cases) has the foundational duty to conduct a thorough **re-evaluation** and analysis of the evidence to reach its own independent conclusion. The key duties of a first appellate court in criminal cases include: 1. Independent Re-evaluation of Evidence **Exhaustive Review**: The court must marshal and re-assess all evidence and materials placed before the trial court. **Independent Conclusion**: It is required to make its own findings of fact and law to determine if the conviction and sentence were proper.

41. **Deference with Caution**: While it must give weight to the trial court's findings (especially since the trial judge saw the witnesses' demeanor), it is not bound by them if the trial judge failed to consider material circumstances.

42. In **Jonas Akuno O’kubasu v Republic [2000] eKLR** that:

*“It is correct that on first appeal the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it...On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.”*

43. The Appellant had been convicted and sentenced to serve 15 years imprisonment for defiling a girl child aged 15 years by the trial court. The High Court sitting at Eldoret while upholding the trial court’s decision identified the main ingredients of defilement to be as follows: **Age Assessment, Penetration, Corroboration and, Identification** see **Ezekiel Kiplagat Tangus Vs. Republic [2018] KEHC 7677 (KLR)**.

**Age Assessment** The ‘age’ is define in Section 2 of the children’s act as follows:

*“age” means the actual chronological age of the child from conception or the child’s apparent age as determined by a Medical Officer in any case where the actual age of the child is unascertainable.*

44. During trial, the Respondent called PC Richard Konana as PW 5 who told the court that he arrested the Appellant in his house where he also found the victim PW 1. Further, PW 5 testified that he took both the Appellant and PW 1 to the hospital where also the victim’s age was determined by a medical officer to be 17 years as indicated in the age assessment report prepared by the doctor as as an exhibit.

45. In the case of *Dismas Wafula Kilweke Vs. Republic [2019] KECA 5 (KLR)* the Court of Appeal while sitting at Kisumu held that the age of the victim was confirmed to be 14 years as shown in the age assessment report prepared by a dental specialist at Bungoma District Hospital.
46. **Penetration: Section** 2 of the Sexual Offences Act defines penetration as: ***“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”***
47. PW 1 told the court that she had sexual intercourse with the Appellant in his house. She further testified that she the Appellant inserted her penis into her vagina during the intercourse. The same testimony was unshaken by the defence.
48. **Identification** ;Section 124 of the Evidence Act provides that where in a Criminal Case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
49. PW 1 told the court during trial that she knew the Appellant as he was living in London Estate where she was also staying with her grandfather, PW 2 and Grandmother. She further told the court that the Appellant moved from London Estate to Basabra where he took her and they had sex in his new house.
50. PW 2 testified that he is the grandfather to PW 1 and the Appellant was his neighbour at London Estate. Further, that he had warned the Appellant to step relations with her granddaughter PW 1 when he caught her coming from his house.
51. PW 5 PC Richard Konana told the court that it is PW 1 who took him to the Appellant’s house at Basabra where he arrested him., the PW 1 knew the Appellant very well from the time he was residing at London Estate where she was also living with her grandparents.

52. That the Appellant knew very well that PW 1 was a minor and school going. He even admitted talking to her after buying her food because she had been chased by PW 2 from home, hence the defence in Section 8(4) of the Sexual Offences Act cannot suffice.
53. That the Appellant denied in toto ever defiling PW 1 and has never raised any defence during trial. In Kenya, the **Sexual Offences Act (No. 3 of 2006)** establishes strict liability for the defilement of any person under the age of 18, meaning that consent is irrelevant.
54. However, the Act provides a specific, limited defence, particularly relevant to cases involving minors between the ages of 16 and 18 (often prosecuted under section 8(4) for a minimum of 15 years), which is outlined in **Section 8(5)**.
55. The Mistake of Age Defence (Section 8(5)); It is a defence to a charge of defilement if the accused proves that: **The child deceived the accused:** The child (minor) actually deceived the accused person into believing they were over 18 years old at the time of the offence. **Reasonable belief:** The accused person reasonably believed that the child was over the age of eighteen years. Requirements for the Defence (Section 8(6)).
56. The "reasonable belief" is not simply a claim of ignorance. The court will determine the validity of this belief by looking at all surrounding circumstances, specifically **the steps the accused person took to ascertain the age of the complainant.**
57. The burden was squarely on appellant to establish the threshold of applications herein which did not prove to exist. He is only raising here in the appellate level.
58. The ulterior motive factor between the Appellant and OW 2 was not brought up during cross examination. The issue of Kshs.50,000.00 only arose during defence hearing, when the Appellant gave his evidence and as such it is deemed and

afterthought. The defence by the Appellant did not shake the watertight evidence by the Respondent.

59. Thus, the court finds no merit in appeal and thus makes the orders;

**i) The appeal is dismissed; conviction is upheld and sentence confirmed.**

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS**

**13<sup>TH</sup> DAY FEBRUARY 2026.**

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**HON. JUSTICE CHARLES KARIUKI**

**JUDGE**