



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCRA E011 OF 2025

BETWEEN
VICTOR ARENGA KEEBA..... APPELLANT

AND

REPUBLIC RESPONDENT

**(Being an appeal from the conviction and sentence in Nyamira
MCSO E055 of 2023 on 18th February 2025 by Hon. B. Jumar (RM))**

JUDGMENT

1. The Appellant, Victor Arenga Keeba, faced the main charge 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 between 01st November 2023 and 05th November 2023 at Nyakemimo Sub-location in Nyamira North Sub-County within Nyamira County he intentionally and unlawfully caused his penis to penetrate the vagina of FNM, a child aged fourteen years. In the alternative, he was charged with committing an indecent act by touching the complainant’s vagina contrary to section 11(1) of the Sexual Offences Act.
2. The matter proceeded to full hearing after the Appellant pleaded not guilty to both the main and alternative counts.
3. The prosecution called four witnesses in support of its case. PW1 FNM, the complainant testified that she was 15 years old at the time of giving evidence

on 30th January 2024 and identified her birth certificate which showed that she was born on 28th October 2009. She stated that she and the Appellant who was her boyfriend had agreed to marry after she finished her exams. She testified that she left home and went to Appellant's house where she stayed between 01st November 2023 and 05th November 2023 during which time they engaged in sexual intercourse. Later police officers found her in Appellant's house and the Appellant was arrested. She was taken to hospital for examination and was found to be pregnant and that she was still pregnant at the time she testified. She identified the Appellant in court as the person who had sexual intercourse with her.

4. PW2, testified that complainant was her daughter and born on 28th October 2009. She stated that when complainant did not return home after she finished examinations, she searched for her and eventually reported to Nyamusi Police Station. She later learned that the Complainant had been seen at the Appellant's home in a place known as Vokera. She thereupon accompanied her husband and police officers to the Appellant's house, where the Appellant was arrested. The Complainant, who was found in his company, was escorted to hospital and, upon medical examination, was confirmed to be pregnant.
5. PW3, DK, a registered Clinical Officer at Nyamusi Sub-County Hospital testified that she examined the complainant on 05th November 2023. She produced the treatment notes and Post Rape Care form and the P3 form all dated 05th November 2023 as exhibits. The witness testified that although the

complainant did not have lacerations on her genitalia, the hymen was broken and the complainant was pregnant.

6. PW4 was the investigating officer, testified he arrested Appellant on 05th November 2025 after finding complainant who had been reported missing in that house.
7. Upon conclusion of the prosecution case, the trial court found that a prima facie case had been established and placed the Appellant on his defence. In his sworn defence, the Appellant admitted that complainant was known to him but denied defiling her.
8. Subsequently, in a judgment delivered on 18th February 2025, the learned trial magistrate evaluated the Appellant's sworn denial against the prosecution evidence, including the complainant's testimony, the medical findings contained in the treatment notes, the Post Rape Care form and the P3 form, as well as the DNA analysis report linking the Appellant to the child born of the pregnancy. The trial court found that the defence did not displace the cogent and consistent evidence adduced by the prosecution and proceeded to convict and sentence the Appellant to 20 years imprisonment.
9. The Appellant filed written submissions dated 13th January 2026 challenging both conviction and sentence.
10. On the issue of fair trial, he submitted that his right under Article 50(2)(m) of the Constitution was violated on account of the trial court's failure to indicate the language used when PW2, PW3 and PW4 testified, and failure to demonstrate that their evidence was interpreted to him in a language he

understood. He relied on section 198(1) and (2) of the Criminal Procedure Code and cited **AMO v Republic [2019] KEHC 7063 (KLR)** where the High Court held that failure to record the language of the court and the language of interpretation amounted to a serious procedural irregularity that compromised the right to a fair trial.

11. The Appellant further relied on **Simiyu & another v Republic (Criminal Appeal 243 of 2005) [2006] KECA 354 (KLR) (31 March 2006) (Judgment)**, in which the Court of Appeal emphasized that the language used at trial must be expressly recorded and that it is insufficient to presume understanding merely because an accused cross-examined witnesses.

12. The Appellant also challenged the sufficiency of the prosecution evidence and contended that the complainant willingly went to his house and stayed there for about one week. He argued that the trial court failed to properly weigh those circumstances and to accord him the benefit of doubt. In that regard, he relied on **Philip Muiruri Ndaruga v Republic [2016] KEHC 4252 (KLR)**, where the court underscored that the benefit of doubt in criminal cases is a matter of right and not grace. He further cited **Wambui v Republic [2019] KECA 906 (KLR)**, submitting that it is unrealistic to assume that teenagers and young adults are incapable of making informed decisions.

13. The Appellant additionally drew the Court's attention to the complainant's statement in court expressing a wish to withdraw the case and forgive him so that he could assist with the child, and urged the Court to consider that factor in re-evaluating the conviction and sentence.

14. On sentence, the Appellant mounted an extensive challenge to the twenty (20) year term imposed under section 8(3) of the Sexual Offences Act. He argued that the mandatory minimum sentence fettered judicial discretion, disregarded his individual circumstances, and violated his constitutional rights. He relied on **S v Malgas [2001] (2) SACR 1235 (SCA)** on the principles governing departure from prescribed sentences and the need to consider the circumstances of the offence and the offender. He further cited **Fredrick Otieno Odero v Republic [2021] eKLR**, where the court held that sentencing must take into account the particular circumstances of each case. He also relied on **Alister Anthony Pereira v State of Maharashtra 2012 AIR SCW 930, 2012 (2) SCC 648**, for the proposition that punishment must be proportionate and serve the interests of justice and society.
15. In challenging the constitutionality of mandatory sentences, he cited **Injiri v Republic [2018] KECA 78 (KLR)**, and **Christopher Ochieng v Republic [2011] KEHC 2364 (KLR)** in which the Court considered the legality and effect of mandatory minimum sentences under the Sexual Offences Act.
16. The Appellant further invoked the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, submitting that the reasoning therein on the unconstitutionality of mandatory death sentences applied equally to mandatory minimum sentences. He also relied on **Maina & 4 others v Director of Public Prosecutions & another [2022] KEHC 15**, where the High Court declared the mandatory nature of certain sentences under the Sexual Offences Act unconstitutional.

17. Additionally, in urging the Court to exercise sentencing discretion in his favour, he cited **Kimori v Republic [2019] KEHC 11444 (KLR)** and **Sekitoleko v Uganda (1967) EA 531**, submitting that sentencing must reflect mitigation, youthfulness, and the offender's personal circumstances.
18. Finally, the Appellant submitted that the trial court failed to comply with section 333(2) of the Criminal Procedure Code by not taking into account the period he spent in custody from 05th November 2023 to 18th February 2025 prior to sentencing. He therefore prayed that the appeal be allowed, the conviction quashed and sentence set aside, or in the alternative, that the sentence be reduced or varied and that the period spent in custody be credited.
19. From the record of appeal and submissions, I have deduced the issues arising for determination as follows:
- 1) Whether the Appellant's right to a fair trial was violated on account of failure, if any, to properly record the language of the court and interpretation in compliance with Article 50(2)(m) of the Constitution and section 198 of the Criminal Procedure Code.**
 - 2) Whether the offence of defilement was proved beyond reasonable doubt**
 - 3) Whether consent was a viable defence in light of the Complainant's age and the provisions of section 8 of the Sexual Offences Act.**
 - 4) Whether the sentence of twenty (20) years' imprisonment imposed by the trial court was lawful, constitutional, and proportionate in the circumstances**

5) Whether the period spent in custody was properly taken into account pursuant to section 333(2) of the Criminal Procedure Code.

20. This being a first appeal, this Court is under a duty to re-evaluate and re-analyse the entire evidence on record and to draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and must therefore make due allowance for that disadvantage. (See **Selle v Associated Motor Boat Co. Ltd [1968] EA 123.**)

21. On the question of language and fair trial, Article 50(2)(m) of the Constitution guarantees an accused person the right to have the assistance of an interpreter without payment if he cannot understand the language used at trial. Section 198(1) and (2) of the Criminal Procedure Code similarly require that where evidence is given in a language not understood by the accused, it shall be interpreted to him in open court and the language used shall be recorded.

22. Courts have consistently underscored the obligatory duty imposed upon trial courts to record the language of the court and, where necessary, the language of interpretation. The record must, on its face, disclose the language in which the proceedings were conducted and whether interpretation was provided. Any omission in that regard engenders doubt as to whether the accused person understood the proceedings and was thereby able to meaningfully participate in his defence, an omission that strikes at the heart of the right to a fair trial.

23. In the present case, however, the record reflects that the court used English, Kiswahili and Ekegusii at various stages. When the charge was read on 06th November 2023, the Appellant responded in Kiswahili. Throughout the

trial he cross-examined witnesses and actively participated in the proceedings. At no stage did he raise any complaint regarding language or indicate any difficulty in understanding the evidence. I am therefore satisfied that the requirements of Article 50 and section 198 of the Criminal Procedure Code were substantially complied with and that no miscarriage of justice arose.

24. Age is a foundational ingredient of the offence under section 8 of the Sexual Offences Act because it determines both the nature of the charge and the sentence prescribed upon conviction.

25. Complainant's Birth Certificate, which was produced as an exhibit, shows that she was born on 28th October 2009, while the offence was alleged to have been committed between 1st and 5th November 2023. She was therefore fourteen (14) years old at the material time.

26. From the foregoing, I find as did the trial court that the prosecution discharged its burden of proving the Complainant's age beyond reasonable doubt.

27. On the issue of penetration, the Complainant testified that she stayed at the Appellant's house for approximately one week and that during that period they engaged in sexual intercourse daily. Her evidence was corroborated by treatment notes dated 5th November 2023, a Post Rape Care (PRC) form dated 3rd November 2023 and a P3 form of the same date. The Clinical Officer also confirmed that the Complainant was in the early stages of pregnancy. Further, the Government Analyst's report dated 12th September 2024 established, with

a probability of 99.99%, that the Appellant was the biological father of the child.

28. Consequently, I am satisfied as did the trial court that penetration was proved beyond reasonable doubt.

29. On the issue of identity, this was not a case of visual identification by a stranger. The Complainant knew the Appellant well and described him as her boyfriend. She was found in his house. Most significantly, the DNA analysis conclusively linked him to the pregnancy. The chain of evidence was direct and scientific. I therefore find as did the trial court that the identity of the perpetrator was proved beyond reasonable doubt.

30. On the issue of consent, section 8 of the Sexual Offences Act expressly renders the consent of a child immaterial. A child aged fourteen (14) years cannot in law consent to sexual intercourse. The Appellant relied on *Eliud Waweru Wambui v Republic* (2019) eKLR to argue that teenagers are capable of making informed decisions and further referred to the complainant's expression of forgiveness and desire to withdraw the matter. However, statutory protection accorded to children under section 8 is absolute. A romantic relationship, willingness to cohabit, or subsequent forgiveness does not constitute a defence. Criminal liability under the Act is founded on age, not on perceived maturity or consent.

31. On sentence, section 8(3) of the Sexual Offences Act prescribes a term of imprisonment of not less than twenty (20) years where the child is aged between twelve and fifteen years. The Complainant was fourteen (14) years

old. The trial court rightly imposed twenty (20) years, being the statutory minimum.

32. The Appellant challenged the constitutionality and proportionality of the sentence. In **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] KESC 31 (KLR)** (“*Muruatetu 2*”), the Supreme Court categorically held that the decision declaring the mandatory death sentence unconstitutional was confined to murder cases under section 204 of the Penal Code and did not extend to other offences carrying mandatory or minimum sentences.

33. While sentencing must indeed consider proportionality and individual circumstances, section 8(3) remains valid law. I therefore find the sentence imposed on the Appellant is lawful and appropriate.

34. The record demonstrates that the Appellant was arrested on 05th November 2023 and sentenced on 18th February 2025. The judgment does not expressly indicate that the period spent in custody was taken into account. Section 333(2) obligates the court to consider such period.

35. In the circumstances, while the sentence of twenty (20) years is upheld, the Appellant is entitled to credit for the period spent in custody. The sentence shall therefore be computed from 05th November 2023.

36. Upon a comprehensive and independent re-evaluation of the entire record, I am satisfied that the conviction of the Appellant for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act was founded on cogent, credible and sufficient evidence. The conviction is

affirmed. The sentence of twenty (20) years' imprisonment is upheld, subject only to the direction that it shall run from **05th November 2023**.

DELIVERED AT NYAMIRA THIS 26th DAY OF February 2025

**WAMAE.T. W. CHERERE
JUDGE**

Appearances

Court Assistant - Anita

Accused - Present in person

For the DPP - Ms. Kiptanui