



REPUBLIC OF KENYA



**In re FC (Minor) (Children's Case E028 of 2025)
[2025] KEMC 351 (KLR) (26 August 2025) (Directions)**

Neutral citation: [2025] KEMC 351 (KLR)

**REPUBLIC OF KENYA
IN THE KILIFI LAW COURTS
CHILDREN'S CASE E028 OF 2025
DI WASIKE, PM
AUGUST 26, 2025
IN THE MATTER OF F.C. (A MINOR)**

Child marriage is an abuse and an offence whether or not a child took herself to the perpetrator or passed as an adult

The case concerned a 16-year-old grade 8 pupil who was three months pregnant after cohabiting with a 22-year-old man. The matter was reported to the police, and a charge of defilement was prepared but deferred by the Office of the Director of Public Prosecutions (ODPP), with the suspect unconditionally released. The Children's Court held that child marriage constituted abuse and an offence under the Children Act, irrespective of consent. The court further held that an unborn child was not a child under the Children Act and therefore the court would consider the best interest of the child victim which interests would safeguard the rights of the unborn child. The court ordered temporary placement at Springs of Hope Rescue Centre, psychosocial support, re-arrest of the suspect, and ongoing supervision by the children officer.

Reported by Kakai Toili

Criminal Law – offences – child marriage - whether child marriage constituted abuse and was an offence even where the child took herself to the perpetrator or passed as an adult – whether releasing the perpetrator in a case of child marriage without prosecution was in the best interest of the minor and her unborn child - Children Act (cap. 141), sections 2, 23 and 144.

Statutes – interpretation of statutes – interpretation of the Children Act - whether an unborn child could be considered a “child” within the meaning of the Children Act for purposes of protection and determination of best interests - Children Act (cap. 141), section 2.

Jurisdiction – jurisdiction of the Chief Magistrates Court – jurisdiction in the exercise of prosecutorial powers of the Office of the Director of Public Prosecutions (ODPP) - whether the Chief Magistrates could interfere with the power of the Office of the Director of Public Prosecutions to defer charges and unconditionally release a suspect in a child marriage case – Constitution of Kenya, article 157.

Brief facts

The matter concerned a 16-year-old grade 8 pupil, who was presented before the Chief Magistrate's Court by the Children Officer, Ganze Sub-County, as a child in need of care and protection. The minor had allegedly been cohabiting with a 22-year-old man as husband and wife and was three months pregnant. The incident had been reported at Vitengeni Police Station following which the minor was traced and rescued. The



investigating officer prepared a charge of defilement and forwarded the file to the Office of the Director of Public Prosecutions (ODPP).

Upon review, the prosecution counsel deferred the charge and forwarded the file to the county office for further directions. The investigating officer, acting on the instructions of the ODPP, unconditionally released the suspect. The minor was thereafter brought before the Children's Court for appropriate placement. The children officer recommended that; the minor be temporarily committed to Springs of Hope Rescue Centre; summons issue to the prosecution office to explain the deferment of charges, that the Officer Commanding Station (OCS) re-arrest the suspect and resubmit the file for appropriate charges; and that the minor be accorded psychosocial support.

Issues

- i. Whether child marriage constituted abuse and was an offence even where the child took herself to the perpetrator or passed as an adult.
- ii. Whether an unborn child could be considered a "child" within the meaning of the Children Act for purposes of protection and determination of best interests.
- iii. Whether releasing the perpetrator in a case of child marriage without prosecution was in the best interest of the minor and her unborn child.
- iv. Whether the Chief Magistrates could interfere with the power of the Office of the Director of Public Prosecutions to defer charges and unconditionally release a suspect in a child marriage case.

Relevant provisions of the Law

Children Act (cap. 141)

Section 2 - Interpretation

"child marriage" means marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation;

"child abuse" includes—

(a) the infliction of physical harm by any person on a child;

(b) the infliction or inducement of physical harm by any person on a child by acts intended to cause harm or negligent acts or omissions that cause harm;

(c) the failure by any person to protect a child from physical harm or to report a case of child abuse;

(d) act or omissions that affects a child's healthy social and emotional development and functioning including—

(i) rejection;

(ii) isolation, including depriving the child of normal social interaction with others;

(iii) deprivation of affection or cognitive stimulation; or

(iv) inappropriate criticism or comparison with other children, discrimination, humiliation, threats, or malicious accusations, directed at a child;

(e) the exposure of a child to emotionally, traumatic and age-inappropriate content, information and photos of any kind;

(f) engaging a child in child sex tourism and child trafficking;

(g) the employment, use, persuasion, inducement, enticement or coercion of a child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct;

(h) the use or exposure of a child in, electronic or online, platforms for purposes of prostitution, pornography or any other unlawful sexual practice;

(i) the use of a child's images for purposes of pornography or sexual gratification;

(j) dissemination to a child of any material, information, education or health services that promotes, induces, condones, or normalizes sexual activity or behaviour among children or with children; or

(k) any other similar acts calculated to cause physical, emotional, economic or psychological injury to the child;



Section 144 - When a child is in need of care and protection

For the purposes of this Act, a child in need of care and protection includes a child—

(j) who is truant or is falling into bad associations;

(k) who is being denied education;

(l) who has been or is likely to be subjected to female genital mutilation, intersex genital mutilation, child marriage, or to other customs and practices prejudicial to the child's life, education or health;

Held

1. Pursuant to article 157 of the Constitution, it was only the Office of the Director of Public Prosecution (ODPP) that had the power to charge. That power could not be interfered with by anyone or any agency nor any institution including the Judiciary. The court would therefore not delve into the issue of deferment of plea or the decision by the ODPP not to charge.
2. Article 49(1)(f) of the Constitution protected the rights of an accused person. An accused person must be brought before court within 24 hours and had a right to bond and bail unless there were compelling reasons why the accused should not be granted. An investigating officer could therefore apply to court within 24 hours if there were compelling reasons to hold a suspect for a specified time pending preference of charges.
3. Pursuant to the Police Standing Orders, an accused person to be charged of a minor offence could be released on cash bail, with or without sureties, or personal (free) bond or recognizance. The proposed preferred charge being a felony and a serious charge, the OCS did not have the capacity to release the accused on bond or bail but to either unconditionally release the accused or apply to court to further hold the accused pending the directions and review of charges. The investigating officer therefore rightly released the accused though he ought to have done the same at the police station.
4. From the Children Officer report, the victim suddenly withdrew from school, showed signs of distress and secrecy and abnormal behavior. Motherhood and marriage of a minor had a tremendous toll and impact on their social health and emotional development and functioning and in many instances led to a cycle of abuse. The withdrawing out of school by the complainant would further have a big impact on her being a mother.
5. The minor fell squarely in the three categories of children in need of care and protection under section 144(j), (k) and (l) of the Children Act, being a child who was a truant as the mother reported that she had started withdrawing from school, was cohabiting with the suspect hence being denied education and was in a child marriage. Section 13 of the Act protected the rights of the child to basic education which was compulsory. Section 12 of the Children Act gave institutional care as a last option in regard to alternative care which care should be given amongst other reasons, to safeguard a child from abuse.
6. Child marriage was abuse and also an offence under section 23 of the Children Act and whether or not a child took herself to the perpetrator or passed as an adult, once it was known that she was a child, the State and in the instant case the court was under a duty to protect that child putting in consideration her best interests. The unborn child could not be considered as a child under the Act and in that case and therefore the court would consider the best interest of the child victim which interests would safeguard the rights of the unborn child.
7. The circumstances of the case were that the minor could not stay at the rescue center for long given that she needed to sit for examinations and at the same time she needed serious psychosocial support which could not be readily available once she was reintegrated back home. Further, given the circumstances of the case, it was imperative that the integration process was done well in order for her family which had strongly expressed dissatisfaction with the justice system in the manner the complainant had been handled to accept the child back and give her the emotional, psychosocial and holistic support she required given that the court could not allow her to go back to the “marriage” however mutual it was as it would be perpetrating an illegality and societal ill.



8. Taking cognizance of the unconditional release of the perpetrator, he may as well be at large given past similar cases, the recommendations by the ODPP may never be actualized and he would go scot free. The court would not delve into the merits of the case. Considering the circumstances of the case, it would have been in the best interests of the child to first undergo psychosocial support as stipulated under the Victims Protection Act (she being a vulnerable victim) before her recording a statement.
9. It would have been in the best interests of the child for the perpetrator to have been brought before court him being above 20 years of age notwithstanding the age gap and any such proposed diversion would have been weighed and considered and the court would have made and or given the conditions if at all that would have considered the interests of the victim (in that case a child) after having a conference with her and all the parties and considered all the circumstances of the case.
10. The crime of child marriage was rampant in Ganze Sub County with the justice actors through the GBV Committee of the CUC holding periodic sensitization on the issue to the community and imploring the community not to tolerate the same and report any such instances for action. Whereas that was a matter that had been considered on merit by the ODPP through their power to charge, it may in the long run not be in the best interests of the children in Ganze Sub County as the community having reported that instance, they may never be ready to report any such incidence again and it would not be long till the defence given would be used as a test and the criminal justice system put to task on why young men in their early twenties who had not cohabited with a child but solely defiled and were in romantic relationships had been brought before court despite the victim being hostile, refusing to testify or being expectant.
11. Letting the perpetrator go free as in the instant case (given that it was not known if he had gone into hiding or not) may not be in the best interests of the unborn child as it was not a guarantee that he would give the love and support nor could he be compelled to do so if he chose to be an absentee father. A more structured way through the court system would have safeguarded the best interests of the child and also the unborn child. It was not mandatory that the perpetrator be charged with defilement. He could have been alternatively charged with child abuse or child marriage.

Orders

- i. *The minor to remain at the Spring of Hope Rescue Center for a further 1 month and to continue with her education during that period.*
- ii. *The Sub County Director of Education-Ganze Sub County to ensure that the minor was allowed to sit for her grade 8 examinations.*
- iii. *During that period the minor to be placed on psychosocial support and the children officer to ensure compliance before the reintegration process could begin.*
- iv. *The prosecution file be submitted to the ODPP-Coast Region Office in Mombasa for the Regional Director to review the file and or make a final determination on the same in regard to the power to charge.*
- v. *The OCS-Vitengeni to re-arrest the accused to be charged with the requisite offences under the Children Act.*
- vi. *Pursuant to sections 135 (1)(c) and 136 (2) as read with sections 139 and 145 of the Children Act:*
 1. *An exclusion order was issued against Michael Safari restraining him from taking the minor and or living with the minor in any circumstances whatsoever until the minor reached the age of majority.*
 2. *The Children Officer Ganze Sub County to supervise the minor as a child in need of care and protection until she attained the age of 18 years.*
 3. *A power of arrest was attached on Order No. 1 in the event Michael Safari breached the order.*
 4. *Further directions on September 23, 2025. The minor to be availed for conferencing. Summons to the mother of the minor to also attend court on that date.*

Citations

Statutes



1. Children Act (cap 141) — section 2, 12, 13, 23, 135, 135(1)(c); 136(2); 139; 142; 144(j); 144(k); 144(l); 145 — Interpreted
2. Constitution of Kenya — article 49(1)(f); 157 — Interpreted
3. Sexual Offences Act (cap 63A) — Cited
4. Victim Protection Act (cap 79A) — Cited

Advocates

None mentioned

DIRECTIONS

Background

1. F.C a 16 year old minor in Grade 8 was brought before court by the Children Officer- Ganze Sub County on 12.08.2025 as a child in need of care and protection with a case summary of defilement.
2. The history was that the minor was cohabiting with the boyfriend a 22-year-old as husband and wife and was currently 3 months pregnant.
3. The matter had been reported to Vitengeni Police Station on 04.08.2025 and subsequently the minor had been traced, rescued and handed over to the Children Officer and the Investigating Officer prepared a charge which was handed over to the ODPP for approval to charge.
4. The Prosecution Counsel approving Charges deferred the matter, informed the Investigating Officer and transmitted the file to Malindi for approval and or directions from the County head.
5. Subsequently the Investigating Officer unconditionally released the suspect and the child was brought before this court for placement into a safe place.
6. The Children Officer in his report dated 12.08.2025 made the following recommendations that:
 1. The minor be committed to Springs of Hope Rescue Center for a temporary period of two weeks under a care and protection order pending further assessment and re-integration planning;
 2. Summons be issued to the Prosecution Office in Kilifi County through the In Charge Prosecution to explain the circumstances under which the case was deferred and to ensure the perpetrator is brought before court without further delay;
 3. The Officer Commanding Station (OCS) Vitengeni Police Station be directed to re- arrest the perpetrator and facilitate the resubmission of the file to the Director of Prosecution for appropriate charges in line with the *Sexual Offences Act* and *Children Act*, 2022;
 4. Continued psychosocial support and counselling be provided to the minor through the government child protection officers and certified child counselors due to the trauma she has undergone.
7. In line with the said recommendations and having considered the children officer report, the Court under Section 135 and 142 of the Act found that the minor was a child in need of care and protection and in the interim placed her at the Rescue Center for a period of 2 weeks only so as to enable her sit for her exams.
8. The Court further directed that the Officer in Charge ODPP-Kilifi North Sub County attends court to shed light on the circumstances leading to the release of the suspect and deference of the charges.



Summary of the Facts.

9. On 25.08.2025 and 26.08.2025 respectively, the Court cross examined on oath Prosecution Counsel Nancy Njeru being the officer who deferred the charge and had been duly authorized by the County In Charge ODPP and the Investigating Officer PC Hilary Miyoma of Vitengeni Police Station.
10. The Children Officer- Ganze Sub County Mr. Omar also submitted in the matter.
11. It is not in dispute that the ODPP had deferred the charges and informed the Investigating Officer of the reasons. The ODPP then directed the Investigating Officer to release the accused pending the directions from the County Office on whether to charge or not to charge.
12. It is also not in dispute that the Investigating Officer had been accompanied by the brother to the minor (who had reported the matter to the police) and the suspect who was brought to the court cells awaiting plea taking. It was also not in dispute that the Investigating officer being frustrated and not understanding the reasons for deferment of charge or what deferment waited at the court to seek further clarity from the Prosecution Counsel who re-confirmed that the Investigating Officer should not continue holding the suspect. The Investigating Officer in frustration and after seeking clarity and informing the Children Officer and the OCS proceeded to unconditionally release the suspect at the law courts in the presence of the complainant's brother and told him that he was free to leave.
13. It is also not in dispute that the Prosecuting Counsel duly forwarded the file to the County Office for further direction.
14. It is further clear that the Prosecuting Counsel on 25.08.2025 received the file and it was stated thus:

“The minor and Suspect were engaging in consensual teenage sexual intercourse as a result of cohabiting as husband and wife. The Suspect states that the Minor never mentioned her age nor the fact that she was in school a fact confirmed by the minor in her statement. Pursuant to the Provisions of Section 8(5) of the *Sexual Offences Act* this is a plausible defence.

When making a decision to charge or otherwise pursuant to our decision to charge guidelines, we take into account both the evidentiary test and the public interest test. Although the evidence meets the threshold to prefer charges, its not in the public interest to charge since the child expected will be deprived of the right of parental love from one of the parents in the event the charges proceed to logical conclusion...Proceeding with the charges to its logical conclusion basing on the circumstances of the case will not benefit any of the parties involved since incarceration would mean the minor would have to take care of the child singlehandedly.

In the best interests of the unborn child, we direct that the matter be diverted. We have also taken cognizance of the recent high court jurisprudence suspending defilement trials involving teenagers.

The diversion should assist find a consensus on how the child who is yet to be born will be catered for to ensure they are not deprived of the right to parental love from both parents and also the best interests of the minor be catered for too.”

Analysis of the Law

15. Pursuant to Article 157 of the *Constitution*, it is only the Office of the Director of Public Prosecution that has the power to charge. That power cannot be interfered with by anyone or any Agency nor any Institution including the Judiciary.



16. I will therefore not delve into the issue of deferment of plea or the decision by the ODPP not to charge.
17. The Prosecution already as per the letter dated 25.08.2025 submitted to the court gave reasons as to why they deferred the charges and the final directions.
18. On the issue as to why the ODPP directed the accused be released, Article 49 (1)(f) protects the rights of an accused person. An accused person must be brought before court within 24 hours and has a right to bond and bail unless there are compelling reasons why the accused should not be granted. An Investigating Officer can therefore apply to court within 24 hours if there are compelling reasons to hold a suspect for a specified time pending preference of charges. Further, Pursuant to the Police Standing Orders, an accused person to be charged of a minor offence can be released on cash bail, with or without sureties, or personal (free) bond or recognizance. The proposed preferred charge being a felony and a serious charge, the OCS did not have the capacity to release the accused on bond or bail but to either unconditionally release the accused or apply to court to further hold the accused pending the directions and review of charges. The Investigating Officer therefore rightly released the accused though he ought to have done the same at the Police Station.
19. Section 2 of the *Children Act* defines Child Marriage as follows:

““child marriage” means marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation”
20. Child abuse is further defined to include:

“Acts or omissions that affects a child’s healthy social and emotional development and Functioning.”
21. From the Children Officer report, the Victim suddenly withdrew from school, showed signs of distress and secrecy and abnormal behavior. Motherhood and marriage of a minor has a tremendous toll and impact on their social health and emotional development and functioning and in many instances leads to a cycle of abuse. The withdrawing out of school by the complainant will further have a big impact on her being a mother.
22. Section 144 (j), (k) and (l) includes the following as Children in Need of Care and Protection:
 - (j) who is truant or is falling into bad associations;
 - (k) who is being denied education;
 - (l) who has been or is likely to be subjected to female genital mutilation, intersex genital mutilation, child marriage, or to other customs and practices prejudicial to the child's life, education or health;”
23. The minor herein falls squarely in the three categories being a child who is a truant as the mother reported that she had started withdrawing from school, was cohabiting with the suspect hence being denied education and was in a child marriage so to say. Section 13 of the Act protects the rights of the child to basic education which is compulsory.
24. Section 12 of the *Children Act* gives institutional care as a last option in regard to alternative care which care should be given amongst other reasons, to safeguard a child from abuse.
25. As earlier stated, child marriage is abuse and also an offence under Section 23 of the Act and whether or not a child took herself to the perpetrator or passed as an adult, once it is known that she is a child, the State and in this case the Court is under a duty to protect this child putting in consideration her



- best interests. The unborn child cannot be considered as a child under the Act and in this case and therefore the Court will consider the best interest of the child victim which interests will safeguard the rights of the unborn child.
26. The circumstances of this case are that the minor cannot stay at the rescue center for long given that she needs to sit for examinations and at the same time she needs serious psychosocial support which cannot be readily available once she is reintegrated back home. Further, given the circumstances of the case it is imperative that the integration process is done well in order for her family which has strongly expressed dissatisfaction with the justice system in the manner the complainant has been handled to accept the child back and give her the emotional, psychosocial and holistic support she requires given that the court cannot allow her to go back to the “marriage” however mutual it was as it will be perpetrating an illegality and societal ill.
 27. Having considered the above, I further take cognizance of the fact that the unconditional release of the perpetrator noting that he may as well be at large now given past similar cases, the recommendations by the ODPP may never be actualized and he will go Scot free. As earlier observed, I will not delve into the merits of the case. Considering the circumstances of the case, the court observes that it would have been in the best interests of the child to first undergo psychosocial support as stipulated under the *Victims Protection Act* (she being a vulnerable victim) before her recording a Statement. Further, it would have been in the best interests of the child for the perpetrator to have been brought before court him being above 20 years of age notwithstanding the age gap and any such proposed diversion would have been weighed and considered and the court would have made and or given the conditions if at all that would have considered the interests of the victim (in this case a child) after having a conference with her and all the parties and considered all the circumstances of the case.
 28. It is notable that the crime of child marriage is rampant in Ganze Sub County with the Justice Actors through the GBV Committee of the CUC holding periodic sensitization on the issue to the community and imploring the community not to tolerate the same and report any such instances for action. Whereas this is a matter that has been considered on merit by the ODPP through their Power to Charge, it may in the long run not be in the best interests of the children in Ganze Sub County as the community having reported this instance, they may never be ready to report any such incidence again and it will not be long till the defence given will be used as a test and the criminal justice system put to task on why young men in their early twenties who have not cohabited with a child but solely defiled and were in romantic relationships have been brought before court despite the victim being hostile, refusing to testify or being expectant. Letting the perpetrator go free as in this case (given that it is not known if he has gone into hiding or not) may in the opinion of this court not be in the best interests of the unborn child as it is not a guarantee that he will give the love and support nor can he be compelled to do so if he choses to be an absentee father. A more structured way through the court system would have safeguarded the best interests of the child and also the unborn child.
 29. It was not mandatorily that the perpetrator be charged with defilement. He could have been alternatively charged with child abuse or child marriage.
 30. In the best interests of the minor, I do give the following directions:

Finding

1. The Minor F.C to remain at the Spring of Hope Rescue Center for a further 1 month and to continue with her education during this period;
2. The Sub County Director of Education-Ganze Sub County to ensure that the minor is allowed to sit for her Grade 8 examinations;



3. During this period the minor to be placed on Psychosocial Support and the Children Officer to ensure compliance before the reintegration process can begin;
4. The Prosecution file be submitted to the ODPP-Coast Region Office in Mombasa for the Regional Director to review the file and or make a final determination on the same in regard to the power to charge;
5. The OCS-Vitengeni to re-arrest the Accused to be charged with the requisite offences under the *Children Act*;

Further Orders

Pursuant to Section 135 (1) (c), Section 136 (2) as read with Section 139 and Section 145 of the *Children Act*, it is ordered that:

1. An exclusion order is hereby issued against M.S restraining him from taking the Minor F.C and or living with the minor in any circumstances whatsoever until the minor F.C reaches the age of majority;
2. The Children Officer Ganze Sub County does supervise the Minor as a child in need of care and protection until she attains the age of 18 years;
3. A power of arrest is attached on Order No. 1 in the event the said M.S breaches the said order.
4. Further directions on 23.09.2025. The minor to be availed for conferencing. Summons to the mother of the minor to also attend court on the said date.

DATED AND DELIVERED AT KILIFI THIS 26TH DAY OF AUGUST 2025

HON. D. WASIKE

PRINCIPAL MAGISTRATE

