

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**  
**APPELLATE SECTION**  
**CRIMINAL APPEAL NO E123 OF 2025**  
**FRED OPENDA ONGANGA ..... APPELLANT**  
**VERSUS**

**REPUBLIC** .....  
**RESPONDENT**

**(Being an appeal against the original conviction and sentence in Criminal SO Case No 245 of 2020 of the Chief Magistrates Court at Makadara)**

**JUDGEMENT**

**INTRODUCTION.**

1. In Makadara since the supervision of JKIA was taken out of the court, our docket is just trying to unravel the issue of sexual offences. The sexual offences Act having been enacted in the year 2006 and having been with us for a period of two decades, is it not time for the Kenyan society to take stork thereof and look at whether the same has served the intended purpose.
2. In this cause the victim was aged 16 years as at the time of the incident. She was 17 years when she appeared before the trial court having in the local jingo “ finished form four and awaiting to join TUK ( one of the Universities) in Kenya. In her own word “ Fred ( the appellant ) had called Zipporah’s phone and wanted to meet me alleging that he had some information from my uncle on a certain business ..... I had no phone and so I took Zipporah’s phone and he directed me to Kia

Ndege Area of Embakasi. I met them and he started to tell me about business. Then he insisted that we have sex but I told him am not in the mood and didn't want to do it. He managed to convince me , I got carried away and I had sex with him. "

3. This is how the Gen Z who are supposed to be protected by the Act talk about sex. When charged with the offence , the boy child in his defence had this to say " I am 32 years old ..... I was in my house with my wife and two children , my younger brother and a cousin ... I had taken a nap and my wife came and woke me up from the bed room. She told me that some people were looking for us. .... I was arrested and taken to the police post .... It is then that I was told I had assisted L to abort as I was allegedly the owner of the pregnancy ..... mama L and her uncle said they wanted kshs 100,000 but told them I can't pay anything ...". The trial court referred to him as" a young man of reverberant confidence and probably a tardy wit " whatever that meant to the court !

4. As they say this generation only fear pregnancy than hot porridge for had not the victim miss her periods , this would have been just one of those sexual activities which they engage in when they are in the mood and the appellant who was happily married with two children would not have avoided her, if anything would have convinced made it happen again. No wonder

they now call it the “ Strait of Hormuz” the only way through the Gulf .

5. Who will save this generation from the consequences of the sexual offences Act ! the Court of Appeal tried but was reminded by the Supreme Court that the Act is still supreme and whether or not the victim is in the mood age is the magic number !.
6. Whereas we are moralist Christians, it is high time the issue of blame worthiness and the part played by the victim in the scheme of this be taken into account in addition to the defence provided for under section 8(5) of the Act, otherwise we shall continue to populate our prisons with the youth who feel that the only way to prove their manhood is by the number of girls they put in the mood and the young girls who are cultured to believe that the only way to prove love is to allow yourself to be put in the mood and to let it happen.
7. The appellant was charged with the offence of defilement the particulars which were that on the diverse dates of May 2020 and August 2020 at Tasia estate in Embakasi within Nairobi county intentionally caused his penis to penetrate the vagina of LK a child aged 16 years. He was convicted and sentenced to serve a thirteen years imprisonment less the two months in custody under section 333(2) of the CPC . on the basis that the offence is serious and the intention of

the legislature in imposing the harsh minimum sentence was to give deterrent sentence .

8. Being dissatisfied with the said conviction and sentence, he filed this appeal initially at the High Court Criminal Registry at Milimani being criminal appeal no E300 of 2023 and raised the following grounds of appeal:

- a) The prosecution was not proved to the required degree in view of the contradictions, discrepancies and omission in the prosecution case which created a reasonable doubt in the mind of the court.
- b) The court erred in failing to appreciate that the charges were solely grounded on the allegation that the appellant impregnated the complainant and was in the process of assisting her procure an abortion, yet it failed to order a DNA test to prove whether the appellant was responsible for the pregnancy.
- c) The prosecution case was solely based on the hearsay evidence.
- d) That the appellant was never interrogated before being charged thereby violating his rights under article 49 of the constitution.
- e) The court exhibited bias towards the appellant by using unsavoury language to wit “the accused is a young man of reverberant confidence and probably a tardy wit “

9. By a notice of motion dated 2st December 2023, the appellant moved the court to be granted bail pending the hearing of the appeal herein on the basis that the same was suffering from diabetes and acute pancreatic.
10. Before the said application was heard and determined directions thereon having been given on 8<sup>th</sup> November 2023, by an order thereon dated 13<sup>th</sup> February 2025, the cause was transferred to this criminal registry upon its establishment and upon the same being admitted on 30<sup>th</sup> July 2025, the application herein was compromised to allow the main appeal to be disposed of, hence this judgement.

### **SUBMISSIONS**

11. On behalf of the appellant it was submitted that the prosecution failed to prove penetration of the complainant by the appellant on the 24<sup>th</sup> august 2020 as the complainant's evidence was that she only interacted with the appellant in the month of may when the appellant lured her into having sex with her and at no point did she say that they met in august as captured in the charge sheet. It was contended that in cross examination , the complainant introduced a new issue to the effect that she had an affair with the appellant over charismas period and in June 2020, thereby raising doubt on the date of defilement.
12. It was submitted that only PW2,PW3 and PW4 who testified that the appellant defiled the complainant in the month of august 2020 and subsequently she was

taken to the hospital on the 24<sup>th</sup> contrary to the evidence of PW1 whose testimony was that it was in the month of may 2020. It was contended that the medical reports including post rape care form were completed on the 24<sup>th</sup> august 2020 which supported the evidence of the witnesses but contradicted that of PW1 and that the said medical reports did not say anything on alleged defilement of the complainant by the appellant. This was the position as regards PW2 who filed the P3 form thereby created a doubt in the prosecution case as to when the offence occurred.

13. On the issue of identification of the appellant it was submitted that the trial court failed to draw adverse inference as regards the witnesses who were not called including the friend who allegedly introduced the appellant and PW1 and the mere fact that the appellant knew the complainant was not proof of the offence of defilement and that the court erred in refereeing to many sexual acts which was not supported by the evidence on record.

14. It was submitted that the prosecution case was full of contradictions as PW1 was not clear on when she met the appellant, which according to her evidence was between may and august through a mutual friend Zipporah when the appellant lured her into having sex and impregnating her in the month of may without giving a date while all the other witnesses talked of the

month of august yet under cross examination she stated that it was in the month of December,

### **PROCEEDINGS**

15. This being first appeal, the applicant is entitled to re-evaluation of the evidence tendered before the lower court to come to its own conclusion while giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses as was stated in the case of Okeno v Republic

16. PW1 evidence was that between May and August 2020 on dates she did not know, she was with a friend called Zipporah, the appellant called her on some business and the appellant directed her to Kwa Ndege area where after they had spoken on the issue of the business, the appellant insisted that they have sex, to which she responded that she was not in the mood but the appellant convinced her and she got carried away and they had sex, which according to her was involuntary as she didn't want to have sex but somehow the appellant made it happen. She went home but after one month she missed her period and as in the norm in this kind of situations, she informed the appellant who started to avoid her.

17. It was her further evidence that when they eventually met, the appellant bought for her some drugs and pills, some which were administered to her by a lady friend of the appellant which later caused her to bleed, she later learned that she had taken abortion

pills and had to be taken to the hospital for her womb to be cleaned and to remove what had remained of the pregnancy. It was her evidence that it was her first sexual encounter. In cross examination she denied having gone to the lady to procure an abortion and stated further that they had an affair over charismas period and in June 2020 and that she took the pills at the house of Planica who was the appellants friend. She stated that she was not a virgin at the time she had sex with the appellant .

18. PW2 Dr. Farah Mohamed produced PRC and P3 form in which it was stated in the history part that the compliant went to the appellants place and he started to caress her until she got into the mood and had unprotected sex, on examination on 24<sup>th</sup> august 2020,her genital was normal , hymen had multiple old tears with traces of blood in the vagina and the urine tested positive for pregnancy. In cross examination he stated that even after abortion one may still test positive because of hormonal changes and that old tear confirmed defilement.

19. PW3 P N O the mother stated that she was born on 29<sup>th</sup> January 2004 as confirmed through her birth certificate. On 22<sup>nd</sup> august 2020when she returned home at 8.00pm, she did not find the complainant at home and her phone was off. They looked for her the following day and found her at the house of the

appellants friend and was later taken to the hospital and the appellant arrested after two weeks.

20. PW4 CPL Lilian kavila received the report on 5<sup>th</sup> September 2020 after the initial report had been made on 23<sup>rd</sup> august 2020 on the complainant having done abortion through the assistance of the appellant. She arrested the appellant on 23<sup>rd</sup> September 2020. In cross examination she stated that she found out that the appellant had a relationship with PW1 during the covid period and that she arrested the appellant in his house.

21. When put on his defence the appellant stated that he was 32 years old unemployed and that on the date of his arrest the mother of the PW1 was present and he denied having assisted the complainant procure abortion. It was his evidence that the mother of the complainant and her uncle demanded kshs 100, 000 to enable them drop the case which was later reduced to kshs 50,000 and 20,000 which he said he will not pay. He confirmed that the complainant was his neighbour in Fedha Estate.

### **DETERMINATION**

22. In this cause the only issues for determination are whether the prosecution case was proved to the required degree, whether the appellants defence was considered and whether the sentence was lawful.

**23.** On the proof of the prosecution case , to sustain a conviction, the prosecution must prove, the age of the victim , the act of penetration and the identity of the

accused person. This was stated by the Court of Appeal in the case of **Kaaka Masara Margeti versus Republic [2020] eKLR.**

24. In this cause the age of the complainant was proved through her oral testimony as corroborated by her mother and the birth certificate , P3 form and PRC form. She was born on 29<sup>th</sup> January 2004 and therefore the trial court was right in assessing her age to be above 16 years and below 17 years for purposes of sentence and was therefore a child under the provisions of Sexual Offences Act .

25. Penetration was proved through the medical reports and a positive pregnancy which led to an abortion. On the identification of the appellant as stated by the trial court the appellant in his defence in chief admitted that the complainant was his neighbour. The complainant in her evidence in chief stated how she met the appellant through a friend in whose house her mother found her which led to the arrest of the appellant at his house. I therefore find and agree with the trial court that the appellant was positively identified. The appellants defence that he is in court because of failure to pay the sum of money demanded by the parents of the victim whereas the court dismissed the same on the basis that there was no evidence of such demand, it is clear that the same would have only been demanded after the appellant's blameworthiness and or responsibility had been established.

26. It is therefore clear that the prosecution case against the appellant was proved to the required degree and his defence was considered against the courts finding that the victim knew the appellant very well and was conversant with his close circles including Dan who smoked the appellant out after he went mteja upon being told of the missing period, Zipporah, whose phone the complainant used to connect with the appellant and Phanice the appellants drinking buddy and the one who helped in procuring the abortion.

27. Whereas the trial court referred to the appellant in not so kind words, this did not prejudice the appellant as the court seems to had reacted to the complainant's graphic account of what the appellant did not enable her give in to his sexual demands noting that the original purpose of the meeting was on some undisclosed business venture which metamorphosized into demand for sex.

28. The issue is not whether the complainant was a virgin or whether she had several sexual escapades with the appellant , the issue is whether she was a minor at the time and whether the appellant penetrated her. The offence as it is a strict liability offence and whether the appellant managed to put her in the mood causing it to happen or whether she had previously been penetrated by other people, as she stated that she was not willing to parade her sexual life in public, is not a defence if the appellant did not pit himself in the purview of the

defence e available under section 8(5) of the sexual offences Act. It is clear that the appellant did not advance the defence under the said section and having confirmed that the complainant was his neighbour, it is clear that he ought to have known that she was a school going child and a minor as such.

29. The appellants contention that the prosecution case was full of contradictions was adequately addressed by the court to the effect that the petty details may not matter so long as the evidence tend to prove that the incidence of defilement occurred .

30. The appellants appeal against conviction therefore lacks merit and is dismissed.

31. On sentence , the appellant was sentenced to 13 years against the minimum of fifteen years as provided for under section 8(4) of the Act which sentence going by the current jurisprudence from the Supreme Court is unlawful. Since the respondent did not file cross appeal and neither was the appellant put on notice of enhancement, I will not interfere with the same.

**32.** Before penning off as stated at the opening of this judgement, it is high time the legislature relooks at the sexual offences act to reopen it for some broader defences including the role and the conduct of the victim in the scheme of things otherwise the boy child will continue to bear the burden of wrong choices while the girl child take cover on **“I was not a virgin at the time and had sex before but I will not be**

**comfortable with my sexual history being examined in court'**

33. In the final analysis in as much as I sympathize with the appellant who mistakenly thought that the victim had consented not knowing that in law she cannot consent, the fact that she was not as virgin notwithstanding, I find no merit on the appeal herein which I dismiss both on conviction and sentence and affirm the trial court finding thereon. The appellant has a right of appeal to the court of appeal and it is ordered.

**DATED SIGNED AND DELIVERED THIS 29<sup>th</sup> DAY OF APRIL 2026**

**J. WAKIAGA  
JUDGE**

In the presence of:-

Court assistant - Gitonga

State Counsel -