



**Mghanga v Republic (Criminal Appeal 14 of 2019)  
[2022] KECA 367 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 367 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 14 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
FEBRUARY 18, 2022**

**BETWEEN**

**JOHN MICHAEL MGHANGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Mombasa (Ongeri, J.) delivered on 27th February 2014 in High Court Criminal Appeal No. 6 of 2016)*

**JUDGMENT**

1. The appellant, John Michael Mghanga, was on 8<sup>th</sup> January 2016 convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* by the Resident Magistrate’s Court at Wundanyi. The particulars of the offence were that on 12<sup>th</sup> January 2014 in Kishamla location, within Taita Taveta County intentionally and unlawfully caused his penis to penetrate the vagina of MMM a juvenile aged 17 years. He was sentenced to serve a prison term of 15 years. The High Court at Mombasa (A. Ongeri, J.) upheld the conviction and sentence in a judgment delivered on 27<sup>th</sup> February 2017.
2. In this second appeal, all we can consider are matters of law by reason of Section 361(1) of the Criminal Procedure Code. We cannot interfere with the decision of the lower courts unless:

“...it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”  
*See Karani vs. R [2010] 1 KLR 73.*”



3. The prosecution case was that MMM's family and the appellant lived in the same neighborhood. MMM's mother used to deliver water to the appellant's house. According to MMM's father, who testified as PW4, on 12<sup>th</sup> January 2014, MMM's mother was unwell and MMM stepped in for her mother to deliver water to the appellant's house. MMM stated that she was at the appellant's house early that morning at about 6.45 am for that purpose. On arrival, she found the appellant sweeping outside. She entered the house and poured water into a bigger jerrican and was in the process of exiting the house when she encountered the appellant at the door. He held the jerrican that she had and invited her to take tea with him. She refused but he insisted. He served her tea and as she was taking it, in her words:

“...he carried me and took me to his bedroom. I tried to resist but he over powered me. When he took me to the bedroom, he place (sic) me on his bed and removed my biker and the under pant. He also removed his clothes. He inserted his penis into my vagina for about 5 minutes. I saw some white fluid looking like mucus. I wore my clothes and went home. I did not tell anyone at home.”

4. A month later, she went on to say, she missed her monthly periods. She informed the appellant about it who advised her to go to hospital to procure an abortion. She went to a dispensary where she was advised by the nurses that it was not possible and went back home. In May 2014, the pregnancy began to show. She informed her father (PW4) who took her to hospital where the pregnancy was confirmed. The appellant was well known to her as his home and her home were “about half kilometer’ apart.
5. The matter was reported to the Assistant Chief (PW2) who then reported it to Musau Administration Police Post where AP Sergeant Mohammed Issa Digalo (PW3) was attached, who then arrested and escorted the appellant to Mwatate Police Station. On 27<sup>th</sup> May 2014, Charo Zakariah (PW5) a clinical officer at Mwatate Sub County Hospital examined MMM who had been escorted there with allegations that she had been defiled and impregnated by a person known to her. On examination, he noted that her hymen was broken and she had white discharge on the vaginal opening. He performed a pregnancy test which turned positive.
6. During the trial proceedings, on 18<sup>th</sup> December 2014 by which time MMM had delivered a baby, the prosecutor applied to the court for a DNA test to be conducted to determine the fatherhood of the child. The appellant not objecting, the court ordered blood samples or other bodily fluid as may be required be taken from the appellant and the child for purposes of DNA testing. Having received the samples, the Principal Chemist, Mombasa, George Lawrence Ogunda (PW6) generated a DNA profile using mucal swabs and concluded that “there is 99.99+ % more chance that [the appellant] is the biological father” of MMM's child.
7. In his defence before the trial court, the appellant did not contest the prosecution case. In his testimony before the trial court on 30<sup>th</sup> November 2015, he stated: “In 2014 I was alone in the house when the complainant came to the house. I am remorseful for what happened.”
8. Such being the state of the prosecution evidence, including that of the investigating officer Police Constable David Masinde (PW7), the trial court was satisfied that the offence of defilement was established to the required standard. The court expressed:

“I have carefully considered the prosecution's evidence on record, that of the accused as well as the applicable law. Suffice it to say that from the totality of the prosecution's evidence especially that of the complainant, that of the clinical officer as well as the DNA results produced by PW6 as prosecution exhibit 5, there is no doubt in my mind that the accused



is the person who had sex with the complainant in the morning of 12 January 2014. Out of the said sexual encounter, the complainant conceived and the by product is a child whose DNA testing shows that the father is the accused. In any event, the accused admitted as much in his unsworn testimony which was delivered in court by the accused who was visibly overwhelmed by remorse.”

9. Being of the view that the appellant knew the complainant well and knew or ought to have known that she was a school going child, the learned trial court dispelled the notion that the appellant believed that the complainant was over 18 years. The appellant was then convicted and sentenced to the minimum sentence of imprisonment for 15 years.
10. The appellant’s unsuccessful appeal before the High Court was principally on grounds that the prosecution did not prove its case to the required standard; that the complainant’s age was not proved; and that Section 8(5) of the Sexual Offences Act had not been adhered to. The learned Judge of the High Court was however satisfied that all necessary ingredients had been proved.
11. In the present appeal, the appellant’s grievances on which he expounded in his written submissions and to which he referred during the virtual hearing before this Court on 29<sup>th</sup> November 2021 are that: both courts below failed to appreciate the charge sheet was defective because it did not outline full information on the nature of the offence; that the evidence was at variance with the charge in that the charge sheet indicated the age of the victim as 17 years old while the evidence comprising the birth certificate was that she was 18 years; that for the same reason, the 15 year sentence was erroneous; that in any event the sexual intercourse was consensual and there was also evidence that the complainant was having sex with other male friends; that there were contradictions in the testimonies of PW1 and PW2 regarding the amount of money the complainant claimed the appellant paid her; and that people mentioned in the proceedings, including the mother of the complainant, were not called as witnesses. On sentence, the appellant urged that he is an old man of 70 years and the sentence imposed is too harsh “for the sunset age person like” him.
12. For the Director of Public Prosecution, Miss. Keya, learned counsel, in opposing the appeal submitted that the charge sheet was not defective as it contained all necessary information; that all the elements of the offence were established to the required standard; that the age of the victim was established by production of the birth certificate; that the clinical officer established that the complainant’s hymen was broken and that she conceived as proof of penetration and the DNA test established that the appellant was the father of the child born out of the defilement; that the appellant was positively identified by recognition as the perpetrator of the offence. On the assertion by the appellant that the sexual relations were consensual, counsel submitted that it was established that the complainant was 17 years old when the offence was committed and had no capacity to consent; that in any event the evidence demonstrated that she was forced. It was submitted that both courts below properly reviewed and analyzed the evidence and arrived at the correct decision.
13. We have considered the appeal and the submissions. The issues of law for consideration are: whether the charge sheet was defective; whether the ingredients of the offence of defilement were established to the required standard; whether the appellant’s defence under Section 8(5) of the Sexual Offences Act was established; and whether the sentence meted out is legal.\*\*
14. We start with the complaint regarding the alleged defective charge sheet. The offence with which the appellant was charged was clearly set out as defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The particulars of the offence were also clearly set out in the charge sheet that on 12<sup>th</sup> January 2014 in Kishamla location, within Taita Taveta County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MMM a juvenile aged 17 years. All the



essential ingredients of the offence were in our view clearly set out. In effect, the offence was disclosed in sufficient detail thereby giving the appellant adequate notice of the charge he was facing. It is also noteworthy that the appellant did not raise any complaint in this regard during the trial.

15. As to the related complaint that the charge sheet was defective because the age of the complainant as indicated in the charge sheet as 17 years was allegedly at variance with the evidence that she was 18 years, the age of the complainant was established by production of her birth certificate. Based on that certificate, as well as the testimony of her father, the complainant was born on 12<sup>th</sup> February 1996. The offence was committed on 12<sup>th</sup> January 2014 when the complainant was just over three months past her 17<sup>th</sup> birthday. The complainant testified on 18<sup>th</sup> December 2014 by which time she had attained the age of 18 years. The fact that she was testifying having attained the age of 18 did not alter the factual position that she was a minor aged 17 years when the offence was committed.
16. The argument that the complainant should have been considered 18 years because she had already passed her 17<sup>th</sup> birthday with over 3 months does not hold. A similar argument had been advanced in *Hadson Ali Mwachongo vs. Republic* [2016] eKLR: In rejecting that argument, this Court stated:

“Section 2 of the Interpretation and General Provisions Act defines “year” to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year.”

In effect, the evidence accorded with the charge. The complaint that the charge sheet was defective has no merit.

17. We turn to the complaint that the ingredients of the offence of defilement, especially the complainant’s age, were not established to the required standard. As this Court stated in *Hadson Ali Mwachongo vs. Republic* (above):

“The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”

18. As already indicated, the complainant’s age was established through the certificate of birth that was produced which clearly indicated the date of birth as 27<sup>th</sup> September 1996. As for the identity of defiler, this was a case, as submitted by counsel for the respondent, of identification by recognition. In her testimony, the complainant stated that, “I have known the accused for over a year. His home and our home is about ½ a kilometer. He is just a neighbour.” Indeed, the appellant acknowledged in his defence, which was more of an admission, that he was alone when the complainant went to his house adding that he was “remorseful for what happened.”
19. As regards penetration, there was the direct evidence of the complainant herself that the appellant “inserted his penis into my vagina for about 5 minutes”. Her testimony was corroborated by that of the clinical officer who upon examining the complainant found that her hymen was broken. Furthermore, there was also the evidence of the chemist who, through DNA profiling concluded that the appellant was the biological father of the child born as a result of the defilement. The upshot is that the complaint that the ingredients of the offence were not established has no merit.



20. We next consider whether the appellant’s defence under Section 8(5) of the Sexual Offences Act was established. Section 8(5) and (6) provides as follows:

“(5) 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.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”

21. Based on that provision, and as stated by this Court in *Eliud Waweru Wambui vs. Republic [2019] eKLR*, it is a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. As already stated, the appellant’s statement in his defence before the trial court was that in 2014 he was alone in the house when the complainant went to the house and that he was remorseful for what happened. However, in his submissions before the trial court, he had this to say:

“I regret my actions because I thought the complainant was over 18 years. The complainant always presented herself as 18 years old. I am bereaved and I therefore was looking for wife since I am a widow. I am ready to take responsibility for my actions including taking care of the child, who is the subject matter of the liaison between myself and the complainant. I plead with the court to have mercy on me as I strongly believe complainant to be of 18 years.”

22. The learned trial magistrate considered that submission in the context of Section 8(5) of the Sexual Offences Act and examined, in that regard, “the circumstances under which the accused allegedly committed the offence” before concluding that the defence had not been proved having found: that the appellant knew the complainant well and therefore knew or ought to have known that she was a school going child; that there was no evidence that the appellant and the complainant were lovers, for had that been so, the appellant would get the benefit of doubt that the complainant misrepresented her age to the appellant; that the evidence showed that the complainant went to supply water to the accused who then “pounced on her and coerced her to have sex with him.”; that the appellant knew the complainant to be a child as he advised her to procure an abortion when she informed him that she was pregnant.

23. The appellant had the evidential burden to establish, albeit on a balance of probabilities, that the complainant deceived him into believing that she was an adult. As the trial court noted, the appellant knew that the complainant was a school going child. Beyond offering her tea when she delivered water, there is no suggestion that she misrepresented her age or that she was a willing participant. On the contrary, the evidence is that she resisted the appellant’s advances. The circumstances in this case are not very different from those in *Paul Munyoki vs. Republic [2021] eKLR* where a similar defence had been raised. In rejecting it the Court expressed:

“We, like the two courts below, cannot find anything to suggest that PW1 deceived the appellant into believing that she was over the age of eighteen years. He did not state what reasonably made him to believe that PW1 was over the age of eighteen years. In any case,



PW1 was categorical that the appellant knew she was a student attending primary school, not to mention that the appellant and PW1 lived only 500 meters away from each other.”

Similarly, in the present case there was no evidence at all of the complainant having deceived the appellant as to her age. There is therefore no merit in the complaint.

24. As for the sentence, under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact outside the scope of a second appeal such as this. It is the minimum sentence prescribed under Section 8(4) of the Sexual Offences Act and there is no suggestion that it is an illegal sentence. We have no basis for interfering with it.

The upshot is that this appeal fails. It is hereby dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF FEBRUARY 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

