



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzau v Republic (Criminal Appeal 11 of 2020)  
[2022] KECA 502 (KLR) (1 April 2022) (Judgment)**

Neutral citation: [2022] KECA 502 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 11 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
APRIL 1, 2022**

**BETWEEN**

**KENNETH RANDU NZAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgement and sentence of the High Court of Kenya at Malindi  
(Nyakundi, J.) delivered on 23rd October 2019 in High Court Criminal Case No. 44 of 2018)*

**JUDGMENT**

1. The Appellant, Kenneth Randu Nzai was convicted of one count of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* No.3 of 2006, and sentenced to serve 25 years' imprisonment, by the Chief Magistrate's Court at Malindi. The particulars of the offence were that between the months of May and June 2013 in Magarini, Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of TTM aged 15 years.
- 2) The prosecution case was that the complainant was a primary school class six pupil where the Appellant was a teacher. The prosecution case was that the complainant delivered milk to the Appellant at his house every morning and would collect the empty bottle in the evening as she went home. In the process of time, on a date she could not recall, the Appellant started having carnal knowledge of her when she delivered the milk to him at his house on Saturday's, until she realized that she was expecting his child.

By the time she testified one year later, her birth certificate which she produced in court as evidence showed that she was born on 5<sup>th</sup> May, 1998, which meant that at the time the offence was committed she was 15 years old. Her father PW3 confirmed her age as that indicated in the certificate. The trial Court found that the complainant's age was sufficiently proven.



3) As to identification which the Appellant also contested before that Court, the learned trial Magistrate found that the complainant knew the Appellant very well as he was her teacher, and was satisfied that he was sufficiently identified. The Court rejected the Appellant's defence, including that of his colleague-teachers in the same school. These witnesses tried to impute that the complainant had multiple lovers and so was immoral on the basis that when asked who impregnated her, she said nothing until a week later when she gave a written list of three men, including the Appellant, as the possible culprits. The document was not produced as evidence; neither was any question put to the complainant that she gave names of three men who could have impregnated her. The learned trial Magistrate found the defence witnesses were not telling the truth, and contradicted each other in regard to the complainant's character. She found that the prosecution had proved the main charge of defilement and convicted the Appellant and sentenced him to 25 years' imprisonment.

4. The learned trial Magistrate expressed herself thus:

“It is clear from the evidence that the very person who was entrusted with the safety of the victim took advantage of his role and became a predator. His defence was laced with outright lies, and contradicted that of his witnesses especially where he stated that he found out the victim would sleep out of home... It was also rather absurd that the accused decided to go to tell parents of the victim of their daughter's bad behavior when he heard that she had accused him of getting her pregnant... The court is fully aware of the danger of basing a conviction on the evidence of a sole witness and has warned itself accordingly. The court is satisfied that the Child's evidence is truthful. Her testimony is corroborated by independent medical evidence. It is therefore safe to base a conviction on her testimony.”

5) Aggrieved with both the conviction and sentence, the Appellant lodged a first appeal to the High Court raising 9 grounds of appeal. The Appellant's unsuccessful appeal before the High Court was based on the complaint that the prosecution case was not watertight; that the prosecution evidence was that the complainant had sex more than once, but that there was no evidence to show with who; that the case was the word of the complainant against that of the Appellant, and that since no DNA test was conducted there was no proof of penetration.

6) The learned trial Judge identified two key issues as the basis of the appeal which he stated were; firstly, whether the prosecution discharged the burden of proof beyond reasonable doubt in relation to the offence of defilement; and secondly, whether the Appellant's defence managed to rebut the prosecution case with regard to the ingredients of carnal knowledge.

7) The High Court considered the evidence adduced by the prosecution witnesses and found that the key elements required in establishing a case of defilement; that the complainant was sexually penetrated by the Appellant, that at the time of commencing the sexual act of intercourse, the complainant was aged below 18 years; and, that the person who had carnal knowledge of the complainant was the Appellant, were all proved.

The Court found that the Appellant had an opportunity to engage in sexual intercourse with the complainant every Saturday during the months of May and June 2013, when she would deliver milk to his house. The learned Judge found that the complainant accounted for her movements and the occurrence of sexual intercourse with the Appellant; and that the carnal knowledge with the Appellant continued unabated for several weeks whenever she delivered milk to his house.

8. As to the age of the complainant, the learned Judge found that it was proved to be 15 years of age at the time the offence was committed; through the primary evidence of the complainant, PW1, her father who testified as PW3, and by documentary evidence through the complainant's birth certificate



produced as evidence on record. The Court denounced the evidence of Age Assessment by a Clinical Officer who contradicted the primary evidence of PW1 and PW3 and the birth certificate, as being unreliable and unnecessary. On the identification of the Appellant as the perpetrator of the defilement, the High Court found that the complainant's identification of the Appellant as her defiler was free from error and mistake as he was no stranger to the complainant, being a person in a position of authority as a teacher in the school where the complainant was a pupil. Hence, the High Court found, there was direct evidence from the complainant that her sexual organ was penetrated by the Appellant's sexual organ.

The Court found that the prosecution adduced credible and truthful evidence to prove the charge of defilement against the Appellant beyond reasonable doubt, and upheld the conviction and confirmed the sentence, thus dismissing the appeal.

- 9) The Appellant prefers this second appeal, against the judgement rendered by High Court on grounds that the sentence meted on him was manifestly harsh, that no DNA test was conducted to determine the prosecution's case and that his defence evidence was not adequately considered. The appeal was canvassed by both oral and written submissions, with the Appellant appearing in person while Mr. Kennedy Kirui learned Prosecution Counsel appeared for the respondent.
- 10) This being a second appeal, all we can consider are matters of law by dint 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.”
11. In his written submissions, the Appellant asserted that the paternity of the complainant's child should have been confirmed by both courts below to establish the complainant's character. In addition, it was submitted that both courts based their findings on unreliable evidence in establishing the age of the complainant; and that the act of penetration in the circumstances was not proved. It was also submitted that the sentence of 25 years was manifestly harsh and excessive in all the circumstances of the case.
12. Mr. Kirui for the State opposed the appeal. He submitted that this being a second appeal, the jurisdiction of the Court was limited by dint of Section 361 of the *Criminal Procedure Code*. Counsel urged that the identification of the Appellant was safe as the complainant knew him by virtue of being his student. He also submitted that there was sufficient evidence to prove that penetration took place. In regard to the complainant's age, counsel urged that there was inconsistency as the prosecution produced P3 form which indicated the complainant's age as of 26<sup>th</sup> September 2013 was 17 years, while the charge stated that the complainant was 15 years at the time of defilement in June 2013. In view of the variance, Mr. Kirui relied on the case of *Obedi Kevevo v Rep* [2015] eKLR for the proposition that the test to apply in such circumstances is to determine whether any prejudice was caused to the Appellant, which he urged that none was caused; and secondly that the defect was curable under Section 382 of the *Criminal Procedure Code*.
- 13) With due respect to the learned Prosecution Counsel, his submissions regarding the evidence on the complainant's age is not correct. We shall get back to this issue.



- 14) We shall start with the Appellant’s 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 [2016] eKLR*:

“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.”

15. The birth certificate and the evidence of PW1 and her father PW3 were clear that the complainant was 15 years old when this offence was committed. The P3 form which assessed the PW1’s age as 17 years, as both the trial court and the first appellate court found, could not contradict the primary evidence of PW1 and PW3 and the birth certificate. We agree with the concurrent findings of the courts below that the evidence on the complainant’s age was proved, and we find no basis upon which we can defer with their concurrent findings on this point.
16. The argument that a DNA test, was required to prove penetration is not well founded. As this Court stated in *Robert Mutungi Mumbi vs. Republic [2015] eKLR*, Section 36(1) of the Sexual Offences Act empowers the court to direct a person charged with an offence under the Act to provide samples, including DNA testing to establish the linkage between the accused person and the offence. That provision is not couched in mandatory terms and DNA evidence is not the only evidence by which commission of a sexual offence may be proved. See also *Hadson Ali Mwachongo vs. Republic [2016] eKLR*.
17. Furthermore, the proof of parentage of the complainant’s child cannot be the basis upon which penetration can be proved. The issue before the court was not parentage of the child but penetration. The two are totally different issues. In the present case, the Appellant requested the court to order for DNA testing to prove paternity of the complainant’s child, which was granted, but apparently it was not done. In this case however, there was the uncontroverted evidence of the complainant that despite being underage, she and the Appellant had a long running sexual relationship that resulted in her pregnancy. She was undoubtedly well known to the Appellant, being his student where she schooled, and the question of mistaken identity did not arise. Being a standard six pupil the Appellant must have known that the complainant was underage. And in the same vein, the complainant’s character cannot be a basis for determination in considering whether penetration was proved. The defence evidence that she gave a note suggesting she had had sexual relations with two other men was considered by the trial court and found to have been tainted with falsehood, and to have been contradicted in the evidence of the Appellant.
18. As for her age, the birth certificate clearly demonstrated that she was 15 years at the time the offence was committed. And as the two courts below found, the P3 form adduced in evidence in contradiction to the evidence of PW1 and PW3 and the birth certificate as to the complainant’s age was correctly rejected by the courts below. The upshot is that the appeal against conviction has no merit.
19. As regards sentence, this Court can only address the legality of the sentence and not its severity. The Supreme Court of Kenya in its Directions in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR* has since pronounced that its earlier decision in the same case “did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute” and that its previous decision “cannot be authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with the Constitution.” The sentence for defilement under Section 8(1) and (3) of the Sexual Offences Act is



imprisonment to a term not less than twenty years' imprisonment. The Appellant was sentenced to 25 years' imprisonment, which is a legal sentence within the law. We have no basis therefore for interfering with the sentence passed by the trial court and affirmed by the High Court.

20. The upshot is that the appeal is devoid of merit and is accordingly dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OF APRIL 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.*

*Signed*

**DEPUTY REGISTRAR**

