



REPUBLIC OF KENYA



**Mbui v Republic (Criminal Appeal E044 of 2023)
[2025] KEHC 908 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E044 OF 2023
AN ONGERI, J
JANUARY 24, 2025**

BETWEEN

JUMA MBUI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. C. K. Kithinji (PM)
in Voi Sexual Offence Case No. E018 of 2021 delivered on 19th July 2022)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that between May 2021 and 17th June 2021 in Voi Sub County within Taita Taveta County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the female organ (vagina) of HC, a girl aged sixteen (16) years.
3. The Appellant pleaded not guilty and the case proceeded to full hearing.
4. The prosecution evidence in summary was that the complainant, a girl born on 14th April 2005 aged 16 years old was in a relationship with the Appellant.
5. The complainant said she used to meet the Appellant when she was sent to the shops.
6. She said the Appellant told her that he wanted to make love to her to stop being a stranger to her.
7. She was expecting her menstrual periods and she refused. He forced her to have sex and she got pregnant.



8. The parents discovered she was pregnant when she was taken for test at Ghazi Dispensary since she was joining Form One.
9. The Accused was arrested and charged with this offence.
10. The Accused person did not adduce evidence in this case.
11. The trial court found him guilty as charged and sentenced him to fifteen (15) years imprisonment.
12. The Appellant has appealed to this court against conviction and sentence on the following grounds:-
 - i. That the learned trial Magistrate erred both in law and fact in failing to appreciate that the evidence adduced revealed that PW1 was in a relationship with the Appellant.
 - ii. That the learned trial Magistrate erred both in law and fact by convicting the Appellant yet failed to find that the conduct of PW1 did not reveal that she was defiled.
 - iii. That the learned trial Magistrate erred both in law and fact by convicting the Appellant yet failed to find that the prosecution did not prove the element of penetration beyond reasonable doubt.
 - iv. That the sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the Appellant's mitigation and the facts and circumstances unique to the case.
13. The parties filed submissions as follows:-

the prosecution submitted that the complainant testified that she was 16 years old having been born on 14/5/2005 and a form one student at [Particulars withheld] Secondary School. This was corroborated by PW2 the complainant's mother who produced the complainant's birth certificate.
14. The complainant, testified that in the month of April, 2021 she commenced a relationship with the appellant whom she met on her way to a shop. The appellant began wooing her. She further stated that the appellant was neighbour and well known to her. The third time they met the appellant informed her that they needed to meet in order to do "something:" They met and had sexual intercourse in the bush. After a month her mother took her and her sister to Ghazi dispensary for HIV and pregnancy test. It was confirmed that she was pregnant. This was corroborated by the testimony of PW4 a clinical officer.
15. The prosecution argued that from the above there was no doubt that all the ingredients were proved to the required standards and thus the court should uphold the conviction.
16. The issues for determination in this appeal are as follows:-
 - i. Whether the prosecution proved the elements of defilement.
 - ii. Whether the sentence is appropriate.
17. The elements of the offence of defilement are as follows:- Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:
 8.
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

18. The ingredients of the offence of defilement were well stated in the case of *Dominic Kibet Mwareng v Republic* [2013] eKLR, by Ndolo J. as follows:

“The critical ingredients forming the offence of defilement are;

- i. age of the complainant,
- ii. Proof of penetration
- iii. Positive identification of the assailant.”

19. I find that penetration was proved. The fact that the complainant got pregnant presupposes there was penetration. In *Wayu Omar Dololo vs. Republic* [2014] eKLR, the decision of the trial that pregnancy was one aspect of proof of penetration upheld on appeal. Hon. Mutuku, J. held that

“The trial magistrate took judicial notice that a pregnancy results from a sexual activity and as such found penetration proved. On my part, I have examined the evidence carefully. At the time of examination by a doctor, the complainant was heavy with child and the pregnancy was visible as observed by the trial court. Indeed, at the time of hearing the complainant said she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being...”

20. Likewise, in *Mbogo Raphael Chengo vs. Republic* [2019] eKLR the Court of Appeal affirmed the position that the fact of pregnancy of a complainant in a defilement case is evidence that sexual intercourse had taken place and is therefore proof of penetration.

21. The complainant was able to identify the Appellant as the one responsible for the pregnancy. He was well known to her since they were in a relationship.

22. Section 124 of the *Evidence Act* states that the evidence of only the complainant is sufficient in cases of this nature if the trial court found reason to believe the complainant.

124. Corroboration required in criminal cases.

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of



the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

23. The age of the minor was proved by production of the birth certificate which stated that the complainant was born on 14th April 2005 and she was a minor aged 16 years at the time of the offence.
24. I find that the elements of defilement were proved.
25. The Accused person was not under a duty to say anything in his defence.
26. I find that the prosecution proved his guilt. The conviction is secure and the sentence lawful.
27. I dismiss the appeal and I uphold both the conviction and sentence.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

The Appellant present at Manyani Prison

