



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwamba v Republic (Criminal Appeal E017 of 2024)  
[2025] KEHC 7547 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E017 OF 2024  
BM MUSYOKI, J  
MAY 30, 2025**

**BETWEEN**

**VINDSAY MADANGA MWAMBA ..... APPELLANT**

**AND**

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

*(Being an appeal against conviction and sentence in the Principal Magistrate's Court at Winam  
(F.M. Rashid PM) in sexual offence case number E019 of 2023 dated 7th September 2023)*

**JUDGMENT**

1. This appeal is all about validity of defence by a person charged with offence of defilement under Sections 8(5) and (6) of the [Sexual Offences Act](#). The said sections provide 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.

The appellant was charged with two counts as follows;

Count 1- Defilement contrary to Section 8(1) as read together with Section 8(4) of the [Sexual Offences Act](#) whose particulars were that on the 30<sup>th</sup> July 2023, at around 1800 hours at [Particulars Withheld] village in Kisumu East Sub-County within Kisumu



County unlawfully and intentionally caused his penis to penetrate vagina of MA a child of 17 years.

Count 2- Committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) particulars being that on 30<sup>th</sup> day of July 2023 at around 1800 hours at [Particulars Withheld] village in Kisumu East Sub-County within Kisumu County touched the vagina of MA a child aged 17 years with his penis.

2. He was arraigned in court on 14-08-2023 and convicted on 14-09-2023 after the court heard five witnesses. To start with, the charge was defective to the extent that it charged the appellant with two counts based on similar sets of facts and events. This would mean that he was being tried for the two offences at the same time which were derived from the same act and in that regard would have prejudiced the appellant if he were to be convicted on both. I believe the drafters of the charge should have made the second count an alternative count. However, looking at the evidence adduced and the judgement of the court, the prosecution and the court concentrated on the first count and as such, I do not think that the outcome of the charge prejudiced the accused in any way. The same is curable under Section 382 of the [Criminal Procedure Code](#) Chapter 75 of the Laws of Kenya which provides that;

‘Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.’

3. In [Bernard Ombuna v Republic](#) (2019) KECA 994 (KLR), the Court of Appeal held as follows;

‘In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.’

4. The appellant did not raise the issue at the trial court and has raised it in this appeal and I see no prejudice occasioned to him. I in the circumstances, proceed to deal with the appeal as if the appellant faced the first count only.
5. After the prosecution closed its case, the appellant was put on his defence and offered a defence which I must say takes a brave soul to adopt. The defence path the appellant took neutralised his denial of having sex with the complainant. He based it on provisions of the Sections of the law I have cited in the opening paragraph of this judgement. For an accused person to successfully plead that defence, the totality of the evidence of both the prosecution and defence must point to possibility or basis of creating a reasonable believe in the mind of the accused person that the complainant was above the age of 18 years. The test is on a balance of probabilities. The following is what the appellant and his witness told the court under oath.
6. That on 30-07-2023, there was a crusade near their home which he attended and came back home. In the evening, he saw a girl and called her and she told him she will come back. Although he was not



sure that she will come back, she did so 30 minutes later. He invited her to their compound and she entered his house. They talked for a while in his house then he left her there and when he came back at 7.30 pm, he found her still in the house. They chatted again for a while and she told him that it was late and she could not go home. He asked her whether she lived alone but she told him that she lived with her parents.

7. The appellant added that the girl told him that she was 21 years and her body showed that she was above 18 years. He gave her food and they slept that night. He confirmed that he had sex with her after she convinced him that she was over 18. She did not tell him that she was a student. On following day which was on a Monday, he went out to search for a job and when he came back at 7.00 pm, he found her in the house and she insisted that he should marry her but he refused. He called his cousin one Edgar who talked to her and advised her that they could get married because the appellant was jobless and she agreed to go home. He was arrested on 10-08-2028. He denied threatening her or covering her mouth. He also confirmed that the compound is surrounded by many households.
8. In cross-examination, he admitted having known the victim for a few months and he had been talking to her. He confirmed that her home was about 20 to 30 meters away but he became aware that she was a student when she testified in court as he had never seen her in uniform. He insisted that he thought that she was mature because she was bold and courageous. He also added that he asked about her age when she refused to go back home and that he did not do anything to prove her age. He also stated that he came to know her parents the day he was arrested.
9. DW2 was one Edgar Tekere who said that he knew the appellant and the victim. He stated that on 30-07-2023 at 8.00 pm, he went home after attending a crusade and found the appellant's door locked from inside and when he knocked, a girl opened and greeted him. The appellant was not in the house. Later, the appellant came and introduced the girl as his friend. They ate together and he went to spend the night at his friend's home. He came back to the house the following day and went to work and when he came back in the evening, he found the girl at home and when he enquired from the appellant, he told him that the girl was his (DW2's) in-law. The witness added that the girl said that she wanted to get married and that she was 21 years. He told the girl that she needed to inform her parents first before she got married. She was reluctant to go home but the witness forced her to.
10. In cross-examination, DW2 stated that he had stayed with the appellant for three weeks and that he did not know the victim before the incident. He stated that he doubted her age as she looked below 18 years.
11. With the above defence, all the ingredients of defilement that is, age, identification and penetration were confirmed despite the appellant having denied the offence when he took the plea. After reproducing the evidence of the parties and before getting into discussing the defence, the trial Magistrate in making conclusion that the ingredient of penetration had been proved stated as follows;

‘PW1’s testimony shows that she knew the accused person well. PW1 stated that the accused person is a neighbour and thus a person well known to her. The accused person similarly confirmed in his defence that the victim was his neighbour. This limb of the offence has thus been proved.’
12. The question which this court has in mind is whether the circumstances of the above alleged interaction if at all, could have made the appellant not believe the complainant was over 18 years. It is important to establish from the evidence produced in the trial court whether the appellant and the victim were well known to each other to the extent that the appellant must have known the age of the complainant.



13. I have gone through the evidence of the complainant and the other witnesses. The complainant stated in her evidence that she knew the appellant who was their neighbour. According to her, she was sent by her mother to the market and as she passed through the appellant's gate, he pulled her to his house, threatened her, tied her hands and legs with a rope and defiled her. He then left for a while and came back and defiled her again. She spent the night in his house and the appellant left in the morning leaving her in the house and came back during the day and defiled her again and left. She claimed that she stayed in his house until 10 pm of 31-07-2023 when the appellant released her and she went home. The proceedings do not show that the complainant talked with the appellant about her age. She also did not state how she interacted with the appellant before the incident. She also did not lay basis that would be safe to assume that the appellant must have known her age.
14. The complainant's mother said that she did not know the accused well though they came from the same estate. She testified that she sent the complainant to the shop on 30-07-2023 but she didn't not come back until the following day at 10 pm. The complainant informed her that she had been dragged into the appellant's house and the appellant defiled her after tying her hands and legs with a rope. She stated that she saw the appellant the day he was arrested.
15. The complainant's father stated that when he came home on 30-07-2023 at 7.30 pm, he found her missing and her mother told him that she had sent her to the market at 6 pm. The child did not come back until the following day at 10 pm. He reported to the police when she failed to turn up. The witness did not state whether he knew the appellant or the appellant was acquainted with their family.
16. PW4 who examined the complainant told the court that the minor was 15 years. When she examined the complainant, she did not observe any tear or lacerations and the hymen was not freshly broken. The investigations officer said that the appellant had told him that the complainant was his girlfriend. She also stated that the brother of the victim asked for 75,000/= to withdraw the case although it is not clear whether this was the investigations officer's own testimony or she was stating what the appellant or the witnesses told her.
17. I find the complainant's evidence with some remarkable gaps that raise questions which make me tend to believe the appellant's version more than the prosecution's. The complainant claimed that she was defiled three times. Twice in the night of 30-07-2023 and once during the day on 31-07-2023. In between these three occasions, the appellant would leave her in the house for some time then come back. All this while she was tied with a rope in her hands and legs. The P3 form produced as exhibit 2 does not have any indication of bruises or swelling or any kind of injuries to the hands and legs which in my view could not be possible for anyone tied with ropes for 24 hours. She must have been untied if she had at all been tied.
18. Again, the complainant did not state that she was restrained during the interludes when the appellant went out for many hours on 31-07-2023. When the appellant left for these three times, she did not bother to raise any alarm or attention for the people outside. Was the door locked from outside such that she could not escape? I find the flow of the evidence and the narration of the sequence of events creating a doubt on authenticity and truth in it. In *Joseph Ndungu Kimanyi v Republic* (1979) KECA 5 (KLR), the Court of Appeal held that;

‘The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.’



19. When she was allegedly pulled into the appellant's compound, it was 6 pm at which time in East Africa there is daylight. She also confirmed that there were people around when the appellant closed her mouth and pulled her. In my view, this act would have raised alarm and suspicions from the people around noting that the complainant confirmed that the appellant's home is surrounded by other households.
20. DW2 testified that when he went to the appellant's house on 30-07-2023, he found the complainant and the appellant talking. He also talked to her and did not see any kind of threat. The doctor who produced the P3 and PTC forms said that the hymen was not freshly broken an indication that the complainant may have had sex before the date of the incident in question in this matter.
21. In my considered opinion, considering what I have stated above, the complainant acquiesced to the encounter and most likely this may not have been the first time. But this is not to say that she gave a consent as the law is that she was incapable of giving any due to her age. My point is that her conduct played a role in misleading the appellant about her real age. I take cognisance of the age of the complainant who was 11 months shy of the age of majority and obviously aware of her environment and able to take some decisive personal actions. In *Wambui v Republic* (2019) KECA 906 (KLR), the Court of Appeal while dealing with a matter under almost similar circumstances held that;

‘We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.

We find merit in the appellant's contention that in all the circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the appellant, but the burden is on a balance of probabilities and is to be assessed on the basis of the appellant's subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is also germane to point out that a child need not deceive by way of actively telling a lie that she is over the age of 18 years. We would give the term deceive the ordinary dictionary meaning which is to;

“Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to.”

22. In dismissing the appellant's defence, the trial court held that the appellant did not state what steps he took to ascertain the age of the complainant. In doing so, he cited Section 8(6) of the *Sexual Offences Act*. The law does not provide for criteria for establishing whether the accused person took steps to ascertain the age of the complainant. That means the same is left to the discretion of the trial court which must of course take into consideration the circumstances of the case and the totality of the evidence from both the prosecution and the accused person. The steps may come in form of but not limited to discussions, enquiries from third parties or even examination of any of the complainant's document. Actually, the Section does not make the steps exclusive but part of the circumstances the court should consider.
23. I am inclined to follow the reasoning of the Court of Appeal the Wambui case cited above. In my judgement, the circumstances of this case would lead a reasonable person to believe that the complainant was above 18 years and therefore afford the appellant the defence founded under Section 8(5) the *Sexual Offences Act*.



24. In the final analysis I find that the defence was available to the appellant and I proceed to set aside the conviction and sentence meted upon the appellant. He shall be set free forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered online in presence of the appellant (from Kisumu Maximum Prison) and Miss Kagali for the respondent.

