Kanake v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 11594 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11594 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E011 OF 2024

RL KORIR, J

JULY 31, 2025

BETWEEN

JOSEPHAT GITONGA KANAKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from original conviction and sentence in SOA No E008 of 2023 delivered by Hon. Mbayaki Wafula (Senior Resident Magistrate) on 21st February 2024 at Marimanti Law Courts.)

JUDGMENT

1. The Appellant Josephat Gitonga Kanake was charged with the offence of defilement contrary to Section 8[1] as read with Section 8[4] of the *Sexual Offences Act*, 2006 before the Chief Magistrate's Court at Marimanti. The particulars of the offence were that on diverse dates between March, 2020 and December, 2020 at Kituo market of Gakurungu Location in Tharaka South Sub-County within Tharaka Nithi County, intentionally and unlawfully caused his penis to penetrate the vagina of E.G.M, a child aged 17 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act*, where it was alleged that he intentionally touched the vagina of E.G.M, a child aged 17 years.

3. At the conclusion of the trial, the Appellant was convicted on the main charge and sentenced to serve 15 years' imprisonment

4. Being dissatisfied with the conviction and sentence, the Appellant filed the present home made appeal dated 17th April, 2024. He listed the grounds reproduced verbatim as follows:-

i. That the learned trial magistrate still erred in both matters of laws and facts by failing to consider that the appellant reasonably believed that the victim was an adult.

ii. That the learned trial magistrate sill erred in both matters of laws and facts by failing to consider the circumstances of the case.

iii. That the learned trial magistrate still erred in both matters of laws and facts by failing to note that the parents were not summoned to give evidence as witnesses in this case.

iv. That the learned trial magistrate erred in both points of law and facts by failing to consider that the appellant's mitigation and that the appellant was a first offender.

v. That more cogent grounds to be adduced at the haring of this appeal.

vi. That I cannot recall all that transpired during trial I request to be furnished with certified trial proceedings and Judgment so as to adduce further grounds during the hearing of this appeal.

5. My duty as a first appellate court is to re-evaluate the evidence on record. This duty was restated by the Court of Appeal in Kiilu & Another v Republic [2005] 1 KLR 174 where it stated:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses."

The Prosecution case before the trial court

6. The Prosecution called four witnesses in support of its case. The victim of the offence E.G.M testified on 17th July, 2023 as PW1. She told the court that she was 20 years old. That in the period March 2020 to December 2020, she was a pupil at [particulars withheld] Primary School and she got pregnant after she went to Josephat Gitonga sometimes in the month of April and had sex. She stated that she removed her skirt and panty and Josephat removed his trouser and penetrated her. That in the month of July 2020, she realized that she was pregnant and went to Marimanti hospital where she had a P3 form filled.

7. The victim's grandmother and guardian Elizabeth Kango [PW2] testified that between March and December 2020, E.G.M and her husband ran away and rented a house after she got pregnant. That both were arrested at the Accused's home. She said that E.G.M. was born on 22nd September,2003 and was an orphan.

8. The Investigating Officer No.260654 P.C Allan Kirwa [PW3] of Tunyai Police Station testified that the Accused and the complainant were escorted to the station on 8th April, 2021 by the complainant's grandmother [PW2], other family members and the Assistant Chief of Murinda Sub-Location. They reported that the Accused had defiled the victim and when she was escorted to hospital, she tested positive for pregnancy. That the two were arrested while standing by the road near the Accused's home.

9. PW3 produced the complainant's Clinic Card [P Exhibit 2]. In cross-examination he stated that the clinic card showed that the complainant was 17 years then and was therefore underage.

10. Lilian Wahu a clinical officer at Marimanti Level 4 hospital [PW4] testified that she filled a P3 Form on 12th April, 2021 in respect of E.M. That she had a history of defilement and had been treated at Tunyai Health Centre earlier. That E.M. told her that she had been in a sexual relationship with the man from March 2020 to the time of arrest.

11. PW4 stated that at the time of examination, the ultra sound examination showed that the victim's pregnancy was 10 weeks, 5 days and the hymen was broken. PW4 produced the P3 – Exhibit 1, Treatment notes from Tunyai Health Centre [Prosecution Exhibit 3] and the ultrasound Report [Exhibit 4].

12. At the close of the Prosecution case, the court found a prima facie case against the Appellant.

The Defence Case

13. The Appellant [then Accused] gave a sworn statement and did not call any witnesses. He testified that he had doubt in the immunization card as stating the correct age of the victim, adding that the Prosecution evidence on the age of the victim was contradictory.

14. Cross-examined, the Accused admitted that he impregnated the complainant and they got a child. He however denied that they cohabited together and insisted that the clinic card was not authentic. He added that the charges were fabricated.

Submissions on Appeal

15. This court directed the parties to canvass the Appeal through written submissions. The Appellant's submissions are dated 25th January, 2025 and filed on 18th February 2020. While the Respondents submissions are dated 12th March 2025.

16. The Appellant submitted that the trial court erred by failing to consider that the Appellant reasonably believed that the victim was an adult. That the complainant told the court that at the time of trial, she was 20 years meaning she must have been about 18 years at the material time.

17. The Appellant further submitted that the complainant told the court that her grandmother who was her guardian was aware of their sexual relationship. He stated that the circumstances of the case showed both parties were adults as the complainant had moved in with him in his shop and the grandmother had no issue with it. He stated that the Clinic Card [P. Exhibit 2] was altered to reflect a younger age.

18. Finally, and on sentence, the Appellant submitted that the trial court erred in failing to consider that he was a first offender and that the child he got with the complainant alongside his other children require his support. He prayed for a second chance to go and look after his family.

19. The Respondent identified four issues for determination as follows:

    a. Whether the Prosecution proved the ingredients of the offence of defilement and to the required standard.

    b. Whether the Prosecution's case was corroborated.

    c. Whether the learned magistrate considered the Appellant's Defence

    d. Whether the sentence imposed was harsh or excessive.

20. The Respondents submitted that all the ingredients of the offence were proved to the required legal standard.

21. With respect to penetration, the Respondents submitted that the complainant's testimony that she went to the Accused's home and had sex which resulted in a pregnancy was cogent. That her evidence was corroborated by medical evidence given by PW4.

22. On the age of the victim, the Respondent submitted that the complainant was 17 years at the time of the offence as proven by the Clinic Card Exhibit 2. They relied on Hadson Ali Mwachongo v Republic [2016] eKLR.

23. On identification, the Respondents submitted that the complainant identified the Appellant as they had even lived together.

24. On the Appellant's defence, the Respondents submitted that the trial court considered the defence and found that it did not cast doubt on the Prosecution case.

25. On sentence, it was the submission of the Respondents that the sentence was in accordance with Section 8[4] of the *Sexual Offences Act* and was therefore mandatory.

26. The Respondents urged the court to disallow the Appeal.

Analysis and Determination

27. I have carefully evaluated the evidence before the trail court, the Appellant's grounds of Appeal and the respective submissions of the parties. This Appeal turns on whether or not the ingredients of the offence and in particular the age of the complainant was proven to the required legal standard.

28. The Prosecution needed to prove the three ingredients of the offence being age of the victim, fact of penetration and the positive identification of the perpetrators.

I. Penetration

29. In this case, the complainant [PW1] testified that between the month of March 2020 to December 2020, she left her home to go to the Appellant's home where they had sex. She was vivid in her testimony and stated how she removed her skirt and the Appellant removed his trouser and they engaged in sexual intercourse. The clinical officer [PW4] testified that upon examining the complainant, she found the hymen long broken and produced medical evidence to that effect.

30. This court, just like the court below finds the fact of penetration proven. There was evidence of penetration not just by the complainant but an admission by the Appellant that they had been in a sexual relationship for several months. PW2 who was the complainant's grandmother and guardian told the court that the complainant had run off with "the husband" [meaning Appellant] to live together at the shops.

31. The complainant testified that she became pregnant as a result of the sexual relationship. The fact of pregnancy was collaborated by medical evidence produced by the clinical officer [PW4]. She produced Treatment Notes [Exhibit 3] P3 Form [Exhibit1] which showed that the complainant was pregnant at 10 weeks and 5 days.

32. There was no evidence presented to show that the fact of pregnancy was a result of a process or procedure other than sexual intercourse and penetration. Apart from the Prosecution evidence, the Appellant admitted that he was in a sexual relationship with the complainant. At trial he admitted that he impregnated her. The trial record shows that he made the admission even at the time of plea.

33. It is my finding therefore that penetration was proven beyond reasonable doubt.

II. Whether the Appellant was identified as the perpetrator.

34. I have evaluated the evidence before the trial court. The totality of the evidence shows sufficient prove of the identity of the Appellant as the perpetrator. The complainant told the court that she went to his house. That they were in a sexual relationship and he had even impregnated her. Their affair had lasted several months before being busted. It appears to the court that it was the pregnancy that attracted attention to the affair. The identity of the Appellant was not only proven by the Prosecution to the required legal standard but also admitted by the Appellant himself.

III. Whether the age of the complainant was proved.

35. The complainant testified that she was 20 at the time of trial. She testified on 17th July, 2023. The Charge sheet was drafted on 27th March 2023 and states that the offence occurred on diverse dates between 8th March 2020 and December 2020. Her approximated age then was 17 years.

36. The Complainant was recalled and cross-examined on her age on 20th September, 2023. She stated that she would turn 20 on 22nd September implying that her birthday was 22nd September. She stated that her grandmother knows her age and that she did not know who had made alterations on her Clinic Card.

37. The grandmother who was her guardian [PW2] testified that she did not know how old the complainant was but that the Clinic Card indicated that she was born on 22nd September 2003. The Clinic Card [P Exhibit 2] was produced by PW3 who is the Investigating Officer. I have looked at the Clinic Card [Exhibit 2] it indicates the date of birth as 30th September 2003. There are no alterations on the card as suggested by the Appellant when cross-examining the complainant.

38. The Clinic Card shows that the complainant having been born on 30th September 2003 was 17 and half years at the time of the offence which in law is 17years as she had not attained her 18th birthday.

IV. Whether the defence under section 8[5] was available to the Appellant.

39. The Appellant answered to the charges when he took plea as follows:-

> " Accused – "It's true, but I know she was an adult because of her conduct and her ability to answer to the proverbial questions I put to her. I slept with her for 2 days."

40. During his defence, the Accused stated "I have no confidence in the immunization card." In cross examination he stated "I have doubt about the clinic card but I do not have better evidence."

41. To the mind of the court, the Accused who had no legal literacy and was unrepresented, was raising the defence under Section 8[5] of the Sexual Offence Act.

Section 8 provides as follows:-

> " [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.

[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.

42. The interpretation of Section 8[5] was analysed in depth by the Court of Appeal in the case of Wambui v Republic [Criminal Appeal No. 102 of 2016 [2019] KECA 906 [KLR.]

The Court made important observations and held as follows:-

34. Subsection [5] states that it is a defense 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. We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection [6] seems to add a qualification to subsection [5][b] that separates it from the belief proceeding from deception in subsection [5][a]. We would therefore opine that the elements constituting the defence should be read disjunctively if the two sub-sections are to make sense.

35. "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.

36. 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."

[Per the Concise Oxford English Dictionary, 12th Edn 2011].

43. Being guided by the above authority, I have re-examined the evidence to determine whether the defence under Section 8[5] was available to the Appellant.

44. The record shows that the Appellant raised the defence at plea and his cross-examination of the Prosecution witnesses revolved around the age of the complainant. Evidently, the Complainant could not have walked up to the Appellant and said that she was 18 years old. There is nothing to suggest from the evidence that there was a conversation about her age. A keen look at the circumstances however shows that the complainant, without lawful consent, did have a consensual relationship with the Appellant. It appears that her guardian was aware of the unlawful relationship as she stated in her testimony that the complainant 'E and her husband ran away and rented a house after she got pregnant.'

45. The circumstances of the arrest was also quite telling. According to the evidence of the Investigating Officer [PW1] the Appellant and the complainant were found standing on the roadside and arrested. This suggests that they were not hiding their consensual yet unlawful relationship. As held in the Wambui case [supra] the closer the complainant was to the age of majority, the more believable the mistaken belief. In this case the complainant was 6 months shy of the age of majority.

46. In the end, it is my conclusion from my analysis of the evidence that the defence under Section 8 [5] of the Act was available to the Appellant. Being, a complete defence, when proven on a balance of probability, it follows that the Appellant would be acquitted.

47. Before ending this judgement, I must address the matter of the child who was born out of the Appellant's mistaken belief on the age of the complainant. As shown earlier in this Judgement, there was evidence that the complainant became pregnant as a result of the sexual relationship. The Appellant [then Accused] told the trial court in his mitigation that "the child born out our sexual encounter the child needs to go to school....."

48. In this Appeal, the Appellant stated in his written submissions that "Being a first offender the Appellant requests this honourable court to note that the child brought forth needs his help being the father and a husband to the mother....."

49. It is clear to this court from the above that the Appellant willingly acknowledges his responsibility over the child born as a result of his sexual relationship with the complainant. His admission of paternity is on record in the present proceedings. This court therefore is mandated by Article 53 of *the Constitution* to take any lawful action in the interest of the child in question. The lawful action is for this court to move the Appellant closer to fulfilling his parental duty.

50. Section 8[2] of the Children's Act 2023 provides:

> [2] All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any power conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-
>
> [a] safeguard and promote the rights and welfare of the child;
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> [b] Conserve and promote the welfare of the child; and
>
> [c] secure for the child such guidance and correction as it is necessary for the welfare of the child, and in the public interest.

51. To this end, and in the best interest of the child, the Children's Court in the jurisdiction of this court is directed to open a Protection and Care File in respect of the child in question and proceed to determine any parental responsibility issues.

52. The Deputy Registrar of the Court shall certify this judgement to the Children's Officer for him to file the requisite report before the Children's Court within 30 days of today.

53. In the end, I quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

54. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 31ST DAY OF JULY, 2025.

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Ms Rukunga for the Respondent, and Muriuki Court Assistant.