



**Kanini v Republic (Criminal Appeal E024 of 2023)  
[2024] KEHC 1921 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1921 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL E024 OF 2023  
CW GITHUA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**PIUS WAMBUA KANINI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. P.M. Kiama (S.P.M) arising from a Judgement delivered in the Senior Principal Magistrate's court at Kangema, on 5th of March, 2020)*

**JUDGMENT**

1. The appellant, Pius Wambua Kanini was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*.
2. The particulars thereof alleged that on unknown dates in July 2018 at [particulars withheld] Location in Murang'a County, the appellant intentionally caused his penis to penetrate the vagina of M.N.K, a child aged 16 years.
3. Upon his conviction, the appellant was sentenced to serve 15 years imprisonment.

He was aggrieved by his conviction and sentence hence this appeal.

In his petition of appeal dubbed 'Memorandum Grounds of Appeal', the appellant relied on five grounds which can be condensed to three grounds namely :-

- i. That the learned trial magistrate erred in law and fact by convicting the appellant on contradictory evidence that did not prove the charge of defilement beyond reasonable doubt.
- ii. That the learned trial magistrate erred in law and fact by convicting the appellant on the basis of a defective charge.



- iii. That the learned trial magistrate erred in law and fact by failing to find that the charge was a fabrication owing to a grudge that existed between the appellant and the victim's family.
4. At the hearing, both the appellant and the respondent chose to rely entirely on their written submissions. The appellant prosecuted the appeal in person and filed his written submissions on 20<sup>th</sup> July 2023. Those of the respondent were filed on 11<sup>th</sup> July 2023 by Senior Principal Prosecution counsel Ms. Ann Penny M. Gakumu.
5. The trial court record shows that in support of its case, the prosecution called a total of four witnesses. The sum total of the evidence by these witnesses is that in the year 2017, the victim herein then aged 16 years dropped out of school and went to live with the appellant in his house at his place of work. They cohabited as man and wife and in that capacity had sexual relations until August 2018 when the appellant was arrested.
6. According to PW2, the victim's mother, PW1 went missing on 19<sup>th</sup> June 2018. She reported her disappearance to their area chief and to Kihoya AP Camp. Later, she learnt that PW1 was living with the appellant in Wacu's homestead where he was employed as a farm hand. The appellant was thereafter arrested by officers from the AP camp and on 9<sup>th</sup> August 2018, he was re-arrested by PW4, P.C Timothy Muia, the Investigating Officer.
7. In the course of investigations, PW1 was examined by PW3, Mr. Dona Maithima, a clinical officer at Nyakianga Health Centre.  
  
PW3 recalled that upon his examination, he found that PW1's hymen was broken and a pregnancy test revealed that she was one month pregnant. When the child was eventually born, PW4 organised administration of a DNA test using samples obtained from the child, PW1 and the appellant. The resultant report by the Government Analyst produced by the investigating Officer as Exhibit 4 confirmed that the appellant was the child's father.
8. When placed on his defence, the appellant elected to give an unsworn statement and did not call witnesses.  
  
In his statement, he described how he was arrested despite having informed the arresting officers that he had been living with PW1 as his wife. He denied knowledge that the complainant was a minor and claimed that before starting his cohabitation with her, upon his inquiry, PW1 had told him that she was 19 years old, which meant that she was an adult which information he believed; that their relationship was consensual and that he was charged with the offence allegedly because he refused to part with Kshs 10,000 PW2 had demanded in order to secure his release.
9. As the first appellate court, I am enjoined to carefully re-consider and re-evaluate the evidence presented before the trial court to arrive at my own independent conclusions on whether the appellant was properly convicted and sentenced. In doing so, I should remember that unlike the trial magistrate, I did not have the benefit of seeing and hearing the witnesses and give due allowance for that disadvantage;  
  
See: *Mwangi v Republic* [2014] KLR 28; *Okeno v Republic* [1972] EA 32.
10. Bearing in mind the duty of the first appellate court, I have considered the grounds of appeal alongside the evidence on record as well as the submissions filed by both parties. Needless to say, I have also read the judgment of the trial court.
11. It is trite that to establish the offence of defilement, the prosecution must prove beyond reasonable doubt its three key ingredients which are;



- i. The age of the victim – that the victim was a child or a minor.
  - ii. Penetration; and,
  - iii. That the accused was the perpetrator of the offence.
12. Before addressing the key issue that arises in this appeal which is whether the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt, let me briefly address the appellant’s complaint that he was convicted on the basis of a defective charge, even though he appears to have abandoned the complaint when prosecuting his appeal as he did not make any reference to it in his submissions.
  13. In my view, the charge as framed fully complied with the provision of Section 134 of the *Criminal Procedure Code* (CPC) which is the law that governs the framing of charges. The provision is to the effect that a charge is valid if it contains a statement of the offence and particulars which sufficiently disclosed the nature of the offence charged.
  14. The rationale for this provision is that an accused person must be clearly informed through the charge sheet at the earliest opportunity the specific offence he or she is alleged to have committed and the time and manner the offence was allegedly committed to enable the accused answer to the charges and to prepare an appropriate defence, if any.
  15. In this case, looking at the charge sheet, am unable to find any merit in the appellant’s complaint. The charge in the main count in respect of which the appellant was convicted contained a statement of the offence charged and particulars supporting the same showing how and against whom the offence was allegedly committed. In the premises, I do not find any defect in the charge as drafted and I dismiss the appellant’s claim that the same was defective.
  16. Turning now to the issue regarding whether the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt, there is evidence that at the material time, PW1 was in fact a minor as evidenced by the birth certificate produced as P Exhibit 3 which showed that she was born on 21<sup>st</sup> December 2001. It is important to note that the appellant did not dispute the victim’s age as stated in the charge sheet. It is thus my finding that the learned trial magistrate correctly concluded that the victim was a minor at the material time.
  17. On penetration, the appellant readily admitted in his defence that prior to his arrest, he was cohabiting with the victim as his wife. He therefore did not deny having had sexual relations with her at the material time save that he claimed that in doing so, he believed that the victim was an adult capable of having a consensual relationship.
  18. In his submissions, the appellant re-iterated that the victim had told him that she was 19 years old which he had no reason to doubt and urged me to find that he had sufficiently established his defence under Section 8 (5) of the *Sexual Offences Act* which should have earned him an acquittal.

For this proposition, he relied on the persuasive authority of *Martin Charo v Republic* [2016] eKLR in which Chitembwe J ( as he then was) held that children who behaved like adults and went to men’s houses for sex cannot be said to be victims of defilement.

I subscribe to a different view that a minor, irrespective of whether she behaves or acts like an adult has no capacity to consent to sex and any sexual engagement with such a minor unless the defence envisaged in Section 8 (5) and (6) of the *SOA* is successfully mounted amounts to defilement.



19. That said, the question I must now answer is whether the learned trial magistrate erred in his finding that the defence raised by the appellant that he reasonably believed that the complainant was an adult was not available to him.

20. As earlier stated, the aforesaid defence is set out in Section 8 (5) and (6) of the [SOA](#) which if properly proved amounts to an absolute defence to a charge of defilement.

Section 8 (5) and (6) states 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. It is manifest from the above provisions that once an accused person elected to rely on the defence, the evidential burden shifted to him to prove deception by the child that he or she was over the age of 18 years at the time the offence was allegedly committed; that he reasonably believed that the child was over 18 years; and, all circumstances surrounding commission of the offence including steps taken to ascertain the victim’s actual age when duly interrogated led to the conclusion that the accused’s belief was reasonable.

22. In this case, the accused when raising his defence claimed that the complainant told him upon his inquiry that she was 19 years old and he just believed her. He did not however go further to state the circumstances or the reasons that made him believe her like, for instance, showing that her behaviour or physical appearance was that of an adult. It is also apparent from his evidence that he had suspicions that the complainant was not an adult since he confessed to having asked her to confirm whether or not she was still going to school. Given that suspicion, the appellant ought to have made some effort to ascertain her actual age before starting cohabiting with her.

23. It is thus my finding that the appellant failed to prove that the circumstances in this case led him to reasonably believe that the complainant was an adult at the material time. Had he taken steps to establish her age, he would have discovered that she was still a minor who was incapable of consenting to a sexual relationship.

24. Given the foregoing, I am satisfied that the appellant did not meet the threshold of establishing the defence set out in Section 8 (5) and (6) of the [SOA](#) and the same did not therefore avail him. Consequently, I have come to the conclusion that the appellant was properly convicted and his appeal against conviction thus fails.

25. On sentence, the appellant submitted that the learned trial magistrate considered himself bound by the provisions of Section 8 (4) of the [SOA](#) and thus sentenced him to the minimum mandatory sentence of fifteen years imprisonment which was manifestly excessive. He invited me to revise the sentence given the recent jurisprudence that has emerged from both the High court and the Court of Appeal declaring minimum mandatory sentences prescribed in the [Sexual Offences Act](#) unconstitutional for fettering



discretion of courts to impose appropriate sentences taking into account the individual circumstances of each case.

26. In making this submission, the appellant was referring to the decisions made by the High Court in *Edwin Wachira & 8 others v Republic* Petition No 97 of 2021 and *Philip Mueke Maingi & 4 others v DPP & Another* petition No. E.107 of 2021 as well as the Court of Appeal decision in *Joshua Gichuki Mwangi v Republic* [Nyeri] Criminal Appeal No 84 of 2015.
27. Guided by the above authorities and considering that the appellant was a first offender, the circumstances under which the offence was committed and his apparent age, I find that the sentence meted out by the trial court though lawful at the time was manifestly excessive and did not meet the ends of justice. I am therefore inclined to exercise my discretion and I hereby set aside the sentence imposed by the trial court and substitute it with a sentence of six years imprisonment.
28. The court record shows that the appellant was in lawful custody throughout his trial. Consequently, the sentence shall take effect from the date the appellant was arrested on 8<sup>th</sup> August 2018.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**C.W GITHUA**

**JUDGE**

In the presence of:

The Appellant

Ms. Muriu for the Respondent

Ms. Susan Waiganjo Court Assistant.

