



**Simulasheni v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 7408 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 7408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E011 OF 2023
M THANDE, J
MARCH 20, 2024**

BETWEEN

LENOX AMANI SIMULASHENI APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the judgment of Hon. R. Amwayi, SRM
delivered on 28.11.22 in Kaloleni Criminal Case No. E001 of 2022)*

JUDGMENT

1. Lenox Amani Simulasheni, the Appellant herein was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on diverse dates between 20.2.21 and 23.5.21, at Kaloleni location, Kaloleni sub-county, Kilifi County, the Appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of AKM, (the Complainant) a child of 16 years. The Appellant also faced the alternative charged of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of this offence were that on the said diverse dates and in the same place, the Appellant intentionally and unlawfully cause his penis to touch the vagina of the Complainant. Upon conviction of the main charge, the Appellant was sentenced to serve a term of 10 years imprisonment.
2. Being aggrieved by the decision of the trial court, the Appellant has appealed to this Court against both the conviction and sentence. The summarized grounds as set out in his amended grounds of appeal filed on 21.9.23, are that the trial court erred in law and fact by:
 - i. failing to appreciate that the Complainant was not a credible witness whose evidence was doubtful.



- ii. failing consider that the matter arose from a grudge between the Appellant and the Complainant after their love went sour owing to his father's involvement with the complainant, thereby occasioning prejudice.
 - iii. finding that there was forceful penetration yet the same was not proved as the conduct of the Complainant was consistent of that of an adult, thus the defence under Section 8(5) and (6) of the *SOA* obtained in the circumstances.
 - iv. Failing to appreciate that the prosecution case was riddled with material discrepancies and fell below the required standard of proof.
3. The Appellant urged the Court to allow the Appeal.
4. As a first appellate Court, I have subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial Court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
5. The brief facts of this case according to the prosecution, as can be gleaned from the record are that the Complainant was at the material time from February 2021 to May 2021, a girl aged 16 years. The Appellant who is her neighbor called her to his home when going to fetch water. He told her that he loved her and after 3 days, she told him that she too loved him. What followed was sexual intercourse at his home. The Complainant stated that they had sex 3 times. When the Appellant's father found her with the Appellant, he threatened to kill her and she reported the matter to the police. Thereafter, the Appellant constructed another house and the relationship continued, in spite the Complainant's mother's warning. Her uncle and grandmother then told her to take all her belongings and go live with the Appellant, which she did. The Police then went to the Appellant's home and arrested him. He was later charged with the offence of defilement. Following trial, he was convicted of the offence and sentenced to 10 years imprisonment.
6. I have considered the submissions filed by the Appellant and the Respondent. A careful reading of the Respondent's submissions will show that the same do not relate to the Appellant's amended petition of appeal filed on 21.9.23.
7. In his submissions, the Appellant contended that there was no forceful penetration and that the Complainant's evidence was not credible. His contention is that the Complainant accepted to be his girlfriend. Further that she stated that they both agreed to have penetrative sexual intercourse and went ahead and did it 3 times. The Appellant thus argued that the Complainant was for the alleged sexual intercourse and did not report the same to the police and only reported the alleged threat to kill her by his father. This is further reinforced by the fact that the incident occurred on diverse dates between 20.2.21 and 23.5.21 and only reported on 1.1.22. The Appellant therefore contended that the Complainant's integrity was compromised or impeached by her evidence and conduct. Her evidence ought not to have been relied upon as it was not credible. Reliance was placed on the case of *Joseph Ndungu Kimanyi v Republic* [1979] eKLR where the Court of Appeal laid down the minimum standard required for upholding a conviction in a criminal case as follows:

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.
8. The Appellant further submitted that the case was premised on bad blood between him, his father and the Complainant. He contended that although he initially had a consensual relationship with the



Complainant, the same went sour upon his realization that his father also had a sexual relationship with her. He contended that even in the mind of the Complainant, the last time she and the Appellant had sex was in May 2021 and not December of 1.1.22. He maintained that he was an innocent man who was framed as he had witnessed his father being in a sexual relationship with the Complainant.

9. The record shows that the Appellant raised the issue of bad blood between him and his father. He accused his father of having sex with the complainant. However, he was unable to prove the allegation. In its judgment, the trial court stated:

The accused person during cross examination of the complainant, never questioned her about the alleged affair she had with his father. The accused person only brought up this issue during defence hearing. He equally didn't call any witness to confirm that indeed the complainant was having an affair with his father.

10. After examining the record, I am satisfied that the trial court did direct its mind to the claim by the Appellant of a grudge arising out of the alleged affair between his father and the Complainant. The trial court found and rightly so, that the same was not supported by evidence.
11. The Appellant further contends that the Complainant's testimony ought not to have been relied on as she was not a credible witness and that there were inconsistencies in her testimony. The Court notes that while this is so, the Appellant has admitted to having penetrative sex with the complainant which he says was consensual.
12. For an accused person to be convicted of the offence of defilement, the ingredients set out in [Charles Wamukoya Karani v Republic](#), Criminal Appeal No. 72 of 2013 must be established. The Court in that case stated:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

13. The Appellant was a neighbor of the Complainant and well known to her and her family. The Appellant was thus positively identified. As to the age of the Complainant, her birth certificate was produced indicating that she was born on 10.8.05. She was thus 16 years old in February-May 2021, the period in question.
14. Penetration is defined in Section 2 of the [SOA](#) as "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person. Both the Appellant and the Complainant admit to having engaged in a sexual relationship. From the evidence on record and the Appellant's submissions, the 3 ingredients of age of the Complainant, the identity of the Appellant as well as penetration are not disputed.
15. It is the Appellant's case that penetration was consensual and that the Complainant behaved more like an adult than as a minor. His position is that the law was intended to protect vulnerable minors and not young ladies who enjoy sex with their boyfriends. The Appellant contends that the Complainant stated that she agreed to be his girlfriend had consensual sex with him. He relied on the defence in Section 8 of the [Act](#) which provides:

- (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.
16. I have looked at the sworn statement the Appellant made in the trial court. At the time, he denied having committed the offence. He stated that his father had a sexual relationship with the Complainant and organized with her to implicate him. At no point did he avail to himself the defence in Section 8 of the Act. Had he done so at the trial, the prosecution would have had an opportunity to cross-examine him on the same to enable the Court arrive at a just decision. Having failed to do so at the trial court, he cannot bring it up now. This is clearly an afterthought and is not of much help to the Appellant.
17. In the case of *Irene Atieno Ochieng v Republic* [2017] eKLR, Mrima, J. considered a defence under Section 8(5) and (6) of the *SOA* at appeal stage and had this to say:
- As I come to the end of this analysis I must point out that the Appellant did not raise the defence she raised on appeal during the hearing before the trial court. The law is very clear. Unless the Appellant sought leave and was allowed to adduce additional evidence on appeal, the line of argument she adopted on appeal is purely for rejection. I however heard the Appellant who was then unrepresented as to ascertain if at all there was any basis for such a defence. An accused person who wishes to take advantage of the defence in Section 8(5) and (6) of the *Sexual Offences Act* must lay such a basis during the trial. When such a serious defence is raised later, more so on appeal, that denies the prosecution the opportunity to interrogate the same by way of cross-examining the accused person and the other witnesses and that visits an injustice to the victim.
18. The Appellant relied on the case of *Duncan Mwai Gichuhi v Republic* [2015] eKLR to support his submissions that the Complainant behaved more like an adult than a minor. The Court notes that in that case, unlike in the present case, the appellant therein and his witnesses had in his defence stated that he and the complainant had agreed to get married and that the appellant genuinely believed that the complainant was of full age and capacity. Indeed Mativo, J. (as he then was) stated:
- I now turn to the third issue. The evidence of the complainant and the appellant is that they were living as husband and wife. In fact the defence evidence was that they had sent elders to the complainants' parents to discuss the issue and there is evidence they went and met the girls' parents but there was no agreement. The girl carried clothes from her home an indication that she was going to say. She was not forced either to enter into the marriage or to sleep with the appellant. In her own words she was living with the appellant as husband and wife. The appellant informed his parents that he had gotten married. There is evidence that the complainants' girl met elders sent by the appellants' father, they sat at a bar and he even demanded beer from the appellants' father and the elder the appellant had sent. There is evidence that it was the complainants' father who asked for beer which evidence was not disputed at all.
19. The cited case is not helpful to the Appellant's case. The defence under Section 8 is only available to an accused person if it is proved that the child victim through deception makes the accused person believe that the child is over 18 years old at the time of the alleged commission of the offence, and the accused



reasonably believed that the child was over the age of 18 years. In the present case, the Appellant had stated cross examination as follows:

The complainant is known to me. I know that she is in school and aged 16 years old.

20. It is trite law that a child has no capacity to consent to sex. The Complainant was still a child of 16 years and had no capacity engage in consensual sex. The record shows that the Appellant was born in 1995. Accordingly, in 2021 when the offence was committed, he was aged 26 years and was 10 years older than the Complainant. As such, as an adult, the Appellant ought to have known better than to engage in sex with a child. His contention that she behaved more like an adult than a minor cannot absolve him of criminal liability.

21. The Appellant has relied on the case of *Karisa Katana Gona v Republic* [2015] eKLR where Chitembwe, J. stated:

The purpose of the law is to assist those who fall victims of defilement by people who take advantage of their victims. It is not the intention of the law to punish accused persons who engage in sex with young people who behave like adults. That is why the *Sexual Offences Act* under section 8(5) anticipated such behaviour. I do find that PW2 presented herself as an adult and it appears that was not the 1st time to meet the appellant.

22. With respect, the decision being by a court of concurrent jurisdiction is not binding on this Court. I instead associate with Ngugi, J. (as she then was) who in the case of *Nebemiah Kiplangat Ngeno v Republic* [2018] eKLR stated:

The fact that a child goes to a man's house and has consensual sex with him does not take away criminal liability from the adult. The law is that a child below the age of 18 has no capacity to consent to sex. Secondly, an adult is deemed to know that it is unlawful to engage in sexual conduct with a child. An adult who engages in sex with such a child commits the offence termed defilement.

23. When a crime is committed, it must be punished and a person who commits a crime is upon conviction subjected to the penal provisions of the law.

24. The mandatory minimum sentence for the offence with which the Appellant was charged is 15 years' imprisonment. The trial court exercised its discretion and sentenced the Appellant not to the 15 years imprisonment, but to 10 years in prison.

25. It is well settled that appellate courts must exercise restraint in interfering with judicial discretion. In the case of *Mbogo v Shah* [1968] EA 93 where the Court of Appeal considered an invitation to interfere with the exercise of judicial discretion and stated:

[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

26. In the end, after reevaluating the evidence, my finding is that the Appellant was properly convicted and sentenced. Accordingly, both the conviction and sentence are upheld and the Appeal being devoid of merit is hereby dismissed.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 20TH DAY OF MARCH 2024



M. THANDE
JUDGE

