



**Mwongela v Republic (Criminal Appeal E049 of 2023)
[2024] KEHC 6905 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 6905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E049 OF 2023
GMA DULU, J
MARCH 19, 2024**

BETWEEN

PETER MWONGELA APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E024 of 2021 at Taveta Law Courts delivered on 17th February 2023 by Hon. D. M. Ndungi (PM))

JUDGMENT

1. The appellant was convicted of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence were that on diverse dates between the months of June 2021 to 28th November 2021 at unknown time at [Particulars withheld]. A village in Taveta Sub County within Taita-Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of E.B.G a girl child aged 17 years.
2. On conviction, he was sentenced to fifteen (15) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied upon the following amended grounds:-
 1. The learned Magistrate grossly erred by failing to consider that the appellant had reasonably established a defence under Section 8(5)(b) of the [Sexual Offences Act](#) No. 3 of 2006.
 2. The learned Magistrate erred by failing to consider that the mandatory nature of Section 8(3) of the [Sexual Offences Act](#) fetters judicial discretion not to consider the appellant's mitigating circumstances on record prior to passing appropriate and proportionate sentence in appropriate case in violation of Article 27(1) (2) (4) and 50(2) (p) of the [Constitution](#) of



Kenya 2010 hence the sentence imposed on the appellant by the trial court was unlawful and unconditional (unconstitutional).

4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions.
5. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
6. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered unsworn defence testimony stating that he did not know the complainant well as she lived mainly in Ukambani.
7. I note that the Director of Public Prosecutions has in submissions conceded to the appeal by stating that the complainant behaved like an adult and thus the defence under Section 8(5) of the *Sexual Offences Act* applied herein.
8. On my part, having considered and evaluated all the evidence on record, I find that all the elements of the offence of defilement were proved by the prosecution. The age of the complainant PW1 Elizabeth Bahati Charles was proved on the basis of birth certificate.
9. The second element which is sexual penetration was proved, as the complainant was found at night in the house of the appellant, and she had lived there for a number of days. The appellant was thus proved to have had sexual intercourse with the complainant, or at least was one of the persons who had such sexual intercourse. Infact the appellant does not deny that allegation, but merely said he did not know the complainant well as she lived mostly in Ukambani. Thus the third element of the identity of the culprit was proved. The appellant was the culprit.
10. The only saving grace in favour of the appellant are the provisions of Section 8(5) of the *Sexual Offences Act*, which provides a defence to a culprit, if he or she was misled by the victim behaving like an adult.
11. With the evidence tendered in court by the complainant (PW1) herein, that she had initially voluntarily engaged in sexual activities with Brio in Tanzania until she got pregnant, and that later when she noticed that she was pregnant engaged in sexual intercourse with the appellant without informing him of the pregnancy, and the evidence from her and her father PW2 Charles Mwanzia Mweu, confirming that she mainly lived in Ukambani, as well as the evidence of the appellant in his defence that he did not know the complainant well because she mainly lived in Ukambani, it is clear to me that the conduct of the complainant would lead the appellant or any other reasonable man in his position to believe that she was an adult.
12. I thus agree with the Director of Public Prosecutions that the defence provided under Section 8(5) of the *Sexual Offences Act*, applies in this case. That being so, this appeal will succeed and the conviction quashed and sentence set aside.
13. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF MARCH 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE



In the presence of:-

Alfred – Court Assistant

Mr. Sirima for State

