



REPUBLIC OF KENYA



**Dambala v Republic (Criminal Appeal E002 of 2022)  
[2024] KEHC 4049 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E002 OF 2022**

**M THANDE, J**

**APRIL 26, 2024**

**BETWEEN**

**SAMMY DAMBALA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal arising out of the judgment of Hon. P. K. Rotich, SPM  
delivered on 25.5.21 in Garsen Sexual Offences Case No. E003 of 2021)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* (SOA). The Appellant was tried and convicted of the offence and sentenced to 20 years imprisonment. The particulars of the offence of which the Appellant was convicted, are that on 22.3.2020 at 22000 hours in Tana Delta sub-county, he intentionally and unlawfully caused his penis to penetrate the vagina of YDK (the Complainant), a girl aged 15 years.
2. Being aggrieved with both the conviction and sentence the Appellant filed a petition of appeal on 26.1.22. The grounds are that the trial court erred by failing to consider that the prosecution did not prove its case beyond reasonable doubt as there were sharp contradictions. The trial court further failed to adequately consider his defence.
3. As a first appellate Court, I have also 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.
4. The facts of the case according to the prosecution are that the Complainant was a 15 year old class 5 pupil at [Particulars Withheld] Primary School at the material time. On 22.3.22, she and her friend Farida went to church and thereafter went to the Appellant's uncle's house. They found the Appellant alone in the house who invited them in. The Complainant left Farida in the sitting room and went



into one of the rooms with the Appellant. While there, they undressed and had sex and the Appellant inserted his penis into her vagina. Thereafter they remained in the house until 8 pm when her parents came looking for her and found her hiding under the bed in one of the rooms. She was taken to the chief and thereafter went home. The following day 23.3.22, the matter was reported at Gamba Police Station and she was then taken to Garsen Hospital where it was confirmed that she was pregnant. The Appellant was arrested 6 months later and charged in court. The Complainant gave birth to her child before the trial commenced.

5. Both the Appellant and Respondent filed their submissions which I have duly considered.
6. To sustain a conviction for the offense of defilement, the prosecution has to prove 3 ingredients. This was set out in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013. 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.

7. In his defence, the Appellant admitted to the offence. He admitted that he had sex with the Complainant and made her pregnant. With this admission, 2 ingredients were proved, namely that the Complainant was defiled as there was penetration. Further that the perpetrator of the defilement was the Appellant.
8. As regards the age of the Complainant, the prosecution's case is that she was 15 years old at the material time. There is however no documentary evidence on her age. The age of a complainant can be established by evidence other than documentary evidence, provided that such evidence is credible. This was the holding in *Edwin Nyambogo Onsongo Vs Republic* (2016) eKLR where the Court of Appeal stated:

[T]he question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

9. The record shows that the Complainant stated that she was 15 years old. Her mother PW2 stated that the Complainant was 16 years old. She testified in 2021 while the incident took place in 2020. Where no documentary proof of age is produced as in the present case, the age of a complainant can be established through other evidence, provided that such evidence is credible. There is nothing on record to place doubt on the evidence adduced by the Complainant and her mother on her age.
10. The Appellant faults the trial court for not considering his defence. The Appellant, in his defence stated that the Complainant went to his home and told him she did not want to go back home but wanted him to marry her. He stated "I looked at body size and thought she was an adult and therefore agreed to marry her." The Complainant's testimony was that she had had sex with the Appellant several times before the incident in question. She got pregnant and their child was born on 10.10.2020. The Appellant has been supporting her and the child and visits them both.
11. Although the trial court stated that the Appellant did say that he thought the Complainant was an adult, it did not make any finding thereon. The trial court said nothing about the Complainant's appearance.



12. Belief that a complainant is an adult is a defence under Section 8 of the SOA which provides 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.
13. The Appellant stated that when the Complainant she told him she wanted him to marry her, he looked at her body size, thought she was an adult and agreed to marry her. The Complainant has stated that even after the birth of their son, the Appellant has been supporting and visiting their son.
14. In the case of *Meshack Nyongesa v Republic* [2016] eKLR, the Court of appeal had occasion to consider the defence under Section 8(5) of the SOA and stated:
10. Section 8(5) of the *Sexual Offences Act* provides a complete defence to a charge of defilement if it is shown that the accused believed that the child was 18 years or above.
- The learned Judges went on to state:
11. We take judicial notice of the fact that these days, children, especially females, appear older than they actually are. In the circumstances, given the fact that this is a defence which few non-lawyers know about, it is our considered view that where a young man is charged with defiling a girl child above the age of 16 years, the trial court should ascertain whether he had reason to believe that the girl was 18 years or above.
15. The Appellant herein raised the defence under Section 8(5) of the SOA that he believed that due to her size, the Complainant who wanted him to marry her, was an adult. Although there is nothing on record about her appearance, the Complainant may very well have appeared an adult as the Appellant claimed before the trial court. The onus is always upon the prosecution to clear any doubts that may arise, failure to which the benefit would go to the Appellant. Had the trial court considered this defence, it may not have convicted the Appellant. Accordingly, I find that the trial court erred in failing to consider the Appellant's defence.
16. In the end, after reevaluating the evidence, my finding is that the Appellant ought to have benefitted from the defence under Section 8(5)(b) which he raised in the trial court. In the premises, I quash the conviction and set aside the sentence. The Appellant is hereby set at liberty unless otherwise lawfully held.

**DATED AND DELIVERED IN VIA MS TEAMS THIS 26<sup>TH</sup> DAY OF APRIL 2024**

**M. THANDE**

**JUDGE**

