



REPUBLIC OF KENYA



**Katana v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 105 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E020 OF 2024
M THANDE, J
JANUARY 17, 2025**

BETWEEN

ATHMAN LEONARD KATANA APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the judgment of Hon. R. Amwayi, SRM
delivered on 22.11.22 in Kaloleni Sexual Offences Case No. E042 of 2022)*

JUDGMENT

1. 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 dated between May 2021 and June 2021, in (particulars withheld) sub-county, Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of FKK, (the Complainant) a child of 17 years. Upon conviction, the Appellant was sentenced to 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. In his amended grounds of appeal, the Appellant faulted the learned Magistrate for failing to consider that he had reasonably established a defence under Section 8(5)(b) of the SOA. He urged the Court to allow the Appeal quash the conviction and set aside the sentence.
3. 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.
4. In her testimony, the Complainant stated that she was born on 18.11.04. Between May and June 2021, she met the Appellant who started to seduce her. One night she went to his house at 8pm and they had sexual intercourse. This went on to have sexual intercourse several times and in June, she missed her



- periods. In July 2021, the head teacher took the Complainant for pregnancy test and found that she was pregnant. After the Complainant was sent home from school, her mother took her to the Police and later to Mariakani hospital. She gave birth on 25.2.22. She identified the Appellant as the father of her child.
5. PW1 Chigulu Mwangolo, a Senior Clinical Officer at Mariakani Hospital stated that he examined the Complainant and a scan showed she was 24 weeks and 3 days pregnant. Her expected date of delivery was 12.3.22. He produced the P3 form, treatment notes and scan reports.
 6. PW3 KJP stated that the head teacher told him to take his daughter, the Complainant, home as she was pregnant. He went to the police and reported the matter. Upon interrogation the Complainant said that the Appellant was responsible.
 7. PW4 Mwidadi Omari the Government analyst stated that he did DNA analysis on samples from the Appellant, Complainant and the child born to the Complainant. The results were that there was a 99.99+% that the Appellant was the father of the child. He produced the Exhibit memo and DNA report.
 8. PW5 No. 260xxx PC Elvis Otieno testified that the investigation file indicated that on 20.11.21 a report was made by PW3 that his daughter had been defiled and impregnated by the Appellant, a person known to her. After investigations and statements were recorded by the witnesses, the Appellant was arrested and charged.
 9. After the close of the prosecution case, the Appellant was found to have a case to answer and placed on his defence. In his sworn statement, the Appellant conceded that he and the Complainant were in a relationship and that she had told him she was not in school. He further stated that the Complainant had informed him that she was 19 years old and that had she told him she was not 19 years old, he would not have had a relationship with her. On cross examination, he said he did not see any document showing her age. He urged the trial court to acquit him as the Complainant had lied to him regarding her age.
 10. I have considered the submissions filed by the Appellant and the Respondent.
 11. It is the Appellant's case that he had reasonably established a defence under Section 8(5)(b) of the SOA. He contends that the Complainant deceived him that she was over 18 years old and this is fortified by the fact that she went to his house at night. Further that the relationship went on for a long time and she kept the same secret until she became pregnant. The Appellant submitted that this was enough to make him believe that the Complainant was above 18 years of age.
 12. For the Respondent, it was submitted that the Appellant did not demonstrate any steps taken to find out the Complainant's age as required under Section 8(6) of the SOA. Additionally, that in cross examination, he admitted that he did not see any document to show that the Complainant was an adult. Further, that he also admitted to having a relationship with the Complainant. Lastly that the prosecution case outweighed the Appellant's
 13. In her judgment, while considering the Appellant's defence, the trial Magistrate stated that he did not ask the Complainant if she ever told him her age before they had sexual intercourse. Further that the issue that the Complainant told him she was 19 years old only came up during defence hearing. The trial Magistrate added that on cross examination, the Appellant admitted he never asked for proof of age from the Complainant and she did not show him any.
 14. Section 8 (5) of the SOA 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.
15. For this defence to be available to an accused person, it must be raised at trial to enable the prosecution response and the trial court pronounce itself on the same. Such accused person must demonstrate that at the time of the alleged commission of the offence, he was deceived into believing that the child was over 18 years old. The trial court then determines the matter taking into account all 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. He stated that the Complainant had told him she is 19 years old and was not in school. Further that had she told him she was not 19 years old, he would not have had a relationship with her. He urged that he be acquitted given that the Complainant had lied about her age. In cross examination, he stated that he did not see any document indicating the age of the Complainant.
17. In the case of *Wambui v Republic (Criminal Appeal 102 of 2016)* [2019] KECA 906 (KLR) (22 March 2019) (Judgment), the Court of Appeal considered the defence under Section 8(5) of the SOA and had this to say:
 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 subsections 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).

37. So understood, we would think that had the two courts below properly directed their minds to the appellant’s defense and the totality of the circumstances of this case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.
18. In the present case, the Complainant was 17 years old at the time of the alleged commission of the offence. As stated by the Court of Appeal, it stands to reason that a person is more likely to be deceived into believing that a 17 year old child is over the age of 18 years. In her own testimony, the Complainant stated that when she met the Appellant, he started to seduce her and gave her his phone number. After a few days, she went to his house at 8pm and they had sexual intercourse.
19. Section 8(6) requires the trial court when considering a defence under Section 8(5), to have regard to all circumstances. The steps taken to ascertain the age of a child is only one of them. Given her conduct of going to the Appellant’s house at night for sex and her age, the more likely the deception, and the more likely the belief that the Complainant was over the age of 18 years. I therefore find merit in the Appellant’s assertion that the Complainant deceived him that she was 19 years old. And that had he known she was a child, he would not have had a relationship with her.
20. Section 111(1) of the Evidence Act provides:
- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
- Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
- Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.
21. The defence by the Appellant raises reasonable doubt as to his guilt given the deception by and the conduct of the Complainant. I thus find that had the trial magistrate properly directed her mind to the Appellant’s defense and the totality of the circumstances of this case, she would in all likelihood have arrived at a different conclusion on it. By dint of the second proviso to Section 111(1) of the Evidence Act, the Appellant was entitled to an acquittal.
22. In the end, I find that the conviction of the Appellant in light of his defence was unsafe. The Appeal succeeds and the same is allowed. I accordingly quash the conviction and set aside the sentence imposed on the Appellant. He is forthwith set at liberty unless otherwise lawfully held

DATED, SIGNED AND DELIVERED IN MALINDI THIS 17TH DAY OF JANUARY 2025

M. THANDE



JUDGE

