Case Number:	Criminal Appeal 102 of 2016
Date Delivered:	22 Mar 2019
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Daniel Kiio Musinga, Patrick Omwenga Kiage
Citation:	Eliud Waweru Wambui v Republic [2019] eKLR
Advocates:	-
Case Summary:	**Constituting elements of the defence of deception in section 8 (5) of the Sexual Offences Act ought to be read disjunctively as opposed to conjunctively** **Eliud Waweru Wambui v Republic** **Criminal Appeal No 102 of 2016** **Court of Appeal at Nairobi** **R N Nambuye, D K Musinga & P O Kiage, JJA** **March 22, 2019** **Reported by Ian Kiptoo** ***Jurisdiction****-jurisdiction of the Court of Appeal-matters of law-where an accused stated that the first Appellate Court did not subject evidence on record to fresh scrutiny, analysis and re-evaluation-whether a second appellate court could refer to facts tendered in evidence before a trial court in its determination-Criminal Procedure Code, section 361 (a)*

Criminal Law*-sexual offences-defilement-ingredients of the offence of defilement-age of the complainant-standard of proof-whether a complainant's age in a charge of defilement in section 8 (1) (4) of the Sexual Offences Act was an essential ingredient that needed to be proved beyond reasonable doubt-Sexual Offences Act, section 8 (1) (4)*

Evidence Law*-documentary evidence-secondary evidence-Photostat copy of an alleged birth certificate-where secondary evidence sought to prove the contents of primary evidence-where Photostat copy was not certified-whether a Photostat copy of an alleged birth certificate that had not been certified was conclusive proof of the age of a complainant in a charge of defilement-Evidence Act, sections 64 and 66*

Statutes*-interpretation of statutes-interpretation of section 8 (5) of the Sexual Offences Act-elements to the defence of deception-deception and reasonable belief that a complainant was over the age of 18 years-where conjunctive terms were used-whether the constituting elements of the defence of deception in section 8 (5) of the Sexual Offences Act, in a charge of defilement, ought to be read disjunctively as opposed to conjunctively-whether the age of sexual consent ought to be reviewed from 18 years to 16 years in light of human development and social change*

Words and Phrases*-deceive-definition of-deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to-Concise Oxford English Dictionary, 12th Edition 2011*

Brief Facts

The appellant was arrested and arraigned before the Chief Magistrate's Court at Thika on a charge of defilement contrary to section 8 (1) (4), and an alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act, No. 3 of 2006 (Act). He was found guilty and sentenced to 15 years' imprisonment. The appellant relied on the grounds that; the first Appellate Court erred in

law and fact by failing to notice that essential ingredients/ of the offence as charged were not proved; that the first Appellate Court erred in law by failing to notice that the appellant reasonably believed that the complainant had granted her consent and that she had capacity to grant the said consent; and that he believed she was of full age and capacity to contract a marriage.

Issues

i. Whether a second appellate court could refer to facts tendered in evidence before a trial court in its determination.
ii. Whether a complainant's age in a charge of defilement in section 8 (1) (4) of the Sexual Offences Act was an essential ingredient that needed to be proved beyond reasonable doubt.
iii. Whether a Photostat copy of an alleged birth certificate that had not been certified was conclusive proof of the age of a complainant in a charge of defilement.
iv. Whether the constituting elements of the defence of deception in section 8 (5) of the Sexual Offences Act, in a charge of defilement, ought to be read disjunctively as opposed to conjunctively.
v. Whether the age of sexual consent ought to be reviewed from 18 years to 16 years in light of human development and social change.

Relevant Provisions of the Law

Sexual Offences Act, No. 3 of 2006

Section 8

"(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."

Held

1. As the appeal was a second appeal, the Court's jurisdiction was confined to a consideration of questions of law only by dint of section 361(a) of the Criminal Procedure Code. The memorandum of appeal framed raised questions of law. The Court's interaction with those grounds could of course involve, as in the complaint that the Trial Court did not re-evaluate the evidence, a reference to the facts as they emerged from the evidence that was tendered before the Trial Court. Such reference was not the same as hearing an appeal on a matter of fact which the Court was statutorily debarred to do.
2. The appellant's complaint that the first Appellate Court did not subject the evidence to fresh scrutiny, analysis and re-evaluation was not an idle one. A first appeal always proceeded by way of re-hearing based on the evidence on record and an appellant was therefore entitled to expect that the first Appellate Court would go beyond a mere rehashing of what was on record or a repetition of the findings of the Trial Court.
3. The High Court was required to, and had to be seen to have consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant. The only limitation to its task being a remembrance that it was without the advantage, enjoyed by the Trial Court, of seeing and observing the witnesses as they testified, for which it had

to make due allowance.

4. The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence could not be gainsaid. It was not in doubt that the age of the victim was an essential ingredient of the offence of defilement and formed an important part of the charge because the prescribed sentence was dependent on the age of the victim.
5. A Photostat copy of the alleged birth certificate produced, which copy was not certified as required by section 66 of the Evidence Act when permitting the production of secondary evidence if primary evidence, which was the document itself, was not produced for the inspection of the Court and the contents of the document were sought to be proved by secondary evidence, was not a document that could be relied on in proof of the complainant's age. Further, the document itself purported to have been issued before the birth of the complainant, evidence of which it purported to be, was a logical impossibility. Therefore, the document as was, was of no probative value.
6. There was no age assessment as such that was done on the complainant whereas the P3 Form that was produced indicated 17 years as the approximate age of the person examined, namely the complainant. The other evidence of age was that of the complainant herself which, other than being hearsay in character, was no more illuminating. The complainant stated that on November 14, 2009, she got married to the appellant and she was about 17 years having been born on October 3, 1991. Simple arithmetic showed that as at that date she would have been 18 years and one month old. She further stated that she conceived in May 2009 which would place her age at 17 years and 6 months at the time but, one could not speak competently on her date of birth as she could not have witnessed it and the only document that was produced of the same was of no probative value.
7. The totality of the evidence on age was

that it did not possess the consistency and certainty that would have proved the exact date of the complainant's birth beyond reasonable doubt. Therefore, had the Trial Court gone into an analysis of the evidence with the thoroughness that was required of it, it would probably have arrived at a different conclusion. In failing to engage in that exhaustive re-evaluation, it fell into error and the lingering doubts had to be resolved in favour of the complainant.

8. The conduct of the police raised doubts as to the *bona fides* of the prosecution which was made worse by the admitted demand by the complainant's father, in a meeting at the Chief's office, attended by two elders no less, for the sum of Kshs 80,000 from the appellant who, incidentally, had been his tenant. During cross examination PW2 stated that the Kshs 80,000 "was to take care of the education expenses" he had used on the complainant and not dowry, but the critical point was the admission that had it been paid the matter would have rested.
9. The picture that emerged was of a father righteously indignant that his daughter had been seduced and put in the family way, and who would have the culprit prosecuted unless he would pay some kind of compensation. That too, raised questions as to whether the prosecution was for the proper purpose of enforcing the law or settling a score. At any rate, the effect was to whittle the reprobate value of the father's evidence and to lend credence to the appellant's contention that both the father and chief did know that the girl was of age.
10. A witness in a criminal case upon whose evidence it was proposed to rely should not create an impression in the mind of the Court that he was not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicated that he was a person of doubtful integrity, and therefore an unreliable witness which made it unsafe to accept his evidence. The evidence of

PW2, properly evaluated, would have been in the category of an unreliable witness.

11. Section 8 (5) of the Sexual Offences Act stated that it was a defence 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. Subsection (5) was a curious provision in so far as it was set in conjunctive as opposed to disjunctive terms which would seem to be more logical. Once a person had actually been deceived into believing a certain state of things, it added little to require that his belief be reasonably held.
12. A reading of section 8 (6) of the Sexual Offences Act seemed to add a qualification to subsection (5) (b) that separated it from the belief proceeding from deception in subsection (5) (a). Therefore, the elements constituting the defence should be read disjunctively if the two sub-sections were to make sense. Further, it stood to reason that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years.
13. The burden of proving that deception or belief fell upon the appellant, but the burden was on a balance of probabilities 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 was also germane to point out that a child need not deceive by way of actively telling a lie that she was over the age of 18 years. Had the two Lower Courts properly directed their minds to the appellant's defence and the totality of the circumstances of the 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. 14. **[Obiter]** "We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and *maturing adults* in the sense employed by the English House of Lords in *Gillick v West Norfolk And Wisbech Area Health Authority [1985] 3 ALL ER 402*, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the *age of maturity* but they may well have reached the *age of discretion* and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps." 15. **[Obiter]** "Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation." *Appeal allowed, conviction quashed and sentence set aside. The appellant would be set at liberty unless otherwise lawfully held.*
Court Division:	Criminal

History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	CR.A. No. 302 of 2011
Case Outcome:	-
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 102 OF 2016

BETWEEN

ELIUD WAWERU WAMBUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Achode, J.)

dated 25th June, 2014 in ***HC. CR.A. No. 302 of 2011)***

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JUDGMENT OF THE COURT

This appeal epitomizes for the umpteenth time the unfair consequences that are inherent in an critical enforcement of the **Sexual Offences Act**, **No. 3 of 2006** (the Act) and the unquestioning imposition of some of its penal provisions which could easily lead to a statute-backed purveyance of harm, prejudice and injustice, quite apart from the noble intentions of the legislation. The case poses one more time whether it is proper for courts to enforce with mindless zeal that which offends all notions of rationality and proportionality.

The appellant, **Eliud Waweru Wambui**, in this second appeal protests, essentially, that he is like Shakespeare's King Lear, a man more sinned against than sinning. He was arrested nearly a decade ago, and arraigned before the Chief Magistrate's Court at Thika on 1st December, 2010 on a charge of **defilement**, contrary to **section 8(1)(4)** of the Act. The particulars of the charge were that;

"On the month of May 2009 at Makuyu Township in Murang"a county within the Republic of Kenya [he] committed an act that caused penetration to a child namely ANK a child aged 17 years and 5 months."

He faced an alternative charge of **indecent act** contrary to **section 11(1)** of the Act particularized that;

"On the diverse dates from January 2009 and 16th November 2009 at Makuyu township in Murang'a county within Republic of Kenya [he] committed an indecent act with a child namely ANK a child aged 17 years by touching her genital organs."

The appellant denied the charges leading to a trial in which the prosecution called some five witnesses, at the end of whose testimony the trial magistrate found the appellant had a case to answer and placed him on his defence. He made an unsworn statement and called three brief witnesses.

In the ensuing judgment, the magistrate (L.M. Wachira, SRM) found the main charge proved against the appellant and convicted him. She then sentenced him to 15 years' imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred a first appeal against both to the High Court at Nairobi. The same was heard by Achode, J. who, by a judgment delivered on 25th June, 2014 found it to be devoid of merit and dismissed it, provoking the present appeal. In his self-crafted memorandum of appeal filed on 30th July, 2017, the appellant raised the following grounds of appeal on the basis of which he asked this Court to quash the conviction and set aside the sentence;

"1. That the 1st appellate court erred in law and fact by failing to notice that essential ingredients/elements of the offence as charged were not proved.

2. That the 1st appellate court erred in law by failing to consider/subject evidence to fresh scrutiny, re-evaluate the same and analyze as required of it. If it did, the 1st appellate court would have discovered that:

i. There were material errors in the prosecution evidence contained in exhibit 1 in that the date of issue of the birth certificate took place before the complainant was born.

ii. There was a likelihood that the charges against the appellant were borne out of malice and ill-will due to the fact that the appellant failed to pay the compensation required by PW2 (complainant's father).

3. That the 1st appellate court erred in law by failing to notice that the appellant reasonably believed that the complainant had granted her consent and that she had capacity to grant the said consent and he believed she was full of age (sic) and capacity to contract a marriage."

In written submissions filed on 30th July, 2018, the appellant combined the first two grounds of appeal. He first charged that the fact that the complainant was school-going did not of itself mean, much less prove, that she was under the age of 18 years. It was upon the prosecution to conclusively prove her age; and whereas she stated that she was born on 3rd October, 1991 and a birth certificate was produced, the same was a copy and not the original.

Moreover, the said document was false as it purported to have been issued on 1st October, 1991, which was two days before the date the complainant was allegedly born. He also asserted that as the local chief is said to have led some negotiations between the appellant and the complainant's father which did not bear fruit because the appellant did not have the money demanded, it is not possible that the complainant was under age and the chief could not possibly have actively condoned an illegality. He thus submitted that **PW2** must have decided "to fix" the appellant for failing to part with the sum of money requested.

On ground 3, the appellant contended that the complainant presented herself to him as a mature girl who was ripe for marriage and that she indeed testified that she and he were married. He went on to submit that;

"The mere fact that the complainant made the appellant her boyfriend had sex by consent several times and was willing to get married to the appellant shows that the complainant presented herself before the appellant as a mature girl ready to get married. After the parents of the complainant were made aware of the same, they approached the appellant for discussions of the way

forward and if the appellant had agreed to pay the sum requested they would not have reported. It is clear therefore that the charges facing the appellant were driven by ill will and vendetta for non-payment of Kshs. 80,000.00."

Basing his submissions on **section 8(5)** and **(6)** of the Act, the appellant posited that he had a reasonable basis for believing the complainant was over the age of 18 years at the time of the alleged offence, which was "*a subjective test with an objective element*" which related to his capacity to evaluate the consent and if so, reasonably believe it, which he did. He thus made the case that the evidence did create a reasonable doubt as to his guilt and was thus entitled to an acquittal in light of **section 111** of the **Evidence Act**.

Ms. Maina, the learned Senior Principal Prosecution Counsel, opened her brief opposition to the appeal by the submission that *"the offence was proved because the appellant impregnated the complainant and so it is obvious defilement occurred. The complainant was still school going and so incapable of giving consent."* She referred to **section 43(4)(7)** of the Act for that proposition. When we asked her the exact date when the offence is supposed to have been committed, she was unable to pinpoint any but referred to the complainant's pregnancy whereupon we asked why it took so long for the appellant to be charged, in fact long after the child had been born, but she was unable to offer any explanation and there was none on record. She conceded that indeed there had been negotiations in which the complainant's father **PW2** sought some Kshs. 80,000 from the appellant, which he was unable to pay, before the charges against him were laid.

The learned Senior Principal Prosecuting Counsel concluded her submissions with the statement which captures the dilemma presented by cases such as the one before us;

"It is unfair for the appellant to be sentenced to 15 years imprisonment but that is the law and there is nothing we can do about it."

The question we cannot ignore is whether a court of law can declare itself powerless in the face of obvious injustice as conceded by the State. We shall address that aspect, albeit briefly, towards the end of this judgment.

The appellant in his response reiterated that the birth certificate produced misled the trial court, and the first appellate court failed to properly re-evaluate the evidence and; find that he did reasonably believe the complainant to have been over 18 years old; take issue with the non-production of the original birth certificate, and find that **PW2** as the complainant's father would not have entered into negotiations and asked for Kshs. 80,000 before the local chief had the complaint been under age; find that had he paid the money the charges against him would not have been laid; and that it would not have been necessary for the complainant to be threatened and detained in custody by the police for 3 days to force her to record a statement and testify against him.

The appellant concluded by complaining that it was harsh and unfair for him to be jailed for 15 years, yet the complainant is his wife and he has responsibilities to take care of her and their child.

He therefore prayed that he be set at liberty.

As this is a second appeal, our jurisdiction is confined to a consideration of questions of law only by dint of **section 361(a)** of the **Criminal Procedure Code**, **Cap 75** Laws of Kenya and we note that the memorandum of appeal as framed does raise questions of

law. Our interaction with those grounds may of course involve, as in the complaint that the learned Judge did not re-evaluate the evidence, a reference to the facts as they emerge from the evidence that was tendered before the trial court. Such reference is not the same as hearing an appeal on a matter of fact which we are statutorily debarred to do.

The appellant's complaint that the first appellate court did not subject the evidence to fresh scrutiny, analysis and re-evaluation is not an idle one. A first appeal always proceeds by way of re-hearing based on the evidence on record and an appellant is therefore entitled to expect that the first appellate court will go beyond a mere rehashing of what is on record or a repetition of the findings of the trial court.

It is required to and must be seen to be seen to have, consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant, the only limitation to its task being a remembrance that it is without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it must make due allowance.

See ***PANDYA vs. REPUBLIC [1957] EA 336***, ***OKENO vs. REPUBLIC [1972] EA 32***.

In this appeal, one of the appellant's major complaints is that the age of the complainant was not proved to the required standard and that the document produced as her birth certificate could not be relied on to prove her age. There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt. That has been the consistent holding of this Court and we are content to adopt what the Court sitting at Mombasa stated in ***HADSON ALI MWACHONGO vs. REPUBLIC [2016] eKLR;***

"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows;

„In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).""

In the present case, the appellant complains that the prosecution did not produce the original birth certificate. Rather, what was produced was a photostat copy of the alleged birth certificate, which copy was not certified as required by **section 66** of the **Evidence Act** when permitting the production of secondary evidence if primary evidence, which is the document itself, is not produced for the inspection of the court and the contents of the document are sought to be proved by secondary evidence under **section 64** of the **Evidence Act**. The appellant contends that the original document would have been the best evidence failing which a certified copy should have been produced.

In the submissions opposing the appeal, the respondent's counsel did not address that aspect of the appellant's case at all, and we think that he is quite plainly right in arguing that what was produced was not a document that could be relied on in proof of the

complainant's age. Things are only made worse by the fact that the document itself purports to have been issued before the birth of the complainant, evidence of which it purported to be, which is a logical impossibility. The document, as is, is therefore of clearly no probative value.

There was no age assessment as such that was done on the complainant, while the P3 Form that was produced indicated 17 years as the *approximate age of the person examined*, namely the complainant. The other evidence of age is that of the complainant herself which, other than being hearsay in character, is no more illuminating. She stated that on 14th November, 2009, she got married to the appellant and she was about 17 years having been born on 3rd October, 1991. Now, simple arithmetic shows that as at that date she would have been18 years and one month old. She stated that she conceived in May 2009 which would place her age at 17 years and 6 months at the time but, one cannot speak competently on her date of birth as she cannot have witnessed it and the only document that was produced of the same was of no probative value, as earlier stated.

PW2's testimony regarding her age was simply that she was born in 1991. He did not give an exact date. Neither did her mother, PW3, who was content to merely say that the complainant was 17 years and 5 months when she exhibited signs of pregnancy. The totality of the evidence on age is that it did not possess the consistency and certainty that would have proved the exact date of the complainant's birth beyond reasonable doubt. We would therefore agree with the appellant's complaint that had the learned Judge gone into an analysis of the evidence with the thoroughness that was required of her, she would probably have arrived at a different conclusion. In failing to engage in that exhaustive re-evaluation, she fell into error and the lingering doubts must be resolved in favour of the complainant.

The next troubling issue is that the complainant's evidence appears to have been procured by duress from the police. She stated as follows;

"My parents chased me away when they realized that I was pregnant. I was then 6 months pregnant. I went and lived with accused and when I was arrested. I refused to tell police anything. I was locked in for 3 days. I now did my statement and was released, I went home. The accused person was arrested. The accused had another wife but he rented for me a house in Makuyu. I was a second wife. I now have his child."

The pressure also seems to have come from her parents to whom she wrote some two letters threatening to kill herself. The question that arises is whether it is lawful for a girl who is already over 18 years of age and is a mother, and who has chosen not to testify against the father of her child, whom she considers to be her husband, to be locked up in police cells to force her to testify against the man. What this kind of conduct on the part of the police does is raise doubts as to the *bona fides* of the prosecution. In this case, it is made worse by the admitted demand by the complainant's father, in a meeting at the Chief's office, attended by two elders no less, for the sum of Kshs. 80,000 from the appellant who, incidentally, had been his tenant. His testimony was that;

"After the girl cleared her exams she went missing. After I had been told, I had the chief summons the accused and was told to move out of my houses. When she went missing, my wife saw her in the house of accused. I went and informed police and they went for her. This girl had written some letters while were together but left after putting the letter on the door pigeon. The girl was born in 1991. She was not 18 years at the time she became pregnant. She became 18 years after the birthday. Later accused was arrested and charged. The chief had said we agree and I asked for Kshs. 80,000/= he said that he cannot agree. If he paid we could have sat and sorted out. The chief and the two elders were present. The child is now with me. She now gave birth. Even when she was in the maternity the accused came to see her. He was arrogant and was stating that this is his child."

During cross examination PW2 stated that the Kshs. 80,000 "*was to take care of the education expenses*" he had used on the complainant and not dowry, but the critical point is the admission that had it been paid the matter would have rested. The picture that emerges is of a father righteously indignant that his daughter has been seduced and put in the family way, and who would have the culprit prosecuted unless he would pay some kind of compensation. This, too, raises questions as to whether the prosecution was for the proper purpose of enforcing the law or settling a score. At any rate, the effect is to whittle the reprobate value of the father's evidence and to lend credence to the appellants contention that both the father and chief did know that the girl was of age. The evidence of **PW2,** properly evaluated, would have been in the category of what this Court described in ***NDUNGU KIMANYI vs. REPUBLIC [1979] KLR 282;***

"The witness in a criminal case 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 unrealiable witness which makes it unsafe to accept his evidence."

This now brings us to the last issue, which is the appellant's defence that he believed that the complainant was over 18 years old. He maintained that he had a relationship with her and that she was of a marriageable disposition. When she got pregnant she came to his house and in fact the investigating officer found her with the appellant's wife. The complainant knew that he was married and she was prepared to be his second wife.

The Act provides as follows in section 8(5) and (6):

"(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."

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 sub-sections are to make sense.

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.

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).

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.

We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and *maturing adults* in the sense employed by the English House of Lords in ***GILLICK vs. WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY [1985] 3 ALL ER 402***, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the *age of maturity* but they may well have reached the *age of discretion* and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps. As Lord Scarman put it in that case (at p421);

"If the law should impose on the process of „growing up" fixed limits where nature knows only a continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change." At p. 422.

The law also referred to the judgment of Chief Justice Lord Parker in ***R vs. HOWARD [1965] 3 ALL ER*** 684 at 685;

"…where he ruled that in the case of prosecution charging rape of a girl under 16 the crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that *„there are many girls who know full well what it is all about and can properly consent."***"**

Where to draw the line for what is elsewhere referred to as *statutory rape* is a matter that calls for serious and open discussion. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Archbold Criminal Pleading, Evidence and Practice, [2002] p1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.

For the reasons we have set out herein, we find that the appellant's conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive.

We allow the appeal, quash the conviction and set aside the sentence.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 22nd day of March, 2019.

R. N. NAMBUYE

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR