



**SMM v Republic (Criminal Appeal E052 of 2022)  
[2024] KEHC 13347 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E052 OF 2022  
SM GITHINJI, J  
OCTOBER 30, 2024**

**BETWEEN**

**SMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from Original Conviction and Sentence in PM’s Court at Kaloleni in SO E021 of 2021 before Hon R.Amwayi – SRM delivered on 15th August, 2022)*

**JUDGMENT**

1. SMM was charged in the lower court with two main counts and two alternative counts, one for each main count.
2. The first main count is of defilement of a child contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
3. The particulars of this offence are that on the diverse dates in the month of January, 2019 and 10<sup>th</sup> May, 2021 in Kilifi County within Coast region, the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of SJ a child aged 15 years.
4. In the alternative he faced a charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.
5. The particulars of this offence being that on the diverse dates in the month of January, 2019 and 10<sup>th</sup> May, 2021 in Kilifi County within Coast region, the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of SJ a child aged 15 years.



6. The second count is of defilement of a child contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No.3 of 2006.
7. The particulars of this offence are that on the diverse dates in the month of January, 2019 and 10<sup>th</sup> May, 2021 in Kilifi County within Coast region, the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of MJ a child aged 13 years.
8. In the alternative to the foregoing offence, the appellant faced an offence of Indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No.3 of 2006.
9. The particulars hereof being that on the diverse dates in the month of January, 2019 and 10<sup>th</sup> May, 2021 in Kilifi County within Coast Region, the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of MJ a child aged 13 years.
10. The Prosecution case is that Pw-2 is an older brother to the appellant herein. Their home is in (Particulars withheld) Sub-County; they have each his respective house at the place where their mother also lives in her own house. Pw-2 works at Mariakani and had left his children at home under the care of his mother and the appellant herein.
11. Pw -3 and Pw-1 who are complainants or rather victims in this case are both daughter of Pw-2. The appellant is their uncle. Pw-3 in accordance to her evidence and her child Health Card which was produced as an exhibit, was born on 25/8/2006. Her younger sister the Pw-1 in this case, in accordance to her evidence, that of her father and her produced child Health Card was born on 28/5/2008. The offences were allegedly committed between January, 2019 and 10<sup>th</sup> May, 2021. It therefore follows that for Pw-3, the offence against her was committed when she was between 12 and 15 years old. For Pw-1 when she was between 10 and 13 years old. It's clear that the prosecution took the older age for each in the charge which is to the advantage of the appellant when it comes to consideration of the sentence.
12. In the year 2019 on a date Pw-3 could not remember, the appellant called her into his house. She was wearing a skirt, shirt and a panty. She went to the appellant's house and was led to his bed. He told her to lie on the bed. She did so. He removed her pants. She was lying facing upward. The appellant was in jeans trouser and a shirt. He removed the trouser and his underwear. He went on her and had sex which involved penetration of her vagina by his penis. When he was through he gave her Kshs.30 to buy food on her way to school.
13. The appellant promised to give her money whenever she agreed to have sex with him. Thereafter the appellant called her several times to his house and whenever she went they had sex after which he gave her money as earlier on promised. At times he bought her trousers, skirts and blouses. Pw-3 had not had sex with anyone else. After having had sex with the appellant several times she became pregnant. The grandmother noted she was pregnant. She questioned her and she said it is the appellant who had impregnated her. The appellant took her to Mombasa for an abortion but those who were to assist and conduct it declined his request.
14. The appellant in accordance to the evidence of Pw-1 and Pw-3 also used to have sex with Pw-1. Whenever the grandmother was away and Pw-2, the appellant would take advantage of their absence, get to the house where Pw-1 was sleeping and have sex with her. He would threaten her against screaming while armed with a knife. At least Pw-3 witnessed an incident where the appellant had sex with Pw-1 at a time when they were staying in his house to avoid insects which had invaded their house. At another instance she witnessed appellant caressing Pw-1.



15. On 10/5/2021 PW-2 was called by his mother and after one day by the appellant where it was reported to him that Pw-3 was pregnant. He went home the following day and took Pw-3 to Mariakani Sub-County Hospital. Pw-5 examined her on 17/5/2021 and noted she was 18 weeks pregnant. Her external genitalia was normal but the hymen was broken. Pw-1 was later examined on 19/5/2021. Her hymen was also broken. Their P-3 forms were filled by Pw-5. The mater was investigated by Pw-4 who preferred charges against the appellant. During the trial, Pw-3 gave birth to a boy namely Hussein. On 6/12/2021 the appellant applied to the Court to have a DNA test to confirm paternity of the child, claiming he was not the father. The Court granted the order. DNA was conducted and a report on it's finding produced by Pw-6. It shows that the appellant herein is 99.99% chances the biological father of the boy child known as Hussein.
16. The appellant in his defence denied commission of the offences. He alleged that he went with Pw-3 to Bamburi where he had gone to pick seedlings when Pw-2 called him and said that he had been told that Pw-3 was pregnant. He requested the appellant to take her to hospital. The appellant was not aware that she was pregnant. He told Pw-2 to take her himself. She was taken to the hospital and confirmed pregnant.
17. After one week when the appellant got back home he found his house broken into. His solar, laptop and Kshs. 5,000/= were missing. Pw-2 who allegedly used to practice witchcraft had a grudge with him. He had even stolen his chicken. When he questioned him about it he paid him. Later on the appellant was called by some ladies and arrested. He denied having impregnated Pw-3.
18. The trial court evaluated the evidence and found the two main counts proved by the prosecution beyond reasonable doubt. The appellant was convicted of the offences and sentenced in count 1 to serve 10 years' imprisonment and in count 2, 20 years' imprisonment; sentences to run consecutively.
19. The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that; -
  1. The burden of proof was shifted to him.
  2. Contradictions in the prosecution case were not resolved.
  3. Investigations were poor, shoddy and insufficient.
  4. Unpresented and questionable medical exhibits were relied upon.
  5. The case was fabricated.
20. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
21. As the first appellate court I have re-evaluated the charges, evidence on record, judgment entered and sentence meted; grounds of the appeal and submissions by both parties.
22. The outstanding issue for consideration is whether the essential ingredients for the offence of defilement as outlined under section 8 (1) and 8 (3) of the *Sexual Offences Act* No.3 of 2006 were proved by the prosecution beyond reasonable doubt, to warrant the conviction and the sentences meted.
23. At the onset I wish to state that the facts of the case properly suit a charge of incest under section 20 (1) of the *Sexual Offences Act* as it's clear that the appellant herein is an uncle to the victims, being a brother to their father. However, nothing in law inhibited the prosecution from preferring the offence of defilement given that ingredients for both offences are similar with the difference being that for incest there is extra ingredient of consanguinity, and the offence can be committed against an adult.



24. The ingredients for the offence of defilement are; -
1. Age of the victim where she or he must be a minor, that is a child below the age of 18 years.
  2. Penetration, which is complete or partial insertion of the genital organs of a person into the genital organs of another person and
  3. Identification or recognition of the suspect as the real culprit.
25. Age as was stated in the case of *Edwin Nyambogo Onsongo vs Republic* [2016] eKLR, 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.
26. In this case, the victim's child health cards were produced showing when each was born. The children themselves stated their age which agrees to the given dates of birth. Their father (Pw-2) corroborated the evidence. Given the evidence, their age is not in doubt. The only issue one may raise in relation to the age is that the offence was committed within a span of three years. As I had earlier on expressed, the age indicated in the charge sheet relates to the year 2021 rather than 2019, of which is to the advantage of the appellant given that the younger the victim the harsher the sentence that may be imposed. In such circumstances, it's logical to have the age as the prosecution preferred in this case. The appellant did not challenge the evidence on age and I find it sufficiently settled.
27. The two victims gave explicit details of what the appellant did to them, that using his genital organ namely penis he penetrated their genital organ namely vagina several times of which led to Pw-3 becoming pregnant. DNA conducted on the child born revealed that the appellant is 99.99% the biological father of the child born by Pw-3. The evidence when weighed together leaves no doubt that there was penetration. Medical examination on the two girls revealed their hymen were absent which buttress the fact.
28. The appellant is an uncle to the victims. He was living with them within the same homestead. They could not have made a mistake of him. The DNA report also shows he is the real culprit.
29. His defence is of mere denial and an afterthought. What he alleged in it about Pw-2 was not put to him during cross-examination. The defence was rightly dismissed. I accordingly conclude that the conviction by the lower court was in order and deserved on the two counts.
30. In my view the appellant was given a very lenient sentence in count one, of which is an illegal sentence as under section 8 (3) of the *Sexual Offences Act* the minimum sentence possible is 20 years' imprisonment. However, given that on the second count he was sentenced to 20 years' imprisonment, both sentences to run consecutively, the leniency in count one does not have effect on the minimum period deserved to be served under the Act as he will serve 30 years' imprisonment. I have considered that he was not remorseful and had no meaningful mitigation. Incest would probably have seen him serve life imprisonment. 30 years' sentence is deserved given the circumstances of the offences.
31. The bottom line is that the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024**

.....

**S.M. GITHINJI**

**JUDGE**



In the Presence of; -

1. Appellant present
2. Ms Ochola for the State

