



REPUBLIC OF KENYA



KENYA LAW
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**Nyokabi v Republic (Criminal Appeal E009 of 2022)
[2023] KEHC 1821 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E009 OF 2022
SM GITHINJI, J
FEBRUARY 22, 2023**

BETWEEN

MAGRATE NYOKABI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the Judgment of the PM's Court in SO No.
E010 of 2021 by Hon B.Kabanga conviction and sentence of 20 years
imprisonment dated on 21st December, 2021 at Hola Law Courts)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms. Agatha Mkongo for the State

1. The Appellant herein was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of this offence are that on the 12th and April 15, 2021 in Tana North Sub – County within Tana River County the appellant intentionally and unlawfully caused her vagina to be penetrated by the penis of DM, a child aged 14 years.
3. In the alternative, he faced a charge of committing an Indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006.
4. The particulars herein are that on the 12th and April 15, 2021 in Tana North Sub-County, within Tana River County, the appellant intentionally and unlawfully touched the penis of DM, a child aged 14 years with her vagina.



5. The prosecution called a total of nine witnesses in the case. Their case is that the complainant in this case, who gave evidence as Pw-1, was born on November 28, 2006 in accordance to his birth certificate number xxxx. By the time of the alleged offence on 12th day of April and 15th of the said month 2021, he was aged 14 years old. At the time he was schooling at [Particulars Withheld] in class 6. He was living with his parents at [Particulars Withheld], Village (5). The mother, WN gave evidence as Pw-5. The appellant herein is their neighbour and it was alleged she sells illicit brew. On April 12, 2021, Pw -1 alleged that the appellant whom he knew very well as N, which is a short name for N, urged him to accompany her into the forest to fetch fire woods. He did so. They collected fire woods and on the way back she stopped him. She removed his shorts and the underwear. She caressed his penis. She then removed a condom and wore it on the penis. She stripped her shorts and sat on him. She inserted his penis into her vagina. After they were through they went back using separate routes.
6. The appellant again on April 15, 2021 called the complainant to go and fetch fire woods. The complainant complied and accompanied her to the forest. Along the way children from the very same village were playing on stones. They are Pw-2, Pw-3 and Pw-4. They saw the two going to the forest together. They were curious and suspicious of what they were up to, of which prompted them to secretly follow them. They collected fire woods and placed it in a sack. The appellant then removed the complainant shorts. She as well removed hers. She produced a condom which was in a red wrapper. She gave it to him to wear. He wore it and the two had sex as the three children secretly witnessed. When they were done, they went separate ways. After they left the scene the three children rushed there. The used condom and it's wrapper had been carelessly but luckily left behind. They picked the condom and wrapper using a thorny stick. Pw-2 carried them. They took them to the village where they got a black paper bag in which they placed them.
7. They called the complainant and told him they had witnessed what he had done with the appellant. The complainant denied it and rushed back home. Pw-2 later told the appellant that they had witnessed the incident. The appellant promised to give each one of them 100 Kshs not to disclose it to anyone. Pw-3 and Pw-4 later informed Pw-5 about it.
8. Prior to the two incidents, on March 16, 2021 Pw-5 had attended to another farm in village 3. She harvested maize and upon her return home she saw some footsteps. They had led to her son's room and then to the appellant's home. She questioned the appellant whether she was in the compound. She said she was, to drive out goats which had trespassed to the place. Pw-5 however not contented with the response questioned her why she was in her boy's place and whether she had an affair with him. She got annoyed and bad mouthed Pw-5 in the village.
9. On April 21, 2021 a neighbour called Jane told her about the incident of April 15, 2021. She said some children had witnessed it. Pw 2, Pw-3 and Pw-4 were called and told her about it. They wondered why she was knowing of it then while the information was all over the village. Pw-5 informed her husband who reported to the village headman.
10. There was a women group meeting on April 22, 2021. The village headman referred the issue there. Pw-5 reported the matter there. Pw-6 the vice chair of the group sent women to call the suspect. She refused to attend. More women were sent to collect her. She was forced to attend. At the meeting she denied the allegations. Complainant was called and confirmed it. Pw-3 and Pw-4 were also called and they corroborated the allegation. They produced the collected used condom and it's red wrapper in a black paper bag. They involved the police at Bura Police Station. The police went to the women group meeting and arrested the suspect. They went with her and the complainant, as well as his mother (Pw 5). Pw 8 was handed the used condom, and it's red wrapper in a black paper bag.



11. Pw-7 examined the complainant at Bura Sub-County Hospital on April 24, 2021. His age was assessed as 14 years. Other examinations did not reveal anything that would be relevant to the case.
12. Pw-9 investigated the case. He recorded witness statements and produced in court as exhibits the used condom, red wrapper, black paper bag and birth certificate of the complainant.
13. The appellant in her defence denied the offence. She alleged that between 9th and April 18, 2021 she was doing casual job at village 3 which is far from village 5. She was clearing the farm, uprooting mathenge plant. She was not at the scene of crime on 12th and April 15, 2021 as alleged. Upon her arrest she was beaten and pepper placed in her eyes. Pw-5 fixed her and demanded from her 50,000/= to end the matter. She did not pay and was charged.
14. Her witness Dw -2, a boy, stated she was at their place working in village 3 on the alleged dates. The trial court evaluated the evidence and found the offence in the main count proved by the prosecution beyond reasonable doubt. The appellant was consequently convicted of the same and sentenced to serve 20 years imprisonment.
15. Dissatisfied with the said conviction and sentence, she appealed to this court on the grounds that; -
 1. The prosecution did not prove their case beyond reasonable doubt.
 2. The defence was not properly weighed.
 3. The case was speedily conducted and denied her a fair trial.
 4. Investigations were shoddy as the scene was not visited.
 5. The imposed sentence is harsh, excessive and unjust.
16. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
17. As the trial court itself rightly observed, in this matter there are three ingredients which the prosecution needed to establish beyond reasonable doubt. These are; -
 1. The age of the victim (must be below 18 years).
 2. Penetration of a genital organ by a genital organ.
 3. Identification of the accused as the perpetrator.
18. The foregoing are provided for under section 8 (1) of the *Sexual Offences Act* No 3 of 2006.
19. In this matter, the age of the victim was well stated by himself as well as his mother who produced a birth certificate No xxxx showing he was born on November 28, 2006 which places his age as of 12th and April 15, 2021 at 14 years. To buttress the fact is the clinical officer's evidence that he assessed his age as 14 years. This fact is not disputed by the defence and is firmly settled that the boy was 14 years old then.
20. On the issue of penetration, the appellant was charged with incidents which happened apart on two separate days but in one count. That is not correct for each alleged date should have had it's own count as a distinct separate offence. However the same did not prejudice the appellant in anyway as it appears save for the evidence of Pw-1, the rest of evidence was inclined to the incident of April 15, 2021. I will therefore weigh the issue of penetration in relation to the incident of April 15, 2021.



21. The complainant's evidence is that he was made by the appellant to wear a condom of which the appellant herself provided, before he penetrated her. He inserted his penis into her vagina. Pw-2, Pw-3 and Pw-4 witnessed the incident. After they were through, the condom and its wrapper were thrown at the scene and the children (Pw 1, Pw-2 and Pw-3) collected them. They were eventually recovered by the police and produced as exhibits. Though the medical examination on the victim could not reveal much in relation to penetration, in my view such is expected given the age of the victim as opposed to that of the culprit, and also due to use of the condom and the fact that the victim is the one who penetrated. Penetration may have been slight or full, but whichever would suffice for the offence given the definition of 'penetration' under section 2 (1) of the *Sexual Offences Act*.
22. The available evidence leaves no doubt that the victim penetrated with his genital organ, the genital organ of the appellant. I now turn to the last ingredient of identification of the appellant as the culprit. The appellant is a neighbour to Pw-1 and Pw-5. She also lives in the same village with Pw-2, Pw-3, Pw-4 and Pw-6. All of them knew her either as N, of which is a short name of her name N or N her full name. The eye witnesses who saw and identified her are Pw-1, Pw-2, Pw-3 and Pw-4. She even later when she learnt that Pw-2, Pw-3 and Pw-4 had witnessed the incident promised to bribe each with 100/= not to disclose to anyone. The evidence is cogent and reliable that she is the real culprit.
23. Her defence that she was fixed by Pw-5 and of an alibi that she was away on the alleged dates at village 3, is not true. The strength of the prosecution case to the contrary leaves no room for doubt on possibility that it could have been otherwise. The defence was wisely crafted but is of no effect given the prosecution water tight evidence to the contrary.
24. As the trial court, I am convinced beyond reasonable doubt that the appellant herein committed the offence of defilement against the 14 years old victim.
25. As of sentence of 20 years imprisonment, it is based on the legal provision and hence not illegal. Given the circumstances of the offence it's a deserved sentence. I find no reason or cause to disturb it. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF FEBRUARY, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. The Appellant in Person
2. Ms A. Mkongo for the State

