



REPUBLIC OF KENYA



KENYA LAW
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**GSK v Republic (Criminal Appeal E041 of 2021)
[2023] KEHC 3715 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E041 OF 2021
SM GITHINJI, J
APRIL 25, 2023**

BETWEEN

GSK APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment in Criminal Case No. S.O No. 141/2019 of the Principal Magistrate's Court at Kilifi Law Court before Hon S.D.Sitati - RM dated 21st December, 2021)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Miss Achola for the State

1. GSK, 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 (4) of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of this offence are that on unknown date in the month of July, 2019 within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of KS, a girl aged 16 years.
3. In the alternative the appellant faced a charge of committing an indecent act with a child, contrary to section 8 (4) of the *Sexual Offences Act* No.3 of 2006.
4. The particulars of the offence being that on the unknown date of July, 2019 in Kilifi North, Kilifi County, the appellant intentionally and willingly touched the vagina of KS, a child aged 16 years with his penis.



5. The prosecution case is that the complainant herein who gave evidence as Pw-1 was born on 23/3/2003 in accordance to her birth certificate No.xxxx produced by Pw-3 as Pexhibit 1. Her evidence is that by the time she gave evidence on 4/11/2020 she was aged 17 years old and was schooling at [Particulars Withheld] Primary School in class 8. The appellant herein is her cousin and was living at Kwa Njora, while she was living at Kakanjuni. On 4/11/2019 she was 16 years old. She went to the farm to weed in the morning. Her mother the Pw-2 in this case joined her. The complainant later sought permission from her mother to visit her aunt at Kwa Njora but the mother declined. The complainant left the farm and went home. She prepared and without her mother's knowledge proceeded to Kwa Njora where she arrived at her aunt's place at 3.00Pm. The mother went home and did not find her. She has six children and the complainant is the 3rd born. She asked the rest of siblings where the complainant was, and was told she had gone to visit her aunt. The mother was furious and followed her there in company of a village elder. Pw-2 was inclined to physically discipline the complainant but her attempt to do so was thwarted by the appellant who rose and threatened to beat up Pw-2 if she did so. Pw-2 returned home while the village elder urged the appellant and the complainant to seek forgiveness from Pw-2.
6. The appellant and the complainant despite being cousins were in a Boyfriend-Girlfriend relationship. They have had sex before. The two on the very same night used a motor cycle and went to a friend of the appellant called Kazungu. They told him of the incident. The said Kazungu advised them that since it was late at night they should just go back home and sleep. They went back to the appellant's home and slept together. They had sex that night.
7. The following morning of 10.00am the complainant was returned home. They met Pw-2. The appellant left the complainant and went away. The complainant also left for her pastor's home where Pw-2 traced her. Pw-2 took her to Kilifi Police Station. Pw-3 recorded the complaint and escorted the complainant to Kilifi County Hospital where PRC form and a P3 form were issued and filled. She was examined by Dr Zuma Bimba who noted that her vagina had no physical injury, blood or discharge. Further tests revealed that she was pregnant but not HIV positive. She had however S.T.I in the vaginal tract.
8. On 25/11/2019 the appellant was arrested by Pw-3 and charged on 26/11/2019. Later when the case was still going on in the lower court the complainant gave birth. DNA was not conducted to confirm the paternity of the born child, but the appellant offered financial, moral and physical support to the complainant before, during and after the delivery of the child. He had promised to marry her and gave some lessos to Pw-2 and thereafter attempted to pass to her 5,000/= in a reconciliatory process known in Kilifi as Kajama, but was arrested in the process. The complainant alleged he was the father to the child and have had sex with him twice.
9. The appellant in his defence denied the offence and called two witnesses. He denied that he had sex with the complainant and alleged that in the PRC and P3 forms is alleged by her that she had a sexual relationship with two men. The other man is not disclosed and the issue in relation to the offence was not investigated. The medical examination does not connect him to the offence and to the paternity of the born child.
10. The trial court analysed the evidence in details and concluded that the offence against the appellant was well proved beyond reasonable doubt. He was accordingly convicted of the offence in the main count and sentenced to serve 15 years in prison.
11. The appellant, aggrieved by the said conviction and sentence, appealed to this court on the following grounds; -



1. That the evidence by Pw-1 was unreliable and it was contrary to provisions of section 124 of the Evidence Act.
2. The medical evidence did not link him to the alleged offence.
3. The case against him was not proved beyond reasonable doubt.
12. The appeal was canvassed by way of written submissions. I have considered the charges, evidence adduced, judgment by the lower court, sentence meted against the appellant, grounds of appeal and submissions by both sides.
13. Having weighed the entire evidence on record, I find this an open and shut case, in which the evidence was clearly recorded by the trial court, analyzed and the correct verdict made.
14. The issues for consideration were well pointed out and exhaustively considered by the serious and committed Resident Magistrate. The age of the victim was beyond doubt established by her produced birth certificate. She was 16 years by the time of the alleged offence. She knew what sex is all about and when she said in her evidence that she had sex with the appellant, the court found no ground for doubting the truth of the allegation and what she meant by that. The court rightly concluded that her genital organ was penetrated by the appellant's genital organ; of which I also confirm that given the evidence on record actually did happen. It does matter whether the complainant have had sex with anyone else or not; or whether that other person was charged or not. What matters is whether the appellant herein had sex with the minor and not even whether he was the father to her child. The evidence shows that most likely than not he is the father to the child, but leaves no reasonable doubt that he had sex with the complainant, whereby he penetrated her vagina with his penis. The appellant does not vehemently deny the fact but craves on indication of another person in the PRC and P3 forms who may have had sex as well with the complainant.
15. Such would not exonerate him so long as he himself had sex with the complainant who was by then a minor. Complainant's evidence was well evaluated within the provisions of section 124 of the Evidence Act and the right verdict made. The sentence meted is within the law, the minimum allowed for the offence. The appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25th DAY OF APRIL, 2023

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S.M.GITHINJI

JUDGE

In the Presence of: -

1. The Appellant in Person
2. Mr Kirui for the State

