



**Fahad v Republic (Criminal Appeal E016 of 2022)
[2023] KEHC 21576 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 21576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E016 OF 2022**

SM GITHINJI, J

MAY 31, 2023

BETWEEN

FAMAU MOHAMED FAHAD APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. Famau Mohamed Fahad was charged in the lower court with a main count of defilement, contrary to section 8 (1) as read with subsection 2 of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of this offence are that on 26th day of January, 2017 in Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of US, a girl aged 4 years.
3. In the alternative he is charged with committing an indecent act with a child contrary to section 11 sub-section (1) of the *Sexual Offences Act* No 3 of 2006.
4. The particulars hereof being that on the 26th day of January, 2017 in Malindi Sub-County within Kilifi County, the appellant intentionally committed an indecent act by touching vagina of US, a girl aged 4 years, using his penis.
5. There was also a second count against the appellant of resisting arrest, contrary to section 103 (a) of the *National Police Service Act, 2011*.



6. The particulars of this offence are that on the 3rd day of February, 2017 in Malindi Sub-County within Kilifi County, the appellant willfully resisted to be arrested by No 92913 Cpl Mariam Hussein and No 102921 Pc Dennis Isemeki attached to Malindi Police Station having committed a defilement offence at [Particulars withheld] area thereby interrupting them in the due execution of their duties.
7. The prosecution case is that Pw-2 and Pw-4 in this case are the parents of Pw-1, the complainant herein. By the time of the alleged offence in Count 1, the parents were divorced. Pw 2 was living at [Particulars Withheld] with her four children while Pw-4 was living in [Particulars Withheld]. The complainant in accordance to her Birth Certificate No 779xxx was born on 9th June, 2012. By the time of the alleged offence she was aged 4 years. She was schooling at [Particulars Withheld] Primary School in class 2.
8. On 26.1.2017 in the morning the complainant was taken to school by a Boda boda taxi via her father. Later that day the father organized for her to be picked by his friend who operates a boda boda taxi, the appellant in this case. The appellant picked her at about 4.00Pm. The complainant knew him well as he used to regularly take her to school and pick her after school. On the way home, the complainant alleged that the appellant hit her leg against the motor bike. He then used a rod and cut her at the vagina using the rod. The appellant got the complainant to her father. She was crying and the appellant told the father that she had defecated on herself. The father paid the appellant 50 kshs and told him to take her to the mother.
9. At 7.00Pm the child (Pw-1) had not gotten home. Pw-2 called the appellant asking him where they were. He responded that they were on their way home. The mother left the house briefly and upon returning home she found the complainant crying. Her private part had a cut and she was bleeding. She informed Pw-4 and then took the complainant to the hospital. At Malindi Sub-County hospital she was treated and told to return the following morning. The following day the complainant told the hospital Matron that Famau (appellant herein) inserted a metal inside her vagina. They were referred to the laboratory for examination. The clinical officer who gave evidence as Pw-3 indicated that upon her examination it was noted that she had laceration on right labia majora. Hymen was broken (not intact). There was a watery foul discharge noted. HIV test was negative. The P3 form was thus filled. The doctor concluded that she had been defiled. The matter was reported to the police at Malindi Police Station.
10. Pw-5 investigated the case. He recorded witnesses statements and on 3/3/2017 with the assistance of Pw-4 arrested the appellant. His motor cycle registration number KMDX 279G Boxer, was produced in court as an exhibit.
11. At the closure of the prosecution case the court found that the appellant had a case to answer and accordingly placed him on his defence.
12. The appellant gave a brief sworn testimony where he said that he lives at Maweni and his work is to supply goods. He alleges that he did not defile the girl and was first arrested on the said date.
13. The trial court evaluated the evidence and found the appellant guilty of the offence in count one. He was convicted of the same and sentenced to serve 15 years imprisonment.
14. The appellant dissatisfied with the said conviction and sentence, preferred an appeal to this court on the grounds that; -
 1. The prosecution did not prove their case beyond reasonable doubt.
 2. The prosecution case is contradictory.
 3. Conviction and sentence were against the weight of the evidence by the prosecution.



4. His defence was not weighed in the finding.
15. The appeal was canvassed by way of written submissions. Both parties filed their submissions.
16. I have considered the charges, evidence adduced by the five prosecution witnesses, the appellant's defence, judgment by the lower court, sentence meted, grounds of the appeal and submissions.
17. The issue for consideration in this appeal is whether the ingredients for the offence of defilement were established by the prosecution beyond reasonable doubt.
18. These ingredients under section 8 (1) of the [Sexual Offences Act](#) No 3 of 2006 are; -
 1. The age of the victim which must be under 18 years (minor or child).
 2. Penetration of a sexual organ by a sexual organ either partly or fully.
 3. Proper identification of the perpetrator.
19. A thorough evaluation of the lower court record shows the age of the victim was well established beyond reasonable doubt by the prosecution witnesses. The victim herself stated she was 4 years then. Her mother the Pw-2, stated she was four years as well as her father who gave evidence as Pw-4. The evidence was sealed by production of her birth certificate No 779xxx showing she was born on 9th June, 2012. Her 5th year birthday would have been on 9th June, 2017. Since the incident took place on 26th January, 2017, she was then 4 years old. There is no evidence to the contrary on the issue and position cannot be doubted.
20. On penetration there is a legal issue that emerges in the matter in relation to the offence in count 1 and the evidence adduced mostly by Pw-1, Pw-2 and Pw-3. In relation to it, a distinction need be drawn between the offences of;-
 1. Sexual Assault under section 5 (1) of the [Sexual Offences Act](#),
 2. The offence of defilement under section 8 (1) of the [Sexual Offences Act](#) and;-
 3. The offence of indecent act with a child, contrary to section 11 (1) of the [Sexual Offences Act](#).
21. I will start from the legal position before I evaluate the evidence on record in relation to it. Section 2 of the [Sexual Offences Act](#) defines "*indecent act*" to mean an unlawful intentional act which causes; -
 - a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
 - b. Exposure or display of any phonographic material to any person against his or her will;

"genital organ" includes the whole or part of male or female genital organs and for purposes of this [Act](#) includes Anus."
22. Getting to the offences, section 5 (1) of the [Sexual Offences Act](#) indicates that, Any person who unlawfully-
 - a. Penetrates any genital organs of another person with –
 - i. Any part of the body of another or that person; or
 - ii. An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;



- b. Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.
23. Put in simpler terms this offence involves unlawful penetration of a genital organ by the perpetrator using an object or any part of his body or of another, other than the defined genital organs. However, under section 8 (1) of the *Sexual Offences Act*, defilement involves penetration of a sexual organ by a sexual organ of the perpetrator.
24. Indecent act as defined is touch of the genital organs, breasts or buttocks by the perpetrator, using any part of his body which does not involve penetration; and unwelcome display of phonographic material.
25. The evidence of Pw-1 indicates clearly that her leg was hit against the motorbike by the appellant, who then using a metal rod penetrated her vagina, causing a cut or a tear. Pw-2 also indicated that when she took the complainant to the hospital, she told the matron that the appellant inserted a metal insider her vagina. The medical evidence does not indicate or suggest that the noted penetration was by a sexual organ. What was noted is that the hymen was not intact and there was lacerations on right *labia majora*. An inserted metal rod could also have given rise to such results in my views. Pw-1's evidence does not indicate or even suggest that the appellant could have penetrated her using his sexual organ (penis). She did not state that he undressed or drew it out.
26. The trial magistrate considered that there was penetration of which I fully agree with given the evidence on record, but she failed to interrogate further, penetration was with what. The doctor who is not a legal expert concluded from his observation that the girl was defiled. "Defilement" as earlier on expressed is a technical legal term which involves ascertainment of the ingredients indicated under the *Sexual Offences Act*. The medical officer would have been safer by indicating simply that there was evidence of penetration.
27. What emerges clearly from the foregoing is that the prosecution were able to establish the offence of Sexual Assault under Section 5 (1) of the *Sexual Offences Act* and not defilement under section 8 (1) of the said Act. Section 5 (2) indicates that the offence carries a minimum sentence of 10 years' imprisonment but which may be enhanced to imprisonment for life.
28. Under section 8 (1) where the victim is below the age 11 years or is 11 years old, the perpetrator should be imprisoned for life. It therefore follows that the offence of Sexual Assault, is less serious than that of defilement under section 8 (1) (2) of the said Act.
29. The two offences are cognate and under section 179 of the Criminal Procedure Code this court is empowered to find the appellant guilty of the lesser cognate offence if well proved beyond reasonable doubt.
30. Before hammering the last nail in this matter, I wish indicate that the 3rd ingredient was well proved beyond reasonable doubt. The appellant was a well-known person to Pw-1 as he regularly dropped her to school and as well picked her using his motor bike. Pw-2 and Pw-4 also knew him well and had his phone number. He could not therefore have been mistaken for the real culprit.
31. The bottom line is that the appeal in relation to the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* succeeds. The conviction in relation to it is quashed and replaced with a conviction for the offence of Sexual assault contrary to section 5 (1) of the *Sexual Offences Act*.
32. He was sentenced to 15 years imprisonment which although within the law, wish to reduce to the minimum for the new offence which is 10 years imprisonment effective from December 31, 2021.



DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF MAY, 2023

.....

S.M.GITHINJI

JUDGE

In the Presence of: -

1. The Appellant in Person
2. Ms Mkongo for the Prosecution

