



REPUBLIC OF KENYA



KENYA LAW
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**Kithi v Republic (Criminal Appeal 81 of 2019)
[2023] KEHC 21291 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 81 OF 2019
SM GITHINJI, J
JULY 28, 2023**

BETWEEN

HAMISI MORRIS KITHI ALIAS SAMMY BOSS APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in criminal case No.33 of 2018 of the Chief Magistrate's Court at Malindi before Hon (Dr) Julie Oseko – Chief Magistrate on 1st August, 2019)

JUDGMENT

CORAM: Hon. Justice S. M Githinji

Appellant in person

Ms Mutua for the State

1. Hamisi Morris Kithi alias Sammy Boss was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with sub-section (3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of this offence are that on March 25, 2018 in Magarini Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of MZM, a girl aged 14 years old.
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 hereof are that on March 25, 2018 in Magarini Sub-County within Kilifi County, the appellant intentionally and unlawfully touched the vagina of MZM, a girl aged 14 years using his fingers and penis.



5. The prosecution case is that the appellant herein and PW-2 who is the father of the complainant were living in the same farm at M but in different houses which are 100 metres apart.
6. They were employed by the same person.
7. The complainant herein who gave evidence as Pw-1 was at the time of the alleged offence aged 14 years old. She produced an age assessment report which placed her age at 14 years and her father as well stated she was 14 years old.
8. In accordance to her evidence she prior to having the appellant herein as a boyfriend, had another who broke her virginity. They however parted and she got into a love relationship with the appellant. Though at the time she was living with her parents and other of her siblings, and was schooling at [Particulars Withheld] Primary School in class six; She was able to secure moments and time secretly at the request of the appellant to visit him and have sex with him. They had such many moments, and the last one was on March 25, 2018. She visited the appellant in his house and they had sex at 4.00am. Pw-2 that night had noted she was not in the house. He, together with his wife sought for her but in vain. When she left the appellant's house to get back home, Pw-2 who happened at the time to be going for work saw her. He questioned her as to where she was from. At first she lied but later on she spoke the truth that she was from the appellant's house and they had sex.
9. The father took her to Mamburui dispensary where she was examined. The case was then reported at Marereni Police Station. They were issued with a P-3 form and referred to Malindi Sub-County Hospital. Pw-3 examined her. It was noted that her hymen was missing showing there was forceful entry. Laboratory tests revealed presence of pus cells, which is evidence of an infection. The P-3 form was thus filled.
10. Pw-4 investigated the case and was led by Pw-2 to the house of the appellant where he was got and arrested. He was then charged with the offences carried in the charge sheet.
11. The appellant's defence is to the effect that Pw-2 owed him 2,500/= of which he had resisted paying. He fixed him with the offences to avoid paying the said debt.
12. The trial court considered the evidence and found that the elements for the offence of defilement which the prosecution need establish being; -
 - i. The age of the victim;
 - ii. Penetration and;
 - iii. Identification of the offender; -

Were established beyond reasonable doubt. The appellant was therefore found guilty for the offence in the main count and sentenced to serve 20 years imprisonment. Dissatisfied with the said conviction and sentence, he appealed to this court on the grounds that; -

 1. Voire Dire was not carried out before the complainant gave evidence.
 2. The prosecution case is contradictory.
 3. His defence was not weighed.
13. I have considered the charges, weighed the evidence adduced by both sides, judgment entered and sentence meted, grounds of appeal and submissions by both sides.



14. The most crucial evidence adduced by the prosecution side was that of the complainant. I say so as she is the only eye witness to the incident. She gave evidence as Pw-1 and though the trial magistrate did not record the voire dire process as enunciated in the case of *John Muiruri v Republic* [1983] KLR 445, where the questions put to her and answers should have been recorded, the lower court record of August 6, 2018 shows voire dire was conducted. The trial court recorded it's finding that; -

“I have examined the 14 years old juvenile. She is intelligent enough for her evidence to be admitted. She understands the meaning of oath. She will give a sworn evidence.”
15. Under Article 159 (2) (d) of the Constitution of Kenya, justice should be administered without undue regard to procedural technicalities. Failure by the trial court to record the voire dire process conducted upon Pw-1, is a procedural technicality of which is not fatal to the prosecution case.
16. Pw-1 was bold enough in her evidence to disclose that she was a girl friend to the appellant. They had sex many times. He is not however the one who broke her virginity as a previous boyfriend had. On the night of March 25, 2018 he invited her to his house and they had sex. These lines of evidence show that complainant knew very well what sex was about, penetration of her female genital organ by the male genital organ of the appellant. The trial court gave reasons why it believed in her evidence. The court observed her as she gave evidence. She was consistent in her story which is free of exaggeration.
17. Section 124 of the Evidence Act states that in a criminal case involving a Sexual Offence where the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. In this case the court complied with the said provision in it's finding.
18. The appellant's defence was rightly dismissed. Pw-2 would not have undergone the process of fabricating a case against him, involving his own daughter to avoid a debt of only 2,500/=. There is even no reliable evidence that Pw-2 owed the appellant the alleged amount, save for mere oral allegation about it.
19. Just as the trial court, I am equally convinced beyond reasonable doubt by the evidence on record that the age of the victim was sufficiently established by her own evidence, that of the father and the age assessment report.
20. Penetration was established by the evidence of the complainant as that of the doctor had little probative value if any, given Pw-1's evidence that her hymen was long broken by a different boyfriend, prior to her sexual relationship with the appellant.
21. The appellant was well known to the complainant and to Pw-2. He had been in a sexual relationship with the complainant for a while and was her neighbour. The question of mistaken identity does not arise. The conviction was therefore rightly entered.
22. On Sentence, section 8 (3) of the Sexual Offences Act states that; -

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
23. The appellant herein was sentenced to 20 years, the minimum provided for in law. I have no cause to interfere with the same.



24. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. The Appellant
2. Ms Mutua for the Prosecution/Respondent

