



**Katana v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 21186 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E002 OF 2022
SM GITHINJI, J
JULY 25, 2023**

BETWEEN

BAKARI KATANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon L.N.Wasige – Principal Magistrate in Criminal Case No.23 of 2021 delivered at Kaloleni on 6th day of December, 2021)

JUDGMENT

1. Bakari Katana the appellant herein, was charged in the lower court with a main count 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.
2. The particulars of this offence being that on the diverse dates between April 1, 2021 and May 30, 2021 at Kaloleni Sub-County 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 SK, a child aged 15 years.
3. In the alternative, 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.
4. The particulars of this offence are that on the diverse dates between April 1, 2021 and May 30, 2021 at Kaloleni Sub-County 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 SK, a child aged 15 years.
5. The prosecution case is that the complainant in this case was born on June 1, 2006. Her produced birth certificate No.xxxx indicates of her date of birth as such. At the time of the alleged offence, which the last date was May 30, 2021. She was 14 years old as on June 1, 2021 is when she would have clocked



- 15 years old. She was a primary school pupil in class 4 then. She was residing with her grandmother and her sister at [Particulars Withheld] Village. Her mother the Pw-2 in this case was however living elsewhere at Nguhiweni. The appellant herein was a neighbour to the complainant as he was living about 500 metres away.
6. At the time he was aged 19 years old. The complainant and the appellant had a love relationship which commenced after the schools were closed due to corona epidemic. Prior to 30/5/2021 the two had sex for four times in the appellant's house. On 29/5/2021 the appellant invited the complainant to spend the night with him in his house. The complainant obliged in the evening. She left secretly without informing her grandmother and her sister. It was the first time she was to spend a whole night with the appellant. They slept together and had sex. On 30/5/2021 the grandmother noted that the complainant was missing in the house. She reported the issue to her daughter, who is the mother to the complainant, the Pw-2 in this case. Pw-2 reported the matter to Pw-3, the village elder. Pw-3 reported the incident to the assistant chief, one Baushi. Baushi advised them to report at Kaloleni Police Station. They reported and continued searching for the complainant. In the process, Pw-3 bumped into the appellant who revealed that the complainant was in his house. The complainant returned home and when she was asked where she had spent the night she said it was at the appellant's home.
 7. On 31/5/2021 Pw-2 took her to Kaloleni Police Station for a report. They reported to Pw-4 a case of defilement. Pw-4 investigated the case. She visited the appellant's house and noted he was living about 500 metres from where the complainant was living with her grandmother. Pw-1 was issued with a P3 form. It was filled by Pw-5 on 31/5/2021 at Mariakani Sub-County Hospital. The medical officer noted that she had a normal unkempt genitalia. Labia was intact but hymen was missing. There was loose vagina sphincter muscles. Other laboratory tests were negative, save for a fungal infection. She concluded that there was adequate penetration. The appellant was then arrested and charged.
 8. The appellant in his defence said he was born on May 6, 2002. He was 19 years old. He was living at Birini and his work was to tap wine. The complainant was his girlfriend. He was not aware that she was 15 years old. He had asked her about the age and said she was 19 years old. She used to visit him in the house where they had sex.
 9. The trial court evaluated the evidence and found the appellant guilty of the offence in count 1. He was convicted of it and sentenced to serve 20 years imprisonment.
 10. Dissatisfied with the said conviction and sentence the appellant filed an appeal to this court on the grounds that; -
 1. The prosecution presented no cogent and tangible evidence to warrant a conviction.
 2. The prosecution case is contradictory, inconsistent and unsubstantiated.
 3. The court relied on evidence of a single eye witness.
 4. The period he had spent in remand was not considered while sentencing him.
 5. His unshaken defence was not properly weighed.
 11. The appellant later availed an amended grounds of appeal of which grounds are not much different from those previously raised. I will not therefore reproduce the amended grounds though have gone through them.
 12. The appeal was canvassed by way of written submissions.



13. As an appellate court I have considered the offences preferred, evidence adduced by the prosecution, the defence, judgment and sentence by the lower court, grounds of the appeal and submissions.
14. In this appeal or case, it is not disputed that at the time of the offence complainant was a child, below the age of 18 years. The charge reveals she was then 15 years but as of 30/5/2021 she was 14 years old, just a few hours from clocking age 15. The produced Birth Certificate showing she was born on 1st June, 2006, buttress the fact. The other undisputed facts are that the appellant and the complainant were neighbours and lovers. They have had sex 5 times prior to 31/5/2021. The appellant though alleges in his amended grounds of appeal that he was then below 18 years, stating he was 17 years; in his defence he stated he was 19 years old and gave his date of birth as 6th May, 2002. Grounds of appeal are not evidence. Evidence is what he offered as such in Court. I therefore find no doubt that he was at the time of the offence, as he alleged, 19 years old.
15. Under section 8 (1) of the *Sexual Offences Act*, a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
16. The appellant herein, no doubt committed the said offence. However, he raised a defence that the complainant told him that she was 19 years old.

Section 8 (5) of the *Sexual Offences Act* states that; -

(5) It is a defence to a charge under this section if; -

- a. It is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- b. The accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

17. The trial court in dismissing the defence stated that the appellant did not cross-examine the complainant in regard to it and was therefore an afterthought. I however do note that the trial court which had advantage of seeing the complainant as she gave her evidence, did not indicate of her physical appearance "*apparent age*." Her demeanor in relation to age was also not noted. What the Court indicated about her, out of *voir dire*, is that; -

"I have orally examined the complainant minor who informs me she is 15 years old. She is in class 4 at (particulars withheld) Primary School. The complainant is an intelligent girl who has answered all my questions satisfactorily. She is aware of her court environment and understands the importance of telling the truth in Court. She also appreciates the meaning of taking Oath. She shall be sworn."

The questions put to her by the court and the answers she gave in response were not captured in the record. This court can therefore only rely on the lower court's conclusion on this issue.

18. The appellant is a lay person to the matters of law. He may not have been aware of the recognized possible defence at the time he cross-examined the complainant, and even if he was aware, may not have appreciated the significance of cross-examining her on it. The complainant who is said by the trial court to be an intelligent girl, having been in love with the appellant may have implied to him that she



was an adult, to keep the relationship. The court not having observed from the complainant's physical appearance and demeanor that no reasonable person would have passed her for an adult, the appellant's defence carries significant weight. It should not simply have been dismissed for only the reason that he did not cross-examine the complainant on it.

19. The trial court may not have been certain on the truth of the defence, but it raised a reasonable doubt on an issue of which being a recognized defence in law for the offence, should have been resolved in favour of the appellant. I do take this position and resolve the doubt in favour of the appellant. The appeal therefore succeeds and the appellant conviction and sentence are hereby quashed. He is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JULY, 2023

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S.M.GITHINJI

JUDGE

In the Presence of; -

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

