



REPUBLIC OF KENYA



**SKM v Republic (Criminal Appeal E043 of 2022)  
[2023] KEHC 21289 (KLR) (8 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21289 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E043 OF 2022  
SM GITHINJI, J  
AUGUST 8, 2023**

**BETWEEN**

**SKM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence issued on 9/06/2022 by Honourable S.D.Sitati – Resident Magistrate, Kilifi Law Courts in Criminal Case No.E055 of 2020)*

**JUDGMENT**

CORAM: Hon. Justice S.M. GITHINJI

Appellant in person

Ms. Mutua for the State

1. SKM was charged in the main count with the offence of attempted defilement contrary to section 9 (1) (2) of the *Sexual Offences Act* No.3 of 2006.

The particulars of this offence are that on the 9<sup>th</sup> day of December, 2020 at around 09:00 hours in Ganze Sub-County within Kilifi County, the appellant intentionally attempted to cause his penis to penetrate the vagina of AC, a child aged 6 years.

2. The appellant also faced an alternative count of committing an indecent act with a child, contrary to section 11 (1) of the *Sexual Offences Act* No.3 of 2006.

The particulars of this offence being that on the 9<sup>th</sup> day of December, 2020 at around 09:00 hours in Ganze Sub-County, within Kilifi County, the appellant willfully and intentionally touched the genital organ namely vagina of AC, a child aged 6 years.



3. The prosecution case is that the complainant in this case was living at Gandia in Kilifi with her mother and other siblings. The appellant is their relative and a neighbour. Her grandmother, the Pw-3 in this case is a close neighbour to the appellant. The appellant had grown some cassava in his farm and on 9/12/2020 at 9:00am the complainant who was then aged 6 years went for cassava from him. The appellant led her to his farm. According to her, he laid her on the ground, removed her under pant, then removed his short and put his penis in her vagina. She felt pain but could not shout as he had held her mouth. Lucky enough, Pw-3 at the said time went to borrow fire from the appellant. She saw the appellant in the cassava farm. He was holding on the complainant. He had drawn out his penis and was using it to rub on the vagina of the complainant. She asked him what he was doing. The appellant asked her for forgiveness.

Pw-3 said she will report him to the parents. The complainant's mother was away and she reported to the appellant's brother who is also a Nyumba Kumi elder. The brother by the name of Kwa D, reported the matter to the police and took the appellant to the area chief. The mother (Pw-1) later went to the chief's office and were referred to the D.O. At the place the appellant prayed for forgiveness but he was not forgiven. He was taken to Ganze Police Station. At the place they were referred to Kilifi County Hospital. The complainant was examined and her P-3 form as well as PRC form were filled.

4. The medical officer who examined her noted that she had no bruises but the hymen was broken. Laboratory test revealed pus cells. The officer made an opinion that there was evidence of attempted defilement.

Pw-4 investigated the case and charged the appellant with the said offence.

The appellant's defence is that on 9/12/2020 very early in the morning, Pw-1 went to his house for cassava. He had not woken up and advised her to return later in the day. Thereafter he rose, prepared himself and went to the farm. Shortly the complainant appeared. She said she was sent by the mother to collect the cassava. He gave her the cassava and expected to be paid later by Pw-1. While they were still in the farm Pw-3 appeared. She asked the appellant what he was doing with the victim. The appellant told her what he was doing but she insisted that he was doing bad manners with her. She said she will report him. The appellant continued with his work. As he later proceeded home, he was stopped by two men who alleged that he had defiled the complainant. He was led before Nyumba Kumi elder. They deliberated and he was taken to the chief. The chief did not listen to him but referred him to the police. He was beaten at home. He denied commission of the offence.

5. The trial court evaluated the evidence and found the appellant guilty and was consequently sentenced to 5 years' imprisonment.

Dissatisfied with the said finding, the appellant preferred an appeal to this Court on the grounds that; -

1. Intent to commit the offence was not established by the prosecution.
  2. The case was not proved beyond reasonable doubt.
  3. His defence was not properly weighed.
  4. Medical evidence did not support the charge.
  5. Complainant's evidence was inconsistent.
  6. Prosecution case is not corroborated.
6. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.



I have weighed the charge against the appellant, evidence adduced in the lower court, judgment and sentence meted, grounds of appeal and submissions by both sides.

Most of the facts as adduced by the prosecution witnesses are not disputed by the appellant. The appellant in his defence concedes that the victim had gone to his house for cassava and they went to the cassava farm. He does not also dispute that Pw-3 visited when the two were in the farm and raised a concern on what he was doing with the victim. Thereafter he was arrested. The disputed issue is whether he attempted to defile the complainant. The complainant, herself, stated she was defiled as she was penetrated. However, the evidence of Pw-3, an adult who witnessed the incident reveals that the appellant rubbed his penis on the vagina of the victim. The evidence of the clinical officer (Pw-5) also supports this position. The lower court was convinced that the appellant's intention was to defile the victim but the presence of Pw-3 cut him short. The issue for determination by this Court is the intent of the appellant, given what he did to the victim.

In *David Aketch Ochieng-vs-Republic* [2015]Eklr, Justice Makau held that:-

“.....For a successful prosecution of an offence of an attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from the complainant's vagina, and/or bruises or lacerations of culprit's genital organ and finding on discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration.”

7. Intent can only be informed by the overt act of an accused person as it's hard to read anyone's mind. The question for the court to determine is whether the overt act as established by the prosecution, establishes beyond reasonable doubt that the accused intended to commit the offence of which he was charged of having attempted to.

The appellant herein had drawn out his penis and undressed the victim whom he had laid down in the farm. He was then caught red handed by Pw-3 as he rubbed his penis on her vagina. These set of facts shows that he intended to penetrate her and was only cut short by the unexpected presence of Pw-3. I am therefore equally convinced that the offence of attempted defilement was proved by the prosecution beyond reasonable doubt. He was therefore rightly convicted by the lower court.

On sentence, the lower court was lenient enough to sentence him to 5 years' imprisonment. I need not interfere with the same. I accordingly find the appeal in want of merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 8<sup>TH</sup> DAY OF AUGUST, 2023**

.....

**S.M.GITHINJI**

**JUDGE**

**In the Presence of:** -

1. The Appellant in Person and Mr Mwarumba holding brief for Mr Omondi for the Appellant.
2. Ms Mutua for the State

