



REPUBLIC OF KENYA



**Appellant v Republic (Criminal Appeal E032 of 2021)  
[2023] KEHC 23018 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23018 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E032 OF 2021  
SM GITHINJI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**NASIR PONDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal against both conviction and sentence in Sexual Offences  
Case No.13 of 2019 before Hon N.C.Adalo –SRM at Mariakani Senior  
Principal Magistrate’s Court delivered on 13th November, 2019)*

**JUDGMENT**

**CORAM:** Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. Nasir Ponda the appellant herein was charged in the lower court with the offence of defilement 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 are that on January 27, 2019 in Tara Sub-County within Kwale County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of NC a child aged 13 years.
3. In the alternative the appellant 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 being that on the January 27, 2019 in Tara Sub County within Kwale County, the appellant intentionally and unlawfully touched the vagina of NC, a child aged 13 years.



5. The Prosecution Case is that the complainant in this case was born on December 5, 2007 and was aged 13 years at the time of commission of the said offence. She was living with her mother (Pw-2), other of her siblings and Pw-3 in this case at [Particulars Withheld] Village, [Particulars Withheld] . She was a pupil at [Particulars Withheld] Primary School in class 5. On January 27, 2019 at about 9.00 Pm the appellant who is their neighbour visited them. He was in the habit of paying them a visit as a neighbour. He had his meal with him, of ugali and fish. He requested Pw-2 to warm it and was directed to warm it outside. However, he declined and insisted on warming it inside the house of which he did. Pw-2 got into the bathroom meanwhile. The appellant warmed the food and ate it.
6. When Pw-2 finished bathing, the appellant invited her to the meal but she declined, saying that she was full. He finished eating and deliberated with Pw-2 till 10.00 Pm. Pw-3 had no room in the said homestead and was sleeping outside.
7. He had slept by that time. At 10.00Pm Pw-2 expressed intention to go to sleep and urged the appellant to go to his house to sleep. Pw-2 told the complainant to join him later in his house for food. He left for his house. When Pw-2 went to sleep, the complainant slipped out of the house through a hole which had been made in the wall by a plough. Pw-2 and Pw-3 did not notice her move. She went to the appellant's house. The appellant was absent, having gotten to another neighbour's house. She waited outside. After a short while the appellant got back. He welcomed her.
8. The appellant told her that he wanted them to do "this and that". She did not get it and asked him to be clear. It's then he said he wanted them to have sex. He held her hand and led her into the house. He urged her to undress of which she resisted. He undressed her forcefully. She had a tight top and a biker but had no pant. He removed them. He then had sex with her, after which she returned home and got back to the house through the hole in which she had sneaked out.
9. Meanwhile, when she was away Pw-2 had noticed of her absence. She searched for her in the house and within the compound but in vain. She even woke Pw-3 and asked him whether he was aware of where she was, but he was not. When they confirmed she was not around, they decided to get back to sleep and wait.
10. When the complainant returned and slept, the mother heard her snoring in the house. She went and woke her up. She was asked where she was and hesitated to tell. She was beaten and disclosed that she was with the appellant and they had sex. They slept.
11. In the morning she was taken to the head teacher and the incident was reported to him. The teacher went looking for the appellant. He was traced and arrested. The matter was reported at Taru Police Station. Pw-6 investigated the case. Complainant was taken to Samburu Health Centre. She was examined by Pw-5 on January 28, 2019 at 9.00Pm. He noted that she had blood in her vagina walls and her hymen was broken. The clinical officer opined that there was vaginal penetration.
12. Her age was assessed by Pw-4 at Mariakani Sub-County Hospital. The age was assessed at 14 years on June 3, 2019.
13. The appellant was then charged with the offences in the charge sheet. His defence is that he hails from Taru and is a machine operator. He is married and is a father of one child. On January 27, 2019 while on duty a teacher of the school he went to approached him. He was urged to accompany him to the hospital as there was a sick relative. Out of respect for the teacher he did so. He was however led to the police station. He was fixed as he had quarreled with his neighbours as their cows were trespassing in his farm. Out of it they had compensated him with 18,000/= and vowed to revenge.



14. The trial court evaluated the evidence and found that the offence in the main count was proved against the appellant beyond reasonable doubt. He was convicted of it and sentenced to serve 20 years imprisonment.
15. Dissatisfied with the said conviction and sentence, he appealed to this Court on the grounds that; -
  1. The entire evidence was not properly evaluated.
  2. The prosecution case was incredible and unsafe to convict on.
16. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
17. I have considered the charges preferred, evidence adduced in the lower court, judgment by the trial court and sentence meted; grounds of the appeal and the submissions.
18. The undisputed and now well settled ingredients of defilement as derived from section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006 are; -
  - i. The age of the victim, who must have been a child at the time of the offence; that is below 18 years. For the purpose of sentence, the age be specifically stated or disclosed.
  - ii. Penetration, of which is of a genital organ by a genital organ. It can be partial or complete.
  - iii. Identification or recognition of the accused as the real culprit.
19. In this case the appellant was well known to Pw-1, Pw-2 and Pw-3 as he was a neighbour and a frequent visitor to their house. He was with the victim hours before the incident as he warmed his meal of ugali and fish before he took it. He extended his visit as he deliberated with PW-2. When PW-2 left for sleep, he invited the victim as he went to his house.
20. The victim was later found missing in the house. When she surfaced later she stated she was with the appellant. The victim had no cause to fix him.
21. From the evidence of PW-2 and PW-3. She even tried to shield him from responsibility and had to be beaten to state what happened.
22. She stated in details of what happened in the appellant's house. She was undressed and they had sex. Pw-5 who examined her the following day found evidence of penetration of her genital organ and was of the opinion that she was penetrated. Given the available evidence I have no doubt that she was penetrated.
23. She gave her age as 13 years and the mother also confirmed that was her age. The age assessment placed her age at 14 years. Both ages are within the range given under section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006. Whether she was actually 13 or 14, does not make a difference for the purpose of the offence and the sentence. However, I wish to state the mother is the one best placed to know the age of her children. The expert opinion might not be exact as it has an error margin, and if anything it's an opinion given on well-established scientific process and finding. In my view, the victim was 13 years old then.
24. The appellant's defence is a sham. It was an afterthought as it was not tested on the witness as they offered their evidence. There is reliable evidence he was a close friend to the victim's family to an extent that he could direct himself on where to warm his meal even contrary to Pw-2's proposal. There was no grudge before then between them.



25. On sentence, the 20 years imprisonment is within the law. Given the circumstances under which the offence was committed, to a young school going girl, it was deserved. I find no reason as to why it should be disturbed in favour of the appellant.

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

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023**

.....

**S.M.GITHINJI**

**JUDGE**

**In the Presence of; -**

1. The Appellant in Person
2. Ms Mkongo holding brief Ms Mutua for the State

