



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Karisa v Republic (Criminal Appeal E041 of 2021)
[2023] KEHC 25815 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E041 OF 2021
SM GITHINJI, J
NOVEMBER 22, 2023**

BETWEEN

MOHAMED HAMISI KARISA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from Original conviction and sentence through criminal case No.E006 of 2018 in the Magistrate's Court at Lamu before Hon. M.M.Maina Wachira – PM on Judgment delivered on 7th October, 2021)

JUDGMENT

1. Mohamed Hamisi Karisa was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section (3) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of this offence are that on the 14th day of February, 2021 at [Particulars withheld] Village within Hindi Division in Lamu Central, Lamu County, the appellant intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of A.N., 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 of this offence being that on the 14th day of February, 2021 at [Particulars withheld] Village within Lamu Central in Lamu County, the appellant intentionally and unlawfully touched the vagina of A.N, with his male genital organ namely penis, a child aged 13 years.
5. The victim in this case stated that she was told by her mother that she was born on 20/5/2007. She had no birth certificate. In her evidence she alleged she was 14 years old and was a class 7 pupil at [Particulars withheld] Primary School. She was living at KN with her grandmother who was taking care of 14 children. She had been impregnated by a person called John of Mpeketoni. However, on valentine day,



the 14th day of February, 2021 she visited her mother's place. The mother was working at a mnazi beer club at [Particulars withheld]. The victim had a secondary school student friend called O. O introduced her to his brother Mohamed, the appellant herein. The said O also gave his brother Mohamed, the victim's phone number. The victim arrived at her mother's work place at 7.00am and told her that she was going to Mohamed's place. The mother gave her green light to go. Her mother employer paid for the boda boda which took her to Mohamed's place. She found Mohamed with Sule and his brother. They were there during the day till the darkness fell, just relaxing. In the evening she made food. They ate it and went to sleep. She shared a bed with Mohamed and they had sex. He penetrated her vagina with his penis.

6. The following day on 15/2/2021 PW5 who is the headman in [Particulars withheld] area, received a call from Maua Mwende. She reported that a girl of her employee had eloped with a mgema(brewer). PW5 investigated and found that she was at Magogoni. He called an NPR called Njoroge (PW4) to help in arresting the suspect. PW4 confirmed that the incident had been reported at Mokowe Police Station. In the company of PW5, Mwangi and Kamau they headed to TSS land in the forest. They found the victim in the company of two other men. The victim had no identification card, and stated she was 16 years old. According to PW5 the men were three and one of them was Munene. The other two were strangers to him. They arrested all of them and took them to Hindi Police Station.
7. The matter was investigated by PW2. On 15/2/2021 the complainant refused to undergo medical examination. She was taken to court and ordered to. She alleged she did not want the appellant to be jailed as she had another case at Mpeketoni on her pregnancy.
8. PW3 examined the victim on 15th and 16th of February, 2021. She said she had sex on the night of 13th -14th February, 2021 and turned pregnant. She disclosed the one responsible for pregnancy was John. On 15th she refused her private part be examined. She said the appellant had promised to marry her as there was no possibility of her getting back to school. On 16th she was examined. The genitalia was normal. She had yellow discharge in vagina. The hymen was absent but not freshly torn. The yellow discharge was a sign of an infection caused by sexual intercourse. The clinical officer made treatment notes and filled a PRC form of which he produced as exhibits. The suspect was not examined. Age assessment of the victim was done by a dentist, Dr Yusuf, and though the date it was done is not indicated, her age was assessed to be between 14-15 years old. The made report was produced as Pexhibit – 4. The appellant was then charged with the offences carried in the charge sheet.
9. The appellant's defence is that he lives at [Particulars withheld] where he is a Mgema(brewer). On 15/2/2021 he worked till 10.00am. When he got back home KPR went to his house in company of the victim. They asked who was Mohamed Khamisi and said he was the one. He was asked whether he knew the girl and said he did not. They took photographs. He was then taken to the police station and charged.
10. In January, 10th 2021 he had differed with his boss called Mbuthia over Kshs 5,555/=. He had sold brew to him and he was reluctant to pay for it. He eventually asked the appellant if he wished to have his money or to go to prison. The mother to the complainant works for Mbuthia where she sells beer. She as well lives in his rental houses.
11. The trial court weighted the evidence and found that the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 20 years imprisonment.
12. Dissatisfied with the said conviction and sentence he appealed to this court on the grounds that; -
 1. Prosecution case had variances, inconsistencies, contradictions and was uncorroborated.



2. The case was poorly, inadequately and shoddily investigated.
 3. The burden of proof was wrongly shifted on him.
 4. The case was fabricated against him.
13. The respondent opposed the appeal and the same was canvassed by way of written submissions.
 14. I have as the first appellate court considered the charges, evidence adduced in the lower court, judgment of the court, sentence meted, grounds of the appeal and submissions by both sides.
 15. The issue for determination is whether the main count of defilement was proved by the prosecution, against the appellant beyond reasonable doubt.
 16. As was rightly considered in the judgment of the lower court, the three ingredients for an offence of defilement as carried under section 8 (1) of the *Sexual Offences Act* are;-
 1. The age of the complainant, which must be below 18 years; that is a child.
 2. Penetration which under section 2 of the *Sexual Offences Act* is either partial or complete insertion of the genital organs of a person into the genital organs of another person. Here I wish state that any slightest penetration would suffice for the offence.
 3. The last one is proper identification or recognition of the suspect as the culprit. Section 8 (5) (a) and (b) and 8 (6) discloses 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.
 - c. 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 complainant.
 17. Considering the evidence in place, the only issue that the court need determine is on the age of the complainant and the recognized defence in law under section 8 (5) (a) and (b); and (6).
 18. The charge particulars disclose the complainant was 13 years old as of the time of the alleged offence, on 14/2/2021. In her evidence she said the mother told her that she was born on 20/5/2007. Though if the given date of birth is correct her age as of 14/2/2021 was 13 years; no birth certificate was produced in support and her mother was not called as a witness. The given date of birth is therefore hearsay of which is not admissible in evidence.
 19. PW4 in his evidence alleged the complainant stated she was 16 years old, on 15/2/21. Though her age was assessed, the date of assessment is not given. The assessor is a dentist, Dr Yusuf, who was not called as a witness. I have seen his report, P-Exhibit -4, and it does not disclose the process used to determine the age. One can only assume that since he is a dentist, he used teeth development and growth, to arrive at the age of between 14 and 15 years. As is well known, age assessment gives a probable age and has an error margin which range is determined by the scientific process used. It is not definite or precise even where a range is given as is in this case of between 14 and 15 years. The circumstances of this case are that by the time the complainant was allegedly defiled by the appellant she was already pregnant, having



been impregnated by another man, disclosed by her as John of Mpeketoni. It is not known how old was the pregnancy and whether it was visible as of the time of the offence. When the complainant gave evidence on 2nd July, 2021, the court observed and recorded that, “The girl though 14 years old has a big body and is tall. She appears to be truthful.” This last statement, “she appears to be truthful,” could not have been reasonably founded on having a big body and being tall. At the point it was recorded the court was not making a finding on *voire dire* as it was after her evidence-in-chief. Having a big body and being tall has only relevance in terms of appearance in relation to age given the matter at hand. Could the court then have mistaken the terms by indicating, that “she appears to be truthful” instead of indicating “she appears to be an adult?”. There is such possibility given the circumstances.

20. The victim took herself to the appellant. The mother gave her green light for the visit. Her employer paid for the motor bike to take the victim to the appellant. The two were not called as witnesses. It is not disclosed why they were not considered as relevant witnesses.
21. It is not explained why they did so, especially the mother if the victim was a child and schooling. For her employer he could not have been possessed of the alleged facts, and given her looks, probably thought she was an adult. Their evidence was necessary to explain these issues.
22. According to PW5, the matter was reported by Mama Mwendu who alleged a girl of her employee had eloped with a (mgema) brewer. The said Mama Mwendu was not also called as a witness. There is the question of how she learnt of the incident and that the victim was a minor.
23. The foregoing facts when considered together discloses that the actual age of the complainant is not known or was not sufficiently established. The age assessment report is not of much help as the process used to arrive at the probable age was not disclosed. The court did not observe and disclose the apparent age of the victim and given what it observed of her, the probable apparent age is that she was an adult. There is no evidence that the appellant knew of her age or had reasonable cause to know it or suspect that she was a child. She took herself to him while she was already pregnant, having been impregnated by someone else. She even cooked food for them. The given circumstances and her behavior avails to the appellant the defence under section 8, 5(a) and (b), where he had reasonable cause to believe that she was an adult, if at she was not. As a lay person to matters of law he may not have raised the defence, but it sufficiently prompts itself from the evidence on record. The trial court should have accorded him the benefit of doubt on this. This court does so. The appeal therefore succeeds. The conviction and sentence are quashed and the appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22nd DAY OF NOVEMBER, 2023

.....
S.M.GITHINJI

JUDGE

In the Presence of; -

The Appellant in Person

Ms Mkongo for the Prosecution

