



REPUBLIC OF KENYA



KENYA LAW
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**Kazungu v Republic (Criminal Appeal E008 of 2021)
[2023] KEHC 27125 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E008 OF 2021
SM GITHINJI, J
DECEMBER 18, 2023**

BETWEEN

BENARD RAMA KAZUNGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the Judgment of the SRM's Court at Lamu Court
by Hon T.A.Sitati – SRM dated 10th May, 2019 in Criminal Case No.22 of 2018)*

JUDGMENT

1. Bernard Rama Kazungu was charged with a main count 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 the 4th day of December, 2018 at around 16.00 Hours in Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MWW, a child aged 15 years.
3. The appellant 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 hereof being that on the 4th day of December, 2018 at around 16:00hours in Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully touched the vagina of MWW an “adult” aged 15 years with his penis.
4. According to the prosecution evidence, the victim in this case was born on 21/3/2003 in accordance to her birth certificate which was produced by the prosecution as Exhibit 1. At the time of the alleged offence, on 4/12/2018 she was aged 15 years. She had completed her KCPE at [Particulars Withheld] Primary School and was living with her mother (Pw-3) at [Particulars Withheld] Village.
5. The appellant herein was employed by an elderly lady namely Mary Wairimu as a shamba boy. Mary Wairimu was a friend and a neighbour to Pw-3. She had solar energy in her house and Pw-3 and the



- victim used to charge their phones in her house. The appellant was therefore well known to both of them.
6. On the material day, 4th December, 2018 the victim was joined by her child friend namely MN, the Pw-2 in this case. The two decided to go and charge the victim's phone in the house of Mary Wairimu. The victim sought permission from her mother to do so, and she was allowed. They took the phone. When they went for it later at 11.00am they found the appellant herein. He told them the phone had not fully charged. The two girls said they could wait for it to charge fully. The appellant welcomed them into the house, to wait while watching Television. They entered. After a short while Pw-2 said she needed to rush back home to take a shower. Her home was nearby. She went leaving the victim alone with the appellant. The appellant turned on the victim with sexual overtures where he told her that he loved her. He held on her hands and pulled her onto a bed. The victim resisted and forcefully struggled to set herself free. The appellant forcefully pulled down her pink shorts and in the process damaged it's zip. In the struggle the victim took a piece of wood and hit him with it on the face, injuring him. However, the said attack did not kill the appellant's determination. He pressed her down and inserted a lesso in her mouth to stifle her from raising an alarm. The victim pulled out the lesso and managed to bite him on the neck and shoulder. The appellant still did not give up. He inserted his fingers into her vagina. He overpowered her and managed to eventually insert his penis into her vagina. The victim was still struggling. She got the lesso off her mouth and managed to scream. She shouted that the appellant was raping her. Pw-2 had by then taken a shower and was on her way to join the victim. She heard her screaming for help. She rushed to assist her. On arrival she found the door closed. She forced it open and entered into the house. She saw the victim and the appellant on the bed naked. The appellant was startled to see her. He threatened that she will face it but that did not deter her. The victim in the confusion managed to escape, grappling the lesso to cover her nakedness.
 7. The two girls went to the house of Pw-4 to seek help. The victim was crying. They requested to be escorted back to the appellant's house to pick the phone and call the mother. The mother had left for prayers. Pw-4 escorted them. The appellant gave them the phone, earphones and shoes. They then left. The victim called her mother and when the mother got home, the two girls narrated to her what had taken place. The mother reported the incident to the local security members. They went to the appellant's house. He denied the allegation, saying that the victim was mad. He was arrested and taken to Mokowe Police Station.
 8. Pw-5 investigated the case. He visited the scene and recovered the wooden stick allegedly used by the victim to attack on the appellant, and the victim's pink short which had a spoilt zip. He took them as exhibits.
 9. Pw-6 examined the victim at King Fahd Hospital and filed her P-3 form. The doctor noted that her vagina walls were reddish and had a vaginal discharge. Urinalysis showed fungal infection. She was not however pregnant. The doctor concluded that she had been penetrated. The appellant was thus charged with the offences in the charge sheet.
 10. When he was placed on his defence he opted to remain mute.
 11. The trial court found the evidence against him overwhelming. He was convicted of the offence in the main count and sentenced to serve 20 years imprisonment.
 12. Dissatisfied with the said conviction and sentence he appealed to this court on the following grounds; -
 1. The trial court did not weigh the gaps and contradictions in the prosecution case.
 2. The case against him was not proved by the prosecution beyond reasonable doubt.



3. The alleged fungal infection was not linked to penetration.
13. The appeal was canvassed by way of written submissions. Both parties filed their respective submissions.
14. The respondent opposed the appeal on the ground that all ingredients for the offence of defilement were proved by the prosecution beyond reasonable doubt and the sentence passed was legal.
15. As the first appellate court I have considered the offences the appellant was charged with, the evidence adduced by the prosecution witnesses, judgment of the lower court and sentence, grounds of the appeal and submissions by both sides.
16. As was observed by the trial court in its judgment, this is a case where the evidence adduced against the appellant is overwhelming. The evidence of the victim is consistent, cogent and highly believable. She knew the appellant before then. Before the appellant advanced towards the commission of the offence the victim had nothing against him. She narrated in impressive details what the appellant did to her and the effort she made to safeguard herself. Her evidence is well corroborated by the evidence of Pw-2 and to some extent that of Pw-3. The fact that the complainant's pant and the stick she used to attack on the appellant were got from the scene shows that the witnesses were truthful. All the witnesses had no cause to fix the appellant. Their evidence was not challenged by the appellant who opted to offer no defence in the matter. He had told the police that the victim was his girlfriend and he had sexual intercourse with her several times. This was a lie and even if it were true, it wouldn't have changed the legal effect of his action given that the victim was a minor aged 15 years old.
17. The birth certificate produced doubtlessly establishes that the victim was 15 years old as of the time of the alleged offence. She was born on 21/3/2003 and the incident took place on 4/12/2018.
18. On penetration, the complainant was clear that she was first penetrated by the appellant using his fingers before he penetrated her vagina using his penis. Though there is no evidence that the hymen was broken, in *Erick Onyango Ondeng vs Republic* [2014] eKLR, the Court of Appeal held that;

“In Sexual offences, the slightest penetration of a female sex organs by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”
19. In the case at hand, the observation by the doctor who filled the P-3 form and made medical notes after examining the victim, shows that there was penetration. This when considered together with the evidence of Pw-1 and Pw-2 leaves no doubt on penetration.
20. The appellant was well known by the victim, Pw-2 and Pw-3. He was working in the neighbouring home for their friend as a shamba boy. Pw-1 and Pw-3 used to charge their phones in the said home. Pw-1 and Pw-2 could not have made a mistake of him. He was doubtlessly recognized as the real culprit, a fact of which he did not deny.
21. The sentence of 20 years meted against him is within the law. The appellant took advantage of the scenario or circumstances to defile the victim. He used violence in doing so and the 20 years imprisonment, given the age of the victim and the circumstances under which the offence was committed is well deserved.
22. The bottom line is that the appeal against the conviction and the sentence is unmerited. The appeal therefore fails and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER, 2022

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. The Appellant in Person
2. Ms Mutua holding brief for Ms Mkongo for the Prosecution/Respondent

