



REPUBLIC OF KENYA



KENYA LAW
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**Republic v AMM (Criminal Case E031 of 2023)
[2025] KEHC 2235 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE E031 OF 2023
SM GITHINJI, J
FEBRUARY 18, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

AMM RESPONDENT

JUDGMENT

1. AMM 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(1)(4) of the sexual offence *Act No. 3 of 2006*.
2. The particulars of this offence are that on the 18th day of February 2022 at Ribe area in Rabai Sub-county of Kilifi County within the Coast region, the appellant unlawfully and intentionally committed an act which caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of S.M.T a child aged 17 years.
3. In the alternative the appellant faced an offence 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 18th day of February 2022 at Ribe area in Rabai Sub-county of Kilifi County within the Coast region the appellant intentionally and unlawfully committed an indecent act with a child aged 16 years namely S.M.T by touching her private parts using his penis.
5. The victim in this case who offered her evidence as Pw-1 was born on 18th October 2004. Her birth certificate No A75XXX10 was produced as an exhibit and carries the said date as her date of birth. She hails from [particulars withheld] village and by the time of commission of the alleged offence on 18th February, 2022 she was a student at [particulars withheld] Secondary School in form three. She was aged 17 years, four months old. The appellant was a forest ranger and used to patrol the area using a motorbike. On 18/2/2022 he met the victim. They deliberated and he urged her to be his girlfriend. The victim was reluctant and informed him that she was a student and still a minor. He was



not however dissuaded as at about 8:00pm he pursued her at her grandmother's home. He picked her using the motorcycle and took her to Ribe where he was living in a rented home. In the house he urged her to have sexual intercourse with him. She informed him that her days were not safe and he told her not to worry for if she gets pregnant he'll be responsible. He then told her to undress. He helped to remove her bra and underwear. He kissed her on the mouth, caressed her breast before he sucked them. He then undressed and led her to his bed. He fingered her vagina before he penetrated it using his penis. They had sexual intercourse more than once that night. It was unprotected sex. After that he took her back to her grandmother's place. She did not tell anyone about it.

6. Later on she missed her periods and she told the appellant about it. The appellant promised to take care of her. He started sending her money using the phone of her friend namely Dora Tsuma. He could send 1,000 or more. This happened up to June 2022 when he went underground. By then she was four months pregnant. She went to Jibana Hospital for pregnancy test and it was confirmed. In July her sister questioned as to whether she was pregnant and she lied to her. She then escaped to her grandmother's place. The grandmother also asked her whether she was pregnant and she told her the truth. The grandmother passed the report to complainant's mother and sister. Her father (Pw-2) was informed about it by his brother. The matter was reported to the area chief who referred them to Ribe Police station. It was reported at Ribe Police Station on 28/8/2022.
7. Pw3 investigated the case. She noted from the treatment notes of Jibana Hospital that the victim was pregnant. She issued them with a P-3 form and referred them to Mariakani Sub-County Hospital. She was examined at the place and the pregnancy ascertained.
8. The Doctor who examined her at Mariakani Sub-County Hospital (pw-4) noted that her breasts were dripping of milk with darkening of areolar tissue and a palpable mass. The genital was normal save for loose vaginal muscles and missing hymen.
9. In the course of hearings of the case, on 27/10/2022 she was admitted at Jibana Sub-County Hospital where on 28/10/2022 she gave birth to a girl child namely NM. The investigating Officer later on took samples from the appellant, the victim and the born child for DNA test. She forwarded them to the Government Chemist in Mombasa. They were examined and a report was made on the finding on 22/3/2023. The report which was produced as exhibit 6 is to the effect that the appellant is 99.99+% the father of the child namely NM.
10. The appellant in his defence stated that he comes from Ganze and he's a Forest Guard Officer. On 18/2/2022 he was on duty at Pangani in Ribe. He had consensual sex with the victim. Later he learnt that she was pregnant. He had not known her age. He impregnated her and he's responsible. He prayed for forgiveness.
11. On cross-examination he stated that he did not ask her about her age. He only asked her if she was in school or not. He never asked her for identification card. He as well took no steps to establish her age.
12. The trial court evaluated the evidence and found him guilty of the offence in the main count. He was consequently sentenced to serve 15 years imprisonment.
13. Dissatisfied with the said conviction and sentence, he appealed to this court on the grounds that: -
 1. The evidence did not meet the required standards to warrant a conviction.
 2. He was not properly identified as the culprit.
 3. Medical evidence was not considered.
 4. His unsworn defence was relied on to arrive at a conviction.



5. DNA report was improperly considered, leading to conviction.
6. Element of the offence were not established beyond reasonable doubt.
7. The sentence meted for the offence is harsh and excessive.
14. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
15. I have re-evaluated the charges, evidence adduced, judgment of the lower court, sentence meted; considered the grounds of the appeal and submissions by the parties herein.
16. To cut the Gordian knot, I wish state from the onset that this is an explicit open and shut case. There's reliable evidence given the produced birth certificate of the victim that by the time of the offence she was below 18 years of age, and therefore a minor. Though she was 17 years and four months old then, her evidence shows the appellant knew she was a student and when he requested her for love relationship she reminded him that she was still a minor and in school. He took no step to establish her actual age given the circumstances, and as a Government employee working then as a Forest Guard should have known better of the consequences and taken keen precaution. The defense under section 8 (5) of the Sexual Offences Act is not therefore available to the appellant in this case. He had not reasonably believed that the complainant was over 18 years.
17. It's true and not in doubt that the victim herein consented to having sex with the appellant. However, under the sexual offences Act minors lack the legal capacity to consent to sexual activity.
18. The evidence of the victim carries convincing and credible graphic details of how she was penetrated, of which cannot be doubted. The appellant throughout the trial did not challenge the evidence but conceded to it in cross-examination and in his defence. Out of the said unlawful act a child was born. DNA test was carried out of which established the appellant is 99.99+% the biological father of the said child. In his defense he conceded that he is the father of the said child. DNA evidence is the most reliable method for determining the biological relationship between a parent and a child. For the said accuracy, its regarded as direct evidence rather than opinion evidence. The evidence reveals there was penetration.
19. The grounds of the appeal are misplaced and do not suit the facts of this case. The trial court was correct in finding the appellant guilty on the main count. All the ingredients of the offence were proved by the prosecution beyond reasonable doubt and the appellant did not challenge the evidence at all.
20. Section 8(4) of the sexual offences Act reads: -
 - “(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
21. The appellant for the said offence was sentenced to serve 15 years imprisonment. He got the minimum allowed in law and as such cannot legitimately claim the sentence is harsh and excessive.
22. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18th DAY OF FEBRUARY, 2025.

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S.M. GITHINJI



JUDGE

In the Presence of; -

Mr. Mwangi for the State

Appellant virtually

