



REPUBLIC OF KENYA



KENYA LAW
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**CMK v Republic (Criminal Appeal E163 of 2023)
[2025] KEHC 11189 (KLR) (28 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E163 OF 2023
SM GITHINJI, J
JULY 28, 2025**

BETWEEN

CMK APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Ruling of Hon. E. Ayuka (S.R.M) in Nkubu
Criminal Sexual offence No. E037 of 2021 delivered on 9/11/2022)*

JUDGMENT

1. CMK, the appellant herein was charged in the lower court together with another namely Martini Mwenda. With the offence of Gang Defilement Contrary to section 10 of the sexual offences [Act No. 3 of 2006](#).
2. The particulars of the offence are that on 14th October, 2021 at around 00:05 hours at [Particulars Withheld] in South Imenti Sub-County, the appellant jointly with the aforementioned Martin Mwenda intentionally caused his penis to penetrate the vagina of E.K, a child aged 16 years.
3. In the alternative, the two 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 of the offence hereof being that on 14th October, 2021 at around 00:05 hours at [Particulars Withheld] in south Imenti Sub-County within Meru County, the appellant jointly with the aforementioned Martin Mwenda intentional touched the vagina of E.K with his penis.
5. The prosecution case is that the victim herein who gave evidence as PW-1 was born on 18th March, 2004. By the time of the alleged offence, that is on 14th October, 2021 she was a pupil at Ithitune Primary School in class seven and was aged than 16 years.



6. On the material day at midnight she was at her uncle's place with her cousin namely G. The said G is a sister of the appellant herein and the victim (PW-1) was therefore at their home. The appellant got to where the victim and G were. He was in company of a neighbor who is his close friend, Martin Mwenda. The appellant herein called G and left with her. He returned without G and got to where the victim was. Martin Mwenda locked the door from outside leaving the victim and the appellant in the room. The appellant had a kitchen knife. He threatened to kill the victim if she did not agree to have sexual intercourse with him. G returned and called on the victim. The appellant herein chased her away. When the appellant got back, he was with Martin Mwenda. The victim tried to escape but was threatened by the appellant. G called their father to assist, but the appellant herein threatened him and locked his house door from outside. When the appellant returned to where the victim was, he told her she had only 8 minutes to decide on whether to have sexual intercourse with him or face the consequences. After 8 minutes, he held her hand and pulled her into the house. Martin Mwenda followed them. The house was a single room. There was a sack in the room. She was laid on it. He then undressed her, by removing her blouse, bra, skirt biker and pants. He then removed his trouser and had sexual intercourse with her. It involved inserting his penis into her vagina. He had worn a condom. After he was done, Martin Mwenda did likewise while wearing also a condom. After they were through they wiped themselves with her blouse and inserted the used condoms in her mouth. The appellant threatened to kill her if she reported to anyone.
7. After the two had left, G who had gone into hiding emerged. She helped the victim and they went to report to Sub-area, the PW-2 in this case. PW-2 offered the two girls a place to sleep and the following morning they reported at Mitunguu Police Station.
8. PW-3 investigated the case. He issued the victim with a P-3 form. He was also led to the scene by the two girls. In the room on the floor, he recovered two used condoms. There was also a sack spread on the floor where the incident allegedly took place. He as well took it. There were torn clothes, of which constituted a blue skirt, Orange blouse, Black biker and cream pants. He was also able to get the victim's birth certificate. He carried the items as exhibits.
9. Later on, the Investigating Officer was informed that the suspect had been arrested by members of the public who were buying for their blood. The officers rushed to where they were and rescued them. Upon search the appellant herein had a kitchen knife of which the victim recognized as the one used to threaten her. It was kept as an exhibit. The suspect were taken to the Police Station.
10. PW-4 examined the complainant on 18th October, 2021 at Kanyakine Sub-County Hospital. He noted that her hymen was broken and she had a whitish discharge from the vagina. He was of the opinion that the broken hymen indicated of penetrative sexual intercourse. He thus filled the P-3 form and PRC form.
11. After completion of investigations the suspects were charged with the offences carried in the charge sheet.
12. The appellant herein gave a sworn statement in his defence and called no witness. His evidence is that before he was arrested PW-2 had told him that the OCPD wanted to see him at the Police Station. He went there and met CPI Nkabu who told him that there was an officer at Ithatu market who wanted to buy a parcel of land from the appellant's father. The said officer had made a down payment of 10,000/= . The appellant was supposed to give consent. The appellant protested as the alleged parcel of land was family land where his mother was interred.
13. On 13/10/2021, he was at home. His sister was with the victim at the place. The two had disagreed with the appellant's wife. The appellant and his sister had an exchange.



14. The next date on his way home he was arrested by some youths who said they were instructed to do so by a Police Officer called Amos. He was taken to the Police Station and the officer asked him for his Identification Card number of which he gave. He was taken to Mitunguu Police Station. After four days he was charged with failure to register as a Kenyan and for creating disturbance. The two offences were later withdrawn. He knew of no defilement allegation till he was charged with the offence.
15. The trial court evaluated the evidence and found both accused guilty of the offence in the main count. They were convicted of it and sentenced each to serve 25 years imprisonment.
16. Dissatisfied with the said conviction and sentence, the convicts appealed separately. Martin Mwenda appealed in HCCRA No. E164 of 2022. The appeal was heard and vide a Judgment delivered by Lady Justice L.W Gitari on 27th October, 2023 the appeal was dismissed for want of merit.
17. The Appellant herein raised his appeal on the grounds that:-
 1. The case was not proved beyond reasonable doubt.
 2. The evidence on record was not properly evaluated and the trial court retired on insufficient, uncorroborated and incredible evidence.
 3. The sentence meted was harsh and excessive given the circumstances of the case.
 4. Crucial witnesses were not called by the prosecution to give evidence.
 5. Contradictions in the evidence of PW-1 and PW-4 were not weighed.
 6. His defence was disregarded which's Contrary to provisions of Section 169 (1) of the CPC.
18. This being the first appellate court, I am obliged to re-evaluate the evidence adduced in the lower court and arrive at an independent finding, taking into consideration that unlike the lower court, I had no advantage to see and hear the witnesses testify.
19. The offence of Gang Rape is defined under Section 10 of the [sexual offences Act](#) No. 3 OF 2006 as follows:-

“ Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offences of rape or defilement is guilty of an offence termed Gang Rape and is liable upon conviction to imprisonment for term of not less fifteen years but which may be enhanced to imprisonment for life.”
20. Two things are vivid from the foregoing provision:-
 - i. Whether the victim is a minor or rather a child below the age of 18 years, or an adult, the offence is termed “Gang Rape.” There is therefore, no offence known as Gang defilement.”
 - ii. Through not pronounced in the provision, it is an aggravating factor while sentencing if the victim is a child.
21. The key ingredients for the offence are:-
 1. Act of rape or defilement occurred. This means there must be penetration of a genital organ by a genital organ, however slight; in case of an adult victim without consent.
 2. The offence must involve more than one perpetrator acting together or in concert, or with common intention.



3. Identification or recognition of the perpetrators as the real culprits.
22. The evidence of PW-1 who was at the time aged 16 years indicates convincingly and in my own view beyond reasonable doubt, that the appellant herein, together with his friend penetrated her genital organ namely vagina, with their genital organs namely penis.
23. She knew the appellant very well as he is her cousin and was at their home. They had a phone torch which enabled her to see and recognize them, and apart from that also recognized their voices. She was with them for a while as they threatened her, before forcing her into sex. Her evidence is well corroborated by the evidence of PW-3, the Clinical Officer who noted that her hymen was broken and had a whitish discharge from her vagina, indicative of having been sexually penetrated.
24. The evidence of PW-4 also well corroborates her evidence. The scene was visited where the sack on which the incident took place was found just as she had described. Her torn clothes were recovered and the knife the appellant had used to threaten her recovered from him at the point of his arrest. These facts when weighed together shows that PW-1 was truthful and her evidence is highly reliable and credible.
25. The appellant defence was an afterthought as it was not brought forth during cross-examination of the witnesses. The victim had no cause to fix him and the details in her evidence are inconsistent with a falsely made story.
26. The two witnesses who were not called by the prosecution, are a sister to the appellant and his father, who would have been unwilling to offer evidence against their own. The reasons came up during the trial. Absence of their evidence creates no lacunas in the prosecution case which I find complete and well sealed.
27. I therefore find as trial court did, also as it was found in HCCRA No. E164 of 2022 against Martin Mwenda, that the conviction was proper.
28. On sentence, the law provides for a minimum of 15 years imprisonment and a maximum of life imprisonment.
29. I have already made it clear that where the victim is a child, it is an aggravating factor which wouldn't deserve the suspect the minimum sentence.
30. The respondent in their submissions indicated aggravating factors in the case of which I totally agree with. The offence was against a relative; a weapon was used to threaten the victim and the act was committed in a cruel, inhuman manner. In my view, the sentence of 25 years is well deserved given the circumstances.
31. The bottom line is that the appeal is in want of merit and is hereby dismissed.

DATED AND DELIVERED AT MERU THIS 28TH JULY, 2025

S.M. GITHINJI

JUDGE

Apperances:-

Ms. Adhi for the state.

Appellant present at Nyeri Maximum Prison.

