



**Bakari v Republic (Criminal Appeal E004 of 2021)  
[2024] KEHC 2324 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2324 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E004 OF 2021  
SM GITHINJI, J  
MARCH 4, 2024**

**BETWEEN**

**SAID ABDALLAH BAKARI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of the Lamu PM's Court in Sexual Offences case No. 180 of 2015 by Hon. Iveri M.D – Resident Magistrate delivered on 19th May, 2016)*

**JUDGMENT**

1. Said Abdalla Bakari was charged in the lower court with a main count of defilement, contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the diverse dates of December, 2019 and 14<sup>th</sup> March, 2020, Lamu West Sub County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MS, a girl aged sixteen years.
3. In the alternative he 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 are that on the diverse dates of December, 2019 and 14<sup>th</sup> March, 2020, at [Particulars withheld]Village, Lamu West Sub-County within Lamu County, the appellant herein committed an indecent act with a minor namely MS, aged 16 years, by touching her vagina with his penis.
5. The prosecution case is that the complainant in this case who offered evidence in the lower court as Pw-1 was born on 7/4/2004. A birth Certificate was produced indicating the said date of birth. In 2018 she was a pupil at [Particulars withheld]Arid Zone School and going by her date of birth was either 14 or 15 years old when she engaged in a love relationship with the appellant. Her parents Pw-2



and Pw-3 in this case came to learn of it. They reported to the police and the appellant was arrested and charged. The judgment of the lower court shows that the complainant herein turned hostile which led to the acquittal of the appellant. However, the two families had a meeting after the acquittal, in which the appellant herein was warned to keep off the child. The appellant heeded to the warning for a short while before he continued with the illicit relationship. The two were used to having sex and on diverse dates between December, 2019 and 14<sup>th</sup> March, 2020 the complainant conceived. She told her mother (Pw-2) about it and Pw-2 informed the father (Pw-3). On 15/3/2022 the father reported the case at Mokowe Police Station. The appellant was disclosed as the culprit. Pw-6 tried to trace him through a given phone number, but the line was dead. World Vision was sponsoring the complainant in her education. They followed on her case. They found out where the appellant was living and on 27/7/2020 the appellant was arrested. Strange enough, the complainant was with him in the said house then. Appellant was taken to the police station and the complainant to hospital for examination.

6. Ultra sound of the pregnancy was done at King Fahid Hospital. It was established that she was 36 weeks pregnant. A P3 form was thus filled. The appellant was charged with the offences in the charge sheet. Later the complainant gave birth to a boy namely AS. Application was made in court for a DNA test, of which was allowed. Buccal swab samples were got from both parents and the child. They were forwarded to Mombasa Government Chemist for analysis. Pw-4 examined them and established that there is 99.99% chance that Said Abdallah Bakari is the father of AS. The said evidence was availed in court.
7. The appellant when he was placed on his defence stated; -  

“I live in Mokowe. I do not wish to contest the charge.  
I concede to the DPP evidence.”
8. The lower court evaluated the evidence and found him guilty of the offence in the main count. He was eventually sentenced to 15 years imprisonment.
9. The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that; -
  1. The offence against him was not proved by the prosecution beyond reasonable doubt.
  2. The sharp contradictions in the prosecution case were not considered.
  3. Certified copies of prosecution exhibits were not produced.
  4. His defence was not considered.
10. As a first appellate court I have re-evaluated the charges, evidence adduced, judgment of the lower court and sentence meted, grounds of the appeal and submissions by the respondent. (The appellant did not file his submissions).
11. Issues for determination are whether the complainant was a minor, whether her genital organ was penetrated by a genital organ and whether the appellant is the one who penetrated her if at all she was penetrated.
12. On the issue of the victim’s age, a birth certificate No.6303214 was produced in her respect, showing she was born on 7<sup>th</sup> day of April, 2004. On 14<sup>th</sup> March, 2020 she was 15 years old as her 16<sup>th</sup> birthday would have been on 7/4/2020. She must have been a year younger than the age indicated in the charge sheet when the offence was allegedly committed. However, the said error did not prejudice the appellant in any way but worked to his advantage as under section 8 (1) (3) he would have been liable



to a sentence of not less than 20 years. I find the said error curable under section 382 of the *Criminal Procedure Code* as it has not occasioned a failure of justice.

13. On penetration, the victim indicated she had sex with the appellant on several occasions for the period they were in love. She indicated to court that sex involved the appellant penetrating her vagina with his penis. Out of the said engagement she got pregnant and when she gave birth DNA test was conducted which showed there is 99.99% chance that the appellant is the father of the born child. DNA evidence given it's reliability and accuracy is rated highly, close to direct evidence as opposed to opinion evidence given by an expert. Considering the evidence with the rest of the credible evidence which incriminates the appellant heavily on penetration and him being the real culprit, I would say this is an open and shut case. It is no wonder during the trial he did not dispute it when he was placed on his defence. The appeal herein was therefore an afterthought and probably the reason why he had no submissions and sound grounds of appeal. Having observed that, the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 4<sup>TH</sup> DAY OF MARCH, 2024**

.....  
**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

M/s Mkongo for the State

The Appellant

