



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ibrahim v Republic (Criminal Appeal E014 of 2022)  
[2024] KEHC 2589 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2589 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E014 OF 2022  
SM GITHINJI, J  
MARCH 12, 2024**

**BETWEEN**

**CHARLES KURIA IBRAHIM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both conviction and sentence in criminal sexual offence case number E029 of 2021 at Lamu by the Hon M.M.Wachira – PM delivered on the 14th April, 2022)*

**JUDGMENT**

1. Charles Kuria Ibrahim alias Ibrahim Said Mohamed 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 between 1<sup>st</sup> February, 2021 and 19<sup>th</sup> of November, 2021 at Lamu Central Sub-County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of K.H.M, a child aged 15 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 are that on diverse dates between 1<sup>st</sup> February, 2021 to 19<sup>th</sup> November, 2021 at Lamu Central Sub-County within Lamu County, the appellant intentionally and unlawfully touched with his penis the vagina of K.H.M a child aged 15 years.
5. The victim in this case who gave evidence as PW-2 was born on 14/10/2006. She has a birth certificate which confirms the said date of birth. She was living in S near K in Lamu and schooling at M Primary School. The victim had a phone. A person called Stewart who is a friend to the appellant gave the appellant the victim's phone number. The appellant whom the victim referred to as Charles, called



- her and introduced himself as Ibrahim. He invited her to his house. She went and they deliberated suggestively on love issues. The appellant then caressed her breasts. He proceeded to remove her pant and his. They had sex of which involved the appellant penetrating with his genital organs, her genital organs.
6. From that day they had such occasions several times in the house. Mostly during holidays they could meet and have sex. They were lovers. Neighbours witnessed the illicit relationship.
  7. On 7/11/2021 at 7.15am the mother (PW-2) sent the victim for milk. She did not return home. Hasia Hassan was sent to go look for her. When she went, neighbouring ladies informed her that the victim was seeing a man. PW-4 was sent to go and confirm the information. PW-4 went and was shown the house which the victim was visiting. He went back and informed PW-2. PW-2 informed her husband, the PW-5 in this case.
  8. PW-5 got home and PW-4 told him about the report. PW-5 questioned the victim who indicated she had a boyfriend called Charles Kuria. He together with PW-4 and the victim went to the said boyfriend. The house was locked, but he was inside and emerged. They deliberated and the appellant, as well as the victim confirmed that they had a love relationship. PW-5 told he appellant to call his parents. The parents were called. They deliberated and it was agreed they let the victim complete school. However thereafter the victim used to sneak to see the appellant. The father took her to Chief Haidar. The appellant was also present in company of his mother. PW-5 wanted the victim to complete school and they could deliberate on marriage. The victim protested saying she did not want to school, but to get married. She threatened to commit suicide. The Chief advised the mother to report to the police. It was reported at Lamu Police Station. PW-6 investigated the matter. The victim was referred to hospital for examination.
  9. PW-1 examined her and filled her P-3 form as well as PRC form on 19/11/2021. Apart from the absent hymen everything else was normal. He concluded that there was likelihood that she had sexual intercourse.
  10. The appellant was then charged with the offences in the charge sheet.
  11. The appellant denied the offence in his defence. He alleged that he lives at Mkomani in Lamu and is a Mason. In May, 2021 PW-5 went to him and asked him for 15,000/=. The appellant had 10,000/= of which he gave to him. PW-5 however did not pay the amount back. In October the appellant told him he could not wait any longer. In November, 2021 he found Hassan Mohamed, Rashid and Khadija. Hassan said they were told by neighbours that appellant was having a relationship with K. They wanted to marry the girl to him but he protested as she was underage. Hassan vowed to destroy him. After three days Hassan got him from his house. He was taken to Gadeni. Rashid and 3 Ustadh were called to witness the marriage. The elders stopped the marriage. Hassan took them to Kadhi Hamis who also refused to officiate the marriage. The following day Hassan took him to the Chief. The Chief called the police and he was arrested. On cross-examination he disclosed that he was 22 years old.
  12. DW -2 stated he officiates marriages. The appellant was taken to him for marriage. He asked for the girl's age and was told she was uner 18. The appellant also indicated so. He told them to leave as the girl could not get married.
  13. The trial court evaluated the evidence and found the offence in the main count proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 10 years imprisonment.
  14. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that;-



1. Conduct of the complainant does not fit that of a person who was defiled.
  2. Penetration was not proved.
  3. Defence was not properly weighed and D.N.A examination was not conducted.
  4. The 10 years sentence deserves review.
15. The appeal was canvassed by way of written submissions.
16. I have re-evaluated the charges, evidence adduced, Judgment of the lower court, sentence meted, grounds of the appeal and submissions by both sides.
17. Section 8 (1) of the *Sexual Offences Act* reveals three ingredients for the offence of defilement which needs be established by the prosecution beyond reasonable doubt. These are; -
1. Age of the victim. He or she must be a child aged below 18 years.
  2. Penetration, which is partial or complete penetration of genital organs of one person by the genital organs of another.
  3. Identification or recognition of the suspect as the real culprit.
17. On the first one as regards the case at hand, a birth certificate of the victim was produced showing she was born on 14/10/2006. Before 14<sup>th</sup> October, 2021 the victim was 14 years old and thereafter 15 years old in the said 2021. In such a scenario where the offence was committed within a span of time which places the victim in two ages, it's safer and reasonable, in interest of the accused person to pick on the higher, or older age as was done in this case. This is so as the age of the victim informs the sentence and a higher age avoid a situation where the accused is likely to be prejudiced. In this case the stated age is well confirmed by the birth certificate. It is not disputed and the issue is well settled within the law.
18. On the second issue, the victim said they had sex with the appellant several times, sometimes protected and mostly unprotected. She disclosed what sex involved, penetration of her sexual organs (genital organs), by the genital organs of the appellant. The clinical officer found her hymen absent, suggesting she had been penetrated. The evidence weighed together leaves no doubt that penetration did take place.
19. The appellant was in a love relationship with the victim. He was 22 years old. The relationship lasted for months. He confused her to an extent where she threatened to leave school for marriage, and if not so to commit suicide. Such a victim could not have made a mistake of the culprit. I therefore find that there is no room where the appellant could have been mistaken for the real culprit.
20. The defence by the appellant is an afterthought. When he cross-examined PW-5 he did not suggest to him that he owed him the claimed sum, and that it is out of it that he was fixed. It is also illogical that a person who owed him a meagre 10,000/= would push hard for marriage of his schooling underage daughter to avoid such payment. The defence was rightly dismissed.
21. Given the foregoing considerations, I am convinced by the evidence on record, just as the trial court was that the appellant committed the offence in count one. It's trite law, accordance to *Sexual Offences Act* of 2006, that minors cannot consent to sex.
22. On sentence, given the age of the victim, under section 8 (3), the appellant would have been entitled to a sentence of at least 20 years' imprisonment. The prosecution did not cross appeal on sentence and neither was the appellant warned of the possibility of enhancing the same. In line with the finding in the case of *J.J.W v Republic* [2012] eKLR, I will not disturb the 15 years imprisonment sentence.



23. The bottom line is that the appeal fails for want of merit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 12<sup>TH</sup> DAY OF MARCH, 2024**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

The Appellant in Person

Ms Mkongo for the Prosecution

