



REPUBLIC OF KENYA



**Kitsao v Republic (Criminal Appeal E040 of 2022)
[2024] KEHC 2937 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E040 OF 2022
SM GITHINJI, J
MARCH 11, 2024**

BETWEEN

JOHNSON MWACHINGA KITSAO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Original Conviction and sentence in lower court criminal case No. E031 of 2021 in the Senior Principal Magistrate Court at Garsen before Hon L.Wasighe delivered on 31st August, 2022)

JUDGMENT

Appellant in person

Ms Mkongo for the State

1. Johnson Mwachinga Kitsao alias Bodyguard was charged with a main count of defilement contrary to section 8 (1) of the *Sexual Offences Act* No.3 of 2006 as read with section 8 (3) of the said Act.
2. The particulars of the offence being that on the diverse dates between 10th October, 2021 and 13th December, 2021 at Tana Delta Sub-County within Tana River County, the appellant intentionally caused his penis to penetrate the vagina of AN a child aged 14 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 being that on the diverse dates between 10th October, 2021 and 13th December, 2021 at Tana Delta Sub-County within Tana River County, the appellant intentionally touched the breasts, vagina and buttocks of AN a child aged 14 years.



5. The prosecution case is that the complainant in this case who gave evidence as Pw-4, was born on 5th April, 2007 in accordance to her Birth Certificate of which was produced in Court as an exhibit. From class 4 to class 8 she had schooled in Nyahururu where she was living with her grandmother. In the year 2021 she was living with her parents in (Particulars withheld) , and was schooling as a day scholar at (Particulars Withheld) Secondary School, in form one.
6. On 10/10/2021 the complainant called the appellant at around 6.00Pm to pick her from home and take her to (Particulars Withheld) . The appellant was a boda boda operator and also used to repair motor cycles at the garage of the complainant's uncle. The appellant told the complainant that he was busy but eventually picked her at 7.00Pm. They went upto (Particulars Withheld) where the appellant claimed the motor cycle had run out of fuel. He took the complainant to his house as he allegedly went to look for fuel. When it got late she decided to sleep in the house, on his bed. When the appellant returned he said he did not get fuel. He slept on the floor. After a short while he joined her in the bed. He undressed her and himself and he had sex with her for about 10 minutes. The complainant protested saying that she was a student but he continued. After sex they slept. By the time the complainant woke up the following morning, the appellant had left. He returned at 9.00am and when the complainant asked him why he had sex with her, he said he was overcome by sexual desire.
7. The complainant intention was to go to Nyahururu. Since they had sex and she had missed the vehicle to Nyahururu, she continued living with the appellant. She was there for one week of which they had unprotected sex. After that the appellant took her to his home at Musumarini where they stayed for 4 weeks. They had sex there for one day without protection. The complainant fell unwell. She vomited and was taken to Musumarini clinic for treatment. At the place she was told she was pregnant. The appellant took her to Mjanaheri, to his brother. She was there for one week. He then took her to his sister's home still within Mjanaheri where they stayed for another week and had sex.
8. The complainant's parents were aware that she was missing. On 10/10/2021 the mother informed Pw-1 who is her father about her absence in the house. They had searched for her in the neighbourhood but in vain. On 11/11/2021 at 9.00am they went to (Particulars Withheld) Secondary School and informed the principal about it. They were advised to report the matter to the police. At 1.00pm they reported at Hurara Police Station. On 13/12/2021 at about 1.00Pm the complainant returned home. She said she was at Musumarini, Kitsao Mwachinga, where she was living with "Body Guard" as husband and wife.
9. On 14/12/2021 the complainant was taken to Hurara Police Station. The police referred her to hospital for examination. She was examined at Ngao Sub-County Hospital. Pw-3 examined her and noted that her genitalia had no laceration. However, the hymen was absent. She was pregnant and ultra sound confirmed she was 2 months and 3 days pregnant. Epithelial cells were noted. The clinical officer concluded that she had been defiled.
10. Pw-6 investigated the case. He gave the complainant a P3 form of which was filled on 16/12/2022 showing the complainant was 2 months pregnant. He had obtained her birth certificate showing she was born on 5/4/2007. They went to the house of the appellant and found him. He was arrested and charged with the offences preferred in the charge sheet.
11. The appellant defence is that he was 24 years old then. He was doing casual works. He denied the charges and informed the court that he did not know the complainant in the case. He alleged to have seen her for the first time in court. He stressed that he knew nothing about the complainant's allegation. On 13/12/2021 he was called while he was working at Watamu. He was told the police need him. On 14/12/2021 he went and was arrested. He denied the allegations then, when he was charged, and denies them to date.



12. The trial court evaluated the evidence and found the main count proved by the state beyond reasonable doubt. He was convicted of the offence and sentence to serve 20 years' imprisonment.
13. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that; -
 1. That voire dire to the complainant (Pw-4) was not done by the trial court.
 2. He was denied representation by a counsel at state expense.
 3. The court failed to consider that the appellant had reasonably established an offence under section 8 (5) (b) of the *Sexual Offences Act* (Sic).
 4. His defence was not properly weighed.
14. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
15. I have re-evaluated the charges, evidence adduced, judgment and sentence meted, grounds of the appeal and submissions by both sides.
16. For an offence of defilement there are three main ingredients which the prosecution need establish beyond reasonable doubt. These are; -
 - a. The age of the victim who must be a minor below the age of 18 years.
 - b. Penetration, partial or complete, of the genital organs of the victim by the genital organs of the accused.
 - c. Proper identification or recognition of the accused as the real culprit.
17. On the first issue the complainant's birth certificate was produced in court as an exhibit. It shows she was born on 5/4/2007, a date which her father confirmed she was born. The offence was committed between 10/10/2021 and 13/12/2021. By simple calculation one gets that at the time of the alleged offence she was 14 years old. The fact is therefore established beyond reasonable doubt that the victim was 14 years old.
18. On the issue of penetration, the victim (Pw-4) informed the court vividly that for the time she lived with the appellant they had unprotected sex many times. It was for a period of about 2 months. The clinical officer who examined her on 14/1/2021 noted that the hymen was missing, there was presence of epithelial cells, and she was 2 months and 3 days pregnant. These facts when considered together leaves no doubt that the victim's genital organs were penetrated by the genital organs of a male, so as to lead to her pregnancy. Penetration was therefore proved to the required standard in law.
19. Though the complainant implied in her evidence that circumstances forced her into having sex with the appellant and to live with him for the stated period, the evidence reveals that she had conceded to having sex with the appellant and the two lived as husband and wife for a period of about 2 months. This is so as for some days she lived with appellant's relatives, a brother and a sister and she never complained to them or ran away. They had consensual sex in my own view.
20. However, it's trite law that minors are incapable of consenting to any sexual activity as carried in section 43 (5) (7) of the *Sexual Offences Act*.
21. On the issue of recognition, the victim was with the appellant for a period of over 2 months. They were living as husband and wife. Definitely she had more than ample time to recognize him properly.



She referred to him as “Body guard”, a name of which he was known by. The circumstances reveal no possibility where (Pw-4) would have made a mistake of him.

22. His defence is of mere denial and it was rightly dismissed. The evidence is crystal clear that Pw-4 was defiled, and by the appellant herein.
23. The appellant raised grounds that *voire dire* was not conducted on the victim (Pw-4) and that he was not represented by a legal counsel hired for him by the state. While what he alleges is true and would have been better if effected, I find the two to amount to procedural technicality, and Article 159 (2) (d) of *the Constitution* states that; -

“Justice shall be administered without undue regard to technicalities.”

24. The omissions did not occasion a miscarriage of justice as the facts were clearly brought out and the applicable law rightly applied.
25. The appellant was sentenced to 20 years’ imprisonment. It is a sentence within the law. It cannot be described as harsh and excessive. I have no cause to disturb the same in favour of the appellant.
26. The upshot is that the appeal fails for want of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF MARCH, 2024

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. The Appellant in Person
2. Ms Mkongo for the State

