



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mureithi v Republic (Criminal Appeal E038 of 2022)  
[2024] KEHC 2323 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2323 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E038 OF 2022  
SM GITHINJI, J  
MARCH 4, 2024**

**BETWEEN**

**PETER MUREITHI ..... 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**

Representation;

Hon. S.M Githinji

Appellant in person

Ms. Mkongo for state

1. Peter Mureithi was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of this offence are that on the 21<sup>st</sup> day of January, 2021 at about 21.00hours in [particulars withheld] Sub-County within Tana River County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of HMB, a child aged 15 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 21<sup>st</sup> day of January, 2021 at about 2:00hours in Tana River Sub-County within Tana River County, the appellant unlawfully and intentionally touched the vagina of HMB, a child aged 15 years, with his penis.



5. The complainant in this case was aged 16 years old. She was a pupil at [particulars withheld] Primary School in clas 7. She was living in [particulars withheld], [particulars withheld] with her mother, the Pw-2 in this case.
6. The appellant herein was their neighbour and was living in a rented house behind a shop. On 21/1/2021 at 10.00Pm. Pw 2 was under weather and sent the complainant to buy her drugs. She also had a phone which was charging in the appellant's place. Pw-1 went for the drugs and also decided to get to the appellant's house to pick the phone. When she got there the appellant was drunk. He urged her to sleep with him in the house. The two were lovers and had have sex several times before. Previously the complainant had sex with a man called Arafat who had broke her virginity. She accepted the request from the appellant. They undressed and had sex using a condom. The complainant's younger sister informed the mother that complainant had entered into appellant's house and when she called her out there was no response. The mother proceeded there and tried to call the complainant. She did not respond. While still there a police vehicle appeared. She stopped it. She informed the police officers about the incident. The police got to the house and called out but there was no response. They forced it open. The complainant was therein with the appellant. Complainant was fully dressed but the appellant had only his shirt on. Both were arrested. They were taken to Hola Police Station. On 22<sup>nd</sup> January, 2021 the complainant was subjected to age assessment at Tana River Sub County Hospital. By use of teeth eruption pattern, the dentist placed her age at 15 years.
7. Doctor Mwenje examined her on 22/1/2021 at Hola County Referral Hospital. He noted that she had no injuries or discharge. However, she had an old hymen scar. Laboratory tests revealed bilharzia infection which is not sexually transmitted. The P3 form and PRC form were thus filled. The doctor was of the opinion that she had been defiled.
8. The respondent/appellant in his defence stated that on 21/1/2021 he was called by a friend to a Wine and Spirits place to take alcohol. He went and they took beer. He was stressed and was problematic at the place. His friend took him home. He could not recall what happened thereafter as he found himself at the police station. He alleged the victim's mother had a grudge with his wife and he was fixed to hurt his wife.
9. Dw -2 stated the day the appellant was arrested he was working as a watchman. The appellant was drunk and harassing people near the fish market. Dw -2 took him to his place to rest. The following day he heard that he was arrested.
10. The trial court evaluated the evidence and found that the offence in the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 15 years imprisonment.
11. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that;-
  1. The charge was not proved beyond reasonable doubt.
  2. Penetration was not proved.
  3. The age of the victim was not proved.
  4. His defence was not properly weighed.
12. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.



13. As a first appellate court I have re-evaluated the charges, evidence adduced, judgment of the lower court and the sentence meted; grounds of the appeal and submissions.
14. As was correctly held in the case of *DS v Republic* [2022] eKLR, the ingredients for the offence of defilement as three. They are; -
  1. The age of the victim whereby she must be a child, below the age of 18 years.
  2. Penetration of the victim's genital organ by genital organ of the assailant.
  3. Proper identification or recognition of the suspect as the real culprit.
15. In this case the appellant and the victim were lovers and had had sex several times prior to the date of the incident constituting the offence herein. Pw-1 indicated so and was bold and honest enough to disclose that it is not the appellant who broke her virginity but another namely Arafat. On the material day she was requested by the appellant to sleep with him in his house and agreed. They had protected sex. They were arrested or caught red-handed in the said room by Pw-2 and police officers, with the appellant only in his shirt while the victim had dressed up. The prosecution evidence is highly compelling as true. It reveals there was penetration of the victim's genital organ by the appellant's genital organ. Recognition of the appellant as the culprit is not in doubt as he was caught red-handed with the victim, in his house. The victim stated she was 15 years old. Her mother also indicated so. The doctor who did her age assessment also settled on the said age. There is no evidence suggesting otherwise or to the contrary. I find the fact well settled that by the time of the offence the victim was 15 years of age. She was therefore a child.
16. The appellant does not deny the facts of the prosecution case. He only feigns ignorance on the ground that he was stressed and drunk and could not tell what happened. He could not have urged the complainant for sex, rise to the occasion, wear a condom and effectively penetrate her, unknowingly.
17. His defence is flimsy and unbelievable. His witness could not tell what happened after the appellant got to his house as he was not there. The defence was well weighed and dismissed by the trial court.
18. Section 8 (1) (3) of the *Sexual Offences Act*, prescribes a sentence of not less than 20 years where the victim is aged between 12 and 15 years. The appellant was entitled 20 years imprisonment and the trial court was lenient enough to sentence him to 15 years imprisonment. He was lucky and I do not wish to adversely interfere with the luck.
19. The bottom line is that the appeal is in want of 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; -

1. Ms Mkongo for the State
2. Appellant in Malindi Prison

