



**MUTEMI v Republic (Criminal Appeal E031 of 2022)
[2024] KEHC 2302 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E031 OF 2022
SM GITHINJI, J
MARCH 4, 2024**

BETWEEN

JOSHUA MUTHYA MUTEMI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Lower Court Criminal Case No.25 of 2020 in the Principal Magistrate's Court at Lamu before Hon M.Maina Wachira – PM on 30th November, 2021)

JUDGMENT

1. Joshua Muithya Mutemi 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 diverse dated between 1st day of April 2020 and 30th day of May 2020 at [Particulars Withheld] in Lamu west sub county within Lamu County, the Appellant intentionally caused his penis to penetrate the vagina of RKN a child aged 14 years.
3. In the alternative, 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 being that on the diverse dates between 1st day of April 2020 at [Particulars Withheld] in Lamu West Sub County within Lamu County, the Appellant intentionally touched the vagina of RKN, a girl aged 14 years with his penis.
5. PW1- the Complainant herein was born on 11th August 2006 in accordance to her Birth Certificate No. 891XXXX. By the time she gave evidence on 18/3/2021 she was aged 14 years and was schooling at [Particulars Withheld]. She was living at [Particulars Withheld] with her parents and other siblings. They used to fetch water in the homestead of a man called Dere, who was also the area headman. In



- April 2020 as the complainant went for water at the said place she met the appellant herein whose name she gave as Joshua. The appellant told her that he loved her and when she finishes school he will marry her. The two met on another day at undisclosed place and the appellant repeated his promise. The third time they met along the road. The appellant held her with intention of having sex with her. He removed her clothes and as well removed his. He then had sex with her, which involved penetrating her genital organ with his.
6. On another day they met near a Mbuyu tree and they had unprotected sex. She had not told anyone about the illicit relationship. The complainant told the appellant to wait for her to complete school. Later the appellant sent a message to Dere telling him that the complainant was pregnant and that he was the culprit.
 7. On 23/8/2020 Dere went to the home of the complainant where he met her mother, the PW2 in this case. He told her that his worker had called him telling him that he had impregnated the complainant. PW2 took the complainant to Genesis hospital for examination. It was confirmed that she was pregnant. The complainant confirmed that the worker for Dere was responsible. His name was given as Joshua.
 8. On 24/8/2020 the matter was reported at Hindi Police Station. PW4 investigated the case. The complainant was taken to Mokowe Health Centre for examination. She was examined and confirmed pregnant. PW2 tried to look for the suspect, one J M. He was not traced as he had gone up-county. He returned on 17/9/2020 and was arrested by an KPR who took him to Kibaoni Police Station. The appellant said he defiled the girl as he had been given go ahead to marry her after she finished school.
 9. The complainant later gave birth to a boy namely NK. Samples were taken from the suspect, complainant and the baby (NK) for purposes of a DNA examination. They were examined at the Government Chemist in Mombasa by PW-5. The result indicates that the appellant is 99.9% the father of the boy namely NK.
 10. When the appellant was placed on his defence he gave unsworn testimony and called one witness, his father. In his defence he gave his name as Joshua Muithya Mutemi. He was living at Majembeni and was a form 3 student at Majembeni Secondary School. He gave his age as 22 years. When the school closed and there was Covid 19 Pandemic he sought employment so as to aid his parents. In May, he went to Hindi town in the homestead of Mzee Dere Mahidu Abdala. He was the Msumarini area elder. He met his wife and also the complainant who was an employee at the place. Mzee Dere told the appellant that he wanted him to convert to Islam. He initially resisted but later agreed. He also told him that he wanted him to marry a girl from that village. The appellant resisted as he was a student. He was introduced to the complainant who said she was 18 years old and after completing class 8 she went for a hairdressing course. Mzee Dere organized for him to meet the parents of the complainant. They met and the purpose for the visit was disclosed.
 11. The appellant was told to give the complainant a ring and a necklace in accordance to Ngiriyama Custom, known as Kanjama. He bought the items and gave them out as urged. There was a goat and beer for the occasion. The appellant was told to tell his parents to visit the parents of the complainant. He did so and his parents visited. They were told the complainant was 18 years old. In June, 2020 the appellant took complainant as his wife. Later the appellant's grandfather died and he went to Ukambani. While there he got a job at a hotel where the pay was Kshs 20,000/, better than what Mzee Dere was paying him. Later the complainant called the appellant telling him that Mzee Dere had gone to her, wanting to have sex with her. Mzee Dere later called him urging him to take the wife from his place. The complainant went. Dere had not paid the appellant for four months. He refused to pay and threatened the appellant. Later the complainant told the appellant that she was unwell. The appellant



sent her to D for money and she was given 1,000/-. The complainant then said she was pregnant. On 17/9/2020 the appellant went home and was arrested by KPR and taken to Kibaoni Police Station. Mzee Dere went there and alleged the appellant had married an under age girl.

12. DW2- the father to the appellant stated the appellant had been employed by Dere as a shamba boy at Msumarini. Later he was called by ere and told to visit with two men as the appellant had gotten a girl to marry called R. He went with Kabwere and Mama Sarah. The girl was not there but they were told she had finished school and attended a Salon Course. She was 18 years old. The appellant confirmed the report. They went to the home of the complainant. They met her parents. DW2 asked for the age of the girl and the parents said she was 18, she had finished school and attended a course. They were told to pay “Kanjama” and paid Kshs 20,000/- to the father of the girl. They were given the girl and were to pay dowry in January. Later the appellant was arrested. DW2 explained to the police at Hindi about the issue but did not agree with him. DW2 called Dere about it and he said he needed Kshs 300,000/- to end it as World Vision were following up on the issue.
13. The trial Court evaluated the evidence and found that the main charge against the appellant was proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 20 years imprisonment.
14. The appellant dissatisfied with the said conviction and sentence, appealed to this Court on the grounds that;
 1. In the light of Article 27 and 50 of the Constitution of Kenya, the sentence imposed of 20 years imprisonment, is unlawful.
 2. The appellant’s defence was not properly weighed.
15. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
16. I have re-evaluated the charges, evidence adduced in the case, judgment entered and the sentence meted, grounds of the appeal and submissions.
17. In this appeal, the age of the complainant is not disputed. She was born on 11/8/2006 in accordance to her birth certificate No. 891XXXX. The last date of the offence is given as 30/5/2020. The complainant would have been 14 years old on 11/8/2020. By the time of the offence she was therefore 13 years old. The charge particulars indicates she was 14 years old. This error does not however prejudice the appellant in anyway as the actual age and the given age falls within the range covered under Section 8(1) (3) of the Sexual Offences Act, of between the age of 12 and 15 years. The error is therefore curable under Section 382 of the Civil Procedure Code as it has not occasioned a failure of justice.
18. On the other two issues there is also no dispute. It is conceded in the case that the appellant had sex with the complainant which led to her pregnancy and birth of a boy child namely NK. The DNA test that was carried out confirms beyond doubt, the position.
19. The defence by the appellant is the one provided for under Section 8(5) of the Sexual Offences Act No. 3 of 2006. The Section reads;
 - 8(5) It is a defence to a charge under this Section if-
 - a. It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and



- b. The accused reasonably believed that the child was over the age of eighteen years.
 - c. The belief referred to in Sub section 5(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
20. The raised defence by the appellant was an afterthought. In his cross-examination of the complainant he never raised it at all. What he raised is that the complainant was impregnated by a bodaboda guy, of which the complainant firmly denied. PW2 was cross-examined by the Appellant's Advocate and he did not as well raise the alleged defence. The defence was raised for the first time when the appellant was placed on his defence. I do read in defence a case of deliberate and unbelievable allegation that the complainant stated she was 18 years old, that Dere also indicated so as well as the complainant parents. The said witnesses had no cause to state the age as alleged unless it was doubted and questioned. If that was the case, there existed apparent evidence that the complainant was a minor and the appellant under section 8 (5) (c) was under obligation to confirm her age from probably her birth certificate. The evidence indicates beyond reasonable doubt that the appellant knew she was a child, below 18 years, and went ahead to lure her into sex of which they had, leading to her pregnancy and giving birth to a boy child.
21. All ingredients for the offence of defilement under Section 8(1) of the *Sexual Offences Act* were established by the prosecution beyond reasonable doubt. The defence as an afterthought, was rightly weighed and dismissed. I therefore confirm the conviction.
22. On sentence the trial Court was right in that the clarification on sentence as it was expounded by the Supreme Court in the case of Francis Karioko Muruatetu vs Republic, only apply to murder cases and not any other offence. As such, the minimum allowed sentence for the offence herein is legal and well in order.
23. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF MARCH, 2024

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S.M. GITHINJI

JUDGE

In the Presence of; -

M/s Mkongo for the State

The Appellant in person

