



**Sudi v Republic (Criminal Appeal E051 of 2021)
[2024] KEHC 2590 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E051 OF 2021
SM GITHINJI, J
MARCH 13, 2024**

BETWEEN

SHS APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the Judgment of Hon P.E.Nabwana – Resident
Magistrate at Mpeketoni Law Courts delivered on 24th October, 2021)*

JUDGMENT

1. SHS was charged in the lower court in count one with the offence 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 dates of the year 2019 at Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of HFF who is a girl aged 14 years.
3. There is a count two of indecent act with a child, contrary to section 11 (1) of the [Sexual Offences Act](#) No.3 of 2006.
4. The particulars herein being that on the diverse dates of the year 2019 at Lamu West Sub-County within Lamu County, the appellant herein committed an indecent act with a child namely HFF, a girl aged 14 years by touching her genital organs.
5. The prosecution case is that one called FF had married EB and it's during subsistence of the said marriage that the complainant herein (PW-1) was born on 27th March, 2007 in accordance to her Birth Certificate No.(Particulars withheld).



6. However, the said marriage did not last as they divorced and FF who is a fisherman married ZS, the mother to the appellant herein.
7. In the year 2019 it's said the complainant was aged 14 years and was in class 2 at [Particulars withheld] Primary School. She was living at [Particulars withheld] village, Mkunumbi location with her father, step-mother (ZS), the step-brother (Appellant) and a step-sister namely FM. The parents had their own bedroom as well as the appellant, while the complainant and FM were sharing a room. Mostly the father was away fishing.
8. On diverse dates within the said year at night ZS could wake up the complainant herein and urge her to join the appellant herein in his room for sex. She could do as urged and the appellant had sex with her for many nights, perpetrated in the said manner. The appellant threatened her not to tell anyone about it.
9. In April, 2020 the complainant visited her aunt who is PW-2 in this case. It was during the holy month of Ramadhan. The aunt sewed a Ramadhan dress for the complainant and noted it could not fit as her belly was bulging. The aunt suspected something was amiss. She took the complainant to Mapenya dispensary where she was examined by doctor Maryann. An examination of her urine indicated that she was pregnant.
10. PW -2 called EB, FB and RA and told them about the examination. Complainant was asked who had made her pregnant and stated it was SHS, the appellant herein. The matter was reported at Mpeketoni Police Station. PW-3 investigated the case. She wrote witness statements and led to arrest of the appellant. PW-4, a clinical officer at Mpeketoni Sub- County Hospital examined her and filled her P-3 form. He did an obstetric scan which revealed that the complainant was 34 weeks (8.5 months) pregnant. The hymen was also broken. The clinical officer concluded that she had been defiled. Before the birth certificate had been availed, on 9/6/2020 the complainant age was assessed at the said hospital and the indication is that she was below 18 years old.
11. The appellant was then charged with the offences in the charge sheet.
12. The appellant in his defence stated that he lives at [Particulars withheld] and is a herder. On 9/6/2020 he was arrested and charged on false allegations. He said he had no idea about the charges. He alleged his parents told him that the complainant was living with her boyfriend as he continued to suffer in remand.
13. The trial court evaluated the evidence, found the appellant guilty of the offence in count 1 to which he was convicted and sentenced to serve 20 years' imprisonment from June 10th, 2020.
14. The appellant dissatisfied with the said conviction and sentence appealed to this court on grounds that;
 1. The offence was committed out of coercion and he is therefore not criminally responsible for it.
 2. Certified copies of exhibits were not produced.
 3. That his defence was absolutely ignored.
15. I have re-evaluated the charges, evidence adduced, judgment of the lower court and sentence meted, grounds of the appeal and submissions by both sides.



16. The first issue for determination is whether the charge is defective, and if defective whether it's curable. I say so because in Count 1, the appellant was charged with defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006. The said section reads; -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Under Section 2 of the said Act,

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person. On the other hand, “indecent act” is defined to mean an unlawful intentional act which causes; -

- a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
- b.

17. The particulars of the offence in the first count reads; -

On diverse dates of the year 2019 at Mpeketoni Division, Lamu West Sub-County, within Lamu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of HFF who is a girl aged 14 years.

18. The said particulars are at variance with the statement of the offence as they do not disclose that the appellant caused his penis to penetrate the vagina of H.F.F who is a girl aged 14 years. They therefore disclose an offence of indecent act under section 11 (1) of the Sexual Offences Act rather than the offence of defilement. To the said extent the offence in count 1 is defective.

19. On the second count, the court in its judgment indicated it's an alternative count but there is nothing in the charge sheet to show it's an alternative to count 1. It's simply indicated as Count -2. It's of indecent act. The particulars reads; -

On diverse dates in the year 2019 at Mpeketoni Division, Lamu West Sub-County within Lamu County the appellant committed an indecent act with a child namely H.F.F a girl aged 14 years by touching her genital organs.

“genital organs” in the Act means the whole or part of male or female genital organs and for purpose of the Act includes anus. Since genital organs are more than one, the particulars of the charge should have disclosed which one was touched and with which part of the appellant's body. The offence also involves other organs like breasts and buttocks.”

20. In the case of Sigilani v Republic (2004) 2 KLR, 480 it was held that; -

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

The particulars of the offence should not only contain the essential ingredients of the offence, but should also as much as possible be framed simply and in the ordinary language without the use of technical words and phrases. In my view an ordinary and reasonable



person would not be able to explain what the term carnal knowledge means, and therefore find for this reason that the charge sheet was defective for reason of not including the particulars of the offence or omitting essential ingredients of the offence.”

21. The first count in the case at hand has particulars which do not disclose the offence as charged. The second count particulars are vague for failure to disclose which genital organs were touched and with which body part(s). Probably the part of the body alleged to had been touched does not qualify as “genital organs” under sections 2 of the *Sexual Offences Act*. With such vague particulars it would be difficult for a suspect to pick or prepare his defence.
22. Accordingly, I do find that the charges as they appear are fatally defective and the appellant should not have been convicted for the offence in Count 1. The conviction and sentence arising from it are quashed. I however direct in the interest of justice that the right charges be preferred for a retrial before another Magistrate at Mpeketoni Law Courts. It’s baffling how the prosecution and the court entirely failed to notice of the aforementioned defects. The charge is the foundation of every criminal process and needs be keenly drafted.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 13TH DAY OF MARCH, 2024

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S.M. GITHINJI

JUDGE

In the Presence/absence of; -

1. Ms Mkongo for the state
2. Appellant in person

Prosecutor; -We pray the accused be taken to the cells at Mpeketoni Prison and judgment released for his processing for retrial.

Court; -Application is granted.

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S.M. GITHINJI

JUDGE

