



**Kithole v Republic (Criminal Appeal E034 of 2023)
[2024] KEHC 5741 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E034 OF 2023
SM GITHINJI, J
MAY 14, 2024**

BETWEEN

SADIKI KIRAO KITHOLE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both conviction and sentence in criminal case number S. O E029 of 2021 at Kaloleni by the Hon R.Amwayi – SRM delivered on the 15th day of August, 2022)

JUDGMENT

1. Sadiki Kirao Kithole the appellant herein, was charged in the lower court with an offence of defilement of a child, 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 being that on the diverse dates between 28th day of September, 2020 and 25th day of December, 2020 at (particulars withheld) Village, Jibana Location, Kaloleni Sub-County in Kilifi County within Coast region, the appellant herein intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of G.K, a child aged 15 years.
3. In the alternative, the appellant faced a charge of 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 the diverse dates between 28th day of September, 2020 and 25th December, 2020 at (particulars withheld) Village, Jibana Location, Kaloleni Sub-County in Kilifi County within Coast region, the appellant herein intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of G.K, a child aged 15 years.



5. The prosecution case is that the appellant in this case and the complainant are neighbours at (particulars withheld) Village, Jibana location in Kaloleni. The appellant was operating Bodaboda at the place while the complainant who was born on 8/9/2005 was a child and a pupil in class 6. The appellant was in the habit of trailing the complainant whenever he saw her walking in the village. His interest was having a sexual love relationship with her despite the fact that she was a minor and he was an adult aged about 27 years.
6. One day in September, 2020 the complainant was sent to the shop. The appellant followed her and urged her to be his lover. She declined. The appellant however held her hand and forcefully dragged her into the forest. At the place he stripped her naked and did likewise. They then had sex which involved him penetrating her vagina using his penis. After the incident they had several other occasions of similar nature on various subsequent days, save for one where they had sex in the appellant brother's house. Out of the said illicit engagement, the complainant conceived. On 10th March, 2021 her mother who gave evidence as Pw-2 discovered that she was pregnant. The mother questioned her about it and she said Sadiki was responsible for it. She reported the incident to the area Assistant Chief who referred them to the police station. The matter was reported at Kaloleni Police Station. She was issued with a P3 form and referred to Mariakani Sub-County Hospital. She was examined at the place by Pw-4, a clinical officer on 30/3/2021. He noted that she had a palpable mass of 26 weeks with a visible linear nigra. Her external genital was normal but the hymen was absent. She had vaginal discharge. She was referred to the laboratory where the pregnancy was confirmed. Her expected date of delivery was 5th July, 2021. The P-3 was thus filled. The clinical officer formed an opinion that she was pregnant, secondary to defilement.
7. Pw-5 investigated the case. On 8/4/2021 they went looking for the appellant in his house but did not get him as he had gone underground. They returned there later on 1/7/2021 and got him. He was arrested and charged on 5/7/2021. On 7/7/2021 the complainant gave birth to a girl child. The appellant during the hearing challenged fatherhood and prayed for a DNA test to establish the truth. The court granted his prayer. He was hesitant to appear for the test he had prayed for and when he eventually co-operated, DNA was done. Pw-3 who did it in Mombasa Government Chemist confirmed to the trial court that the appellant was 99.99% the biological father of the complainant's child called T.
8. The complainant had produced a Birth Certificate in court as an exhibit which shows she was born on 8/9/2005.
9. The appellant in his defence stated he resided in Midodoni and was 27 years old. He was a fruits vendor. He denied the charges. He alleges that though the complainant was a neighbour they never had a love relationship. He never had sex with her. He did not impregnate her and the DNA test is not correct. The complainant lied to her mother that he had impregnated her and the mother demanded from him Kshs. 30,000/=. He could not pay and was thus charged. The appellant's brother who gave evidence as Dw-2 stated that he was told by the parents of the complainant that the accused had impregnated the complainant and they needed money for her to carry out an abortion. He refused to support the abortion as it amounts to killing. The parents said they will take the matter to the police of which they did.
10. The trial court evaluated the evidence and found the offence in the main count proved against the appellant by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 15 years' imprisonment.
11. Dissatisfied with the said conviction and sentence he preferred an appeal to this court on the grounds that; -



- a. The victim clearly demonstrated incredible doubtful integrity and her evidence is therefore doubtful and occasioned serious prejudice.
 - b. Prosecution did not prove their case beyond reasonable doubt.
 - c. The sentence imposed is harsh and excessive given his mitigation and circumstances of the case.
12. The appeal was canvassed by way of written submissions and both parties filed their respective submissions in the matter.
 13. As the first appellate court I have re-evaluated the charges, evidence on record, judgment of the lower court and the sentence meted, grounds of the appeal and submissions by both sides.
 14. The offence of defilement is founded on three main ingredients being; -
 - i. The age of the victim; she must be a minor (child) under the age of 18 years.
 - ii. Penetration; which is partial or complete insertion of the genital organs of a person into the genital organs of another person.
 - iii. Identification or recognition of the suspect as the real culprit.
 15. On age, the particulars of the offence states the victim was aged 15 years. Her Birth Certificate No. A4587195 was produced as an exhibit and shows she was born on 8/9/2005. The offence was allegedly committed on diverse dates between 28/9/2020 and 25/12/2020. The complainant “celebrated” her 15th birthday on 8/9/2020. At the given time of the offence she was therefore 15 years old. It’s noticeable that the defence did not dispute her given age and the issue is firmly settled.
 16. Turning to penetration, the complainant/victim in her evidence stated vividly that on several occasions she had sex with the appellant in the forest, save for once when they had it in the appellant brother’s house. She explained what sex involves, of which is insertion of the appellant penis into her vagina. The two organs under the Act are sexual organs. Her evidence is well buttressed by the evidence of the clinical officer (Pw-4) who noted upon examination that her hymen was absent and she was pregnant. When she later gave birth and DNA was conducted the result was that the appellant is 99.99% the biological father of the born child. DNA evidence in this regard is incredibly valuable in establishing or disproving paternity. It provides concrete scientific proof of biological relationships, which has significant implication in establishing the real culprit. It helps in making fair and accurate decisions based on biological, scientific facts rather than assumptions or mere claims. In this regard, the DNA evidence availed nails down the appellant, beyond reasonable doubt, as the real culprit. Having found so, I can only add a few lines in relation to it that the appellant was well known to the victim. They had sex more than once. She could not have made a mistake of him. Her mother and herself had no cause to fix the appellant.
 17. The defence raised is flimsy; it’s in want of facets of truth; It stares on the face as a sham which raises no doubt at all on the truth of the prosecution case. The defence was therefore rightly dismissed by the trial magistrate.
 18. The upshot is that the appellant was fairly and rightly found guilty of the offence in count 1 and subsequently convicted of the same.
 19. On sentence, under section 8 (1) (3) of the *Sexual Offences Act*, the appellant was entitled to a sentence of 20 years’ imprisonment. He was lucky that the trial court sentenced him to serve 15 years’ imprisonment. The sentence cannot in the circumstances be described as harsh and excessive.



Prosecution in their submissions urged the court not to disturb the sentence. I find it will serve the legal purpose if left at that. The appellant will therefore serve the sentence imposed or in place.

20. The appeal is in want of merit and is hereby dismissed.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MAY, 2024

S.M.GITHINJI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of; -

The Appellant in Person

Ms Ochola holding brief for Ms Mkongo for the Prosecution

