



**DMN v Republic (Criminal Appeal E039 of 2021)  
[2024] KEHC 7477 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7477 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E039 OF 2021**

**SM GITHINJI, J**

**JUNE 19, 2024**

**BETWEEN**

**DMN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from Judgment in Sexual Offences No.015 of 2020 at PM's Court – Mpeketoni before Hon P.E.Nabwana – RM delivered on 8th July, 2021)*

**JUDGMENT**

1. DMN was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence being that on the 25<sup>th</sup> day of July, 2020 at (Particulars withheld) area in (Particulars withheld) Sub-County within Lamu County in the Republic of Kenya, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of P.T a child aged 10 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, particulars being that on the 25<sup>th</sup> day of July, 2020 at (Particulars withheld) area in (Particulars withheld) Sub-County within Lamu County in the Republic of Kenya, the appellant intentionally and unlawfully touched the vagina of P.T a child aged 10 years with his penis.
4. The prosecution case is that PW-4 who is the mother to the complainant in this case had been married to the appellant for a period of 3 years. PW-4 is a mother of seven children and some are over 18 years old. The complainant according to her was aged 8 years and there was a younger child known as EN who was aged ten months. PW-4 alleged that the complainant herein used to refer to the appellant as her step father, but PW-4 herself did not disclose whether he was the biological father. However, given



- the history that she had been married to him for only 3 years and the complainant was 8 years old, probably the complainant was right in referring to him as her step father.
5. The complainant gave her evidence on 17/2/2021. She stated then that she was 9 years old and was in class 2 at (Particulars withheld) Primary School. She referred to the appellant as MN, saying she referred to him as her father though he was not, as her father died.
  6. On 25/7/2020 the complainant was left by her mother at home to look after a child called Daniel (witness doubted whether she knew his proper name). The mother had gone to harvest Bixa. When the child fell asleep, the complainant went to harvest “makuti” palm leaves. The child woke up while the complainant was away. The appellant who had gone to uproot young palms found the child unattended and crying. The appellant was annoyed with the complainant and beat her up using a cane, on the legs. The complainant cried as a result and when the mother returned she asked her why she was crying. She told her that the appellant had beaten her. She was bleeding and her wounds on the legs were cleaned by the mother. The following day the complainant was still in pain. She was taken to the hospital.
  7. According to the evidence of PW-3 the complainant was taken to [Particulars Withheld] Sub-County hospital on 31/7/2020. She had pain around anal area. The history was that she was a frequent eater of “mkoma” which is a palm fruit, and hence developed serious constipation. Examination of external genitalia was indicated as normal anatomically. There was faecal matter on the outside of the anus. A digital rectal exam revealed a sponge like matter at the opening of the anus. Using a sponge holder it was removed. Examination was repeated and there was a mass which one could not go over or under and the examining finger was blood stained. They planned to give soap enema of which they did. If that did not work they would admit her for surgery. It did not work as they were referred to Mombasa. She was taken to theatre. It’s at the place that the doctor raised the allegation of defilement of the complainant. They questioned the mother about it and she knew nothing of it. The complainant had not told her about it. They waited for her to heal. The doctors called PW-2, a paralegal and Human Rights Defendant with ICHR, to assist. She met the mother who knew nothing of the alleged defilement. When she questioned the complainant she at first denied. The doctors however urged PW-2 to follow up as there were certain of defilement. The mother and the complainant kept on denying the allegation. On 13/8/2020 the doctor called PW 2 and told her they will not discharge the complainant till she gets to the bottom of the matter. PW-2 asked the complainant what she loved to eat and she said bananas and juice. They were bought for her. It’s then the complainant said she will tell her something of which she should not reveal to the mother as the mother will tell her father. She alleged that the father had said he will kill her if she disclosed. PW-2 said she will not disclose. The complainant then said the father found her washing utensils and led her to the house. He removed her biker and defiled her. After the incident he warned her not to tell anyone. He beat her up and said if she disclosed he will kill her.
  8. Her filled PRC form on 6/8/2020 shows there was a whitish discharge noted on the vagina. The hymen was broken and there were multiple perennial lacerations.
  9. The P-3 form was filled later on 27/8/2020. It indicates that her hymen was broken. She had multiple perennial lacerations. They were in the area between the vagina and anus. PW-3 indicated that the lacerations in the perennial area and the broken hymen signify defilement. He further indicated palm fruits could cause fissures and not lacerations. Lacerations are deeper and fissures are superficial.
  10. The matter was investigated by PW-6. The complainant was rescued and kept in a safe place. The appellant was arrested and charged.
  11. The appellant called two witnesses in his defence. His case is that on 25/7/2020 he was working for a neighbour where he was clearing the bush. He worked till noon and when he went back home he



found a young child EN unattended to and crying. The complainant and another child were at a palm tree making brooms. He called them. They said the child was left under the care of the complainant. The appellant took a stick and gave her three canes. He told them that next time they should play near the child. They went to the house and took the child.

12. When the mother returned she found the complainant crying. She was asked the reason for it and disclosed. The mother sent them to go and collect firewood. They found “mikoma” sugary palm fruits. The complainant ate a lot of them. Later the complainant fell sick as a result. The mother took her to the hospital. She complained of stomach aches. The complainant said she tried to go to the toilet and was unable to pass out the waste. She was taken to the toilet and her stool had blood and string like thing. They gave her some drugs. She still did not get better. She was taken to [Particulars Withheld] by the mother for treatment. She was treated and did not get well. On 29/7/2020 she was taken to [Particulars Withheld] for treatment. She was treated. She did not get well. She was returned there on 31/7/2020. The doctor found a sponge like substance blocking stool exit. It was removed. The doctor said if the problem persists they will give a drug to help her diarrhea. Still she did not improve. She was taken back to hospital and an X-ray was done. The doctor recommended surgery. She was taken to theatre and an operation was done. Later when the complainant passed stool it was noted to exit through the vagina. The in charge referred them to Mombasa. The ambulance took long to arrive and the mother took her to Mombasa. At Mombasa she was operated and rectified.
13. The appellant alleged he could have been fixed by his wife who wanted to have the land title deed in her name. The appellant said the land will be for the children and she told him things won't get well for him.
14. DW-2 who is his sister stated she visited the complainant at the hospital. While there the child wanted to go for a long call. She suggested she passes it in bed as she was from theatre and could not walk. She passed it and it got out through the vagina. She called the appellant and told him about it. The girl was transferred to Mombasa. It is in Mombasa that the defilement issue was raised.
15. DW-3 is a medical officer from [Particulars Withheld] hospital who was summoned by the court to produce medical documents from the hospital involving treatment of the complainant at the place. The appellant requested for them. The doctor said on 30/7/2020 the complainant went there with complaints of pain in the anus and lower abdomen. Clinical officer Karen Njeri found faecal matter on the outer openings of the anus. During the test blood was found. They decided to do soap enema. Later examination showed faecal matter was very fiber like and had a lot of seeds. They did not indicate any issue on the vagina. On the 2<sup>nd</sup> day, there was faecal matter passing on the front of the vagina. He did not examine her vagina. She was referred to Mombasa for surgery. He stated that no surgery was done at [Particulars Withheld] Sub-County Hospital. When questioned by the prosecutor he as well revealed that there was no possibility that stool passing through the vagina could break hymen.
16. The trial court weighed the evidence and found the main count proved against the appellant beyond reasonable doubt. He was convicted of it and sentenced to serve life imprisonment.
17. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that;-
  1. The charges were framed against him.
  2. The charge did not originate from the initial complaint at the hospital.
  3. The doctor who treated the complainant at Coast Provincial General Hospital, the one who made an opinion that the complainant had been defiled, was not called as a witness.



4. The court itself summoned the doctor at [Particulars Withheld] Sub-County Hospital to offer evidence for the defence.
  5. The Court did not warn itself on admissibility on the medical and police officer's evidence.
  6. Defence was unfairly dismissed or rejected.
  7. Life imprisonment meted is harsh and excessive.
18. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
  19. There is no dispute that under section 8 (1) of the *Sexual Offences Act* No.3 of 2006, and as was held in the case of *Dominic Kibet Mwareng vs Republic*[2013]eKLR, the ingredients for the offence of defilement are:-
    1. The age of the victim; who must be a minor or a child below the age of 18 years.
    2. Partial or complete penetration of the victim's sexual organ by the perpetrator's sexual organ.
    3. Identification or recognition of the perpetrator as the real culprit.
  20. On the first issue, the complainant said in court that she was 8 years old. The mother said she was eight years old though could not remember the date she was born. However, the complainant who had said was 8 years old in her *voire dire*, said she was 9 years old while giving evidence. The age assessment report indicates that she was 9 years old. Though the age given is not precise, there is no doubt that the complainant as of the time of the alleged offence was below 10 years of age. Such is not in dispute and the defence has not made it an issue in the appeal.
  21. The second issue is of penetration. The only evidence we have, direct evidence that is, is of the complainant. The history of the matter is relevant as the complainant was taken to hospital with an issue of faecal matter due to over eating of "mkoma" palm fruits. It was terrible as initial treatment did not work and she had to be operated on at Mombasa Coast Provincial General Hospital. Of notice is that she never complained of defilement before intervention by PW-2 who was called by the doctors in Mombasa to follow up on the issue of a possible defilement. Even when she intervened, PW-1 did not disclose of it until she was enticed with what she liked most, bananas and juices. The issue is whether evidence obtained this way from a minor is credible. In my view, the evidence of the minor required corroboration given the circumstances of this case. She could have been enticed to state what she stated to PW-2 and later to the court, given the doctor's position that they would not discharge her till PW-2 gets to the bottom of the matter. After her release she never went back home even to stay with her mother if not her father. We do not know the advice or coaching she received at the safe place where she was living before she gave evidence in court.
  22. The police did not try to obtain evidence that would corroborate the victim's allegations: if the incident happened in bed and she bled, evidence of such would have been obtained from the beddings. The clothes she was in during the alleged incident as well as those the appellant was in were not examined. Apart from the doctor's opinion that she was defiled, her evidence is not corroborated otherwise. The appellant had beaten her for leaving the child unattended and she was bleeding from the legs. She over fed on mikoma which caused her terrible constipation.
  23. There is undisputed evidence that she was passing stool through the vagina. The evidence came out through the defence case and is questionable why the prosecution case hushed such vital evidence. The only reason why the doctors were of the opinion that the complainant had been defiled is because



her hymen was broken and she had multiple perennial lacerations between the vagina and anus. The complainant had acute constipation problem. She was unable to pass faeces and had to be operated. It must have torn the normal pass way as it was coming out through the vagina. Given the circumstances and the trouble the doctors took in treating her, I find existence of a possibility where the hymen could have been ruptured by the hard faeces coming out through the vagina or even by the medical officers during her treatment and the operation. Equally, the noted lacerations could have been caused by the victim in her struggle to pass faeces or the doctors in the treatment process. The treatment involved working on the given areas and those who did the actual treatment were not called as witnesses to clarify on the given possibility.

24. The complainant's evidence required corroboration given that she did not disclose the information immediately after the alleged incident; and when she did, it was not freely as she was enticed with bananas and juice.
25. The onus was on the prosecution to prove the offence beyond reasonable doubt. This means the evidence presented must be so convincing that no reasonable person would doubt the appellant's guilt. Though this does not mean absolute certainty, it's rather a high level of certainty based on the evidence provided. It aims in ensuring fair trial and safeguarding as much as reasonably possible against wrongful convictions.
26. Having weighed the entire evidence, I find existence of a reasonable possibility that the appellant did not commit the offence he was convicted of. The existing doubts should have been resolved in his favour. Having found so, the appeal is merited.
27. I therefore do hereby, quash the conviction and the sentence. The appellant is set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 19<sup>TH</sup> DAY OF JUNE, 2024**

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**S.M.GITHINJI**

**JUDGE**

In the Presence of; -

1. Appellant (Manyani Prison)
2. Ms Ochola for the State

