



**Khamisi v Republic (Criminal Appeal E043 of 2023)  
[2024] KEHC 7250 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E043 OF 2023  
SM GITHINJI, J  
JUNE 13, 2024**

**BETWEEN**

**SHAURI PANDE KHAMISI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from both conviction and sentence from (S. O) No. E008 of 2022 at Kaloleni Law Courts delivered on 06th December, 2022 by Hon R.Amwayi – SRM)*

**JUDGMENT**

1. Shauri Pande Khamisi, the appellant herein, was charged in the lower court with a main count of defilement of a child, contrary to section 8 (1) as read with section 8 (1) (3) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the diverse dates between 1<sup>st</sup> December, 2021 to 7<sup>th</sup> February, 2022 at Ribe area in Rabai Sub-County of Kilifi County within the Coast Region, the appellant herein unlawfully and intentionally committed an act which caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of PNN, a child aged 15 years.
3. In 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 hereof being that on the diverse dates between 1<sup>st</sup> December, 2021 to 7<sup>th</sup> February, 2022 at Ribe area in Rabai Sub-County of Kilifi County within the Coast region, the appellant intentionally and unlawfully committed an indecent act with a child aged 15 years, namely P.N.N by touching her private parts using his penis.
5. The prosecution case is that the victim in this case who gave evidence as Pw-2 was born on 21/5/2006. The investigating officer (Pw-5) produced her Birth Certificate No. A5174508 which indicates the said



date of birth. At the time of the alleged offence, between 1<sup>st</sup> December, 2021 and 7<sup>th</sup> February, 2022 the victim was a pupil at Ribe Primary School, in class 8. She was living at Ribe village with her mother (Pw-4) and other siblings. The mother was dealing in mnazi at their home. The appellant herein was their neighbour for a period of 4 years. He used to visit the victim's home and was well known to the victim's family members.

6. On 7/2/2022 the appellant herein visited Pw-4's home. By that time according to the evidence of Pw-5, he was in an illicit love relationship with the victim as the two have had sex since December, 2021. On the material day the appellant requested the victim to visit his home. She agreed and visited him. She slept in his house and they had sex which involved penetration of her genital organ, namely vagina, by the genital organ of the appellant namely penis. It was the first time the victim was spending the entire night in his house as previously she used to get home immediately after sex.
7. In the morning she never went home but to the forest, she stayed there and spent the night at the place. She returned home on 9<sup>th</sup> February, 2022 at the wee hours, 5.00am. Pw-3 who is her brother saw her. He was aware she had not slept at home. He called her and when she saw him took to her heels. He run after her and managed to catch her. He took her home. She was interrogated as to where she was but she did not open up. They took her to Ribe Police Station. Pw-5 interrogated her and she stated that she with her boyfriend namely Shauri. She alleged the relationship started in December, 2021 and they have had sex till the date of her return home on 9/2/2022. She was taken to Mariakani Hospital for examination. Pw-1 examined her. It was established that she was 8 weeks pregnant. The hymen was broken and had a white discharge. The P-3 form was filled to the effect that she had been defiled.
8. The appellant went underground and serviced on 10/3/2022 in the victim's home where he went to drink mnazi. The police were called and he was arrested. Upon completion of investigations he was charged with the offences in the charge sheet.
9. The appellant gave a very brief defence. He said he comes from Ribe and he was a shop keeper. He went further to state that during the time he is alleged to had committed the offence he was not at home. He did not commit the offence and was later arrested while at the victim's home. Upon cross-examination he disclosed that during the said period he was in Mombasa.
10. The trial court evaluated the evidence and found the offence in the main count proved by the prosecution beyond reasonable doubt. The appellant was accordingly convicted of it and sentence to serve 15 years' imprisonment.
11. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that: -
  1. That he was not positively identified.
  2. His defence which is cogent and believable was unfairly dismissed.
  3. Crucial witnesses in the case were not availed by the prosecution.
  4. Prosecution case was marred with contradictions and inconsistencies.
  5. The evidence adduced was circumstantial and could not lead to a conviction.
12. The appeal was canvassed by way of written submissions and both sides filed their respective submissions. As a first appellate court, I have re-evaluated the charge, evidence on record, judgment and sentence meted, and submissions by the parties herein.



13. At the onset I wish to observe that it's evident that the grounds of the appeal must have been picked from another case of which circumstances do not well fit this case as they appear misplaced given the evidence on record.
14. The offence of defilement is founded on three main ingredients being;
  1. The age of the victim who must be a minor, that is a child below the age of 18 years.
  2. Penetration, which is partial or complete insertion of the genital organs of a person into the genital organs of another person.
  3. Proper identification or recognition of the perpetrator.
15. These ingredients are provided for under section 8 (1) of the *Sexual Offences Act* No.3 of 2006 and must each be proved by the prosecution beyond reasonable doubt for a conviction to issue.
16. Starting with the first one of age of the victim, in this case a Birth Certificate No. A5174508 was produced showing the victim was born on 21/5/2006. In December, 2021 she was therefore aged 15 years old as stated in the particulars of the offences. A birth Certificate, unless otherwise established, is prima facie dependable evidence in establishing the date of birth, and therefore the age in respect to the person in whom it's issued. The age of the victim was not challenged and the issue is therefore firmly settled.
17. The victim stated on several occasions she had sex with the appellant who was her boyfriend. She indicated vividly what that entailed of which is penetration of her vagina by the appellant's penis. Upon examination by Pw-1 it was established that she was two months pregnant. Her hymen was absent and she had a white discharge. She indicated that she was impregnated by the appellant. There is no evidence that anyone else had an opportunity of doing so during the given period. I find the evidence of Pw-2 reliable to the said effect. It is well corroborated by the evidence of Pw-1, the clinical officer. It's clear that she was penetrated.
18. The appellant is the real culprit. The victim, her mother and brother had no cause at all to fix the appellant. The appellant was their neighbour and a customer to Pw-4 who was selling mnazi beer. He was well known to them as Shauri. Even after the incident, he was later arrested in their homestead. The complainant who was in a love relationship with him for a while could not have made a mistake of him. He was sufficiently recognized as the real culprit. I do notice in his mitigation he acknowledged commission of the offence after conviction as he stated; -

“I ask for leniency of the court. I will not repeat the offence again.”
19. His alibi defence was not well supported by way of corroboration and details of where about he allegedly was. The defence was therefore rightly dismissed. 15 years' sentence meted against him is within the law. He impregnated a school going girl and this has far reaching effect on her life. He deserved not more lenient sentence. I find no ground on which to vary the sentence to his advantage or favour.
20. The bottom line is that the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 13<sup>TH</sup> DAY OF JUNE, 2024**

.....

**S.M. GITHINJI**

**JUDGE**



**In the Presence of**

**1. Appellant present (Manyani Prison)**

**2. Ms Ochola for the State**

