



**KKC v Republic (Criminal Appeal E055 of 2022)  
[2024] KEHC 6774 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6774 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E055 OF 2022  
SM GITHINJI, J  
JUNE 6, 2024**

**BETWEEN**

**KKC ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from decision and judgment of the Senior Principal Magistrate's  
Court in Kilifi – SPM Criminal Sexual Offences Case No. E030 of 2021  
delivered by Hon S.D.Sitati – SRM on the 21<sup>st</sup> day of December, 2021)*

**JUDGMENT**

1. Kassim Kazungu Chiko, the appellant herein 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 this offence are that on the 6<sup>th</sup> day of October, 2020 in [particulars withheld], in Kilifi South Sub-County, Kilifi County within Coast Region, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of SMM, a child aged 10 years. In the alternative, he faced an offence of committing an indecent act with a child, contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
3. The particulars herein are that on the 6<sup>th</sup> day of October, 2020, at [particulars withheld], in Kilifi South Sub-County in Kilifi County within Coast Region, the appellant unlawfully and intentionally touched the vagina of SMM a child aged 10 years with his penis.
4. The prosecution case is that at the time of the alleged offence, that is on 6<sup>th</sup> day of October, 2020 the victim who offered her evidence as Pw-1 was aged 10 years. Her clinic card was produced as exhibit -4 and shows that she was born on 26<sup>th</sup> June, 2010. The victim was living at [particulars withheld] with her parents. She was attending Madrassa class.



5. The appellant is her relative and was living in the said village in a house near a “*mangwe*” of which he was the caretaker. On the material day the appellant called the victim to go and fetch water for him using a 10 litres jerrycan. The victim went and took water to him. She was with Joel and Hamu then. The appellant was with Jilani. After she took the water, the appellant sent her to the shop to get him Kshs.100 change. She went and upon returning to the appellant’s house found him alone. She was also alone at the time. The appellant told her to climb on the bed. She did so. He undressed her and also removed his clothes. He then inserted his fingers in her vagina. He covered her mouth and nose with his hand. At that point he inserted his penis into her vagina. Jack, who is a cousin to the victim’s father knocked on the door. The appellant told the victim to hide under the bed. She hid under the bed. The appellant then escaped from the house. Jack saw her under the bed.
6. That same day, 6<sup>th</sup> October, 2019, Jack (Jackson) went to the victim’s father who is Pw-2 in this case at 1.00 pm . The father was resting in the house. He reported that the victim was in a house near “*mangwe*” (palm wine selling den). The father went to the house and found the victim. The appellant who was living therein was however absent. He questioned the victim who narrated to him all that happened but indicated that before the appellant could defile her, Jack knocked on the door.
7. The parents and the victim reported the matter to the area chief who referred them to Kilifi Police Station. Upon reporting the matter at Kilifi Police Station they were referred to the Hospital at Vipingo. At Vipingo Health Centre she was examined and treatment notes made. Post Rape Care Form and P-3 form were filled at the place on 7<sup>th</sup> October, 2020 by Dr Frida Dama. The filled documents show she had minimal lacerations on outer genitalia with intact hymen.
8. Pw-4 investigated the matter. The appellant on 23/10/2020 went to the area chief to negotiate about the case and was arrested. He was then charge with the offences carried in the charge sheet.
9. The appellant’s defence is that he was a farmer at Kongoni but was living at Pingilikani. On 6/10/2020 he was at his house at [particulars withheld]. He sent a boy to call for him any girl to fetch water for him. The sent boy is Uhuru and was aged 7 years. He went back and reported that the victim, S, will fetch the water. The appellant was with Jilani. The victim took water and placed it outside. The appellant gave her Kshs.100/= and told her to get change, take Kshs.10/= and return to him Kshs.90/= . She took the change and all along she was with her two brothers. She then left in company of her brothers while the appellant was still in company of Jilani. Later Jilani left and the appellant slept at 11.00 am. After about 10 minutes a boy called Jackson knocked on the door and entered into the house. He peeped therein and left. At about 3 pm the appellant left his house for a walk. In the evening he got back to the house and slept.
10. The following day the victim’s father alleged that the appellant had defiled S. He questioned the father who said he was told about it by Jackson. The father had a grudge with him as he kept accusing him of seducing his sisters. He also alleged that the appellant had defiled another child but could not state which child. The victim was examined and found okay. He never committed the offence.
11. The trial court evaluated the evidence and found that the prosecution did not establish the element of penetration but established the others. The alternative count was therefore found to have been established by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 10 years’ imprisonment.
12. Dissatisfied with the said conviction and sentence, the appellant appealed to this court on the grounds that; -
  1. His defence was not appreciated by the trial magistrate.



2. The case was not proved against him beyond reasonable doubt.
  3. Contradictions in the prosecution case were ignored and ought to have been resolved in his favour.
  4. He was not accorded a chance to call his witnesses.
  5. The trial court was biased against him.
13. The appeal was canvassed by way of written submissions. As the first appellate court, I have re-evaluated the charges, evidence on record, the judgment of the lower court and sentence meted, grounds of the appeal and submissions by both sides.
14. The offence of “indecent act” is defined under section 2 of the [Sexual Offences Act](#) as follows; -
- ‘indecent act’ means 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. Exposure or display of any pornographic material to any person against his or her will;
- The ingredients for this offence therefore are that; -
- i. The suspect must have unlawfully and intentionally touched with any part of his body, the genital organs, breasts or buttocks of the victim, without penetration.
  - ii. Unwelcome display or exposure of any pornographic material to another.
15. The issue is whether the available evidence discloses the said ingredients beyond reasonable doubt. The evidence of the victim who was aged ten 10 years to a good extent is well corroborated by the defence case.
16. The appellant concedes that on the material day he was with the victim. He sent her for water of which she delivered. He gave her Kshs.10 and 100 note to get change. Those present at the time of the incident are also well corroborated. Out of this it’s clear that the complainant knew what she was talking about. The appellant only deviates from her evidence on the facts which constitutes the offence and that is simply in an effort to escape culpability. What the victim narrated is that the appellant touched her vagina with his fingers and his penis. The doctor’s evidence shows or raises doubts as to whether penetration was achieved as the hymen was intact and what was noted was only minimal lacerations on the outer genitalia. The trial court was therefore correct in according the appellant the benefit of doubt in relation to the issue of penetration. The evidence of the victim of which the trial court found reliable and credible under section 124 of the [Evidence Act](#), reveals beyond reasonable doubt that the appellant using his hand and penis touched the victim’s vagina, of which constitutes the offence he was convicted of.
17. The case was not planned and organized by anyone with intent to fix the appellant. The victim would not have gotten to the appellant, were it not for that she was called to fetch water for him. The father would not have been in the picture were it not for the said Jack (Jackson) who witnessed the victim in the appellant’s house and reported to him. The occurrence and flow of the evidence is natural and



highly reliable. Nothing in the evidence portrays that Pw-2 had a grudge against the appellant. The defence was rightly rejected as untrue.

18. The incident took place during the day. The appellant was well known to the victim as a relative. They were together for a long time. Pw-2 found the victim in the appellant's house. The appellant himself does not deny involvement otherwise, but for commission of the offence. He could not have been mistaken for the real culprit. He is the culprit.
19. The age of the victim was well established through her clinic card. She was 10 years old.
20. Having gone through the proceedings, I find nothing portraying biasness on the part of the trial magistrate. The trial was fair to both sides and it's the defence that closed their case without calling witnesses in case they had any.
21. The sentence of 10 years is the minimum provided for under section 11 (1) of the *Sexual Offences Act*. Given the age of the victim, the court was lenient enough to sentence the appellant at the minimum, otherwise in my view the circumstances would as well have justified a stiffer sentence.
22. The bottom line is that the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 6<sup>TH</sup> DAY OF JUNE, 2024**

**S.M. GITHINJI**

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**JUDGE**

In the presence of; -

Ms Ochola for the State

Appellant (in Manyani Prison)

