



**GMM v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 8949 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E030 OF 2023
SM GITHINJI, J
JULY 22, 2024**

BETWEEN

GMM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence in Sexual Offences Case No. E012 of 2022 at Wundanyi
by the Hon D.Wangeci – Principal Magistrate delivered on 27th day of July, 2022)*

JUDGMENT

Representation:

Mr Mulamula for the State

1. GMM was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No.3 of 2006.
2. The particulars of this offence are that on the day of 9th November, 2021 at around 22.00hrs at [Particulars withheld] area of Langoni Location, Lamu Central Sub-County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ZK, a child aged 16 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 day of 9th November, 2021 at around 22:00Hours at [Particulars withheld] area of Langoni Location, Lamu Central Sub-County within Lamu County, the appellant herein intentionally and unlawfully touched with his penis the vagina of ZK, a child aged sixteen (16) years.



5. In this case one witness who is an uncle to both the victim and the appellant gave evidence as Pw-1. After his evidence-in-chief the appellant did not cross-examine him but indicated vividly to the Court that he wished plead guilty to the offence. The court warned him of the seriousness of the offence but went ahead to plead guilty.
6. The charge was read out to him in Swahili to which he stated was true. The Court entered a plea of guilty. The facts were read by the prosecutor that on 9th November, 2021 Z left Mokowe for Amu for work. She met GM who was her first cousin as G had promised to link her up with a potential employer. G invited her to his house in Makafuni. She arrived there at 8.00Pm where he prepared food. The two ate the meal.
7. At bed time, G requested Z to sleep on his bed while he slept on the floor. This was at 9.00Pm. At midnight Z got up and found G caressing her breasts and vagina. She felt that he was stark naked. Z pleaded with him (her cousin) to stop fondling her breasts and vagina but he paid no attention. He forced her panty down before he inserted his finger into her vagina.
8. When she resisted, he slapped her very hard. She yielded in fear. G then forced his penis into her vagina. She cried but could do no more.
9. In the morning at 6.00am, her uncle (Pw-1) bumped into her as she was coming from G's house. She disclosed the forced sex she had with G. She was taken to Lamu Police Station and King Fahd Hospital for further processes. Her birth certificate, P-3 form, PRC form and treatment notes were produced as exhibits.
10. The suspect was later arrested on 10/11/2021 and brought to court with the present charges. Pc Ngatia effected the arrest.
11. The accused in his plain statement conceded to the circumstances leading to the forced sex. He however claimed that Z first watched pornography videos on G's phone and this gave her a strong sexual arousal. This made them to have sex after he begged her for it since he had also watched pornographic videos. He said that Z is his first cousin. He admitted that Z pushed him away and he stopped the sex before it went too far.
12. The appellant on the said facts stated: -

"All those facts are wholly true."
13. The Court therefore convicted him on the main count on his own plea of guilty.
14. The Prosecutor indicated that he is a first offender.
15. In mitigation the appellant stated that he seduced her and used no force.
16. The Court sentenced him to the minimum, 15 years' imprisonment.
17. The appellant dissatisfied with the said conviction and sentence, appealed to this Court on the grounds that; -
 1. The sentence imposed is harsh and excessive.
 2. The Plea of guilty was not unequivocal and as such he was greatly prejudiced.
18. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.



19. In this case the appellant pleaded guilty to the offence. Section 348 of the Criminal Procedure Code provides that: -

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate Court, except as to the extent and legality of the sentence."

20. In the case of *Olel vs Republic* [1989] KLR 444, it was held that: -

"where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (Cap 75) does not merely limit the right of appeal in such cases but bars it completely."

21. Section 207(1) and (2) of the Criminal Procedure Code, and the holding in the case of *Adan vs Republic* [1973] EA 445, is clear on what unequivocal plea of guilty amounts to. It is where in a plea of guilty; -

1. The charge and all the essential ingredients of the offence are explained to the accused in his language or in a language he understands;
2. Where the accused's own words in response to the charge are recorded and amount to admission, leading to a recording of a plea of guilty.
3. The facts are stated by the Prosecutor and the accused is given an opportunity to dispute or explain the facts or to add any relevant facts:
4. If the accused does not agree with the facts or raises any question of his guilt his reply is recorded and change of plea entered;
5. If there is no change of plea a conviction is recorded and a statement of the facts relevant to sentence together with the accused's reply are recorded.

22. The lower court record shows the foregoing procedure was observed during the plea taking on 25/11/2021. The appellant claims that the plea of guilty is equivocal is not correct. It's demonstratively unequivocal. Having found so, the next question is whether the meted sentence for the offence is harsh and excessive.

23. Section 8 (4) of the *Sexual Offences Act* No.3 of 2006 reads; -

"(4) Any person who commits an offence of defilement with a child between the age of sixteen (16) and eighteen (18) years is liable upon conviction to imprisonment for a term of not less than fifteen (15) years."

24. In Petition No. E018 of 2023, *Republic vs Joshua Gichuki Mwangi*, the Supreme Court of Kenya held that mandatory minimum sentences under *Sexual Offences Act* does not impede judicial discretion and is constitutional.

25. The appellant herein was given the minimum possible sentence under the law. He could not have gotten it better than that. The sentence is not therefore harsh and nor is it excessive.

26. The bottom line is that the appeal lacks merit and is herein dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JULY, 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; -

1. Appellant
2. Ms Ochola for ODPP

