



**Mwangi v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 9383 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E039 OF 2023
SM GITHINJI, J
JULY 22, 2024**

BETWEEN

FRANCIS NG'ANG'A MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the sentence in Sexual Offences Case No. E004 of 2023 at Lamu by the Hon M.Maina – Principal Magistrate delivered on 22nd day of February, 2022)

JUDGMENT

1. Francis Ng'ang'a Mwangi was charged in the lower court with a main count of defilement 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 are that on the 6th day of March, 2020 at [particulars withheld] village in Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of R.W a child aged 14 years.
3. In the alternative the appellant faced an offence of committing an indecent act with a child contrary to section (1) of the [Sexual Offences Act](#) No.3 of 2006.
4. The particulars hereof being that on the 6th day of March, 2020 at [particulars withheld] Village in Lamu West Sub-County within Lamu County, the appellant herein intentionally and unlawfully committed an indecent act with a child namely R.W, aged 14 years by touching her vagina using his penis.
5. The prosecution case is that the victim in this matter who gave evidence as Pw-1 was born on 5th November, 2006. A copy of her Birth Certificate was produced as exhibit. She was living with her parents and other siblings at [particulars withheld] village in Lamu. She was schooling at [particulars withheld] Secondary School in form one.



6. On 6/3/2020 the family had dinner together before they retired to bed. The parents went to sleep upstairs and the three children, all girls, downstairs. These girls are the victim herein, JI (Pw-4) and EA. At about midnight, Pw-2 who is their father heard EA, aged then 4 years old crying. He woke up his wife (Pw-3) to go and find out what was the problem. When she went she found out that EA was calling on Pw-1 saying she wanted to pee. The door to their bedroom was open and Pw-1 was missing.
7. The appellant was their neighbour and a friend. He was living only 400 metres away. Pw-2 had even assisted him with trees and stones as a good neighbour. His apparent age is given as 26 years. He was in love with Pw-1 who on 6/3/2020 was aged 13 years old. She would have hit 14 years old on 5/11/2020. At night of 6/3/2020 the victim left home clandestinely to join the appellant in his house. The appellant was in his house alone. In the bedroom they both undressed before they had sex.
8. When the mother found the victim missing on the material night, she informed her father (Pw-2) about it. The father went out looking for her till morning but in vain. She had spent the night in the appellant's house. The parents reported about her missing at Hindi Police Station. On 10/3/2021 Pw-2 was called by his sister OJ. She told him that the victim was spotted somewhere. The area chief had told Pw-2 that the victim was with Kamau the appellant herein. He was using the name Kamau of which Pw-2 had not known of. Pw-2 told Pw-3 about the report. At 8.00Pm they went to the village elder and reported about it. They then proceeded to the appellant's house. The appellant was at the door to his house naked. When he saw them he took on to his heels naked. Pw-2 chased after him. About 25 metres away he was held. Pw-1 was inside the house. Before the appellant run away he had alerted her to also escape. Pw-3 remained taking guard at the door. Pw-1 emerged and hit her. Pw-3 fell down and Pw-1 managed to escape only in a lessso. The appellant was escorted back to his house to dress up. When he entered he dressed up, armed himself with a panga of which he used to threaten Pw-2 and Pw-3. Pw-2 and Pw-3 retreated from his house and he got a chance to also escape.
9. The victim (Pw-1) went back home. She knocked on the door hard. Before Pw-4 could open for her, she put her hand through the window and opened. She hurriedly packed her clothes, forced Pw-4 to give her keys to the house of which she was given. She opened the door and left. She went to her grandmother's house.
10. Pw-2 and Pw-3 went back home and were told by Pw-4 what the victim had done. The following day they returned to the appellant's home and did not find him. After one week the victim was traced in her grandmother's house. Pw-2 got information that the appellant was trying to run away. He organized with a World Vision lady called Elizabeth and Sylvester and were able to trace him. He was held and taken to Hindi Police Station. The victim returned home. She had abdominal pains and was bleeding. She was taken to Hindi Hospital.
11. The victim was examined on 14/3/2020 at King Fahd Hospital by Pw-5. It was noted that her vagina was normal with no discharge though the hymen was absent. HIV and pregnancy tests were negative. Pus cells were however seen of which is an indication of an infection of which she was treated. Medical notes were made; PRC and P-3 forms filled. Absence of hymen made the clinical officer form an opinion that she was penetrated the appellant was then charged.
12. The appellant in his defence denied the offence. He alleged that Pw-2 who is his neighbour had offered to sell him a canter of stones to build a wall. He paid 10,000/= for the stones. On 8/3/2020 he went to collect the stones. Pw-2 had directed his two daughters to go and count them. They went and found no stones. On 9/3/2020 the appellant pursued the issue with Pw-2. Pw-2 just gave him excuses. The accused ordered for refund of his money by evening or he will take the law into his own hands. On 10/3/2020 he met Pw-2 together with Pw-3 and two others. Pw-2 told him that he wanted them to



go somewhere. He was then led to Hindi Police Station. He was not with the victim and his money was not refunded.

13. The trial court evaluated the evidence and was of considered view that penetration was not proved by the prosecution and hence considered the alternative charge leading to this acquittal on the main count and conviction on the alternative count. He was consequently sentenced to 8 years' imprisonment.
14. Dissatisfied with the said conviction and sentence he appealed to this Court on the grounds that; -
 1. The offence was not proved by the prosecution beyond reasonable doubt.
 2. The prosecution case is marred with contradictions and inconsistencies.
 3. That the conduct of the victim was consistent with one of an adult and the defence under section 8 (5) and (6) of the *Sexual Offences Act* obtained in this case.
 4. The sentence is harsh and excessive and should be reviewed in favour of a non-custodial sentence.
15. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
16. As a first appellate Court I have re-evaluated the charges, evidence adduced by the prosecution, the defence, judgment of the lower court and sentence meted, ground of the appeal and filed submissions.
17. In the case of *Okeno v Republic* [1972] EA it was held that an appellant on the first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and for the appellate Court to draw its own conclusions.
18. In the case of *Pandya v Republic* [1957] EA 336, the Court held that:

“ 14. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8 (1) of the *Sexual Offences Act* No.3 of 2006.”
19. In the case at hand, a Certificate of Birth No.XXXX was issued in respect of the victim herein on 18th of February, 2015, showing that she was born on 5th November, 2006. The offence in this case was allegedly committed on 6th March, 2020. By simple calculation the complainant as of the time of the alleged offence was aged 13 years old. Her 14th year Birthday would have been on 5th November, 2020. The age 14 given in the charge sheet is therefore not entirely correct. It may have been arrived at by considering the years between 2006 and 2020 without paying due attention to the date of birth and the month. However, the complainant (victim) was right when she told the Court on 7/10/2021 that she was 14 years old. Having been 13 years old at the time of the alleged offence, it's no doubt that she was a child or a minor below the age of 18 years. The error in the charge sheet is curable under section 382 of the Criminal Procedure Code as it did not occasion a failure of justice.
20. I now turn to the issue of “penetration” which in my view is the “elephant” in this determination.
21. Penetration” under section 2 of the *Sexual Offences Act* No.3 of 2006, is defined as partial or complete insertion of the genital organs of a person into the genital organs of another person.

Genital Organs” under the said Act, includes the whole or part of male or female genital organs and for the purposes of the Act also the anus.”



22. The evidence of Pw-1, the victim herein, shows that she went to the appellant's house at night. They undressed and had sex in his bed. This was on 6/3/2020. The evidence of Pw-2 shows by 10/3/2020 they had not yet traced her and was traced thereafter. This shows she was with the appellant in his house for more than 4 days. When she was later traced she was inside the appellant's house naked. The appellant was also naked and fled that way.
23. The victim however managed to cover her nudeness with a lessso and escaped. Pw-5 the clinical officer who examined the victim at King Fahd Hospital observed that the vagina was normal, there was no discharge and the hymen was not intact. She also had a severe vaginal infection which made her be admitted for 3 days. The PRC form shows she had a swollen clitoris and hymen was not intact. Pw-5 was of the opinion that the absence of hymen shows penetration could have occurred.
24. The trial court on penetration held that; -

“According to the victim, she said she went to the house of accused at night and they had sex. She said she was not forced, it was voluntary. The medical records did not show any evidence of sexual intercourse. The only abnormality noted was the vaginal infection which the clinical officer said could have been caused by sexual intercourse or other factors.”
25. Having considered the foregoing, the Court went ahead to conclude that; -

“The complainant said the accused had sex with her; that the prosecution did not probe her further to confirm if she understood what sex means. The medical evidence also did not prove that there was penetration in the circumstances. It is hard to say without doubt that penetration occurred. Whether or not accused penetrated her vagina, he must have touched her vagina with his penis. I therefore find the accused guilty of the lesser offence of committing an indecent act with a child by touching the vagina of the R.W. using his penis since the issue of penetration is doubtful.”
26. My finding is that, given the evidence on record the trial Court was wrong in finding so. By the time the complainant gave her evidence she was aged 14 years. Given her conduct in the incident which gave rise to this case, she definitely knew what sex was all about. The trial court indicates that the prosecutor should have probed the minor to explain what sex is about. It also applies that having said they had sex, if the court doubted her understanding of the word, should have sought clarification from her. That the Court did not, as well as the prosecutor, they must have had no doubt of her understanding on what sex involved.
27. The circumstances of the case is that she was with the appellant for more than 4 days in his house. On 6/3/2020 the night she visited him they undressed, and in bed had sex. Trying to understand this phrase otherwise than what it plainly means, is in my view, overthinking. The circumstances leave no doubt that the two had sex that involved penetration of the victim's genital organ by the appellant's genital organ.
28. The court was also wrong in holding that the medical evidence only revealed of the vaginal infection with no any other evidence showing penetration. It is clear the PRC form shows that the clitoris was swollen and hymen was absent. The P-3 form also indicate of the missing hymen as well as the clinical officer in his evidence. This buttresses the victim's evidence that there was penetration. It's therefore



vivid, contrary to the trial court’s finding, that there was penetration. In the case of Erick Onyango Ondongo v Republic [2014] eKLR, the Court of Appeal held that; -

“In Sexual Offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It’s not necessary that the hymen be ruptured.”

29. Given the foregoing consideration it’s baffling how the trial Court found there was no penetration and went ahead to convict the appellant for a lesser offence of indecent act with a child.
30. The third ingredient is of identification or recognition of the appellant as the real culprit.
31. The appellant herein was well known to the victim and members of her family as they are neighbours. She stayed with him in his house for more than 4 days. They were found together inside the said house by her parents. The facts reveal beyond doubt that the appellant is the real culprit.
32. The appellant’s defence was an afterthought. He did not cross-examine Pw-1, Pw-2 and Pw-3 about it. The evidence of Pw-2 shows he was kind enough to have assisted the appellant as a neighbour with trees and stones. The witnesses had no cause to fix him.
33. The bottom line is that the main count was established by the prosecution beyond reasonable doubt, and the appellant ought to have been convicted of it rather than the alternative count. I am hereby obliged to correct the error and convict him of the main count as I reverse the conviction on the alternative count. He is therefore found guilty of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
34. Under section 8 (3) of the Sexual Offences Act, a person who commits an offence of defilement with a child between the age of twelve (12) and fifteen years (15) is liable upon conviction to imprisonment for a term of not less than twenty (20) years.
35. The appellant was serving eight (8) years’ imprisonment for the inappropriate offence. He will now serve twenty (20) years’ imprisonment as deserved for the correct offence, from 20/3/2020.

This Court so finds.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JULY, 2024

.....
S.M. GITHINJI

JUDGE

In the Presence of

1. Present (Manyani Maximum Prison)

2. Ms Ochola

.....
S.M. GITHINJI

JUDGE

22/7/2024

