



REPUBLIC OF KENYA



KENYA LAW
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**NM v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 8691 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E030 OF 2023
SM GITHINJI, J
JULY 10, 2024**

BETWEEN

NM 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

Representation:

Appellant in person

Mr Baraka for the State

1. Nguta Munyika 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 diverse dates between 1st January, 2020 and 1st January, 2022 within Kwale County, the appellant intentionally caused his penis to penetrate the vagina of MR 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 of the offence hereof being that on diverse dates between 1st January, 2020 and 1st January, 2022 within Kwale County, the appellant intentionally touched the vagina of MR a child aged 16 years.



5. The prosecution case is that during the period of commission of the said offence, the complainant was living with her parents and other siblings at (Particulars Withheld) Location. According to her clinic card of which was produced as an exhibit by Pw-4, she was born on 26/8/2006. On the alleged last date of commission of the offence, that is on 1st January,2022 she was aged 16 years. She was a pupil at (Particulars Withheld) Primary School in class 4.
6. The appellant herein is a brother to her father and is a neighbour at (Particulars Withheld) , living less than 100 metres away. The complainant was therefore well known to him. The complainant who gave evidence as Pw-2 stated that in January, 2020 on a date she could not recall, the appellant invited her to his house. She however did not go. Later that day at about 6.00Pm she was sent by her mother (pw-3) to go and buy vegetables. She went and bought, and on her way back home she got across the appellant in a thicket. He called her into the thicket. She went and he caressed her breasts. He then removed her pant and fell her to the ground. He removed his trousers and had sex with her, of which involved insertion of his penis into her vagina. After he was through he told her to rise and go home, and not to tell anyone. She did as instructed.
7. After two weeks while the complainant was headed home from CCM Church at Kibaoni, she came across the Appellant waiting for her within a thicket. He held her from behind and fell her to the ground. He removed her pant and lowered his trousers. He as before had sex with her. She tried to resist and scream but got no assistance. The path was a deserted one. After the incident she went home but she did not report it as the Appellant had warned her not to.
8. Again after about 2 weeks he waylaid her as before when she was from the church. He grabbed her by the right hand and pulled her to the thicket. He undressed her and lowered his trousers. He then had sex with her. After the incident she went home.
9. On 20/3/2022 she reported the incident to her mother (Pw-3). The mother informed the father about it. On 24/2/2022 the matter was reported at Samburu Police Station. They were referred by Pw-4 to Samburu Sub-County Hospital for examination. She was examined by Pw-1 at about 2.28Pm at the said Hospital. The doctor noted that the hymen was broken or missing, there were no bruises on the labia and though she was on menses, had no STI. She was also not pregnant. He concluded that she had been defiled and thus filled the P-3 form.
10. Pw-4 investigated the matter. He obtained the complainant's Health Card. He also established that the appellant is complainant's uncle (a brother to her father). He visited the scene and noted the appellant house is less than 100 metres from the victim's home. He arrested the Appellant who upon interrogation denied the offence. The Appellant and the complainant's family had no dispute. After completion of the investigation he was charged with the offences.
11. In his defence, the appellant denied the offence and expressed denial of truth in the witness statements.
12. The trial court evaluated the evidence and found that the offence in the main count was established by the prosecution beyond reasonable doubt. The Appellant was convicted of it and sentenced to serve 15 years imprisonment.
13. Dissatisfied with the said conviction and sentence he appealed to this Court on the grounds that: -
 1. The case against him was not proved by the prosecution beyond reasonable doubt.
 2. Voire dire was not conducted on Pw-2.
 3. The charge sheet is defective.



4. Unreliable exhibits were used to arrive at a conviction.
 5. Investigations were shoddy and the case was fabricated.
14. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
 15. As the first appellate court I have re-evaluated the charges, evidence on record including the defence, judgment of the lower court and sentence meted; as well as submissions by both sides.
 16. The Appellant challenges the correctness of the charge. I agree with him that the charge allege the offence was committed between 1st January, 2020 and 1st January, 2022 of which is a period of 2 years. However, in her evidence-in-chief, the complainant stated the first incident was in January, 2020; the second one two weeks after and the 3rd one two weeks after the second one. This would mean the incidents happened all in the year 2020, between the months of January and February. However, not every error in the charge sheet occasions a miscarriage of justice. Under section 382 of the Criminal Procedure Code, some errors are curable if they do not prejudice the accused. The actual date may not be crucial where the defence is not of alibi; and what counts is whether the offence was committed or not – see the case of *J.M.A=versus=R* [200]KLR 671.
 17. The other issue raised by the Appellant is that *voire dire* was not conducted on the complainant. The Court before taking the evidence of the complainant observed that she was not a child of tender years and there was no need for a *voire dire*. Going by section 19 of the *Oaths and Statutory Declarations Act*, one gets the impression that a child of tender years is one below the age of 14 years. However, section 2 of the *Children Act* defines a child of tender years to be one under the age of (10) ten years. The complainant in this case according to her clinic card was aged (16) sixteen years in the year 2022. She was not therefore a child of tender years and the trial court was right in holding that *voire dire* was not necessary.
 18. Having dealt with the foregoing issues, I now wish to turn on the common ingredients for the offence of defilement. Going by the provisions of section 8 (1) of the *Sexual Offences Act*, these ingredients are; -
 1. The age of the victim, who should be a minor 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. Identification or recognition of the accused person as the real culprit or perpetrator.
 19. On the first ingredient, the complainant stated in her evidence that she was 16 years old. Her mother stated likewise though they could not tell when she was born. However, the investigating officer was able to obtain her Health Clinic Card which indicates her date of birth as 26/8/2006 It therefore follows that in the year 2022 she was 16 years old as stated. The appellant did not challenge her age and in my view the age is well settled.
 20. For penetration, the complainant given her age knew what sex is about. She narrated how on three occasions the appellant waylaid her along a path, pulled her into the thicket, laid her down, undressed her, removed his trousers and using his sexual organ, penetrated hers. The evidence is corroborated by the evidence of Pw-1 who examined her and filled her P-3 form. He noted that hymen was missing showing she had been penetrated. It's my finding, just as the lower court did, that penetration is established beyond reasonable doubt.



- 21. On the last ingredient, the appellant is an uncle to the complainant. He is a brother to her father and a neighbour. They had sex not once but thrice. She and her mother had no cause to fix him. He was well recognized by the complainant who could not have made a mistake of him.
- 22. The defence is flimsy and of mere denial. The appellant during trial did not also pose meaningful challenge to the prosecution evidence by way of cross-examination. The defence does not challenge the truth of the prosecution case and the trial court rightly dismissed the same.
- 23. The appellant was sentenced to 15 years imprisonment. He is an uncle to the victim and exploited the relationship to defile her, not once but thrice. The trial court weighed the circumstances of the offence and an availed pre-sentence report in settling at 15 years imprisonment. The said sentence given the circumstances cannot be said to be harsh and excessive. It is a deserved sentence. I find no reason to disturb the same.
- 24. The parting shot is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF JULY, 2024

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S.M.GITHINJI

JUDGE

In the Presence of; -

- 1. Ms Ochola for the State
- 2. Appellant present (Malindi Prison)

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S.M.GITHINJI

JUDGE

