



**AM alias A v Republic (Criminal Appeal E043 of 2023)  
[2024] KEHC 10779 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10779 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E043 OF 2023  
SM GITHINJI, J  
SEPTEMBER 17, 2024**

**BETWEEN**

**AM ALIAS A ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the sentence ONLY in MCSO Case No. E028 of 2021 at Lamu by the Hon T.A.Sitati – PM delivered on the 23rd day of January, 2023)*

**JUDGMENT**

**Representaion:**

Appellant in person

Mr Mulamula for the State

1. AM alias A was charged in the lower court with a first 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 in September, 2021 in Lamu Central Sub-County within Lamu County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of HMI, a child aged sixteen (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 this offence being that on diverse dates in September, 2021 in Lamu Central Sub-County unlawfully and intentionally touched the vagina of HMI, a child aged sixteen (16) years with his hands.
5. The second count is of going armed in public contrary to section 88 of the Penal Code.



6. The particulars of this offence are that on the 16<sup>th</sup> day of November, 2021 at around 11.50 hours in Lamu Central Sub-County within Lamu County, the appellant without lawful excuse went armed with a knife in the above named area in such a manner to cause fear to the residents living around the area.
7. The prosecution case is that the victim herein who gave evidence as Pw-1 was living with her other siblings in Lamu. She was a pupil at [Particulars Withheld] Primary School till December, 2021 when she dropped out in class 8. In September, 2021 on a day she could not recall, she left home to go and meet her boyfriend namely Abuu, the appellant herein. At the time she was aged 16 years. She met him at Wiyoni in the house of his friend called Rashid. Rashid was not however in the house that evening. While in the house, the appellant kissed her on the lips. He then touched her chest and pubic, going down to the genitals. Soon thereafter they had sexual intercourse. The act involved him inserting his male genital organ into her female genital organ. They had it on a mattress that was placed on the floor. She felt pain as sex progressed. After they were through she took a bath, dressed up and went back home.
8. Later at home she felt unwell. She thought she had ulcers. She informed her mother about it. The mother (Pw 2) took her to the chemist where she bought her some pain killers. She took them but the pain persisted. She was then taken to King Fahd Hospital. Her urine was tested and it was discovered she was pregnant. It is then Pw-1 disclosed that AA is the one who had impregnated her, and promised to marry her. The mother reported to the area chief who detested the action. The matter was reported to the O.C.S. On 14/11/2021 Pw-6 was assigned the case for investigations. He escorted the victim and the mother (Pw-2) to King Fahd Hospital for examination. The victim was tested and found was 10 weeks pregnant. P-3 and PRC forms were filled by Pw-5. He noted that her hymen was missing and had a whitish discharge, a sign of an infection. She was treated. Ultrasound test disclosed she was 10 weeks and 3 days pregnant. Her age was also assessed and placed at 15 years then. However, the victim claimed to be 16 years old.
9. Pw-6 then recorded other witness statements. On 16/11/2021 when the investigating officer was on patrol with Pw-3 and Pc Shukri at Wiyoni, they spotted the appellant who was standing facing a shop. They went and identified themselves to him. He was searched and had a military type knife which was strapped on his side. It was recovered. The appellant was taken to Lamu Police Station. He was interviewed and said he had sexual intercourse with the girl and intended to marry her. He was then charged with the offences carried in the charge sheet.
10. During the trial, he absconded and went underground in Mombasa. However, with the help of the surety he was traced and arrested. His bond was consequently cancelled. The victim also gave birth and a DNA test was conducted. The report which was produced as P-exhibit -10 shows that the appellant is 99.99% the biological father of FA, the boy who was born by the victim.
11. The appellant in his defence stated that he was from Mkomani and was a motorcycle rider. His mother died while he was in class 8 and was an orphan. He never met his father. He however had a sister called Z who died leaving behind two children. He was depending on elderly grandparents. He admitted paternity of FA and requested for a chance to raise him. He acknowledges it was wrong to have sexual relationship with the victim.
12. The trial court evaluated the evidence and convicted the appellant on the first count. He was sentenced to serve 15 years' imprisonment.
13. The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that; -



1. He is a first offender.
  2. He is remorseful for the offence and is willing to take responsibility for it.
  3. Considering the best interest of the child he should be granted a chance to raise and provide for him.
  4. The relationship between him and the victim was consensual.
  5. The sentence imposed is harsh and excessive given the circumstances.
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 adduced by both sides, judgment of the lower court, considered the grounds of the appeal and submissions.
16. The grounds of the appeal reveal clearly that the appeal herein is against the sentence and not conviction. If anything, the evidence on record undoubtedly establishes that the offence of defilement was committed by the appellant. He accepted it in his defence and as well in the grounds of the appeal.
17. He only challenges the sentence of which he alleges given the circumstances is harsh and excessive.
18. The amended charge shows the victim was aged 16 years old at the time of commission of the offence. Section 8 (4) of the [Sexual Offences Act](#) No.3 of 2006 reads; -
- “A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
19. Under section 42 and 43 of the [Sexual Offences Act](#), a child lacks capacity to consent to sex.
20. [Petition No. E018 of 2023](#) of Republic=vs=Joshua Gichuki Mwangi of which was decided upon by the Supreme Court is vivid that mandatory minimum sentences as prescribed in the [Sexual Offences Act](#) are constitutional. The appellant herein was sentenced to the minimum possible sentence under the Act, for the offence committed. This Court lacks legal grounds on which to interfere with the said sentence downward. As such the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Appellant present
2. Ms Mkongo for ODPP

