



**JMB v Republic (Criminal Appeal E038 of 2023)
[2024] KEHC 10793 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E038 OF 2023
SM GITHINJI, J
SEPTEMBER 19, 2024**

BETWEEN

JMB 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. JMB, the appellant herein was charged together with another who was acquitted, with the offence of Gang Defilement contrary to section 10 of the Sexual Offences Act No.3 of 2006.
2. The particulars of this offence are that on the diverse dates between 2020 and 26th August, 2022 at Lamu County, in association with Patrick Muchira Karinga the appellant unlawfully and intentionally caused his penis to penetrate the vagina of M.W a child aged 12 years.
3. In the alternative he faced a charge of 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 diverse dates between 2020 and 26th August, 2022 at Lamu County, the appellant intentionally touched the vagina of M.W a child aged 12 years with his penis.
5. The appellant also faced a third count of incest, contrary to section 20(1) of the Sexual Offences Act No.3 of 2006.
6. The particulars of this offence are that on the diverse dates between 2020 and 26th August, 2022 at Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M.W who was to his knowledge his daughter.



7. The prosecution case is that the victim herein who gave evidence as Pw-1 was born on 16th March, 2010 in accordance to her Birth Certificate Entry No.020210xxx of which was produced in court as P-exhibit -5. The victim was living with her parents at [Particulars withheld]. However, when she was 9 years old, the parents disagreed and her mother left the matrimonial home with other children for Bomani in Mpeketoni, leaving behind the victim to live with her father who is the appellant herein, and grandmother. The victim was living in the same house with the grandmother while the appellant had a house at one end of the farm. The grandmother used to send the victim to her father to collect some items for cooking such as sugar, salt and oil. The appellant got into the habit of defiling his daughter whenever she was sent to the house. He could cover her with cloth and insert his penis into her vagina. She had reported the incident to her grandmother and her uncle M, but the two told her to remain mute about it. The grandmother later passed on in the year 2022. The victim's mother took her to Mpeketoni to live with an aunt called NK, the Pw-2 in this case. The victim opened up to her aunt and narrated what the father had done to her at [Particulars withheld]. Pw-2 reported the incident to a children officer namely Ndolo. The officer listened to the victim and advised that they report to the police. They reported at Hindi Police Station. Pw-4 took the victim to Hindi dispensary where her P-3 form and PRC form were filled.
8. On 4/12/2022 police got information that the suspects were in their houses. The victim led them to the said houses where they were traced and arrested. The appellant was asked for the victim's birth certificate and he produced it. The P-3 form and PRC form indicated that the victim's hymen was long broken. The clinical officer who examined her was of the impression that she had been defiled.
9. The appellant's defence is that he was fixed by his wife as she wanted him to sell the land and hand her money to travel to Kirinyaga, of which the appellant did not agree to. She later run away, leaving him with the victim. He reported at Hindi Police Station and was referred to Chief Jamal who told him to take the child to her grandmother. The grandmother was very old and he took the victim to his sister namely HNB. The sister died and the victim was returned back to him. He took her to his brother who died in August, 2022 and the mother namely MW took the victim. The appellant was left taking care of B who had suffered a road accident. The appellant's wife had threatened him, saying he will see it.
10. The trial court evaluated the evidence and was of the decision that the offence of Gang defilement had not been established by the prosecution to the required standard as the involvement of the second accused Patrick Muchira Karinga was doubtful. The said second accused was consequently acquitted of the offence. However, given the evidence on record that the appellant had defiled the victim on several occasions, the court convicted him of the offence of defilement and incest given that he was the father to the victim.
11. For the offence of defilement, the appellant was sentenced to serve 20 years' imprisonment and for incest 10 years imprisonment, sentences to run concurrently.
12. The appellant dissatisfied with the said conviction and sentence, appealed to this Court on the grounds that; -
 1. The charges were not proved beyond reasonable doubt as required by the penal laws of Kenya.
 2. Crucial witnesses mentioned by the victim were not called to give evidence, namely Mwenda, Rose and victim's teacher of the school where she was schooling.
 3. Two medical reports, one from Mpeketoni Hospital and the other Hindi Hospital had differing name of the victim as Tabitha Wanjiku and Mary Wamani respectively.



4. The appellant was not examined given that the victim had STD which is Herpes Simplex, for nexus of the alleged incident.
5. The appellant's defence was not properly weighed.
6. The victim's case was not corroborated.
7. The victim lied about the presence of the 2nd accused in the appellant's house.
8. The allegation arose from the victim's aunt in collusion with the minor's mother.
13. The appeal was canvassed by way of written submissions of which were filed by each side.
14. I have re-evaluated the charges, evidence adduced in support, the defence, judgment and sentences meted; considered the grounds of the appeal and the submissions.
15. I wish to start by making it clear that under section 10 of the Sexual Offences Act No.3 of 2006 there is no offence known as "Gang defilement." The offence disclosed is of "Gang Rape" and is not proper to give the offence a name not known in law. The section clearly reads; -
 - 10 "Any person who commits the offence of Rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of Rape or defilement is guilty of an offence termed gang Rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."
16. The provision is explicit that whether the victim is an adult or a minor, the offence is termed Gang Rape. The appellant was not however convicted of the offence and the error did not therefore prejudice him in the case and I need therefore not explore more on the issue.
17. The appellant challenges the evidence that led to his conviction on defilement and incest. Weighing the evidence, the minor had no cause to fix the appellant who is her father. She stated firmly how the father used to defile her in his home whenever she was sent there by the grandmother. She had reported to the grandmother before she passed on, and to the uncle, but was told to remain mute about it. The medical report at least shows the hymen was absent, which suggests she had been penetrated. The evidence is reliable that she had been penetrated by the father using his genital organ.
18. There is in place a Birth Certificate which indicates the victim's date of birth as 16th March, 2010. Between the year 2020 and 2022 the victim was therefore aged between 10 and 12 years. She was doubtlessly a minor. The assailant being the father who was living in the same compound with her, was well known to her, and the evidence of recognition cannot be questioned. The defence by the appellant is just a crafted story. The victim's mother did not play a pivotal role in raising the complaint and also in the prosecution. If she was the force behind it she would definitely have featured prominently somewhere. The evidence and circumstances of the case suggest otherwise.
19. The only issue which this court need determine is whether the trial court was in order to convict the appellant for defilement, an offence which he had not been charged with in count 1, in place of the offence of gang Rape of which was indicated wrongly as gang defilement.
20. Defilement is committed by one person while Gang Rape is committed in association with another or others, which is therefore by more than one person. The ingredients are therefore different for the offences.



21. Section 179(1) of the Criminal Procedure Code reads; -
- “When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- 2) when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence though he was not charged with it.”
22. The question then is whether gang Rape is a lesser or minor offence to defilement.
23. Defilement under section 8 (1) (3) where the victim is between 12 and 15 years old, carries a sentence of not less than 20 years. For Gang Rape as indicated before, is a sentence of not less than fifteen years but which may be enhanced to imprisonment for life. While for the defilement the sentence is of not less than 20 years, it simply connotes that given the circumstances the sentence can be enhanced, upto life imprisonment. Given the sentence provisions, defilement may be perceived to be a more serious offence than that of Gang Rape.
24. The trial court was therefore not entitled under the law to convict the appellant for defilement, an offence he was not charged with, in place of the offence of “Gang defilement” – Gang Rape.
25. Defilement and incest where the victim is a child carries similar ingredients save for that in incest the victim is related to the suspect by virtue of being a daughter, granddaughter, sister, mother, niece, aunt or grandmother; and that in incest indecent act is part of it’s ingredient.
26. The foregoing implies that it is not advisable to charge a person with defilement and incest in the same charge sheet as different counts. The same should apply for the offence of indecent act. The prosecution should decide which one to prefer to avoid charging the same offence in multiple counts which makes the charge multiplicitous/duplex. I guess if defilement had been preferred as an offence in Count 1, the prosecution should not have had the offence of incest in the third count.
27. The trial court was not therefore entitled to convict the appellant for the offence of defilement of which he had not been charged with. The appellant should have been acquitted for the offence of Gang Rape and convicted for the offence of incest. Considering the sentences meted the error did not prejudice the appellant for the sentences were held to run concurrently.
28. Incest has a minimum sentence of 10 years; and life imprisonment where the victim is a child. The appellant who is the father to the victim committed an act which caused penetration several times with her. From the proceedings he was not even remorseful about it. The circumstances did not entitle him to the minimum sentence as the victim was a minor. I therefore quash the conviction and sentence in the first count of defilement and uphold the conviction in the third count of incest. The 10 years’ imprisonment meted for the offence is enhanced to 20 years’ imprisonment of which the appellant is already serving.
29. The appeal therefore partly succeeds and fails as held in the foregoing with no benefit to the appellant whatsoever in relation to the period he will serve in custody.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF SEPTEMBER, 2024.

.....
S.M. GITHINJI



JUDGE

In the Presence of; -

Mr Soita for the Appellant

Ms Mkongo for the ODPP

