



**KKM v Republic (Criminal Appeal E029 of 2023)  
[2024] KEHC 12222 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12222 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E029 OF 2023  
SM GITHINJI, J  
OCTOBER 14, 2024**

**BETWEEN**

**KKM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment and Sentence made by the Principal  
Magistrate's Court at Kaloleni before Hon R. Amwayi – Principal  
Magistrate on 18th May, 2023 in Sexual Case No. E005 of 2023)*

**JUDGMENT**

**Representation**

Mr Collins Odeng for the Appellant

Mr Mulamula for the State

1. KKM 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 23<sup>rd</sup> day of January, 2023 at Kilifi County, the appellant unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of RKK, a child aged 14 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. The particulars hereof being that on the 23<sup>rd</sup> day of January, 2023 at Kilifi County, the appellant unlawfully and intentionally touched the genital organ namely vagina of RKK, a child aged 14 years.



4. The prosecution case is that the appellant herein is the biological father of the victim who gave evidence as Pw-4. The appellant and the victim's mother (Pw-3) had disagreed and separated leaving the children with their grandmother and father (appellant). They were living at Kaloleni Sub-County. The victim (Pw-4) was aged 14 years and was a pupil in grade 5 at [Particulars Withheld] Primary School. She had two other siblings disclosed in the matter, NK (Pw-2) who was older than her as she was 16 years old, and a brother called J.
5. On 23/1/2023 at around 7.30Pm the victim and her sister NK were from fetching water. The appellant who is their father sent J to call the victim. The victim was called to join the father in his house. She went and when she entered, the father asked how much was her school fees balance. She said 400 Kshs. The appellant started to carelessly her erotically. He was in a lesso. He pulled her to bed. She sensed danger and called for help but no one heard her as the house was at distance from the rest. He removed her skirt, biker and panty. He removed the lesso and laid her facing upward. He went on top of her and using his penis, penetrated her vagina. When he was through, the victim escaped half-naked. Pw-2 spotted her leaving the house that way, crying. She rushed for a skirt and covered her nudeness.
6. Pw-2 reported the incident to their grandmother who asked the appellant about it. The appellant gave them a 100 Kshs to share between them and forgive him. They were told not to tell anyone.
7. That evening at about 8.00Pm Pw-3 called Pw-2, asking her how they were doing. It's then that Pw-2 reported to her that Pw-4 had been defiled by the father. On 28/1/2023 the matter was reported at Gotani Police Station. Pw-5 investigated the case. He issued Pw-4 with a P-3 form which was filled at Mariakani Sub-County Hospital by Pw-1 on 29/1/2023. The clinical officer upon examining Pw-4 noted that the internal and external genitalia were normal, save for loose sphincter muscles. The hymen was however absent. No infection was noted and pregnancy was negative. According to him, the absence of hymen indicated that she had been penetrated. He thus filled the P-3 form. The appellant was then arrested and charged with the offences in the charge sheet.
8. The appellant gave a very brief defence. He denied commission of the offence, saying that he called the daughter to the house to give her money. They were three and they left. It's after 3 days that he heard of defilement allegation. He did not defile her. After the victim was given money her younger sister went back claiming it was not enough. He told her to return the following day for more.
9. The trial court evaluated the evidence and found that the main count had been proved by the prosecution beyond reasonable doubt. The appellant was convicted of the offence and sentenced to serve 20 years imprisonment.
10. Dissatisfied with the said conviction and sentence, he appealed to this Court on the grounds which I summarize as follow: -
  1. That the trial court erred in convicting him on uncorroborated evidence of a minor.
  2. The trial court erred in attributing the absence of hymen of the complainant to the appellant, while the evidence suggested otherwise.
  3. The prosecution failed to call some named material witnesses, who are J the victim's brother, and their grandmother, while the two were readily available.
  4. The victim's clothes of which she was allegedly wearing on the material night were not produced as exhibits, which weakens the cogency and cohesion of the prosecution's case.
  5. The inconsistencies in the prosecution case were not properly analysed by the trial court.



6. The trial court erred in dismissing the appellant application dated 9<sup>th</sup> May, 2023.
7. The prosecution case was not proved beyond reasonable doubt.
8. The conviction and sentence imposed were totally against the weight of the evidence presented in court.
11. The appeal was canvassed by way of written submissions and both parties filed their respective submissions. As the first appellate Court, I have re-evaluated the charges, evidence adduced by both sides in the lower court, decision of the trial magistrate and sentence meted, grounds of the appeal and submissions.
12. The victim was allegedly defiled by her biological father, the appellant in this case. One would therefore immediately think of the offence of incest under section 20(1) of the Sexual Offences Act, which carries a sentence of life imprisonment. However, the prosecution opted for the offence of defilement which carries lesser ingredients as they did not have to establish the relationship between the victim and the accused, of which probably was a wise decision.
13. The ingredients which the prosecution were to establish beyond reasonable doubt for the offence are; -
  - i. Age of the victim, who must be a child under the age of 18 years.
  - ii. Penetration, which is partial or complete insertion of the genital organs of a person, into the genital organs of another person.
  - iii. Proper or reliable identification/recognition of the accused as the real culprit.
14. As regard the age, the victim who gave her evidence on 16/3/2023 as Pw-4, stated in voire dire that she was aged 14 years. In her evidence-in-chief she as well reiterated her age as 14 years. I have as well seen a copy of Acknowledgement of Birth Notification in the name of the victim which show her date of birth as 1<sup>st</sup> January, 2009. The incident in this case allegedly took place on 23/1/2023. By simple subtraction, the age was as indicated, 14 years. Though the victim did not disclose her date of birth, and the mother did not as well disclose it, and the age; the evidence of the victim that she was 14 years old is well corroborated by the “Acknowledgement of Birth Notification.” As such, her age was well established by the prosecution beyond reasonable doubt.
15. On penetration, the victim gave impressive and detailed account of what the father did to her, of which culminated in penetration. He caressed her, pulled her in bed, laid her facing upward, removed her skirt, biker and panty before he removed his clothes, went on her and penetrated her genital organs with his. The clinical officer who examined her had findings consistent with penetration. The hymen was absent and sphincter muscles loose.
16. Eventually she escaped half naked and her sister Pw-2 saw her and availed a skirt to cover her nudeness. All these facts weighed together shows that the witnesses had no cause to fix their father and their evidence was naturally and honestly offered. The disclosed details are devoid of a fiction and exaggeration. A vivid analysis of the same leaves me with no doubt that the victim was penetrated.
17. The appellant is said to be the biological father to the victim. He concedes to that in his defence. He was living with the children in the same place if not in the same house and compound. The children knew him very well. The complainant could not have made a mistake of him. He was well recognized, considering that he committed the offence in his own house. He is the real culprit.
18. His defence is flimsy. It is of mere denial. It reveals no cause why the victim would be out to fix the father given that she is even younger than Pw-2. If anyone wished to fix him, most likely than not,



would have used Pw-2 who was an older minor, than the victim. The defence casts no doubt at all on the truth of the prosecution case and was justly dismissed by the trial magistrate.

19. Appellant was sentenced to serve 20 years imprisonment. He took advantage of the relationship with the victim as a father, to get her unsuspectingly into the house. She was aged 14 years. He was lucky to have been charged with defilement which carries a sentence of not less than 20 years given the age of the victim, rather than incest where we would be looking at life imprisonment. He got the minimum sentence possible under section 8 (1) (3) of the *Sexual Offences Act* No.3 of 2006. He could not have had it better on sentence, given the circumstances.
20. Having weighed the foregoing, I do find the appeal in want of merit and is dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Mr Collins Ondeng
2. Ms Ochola for the State

Mr Collins Odeng; - We pray for copies of the proceedings and judgment to enable us file an appeal.

Court; - Application is granted.

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**S.M. GITHINJI**

**JUDGE**

**14/10/2024**

