



REPUBLIC OF KENYA



KENYA LAW
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**AOS v Republic (Criminal Appeal E043 of 2021)
[2023] KEHC 21174 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 21174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E043 OF 2021
SM GITHINJI, J
MARCH 21, 2023**

BETWEEN

AOS APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Original Conviction and Sentence in lower court criminal case No. E002 of 2021 in the Principal Magistrate's court at Lamu delivered on 28th day of October, 2021 before Hon T.A.Sitati – Principal Magistrate)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms A.Mkongo for the State

1. AOS, the appellant herein was charged in the lower court with the offence 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 15th day of September, 2019 in Lamu West Sub-County within Lamu County, the appellant intentionally caused his penis to penetrate the vagina of ZSA, a child aged 15 years.
3. The appellant also faced an alternative count 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 hereof being that on the 15th day of September, 2019 at around 1300Hours in Lamu West Sub-County within Lamu County, the appellant intentionally touched the vagina of ZSA, a girl aged 15 years with his penis.



5. The prosecution case is that the complainant who gave evidence as Pw-1 was born on October 17, 2004. Her birth certificate No xxxx, issued on May 14, 2019 was produced as an exhibit to ascertain her age. At the time of the alleged offence, that is on 18/9/2019, she was aged 15 years and was a pupil at [Particulars Withheld] Primary School in class 7. Her evidence is that in June, 2019 she visited her aunt called M and at a wedding met the appellant herein. The appellant was not new to her as she used to see him in the village. The appellant deliberated with her where he promised to marry her after she completed school. She discussed the issue with her father who insisted she was to complete school before considering marriage.
6. Later, yet at another wedding of Saggaff, the appellant met the complainant. The ceremony ran for a number of days. On one of the days at night the appellant wooed her into Marora's house. While therein he requested her for sex. They removed their clothes and had sex in bed. He then gave her 500/= . They both returned to continue with the wedding ceremonies.
7. Out of the said sex act, the complainant became pregnant. She informed the appellant about it and he did not dispute the allegation. The complainant also informed her grandmother who informed Pw-2 about it. The appellant vanished from the village. On 22/1/2020 the head teacher of [Particulars Withheld] Primary School, following a complaint by the complainant's parents, wrote a letter indicating the complainant was pregnant and yet was underage. Pw-1 and Pw-2 armed with the said letter reported the matter at Hindi Police Station. Pw-3 investigated the case. The complainant was escorted to Mokowe dispensary for medical examination. She was examined on 5/2/2021 by a clinical officer called Chege. He noted that the hymen was ruptured but genitalia had no injuries though there was a discharge. She was 29 weeks pregnant and the foetus was in good health and position. The PRC form and P3 form were thus filled.
8. Later, the complainant delivered and Pw-3 preferred a DNA to ascertain the parents of the child (fatherhood). On 5/2/2021 samples were extracted from the infant, the mother and the appellant. They were forwarded to the Government Chemist in Mombasa. Pw-4 did the DNA analysis and confirmed that the appellant herein is 99.99% the father to the infant, AAM.
9. The appellant was then charged with the present offences.
10. The appellant gave sworn evidence and called no witness. What emerged from the defence case is that he was born in the year 1973 and was married and with children. He was a madrassa teacher (Ustadh) in Mombasa. When he met the complainant, she told him that she had dropped school at class 6 as she was schooling with children younger than her. She felt ashamed as a result and dropped out. He intended to marry her and deliberated with her uncle and mother. Her father was involved later. The parents confirmed that she was ready for marriage. He gave 10,000/= to her father as it's the custom.
11. The appellant's father was an Ustadh who according to Islam could officiate a marriage. He agreed to officiate the marriage between the appellant and the complainant. The complainant did not have a National Identification card. The father said she could not apply for it before obtaining a birth certificate. He promised to apply for a Birth Certificate. He promised to apply for a Birth Certificate. Later the wedding took place. As a Bajuni, the custom was that the appellant had to live with the wife's family. Two to three weeks after the marriage, activists from World Vision Organization followed on the matter. They wanted the complainant to go back to school. The matter was reported to the area chief.
12. The chief ordered him to break the marriage. The appellant went to Mombasa for treatment as he fell sick. While there he was alerted that the complainant was pregnant. As a responsible husband he



- supported her. When she experienced labour pains he went to support her. It is then he was arrested. The complainant gave birth the following day.
13. The appellant alleged that the complainant looked a mature girl. She is taller and bigger than him in physique. She appeared mature. The parents and herself assured the appellant of her maturity. When he was arrested, the complainant's mother sold a plot to bail him out by paying 20,000/=. The matter even made her disagree with her husband. He was not told she was underage, irrespective of her mature looks. The father and mother confirmed she was a mature person fit for wifely duties. That is why he paid dowry. He alleges Pw-2 was not aware of the actual age of the complainant and she was coached to state she was 16 years old.
 14. The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was consequently convicted of it and sentenced to serve 15 years imprisonment.
 15. The appellant dissatisfied with the said conviction and sentence, appealed to this Court on the grounds that; -
 1. He had a reasonable defence under section 8 (5) (b) of the *Sexual Offences Act*.
 2. Sharp contradictions in the prosecution case were not weighed.
 3. Prosecution exhibits were not certified.
 4. His defence was not adequately weighed.
 16. The appellant had promised to file submissions but did not. However, prosecution filed theirs.
 17. I have considered the charges, evidence adduced in the lower court, judgment and sentence, as well as the grounds of the appeal and submissions.
 18. Two ingredients of the offence of defilement are not in dispute in this case. These are penetration of a genital organ by a genital organ and the identity of the perpetrator. The only disputed issue by the appellant and of which this court should consider is the age of the victim (Pw-1) and whether the appellant, given the circumstances, reasonably believed that the complainant was over the age of eighteen years.
 19. Section 8 (5) of the *Sexual Offences Act* indicates that it's a defence to the offence of defilement if; -
 - a. It's proved that the child deceived the accused person into believing that she or he was over the age of eighteen years at the time of the alleged commission of the offence; and
 - b. The accused reasonably believed that the child was over the age of eighteen.
 20. Section (6) states that the belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
 21. In this case, the age of the complainant was established by production as exhibit 6, of a birth certificate which shows she was born on October 17, 2004. The said birth certificate was issued on May 14, 2019. The offence was allegedly committed on 15/9/2019. This shows the Birth Certificate was in place before the commission of the offence, and the complainant's age was known or could be easily ascertained.
 22. It is not in dispute that the complainant was a primary school pupil in class 7. Given this fact alone, the presumption by any reasonable person about her age, should have been that she was a child unless



otherwise ascertained. When the appellant expressed his love to the complainant and the desire to marry her, it was made clear by her father that she was a child who needed complete schooling first. This fact was made aware to the appellant herein. At no time did the complainant present herself to the appellant as an adult. Under section 8 (5) and (6) of the *Sexual Offences Act* it was for the appellant, given the circumstances, to take the necessary steps to ascertain the age of the complainant. He did not do so. He only claims she looked mature, but maturity and the age of 18 are two different things. He is far much older than her as he was then as he claimed, 48 years old, married and with children. He ought to have ascertained her age before engaging in a love relationship and sex with her. Birth certificate was readily available, probably school documents indicating her age and age assessment could as well have been undertaken in absence of the other means. He never made effort to obtain any of those. His word that the parents confirmed she was mature for marriage lack reliable basis. In the circumstances he deserved to do more than depending on her physique and behavior to assess the age.

23. The trial court was right in finding him guilty. The sentence of 15 years imprisonment is within the law and reasonable. I accordingly find the appeal in want of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF MARCH, 2023

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S.M.GITHINJI

JUDGE

In the Presence of

1. Appellant (absent) could not be traced in all prisons.
2. Ms Mkongo for the State

