



REPUBLIC OF KENYA



**Katana v Republic (Criminal Appeal E030 of 2021)
[2023] KEHC 2146 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E030 OF 2021
SM GITHINJI, J
MARCH 15, 2023**

BETWEEN

EMMANUEL CHAMA KATANA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Original conviction and sentence in lower court criminal case No.64 of 2019 in the Senior Principal Magistrate's Court at Mariakani before Hon N.C.Adalo – SRM delivered on 28th April, 2021)

JUDGMENT

1. Emmanuel Chama Katama was charged in the lower court with the offence 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 the diverse dates between the month of January, 2019 and September 16, 2019 at [Particulars Withheld] area in Rabai Sub – County within Kilifi County of the Coast region, the appellant unlawfully and intentionally committed an act which caused his male genital organ namely penis to penetrate into the genital organ namely anus of BBM, a child aged 8 years.
3. In the alternative, the appellant faced a charge of committing an indecent Act with a child contrary to section 11 of the *Sexual Offences Act* No.3 of 2006.
4. The particulars of this offence being that on the diverse dates between the month of January, 2019 and September 16, 2019 at [Particulars Withheld] area in Rabai Sub-County within Kilifi County of the Coast region, the appellant unlawfully and intentionally committed an indecent act with a child aged 8 years, namely BBM by touching his private parts.
5. The prosecution case is that the complainant in this case was born on 10th of October, 2010. His mother the Pw-2 in this case produced a baptism certificate dated 21/5/2015 from Anglican Church of Kenya



showing the said date of birth. At the time of the alleged offences, the complainant was living with his parents at [Particulars withheld]. He was in class two at [Particulars Withheld] Primary School. They were living in a three bedroomed house where one was occupied by the parents, the other by an uncle called BG and the third by the complainant. The appellant is an orphan. He lost his parents and the father of the complainant decided to support him. He thus invited him to live with them at [Particulars withheld]. The appellant shared a bedroom with the complainant but each had his own bed. The appellant was in form three at [Particulars withheld] Secondary School, and was aged 19 years old.

6. On different occasions between January, 2019 and September 16, 2019 the appellant could at night shift from his bed and join the complainant in his bed. As complainant at times used to pee in bed, he had been advised by the mother to be sleeping naked and cover himself with a bed sheet or lessso. The appellant could uncover him, urge him to lie facing downward, remove his clothes and then defile him by inserting his penis into his anus. At times the complainant could feel pain and call upon his mother, but the appellant could shout back and say it was nothing. Whenever the mother reached out for help, the complainant could say he wanted to attend to the washroom or was being attacked by mosquitoes. The appellant had urged him not to reveal the truth.
7. On 16.9.2019 at about 7.00Pm Pw-2 was preparing dinner. The complainant offered to assist her. While the two were working together, Pw-2 questioned the complainant why he was not feeding well as he mostly used to say he was okay in the morning and could take very little food. The complainant stated that he had a problem passing stool as he was feeling pain in the anus. The mother questioned how his stool was and he said at times it was hard and other times soft. The mother questioned him on the kind of games they were playing in school and urged him to tell the truth. It's then he disclosed how the appellant was defiling him at night. Pw-2 reported to her husband about it and she was advised to take him to the hospital. He was taken to Rabai Health Centre where he was referred to Mariakani Sub-County Hospital. Pw-4 examined him and noted that his anus had fresh and healing bruises on the anal orifice. The anus muscles were loose. Laboratory tests revealed no venereal disease. He concluded that the complainant had been defiled. He produced the treatment notes, P3 form and PRC form as exhibits.
8. The matter was reported at Rabai Police Station. Pw-3 investigated the case and arrested the appellant. He was then charged with the offences in the charge sheet.
9. The appellant gave a sworn statement and called no other witness in his defence. He alleged that on Wednesday the September 18, 2019 he went to [Particulars withheld] where he visited his aunt who was unwell. He was there till 20.9.2019. He was then called back home. When he went he was arrested. He denied having committed the offences.
10. The trial court evaluated the evidence and found the offence in the main count proved by the prosecution beyond reasonable doubt. The appellant was convicted and sentenced to serve 20 years imprisonment.
11. Dissatisfied with the said conviction and sentence, the appellant appealed against both on the grounds that;-
 1. That the actual age of the complainant was not proved.
 2. Penetration as an ingredient for the offence was not established.
 3. His defence was not adequately weighed.
11. The appeal was canvassed by way of written submissions and both sides filed their submissions. As an appellate court, I have re-evaluated the evidence adduced in the lower court, the offences preferred



against the appellant, his defence, judgment of the lower court and the sentence meted, the grounds of the appeal and submissions by both sides.

12. As the lower court rightly considered, the ingredients for the offence of defilement are; -
 1. The age of the victim which must be below 18 years and therefore a child.
 2. Proof of penetration of a genital organ by a genital organ.
 3. Positive identification of the accused as the culprit.
13. On the issue of age the complainant said he was 9 years old. Pw-2, the mother however stated he was born on 10th of October, 2010 and was therefore 8 years old. She produced his Baptism Certificate which shows the said date of birth. It is a fact that no one would be able to know of their age unless told by the parents, any witness who is aware of it, a document which carries it, or by way of an age assessment by an expert. The mother who gave birth to a child can be depended on to indicate the age, and such cannot be doubted unless contradicted by some other highly credible and reliable evidence. In this case whether the complainant was 8 years old or 9 years old would not matter much as both ages are below 11 years.
14. It is however ascertained that the age given by the mother is the correct one as it's supported by the Baptism certificate. I therefore conclude that the age of the complainant was ascertained as 8 years as of the time of the alleged offence.

“Penetration” under section 2 of the [Sexual Offences Act](#), 2006 means;-

-the partial or complete insertion of the genital organs of a person into the genital organs of another person.

“genital organs” includes the whole or part of male or female genital organs and for the purposes of this Act includes anus.
15. The evidence of Pw-1 is that the appellant used his penis to penetrate his anus. The evidence of Pw-4 corroborates the evidence on penetration as he observed that there were fresh and healing bruises on the anal orifice. The anus muscles were loose. The trial court considering the evidence was right in finding that penetration was well established.
16. The appellant was living with the complainant and Pw-2. He was invited to be assisted as an orphan by the father of the complainant. He is as well their relative. They had no cause to fix him. He had the opportunity to commit the offence as he was sharing a bedroom with the victim. The evidence of the victim is convincing that he defiled him on several occasions. From the evidence it's vivid that he is the culprit. The guilty verdict by the lower court is therefore legally sound and appropriate.
17. Under section 8 (1) (2) of the [Sexual Offences Act](#), a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to serve imprisonment for life.
18. The victim in this case was aged 8 years. The appellant was lucky to get 20 years imprisonment. Life imprisonment was probably the most appropriate sentence given the circumstances but as an appellate court I don't desire to push it to that.
19. The upshot is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF MARCH, 2023

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S.M.GITHINJI

JUDGE

In the Presence of; -

The Appellant in Person

Ms Mutua for the State

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Miss Mutua for the State

