



REPUBLIC OF KENYA



KENYA LAW
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**SAB v Republic (Criminal Appeal E033 of 2021)
[2023] KEHC 1565 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E033 OF 2021
SM GITHINJI, J
MARCH 6, 2023**

BETWEEN

SAB APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence from the
Original Lamu Criminal case No.17 of 2019 in a judgement delivered
on 8th September, 2021 by Hon T.A.Sitati Principal Magistrate)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. SAB 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 being that on diverse dates between 1st October and November 8, 2019 in Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of MW a child aged 12 years.
3. In the alternative the appellant faced an offence 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 which are that on the diverse dates between 1st October and November 8, 2019 in Lamu West Sub – County within Lamu County, the appellant intentionally and unlawfully



- committed an indecent act with a child namely MW a child aged 12 years by touching her vagina using his penis.
5. The prosecution case is that the complainant who gave evidence as Pw-1 in this case was born on 2/10/2008 in accordance to a copy of her birth certificate No xxxx of which was produced in court as Exhibit – 4. By the time of the alleged offence she was 12 years old. She was living in [Particulars Withheld], with her parents. The father was mostly living at their rural home at [Particulars Withheld] in Ukambani. His name is MZ. The mother who gave evidence as Pw-3 was living with her and was the proprietor of [Particulars Withheld] in [Particulars Withheld]. Pw-2 is a sister to the grandmother of the complainant and is also a hotelier. She operates [Particulars Withheld] Hotel though she did not disclose where.
 6. The complainant's evidence is that she was at home on that date (the date itself is not disclosed). At around 10.00am the appellant whom she referred to as Babu (Grandfather) called her. She responded by going to him. He requested her to accompany him to his house. Her father at the time was asleep in the house. Her younger brother was in the house while the mother was at her place of work. She followed the appellant up to his house near [Particulars Withheld] church. At the place he ushered her into his house of which was made of mud walls and iron sheets roof. Inside, he requested her to remove all her clothes and she did so. He also undressed. He laid her on a mattress on the floor. He went on her and inserted his male organ into her female genital organ. When he finished she noted presence of a mucus like fluid on her genitalia. He took a piece of clothing and wiped her. He ordered her to dress up. He then gave her 50 kshs and urged her to get out and ensure nobody sees her.
 7. After a few days the appellant shifted to Jujumura area into another house. At the time he was working at a construction site. The complainant's grandmother, one MM was also working at the said construction site. She is the sister to Pw-2. The grandmother requested the complainant to prepare food for her as she worked at the site. She obliged. At the site she met the appellant again. He requested her to visit his house after she had delivered food. She refused to visit. He however persistently urged her for a period of 4 days. She later obliged. In the house he told her to remove only her pant. She removed. She laid on the mattress and they had sex. After he was through he gave her 20 kshs. The next day he as well called her. When she got into the house he removed her panty and inserted his genital organ into hers. He then gave her 10 kshs coin. After that he called her again and repeated the same act and gave her 100 kshs note. On another day he called her again and they had sex.
 8. Though she said she alerted her grandmother about it, Pw-2 alleges on November 13, 2019 at 2pm she was in her house asleep. In her dream she heard a voice telling her to speak to the granddaughter. She rose from the sleep and went outside. She found the complainant playing with other children. She called her aside. She inquired from her whether there was a man playing with her just as Mzee Ng'ethe had previously done to her in the year 2017. She alleged that the said Mzee Ng'ethe had defiled the complainant in the year 2017 and he subsequently vanished from the village.
 9. The complainant responded by saying she was afraid of telling her mother but could tell Pw-2 if she could keep the secret. Pw-2 said she will keep the secret. It is then that the complainant told her that Babu who works with Pw-2's sister had been defiling her. She gave details that he repeatedly had sexual intercourse with her and on each occasion would give her money in different denominations. After each encounter with Babu, she could see a mucury fluid on her external genitalia.
 10. Babu was in intimate love relationship with Pw-2's sister MM. Pw-2 could not therefore believe that he could do that to the complainant. It shocked her. She informed Pw-3 about it while in tears.



11. Pw-3 met Pw-2 who gave her the details about the incident. The complainant was also there and stated that Babu have been having sex with her and on each occasion he would give her cash. She alleged to had been given 10/=, 20/=, 50/= and 100 kshs on different dates. They reported to the police.
12. Pw-4, an officer who was then stationed at Hindi Police Station investigated the case. He took the complainant to Mukowe Dispensary. She was examined by Pw-5. Pw -5 observed; -
 1. No bruises to genitalia
 2. Normal genitalia
 3. No discharge from the vagina
 4. Hymen missing of long standingLaboratory examination revealed; -
 1. VDRC negative
 2. HIV negative
 3. Pregnancy negative
13. Pw -5 produced treatment book and PRC form as exhibit 1 and 2 respectively.
14. The court found that the accused had a case to answer and accordingly placed him on his defence.
15. Accused gave sworn evidence and called one witness. His case is that he had employed the complainant's grandmother by the name of MM at a construction site. The said MM is the one who was serving tea and meals at the construction site. The accused used to give her money to buy items required for tea and food. However, the two disagreed out of MM's work ethics which were unbearable. She unnecessarily claimed for her daily wages which made appellant's work hard. When she was dismissed she protested demanding to be given reasons for it. The appellant was forced to lock her outside the construction site.
17. The appellant travelled to Amu to undertake a different task on 7/11/2019 and returned to Hindi on November 18, 2019 after the task in Amu was completed. He denied having defiled the minor. The police arrested him from the construction site. However, in cross-examination, the appellant agreed that he had recorded a statement with the police on November 19, 2019 where he stated that he had employed MM as a laborer at the construction site where he was the foreman. The two fell in love and had a sexual relationship. Two weeks prior to the appellant's arrest, he had fallen out with MM over money and relationship issues. He also agreed that the complainant used to accompany MM to the site, but he never gave her money.
18. The appellant's witness stated that he was with the appellant in Bombay at a construction site where they worked from 7/11/2019 till November 17, 2019.
19. The trial court evaluated the evidence and found that the prosecution had proved the offence against the appellant beyond reasonable doubt. He was accordingly convicted of the offence in the main count and sentenced to serve 12 years imprisonment.
20. Dissatisfied with the said conviction and sentence, the appellant appealed to this Court on the grounds that; -
 1. Complainant's evidence is uncorroborated and unreliable.



2. The adduced medical evidence is inconclusive.
 3. The imposed sentence is harsh, unjust and excessive.
21. The appeal was canvassed by way of written submissions and both parties filed their respective submissions. Briefly, the appellant argued his grounds of appeal while the prosecution averred that the prosecution case establishes beyond reasonable doubt that there was penetration, that the victim was a child and that it's the appellant who penetrated her.
 22. I have considered the charges preferred against the appellant, evidence adduced by both sides, the judgment by the trial court and the sentence meted, the grounds of the appeal and submissions by both sides.
 23. Having evaluated the evidence and the judgment, I do find existence of some disturbing findings by the trial court which are inconsistent with the evidence on record.
 24. To start with the particulars of the offence in the charge are vivid that the alleged offence was committed between the 1st day of October, 2019 and 8th day of November, 2019.
 25. The complainant in her evidence never gave any specific dates for the offence. Pw 2 was only told of the incident by the complainant on November 13, 2019 when she questioned her. She did not also give specific dates of the alleged offence. Pw-3 was told of the incident by Pw-2 on November 13, 2019. She did not give specific dates of the offence. The investigating officer (Pw-4) had also no specific dates for the offence. The court however in its judgement, determination part, stated that " in this case, the repeated vaginal penetrations took place over a period of 4 months by the same offender."
 26. From 1st day of October, 2019 to 8th day of November, 2019, is not a period of over 4 months. The said position is not supported by the particulars of the offence in the charge sheet and the evidence adduced. Similarly, on sentencing the appellant the trial court reiterated that, "offender preyed on the minor over a continuous period of 4 months forgetting that at 12 years old she was of grandchild status to him."
 27. The circumstances under which the alleged offence was committed deserved careful consideration and thorough investigations to establish the truth. Pw-2 and Pw-3 are sisters. Pw-3 is the mother to the complainant. The mother to Pw-2 and Pw-3, whose name is given as MM was employed by the appellant who was a foreman at a construction site. The appellant and the said MM had a love affair but later on they fell out and the woman was sacked.
 28. Pw-2 who appears as the star witness for the prosecution stated she was driven to questioning the complainant out of a dream she had. How logical this is, it is hard to ascertain. On cross-examination she revealed that the appellant used to fondle her breast and buttocks whenever she passed near him. She rejected his sexual advances because he was in a relationship with her sister.
 29. She as well disclosed that in the year 2017 the complainant was defiled by Mzee Ng'ethe. The investigating officer when he was cross-examined on this said Mzee Ng'ethe escaped to Kiambu. However, he had been arrested two weeks prior to March 4, 2020 in connection with the offence. This evidence though disregarded by the trial court in its judgment is crucial when one considers the doctor's evidence.
 29. The doctor's finding on examination of the complainant is;-
 1. No bruises to genitalia
 2. Genitalia looked normal



3. No discharge from the vagina
 4. Hymen missing of long standing.
30. Considering the evidence about a former incident with Mzee Ng'ethe, the court was not right in it's finding against the appellant that; -
- “.....applying section 60 (m) of the Evidence Act stating that the court shall take judicial notice of the ordinary course of nature, it is not a natural occurrence for a female minor aged 17 years old to have a missing hymnal membrane of a long standing unless there had been repeated vaginal penetrative actions.” I find this interesting because it was not a doctor's opinion and it's not based on any known or disclosed scientific facts. I think one penetration is capable of rupturing hymnal membrane.
31. The court dismissed the evidence about Mzee Ng'ethe, saying it was inadmissible. However, it came from a prosecution witness in her evidence –in – chief (Pw -2) and the court did not at that point apply the claimed safeguards. It also came out during cross-examination of Pw-4. The evidence tends to explain the doctor's finding on examination of the complainant. The finding is consistent to the fact that the complainant may not have been recently penetrated. Mzee Ng'ethe may have raptured the hymen in 2017. The evidence was for certain in favour of the appellant's position and having derived from prosecution witnesses could not be wished away or rather declared inadmissible when it's effect was obvious to the trial court.
32. MM, the grandmother to the complainant, and her father were not called as witnesses. They were relevant witnesses. MM because she had a love affair with the appellant and they later fell out and for the reason she could have influenced her daughters and granddaughter to fix the appellant. The father because Pw - 3 in re-examination said, “I discovered the suspicious activity when my husband asked me why Siraj had come to call “W”.
33. The trial court was therefore wrong in holding that, “The father was allegedly asleep in the home on the first day that the girl was called. He had nothing useful to say.”
34. Though the appellant was not entirely truthful in his defence as he denied having had a love relationship with the said MM, his conviction cannot be founded on the weakness of his defence but rather on the strength of the prosecution's case.
35. Considering the circumstances of this case as revealed by the evidence on record, I find existence of a possibility where the appellant could have been fixed by MM, using her daughters who are Pw-2 and Pw-3 and also her granddaughter the complainant in this case. The evidence raises reasonable doubts as to whether the appellant committed the offence charged with. The trial court should have accorded him that benefit and acquitted him of the offence. I am therefore of the finding that the evidence was short of establishing the offence against the appellant beyond reasonable doubt. The appeal therefore succeeds, the conviction and sentence are quashed and the appellant set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF MARCH, 2023

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S.M.GITHINJI

JUDGE

In the Presence of; -



1. The Appellant in Person
2. Ms Mkong for the State

