



**Muthui v Republic (Criminal Appeal 14 of 2020)
[2023] KEHC 17959 (KLR) (4 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL 14 OF 2020
SM GITHINJI, J
APRIL 4, 2023**

BETWEEN

JOSHUA KILUNGYA MUTHUI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Conviction and Sentence from the Original
Holo Criminal Case No. 278 of 2016 in a Judgment delivered on 22nd
November, 2016 by Hon. M.D.Kiprono – Senior Resident Magistrate)*

JUDGMENT

CORAM: Hon. Justice S.M.Githinji

Mr Mwangi for the state

Appellant in person

1. The Appellant herein was charged in 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 diverse dates between the month of January, 2014 and September 17, 2016 in Tana North Sub-County, within Tana River County, the Appellant intentionally caused his penis to penetrate the vagina of MK (name withheld) a girl aged 15 years.
3. The Appellant in Count Two faces an alternative charge of committing an indecent act with a child, contrary to section 11 (1) of the *Sexual Offences Act*, of which particulars are that on diverse dates between January, 2014 and September 17, 2016 in Tana North Sub-County within Tana River County, the appellant intentionally touched the vagina of MK, a girl aged 15 years old, with his penis.



4. The prosecution case is that the complainant herein who gave evidence as Pw-1, was born on April 16, 2001. Her father who gave evidence as Pw-3 produced her birth certificate to ascertain her date of birth. By September 17, 2016 she was therefore aged 15 years.
5. The complainant was living at [Particulars Withheld] Village with her parents. She was schooling at [Particulars Withheld] Primary School in class 7. In the year 2013 she was schooling at [Particulars Withheld] Primary School. She came to know the Appellant then who was a pupil in the same school but a class ahead of her, in class 6. The Appellant seduced her and she welcomed him. The two became lovers. The Appellant was also their neighbor at home.
6. In August, 2015 at 7.30Pm the two were caught together by Pw-2. Pw-2 disciplined the complainant. He then called her and the Appellant and warned the Appellant about his association with the complainant. However, the two continued to meet secretly.
7. On September 16, 2016 the complainant went to sleep in the room where she was sleeping with her younger sister, namely TN who was then 11 years old. That night she had arranged with the Appellant to sneak and visit him in his room. At about 1.00am she got out of the room and moved stealthily to the Appellant's room. The Appellant received her. They deliberated for a short time. Each of them undressed before they engaged in a consensual unprotected sexual intercourse.
8. As luck or fate would have it, Pw-3 moved out of the house for a call. He discovered that the door was locked from outside. He went round the compound checking for anyone and there was no one. He went to the girl's room and found the complainant missing. He woke the mother, the Pw-4 in this case. They decided to search for the girl, starting at the Appellant's home. They went there and called out the Appellant who responded. He was asked if he had seen the complainant. He said he had not. Pw-3 said he will inspect the room. The Appellant then said she was there. The door was opened. The complainant was on the floor. She had her clothes on. They decided to call the village elder.
9. Pw-4 called Pw-5 the village elder. Pw-5 went to the scene at around 3.00am. He witnessed what had happened and told the group to wait till dawn so as to report to the police. At dawn, the matter was reported at Bura Police Station. Pw-6 together with Pc K and T visited the scene. They questioned the Appellant and the complainant and the two agreed to having had unprotected sexual intercourse. The two were taken to Bura Hospital for examination. Pw-2 a Clinical Officer at the place examined them. Complainant was in a wet under pant, which was stained. Examination revealed presence of semen. She had bruises which would have resulted out of Sexual Intercourse, and a whitish discharge. She had candidiasis and was treated of the same. The Clinical Officer concluded that she had been penetrated.
10. The Appellant was as well examined. He was circumcised. He had no infections. The Appellant age was assessed and noted that he was an adult. After conclusion of the investigations the Appellant was charged with the offences carried in the charge sheet.
11. The Appellant gave sworn statement in his defence. He alleged that the complainant was someone's wife and demanded that the husband, whom he did not disclose, be called. Prosecutor objected to the demand and when the Court ruled in his favour, the Appellant opted to offer no further defence.
12. The trial court evaluated the evidence, found the appellant guilty of the offence in the main count and sentenced him to serve 20 years imprisonment.
13. Dissatisfied with the said conviction and sentence, the Appellant appealed to this Court on the grounds that; -
 1. The trial court did not consider that he was a minor at the time when he committed the offence.



2. The sentence meted against him is harsh and excessive.
3. His mitigation was not weighed.
4. The time spent in remand was not considered.
14. The Appellant filed written submissions but the state did not file theirs though indicated they had filed.
15. I have as a Court of first appeal re-evaluated the evidence on record, judgment passed, sentence meted, grounds of the appeal and submissions by the Appellant. In accordance to his grounds of Appeal and his submissions, he does not deny having had sexual intercourse with the complainant. He does also not deny or challenge the given age of the complainant, but alleges that he was also a child then as he was a class ahead of the complainant, and in sentencing the Court should have dealt with him in accordance to provisions of section 8 (7) of the [Sexual Offences Act](#), which provides that; -

“Where the person charged with an offence under this Act is below the age of 18 years, the Court may upon conviction, sentence the Accused person in accordance with the provisions of the Borstal Institution Act and the Children’s Act.”
16. The issue which therefore emerges for consideration is whether the Appellant was a child at the time of commission of the offence, who deserved to be treated as such during the trial and sentencing.
17. The Appellant only claimed that he is a child in this appeal. During the entire trial he never alleged so. He was examined by Pw-2 who as well assessed his age. The Clinical Officer found that he had full dentation of 32 teeth which shows he was over 18 years thus, an adult. On proof of age the [Sexual Offences Rules of Court 2014](#), rule 4 provides that; -

“When determining the age of a person, the Court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents.”
18. The Appellant herein has produced nothing to show his actual age or apparent age. The class he was in is of little help if any, in age assessment. Some people go through their basic (primary) education while advanced in age.
19. He must have failed to challenge the evidence during trial because he was an adult, and for the said reason he could not avail a document in support of his allegation that he was a minor then. My finding is that he was an adult as found by Pw-2.
20. The offence when it involves a child of between the age of 12 and 15 years, carries a sentence of not less than 20 years imprisonment. This is the sentence meted by the trial court. Mitigation must have been weighed as he got the minimum sentence possible under the law, section 8 (3) of the [Sexual Offences Act](#).
21. As such, the Appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 4TH DAY OF APRIL, 2022.

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S M GITHINJI

JUDGE__

In the presence of; -

Mr Mwangi for the State



The Appellant in person

