



REPUBLIC OF KENYA



**KENYA LAW**  
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**AAM v Republic (Criminal Appeal E049 of 2021)  
[2023] KEHC 17252 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17252 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E049 OF 2021**

**SM GITHINJI, J**

**MAY 3, 2023**

**BETWEEN**

**AAM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the original conviction and sentence in the lower court in Criminal Case No.211 of 2020 in the PM's Court at Lamu before Hon M.M.Wachira – PM and Judgment delivered on 5th November,2020)*

**JUDGMENT**

**CORAM:** Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. AAM, the appellant herein was charged in the lower court with a main count of defilement, contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No3 of 2006.
2. The particulars of this offence are that on the diverse dates between July 17, 2020 and August 11, 2020 within Kiambu County, the appellant intentionally caused his male genital organ namely penis to penetrate the vagina of ARK a child aged 17 years old.
3. To the main count there was an alternative count of committing an indecent act with a child, contrary to section 11 (A) of the *Sexual Offences Act* No3 of 2006.
4. The particulars hereof being that on the diverse dates between July 17, 2020 and August 11, 2020 in Kiambu County, the appellant intentionally and unlawfully committed an indecent act with a child namely ARK, a child aged 17 years by touching her vagina using his penis.



5. During the hearing of the prosecution case, the complainant herein who gave evidence as Pw-1, and her mother who was Pw-2 gave evidence contrary to their recorded statements and expectation of the prosecution. The prosecutor applied they be declared as hostile witnesses of which the court allowed. Pw 1 in her evidence alleged she was defiled by a man called M who was a GSU officer at Borgoni. At the time she was a pupil at [Particulars Withheld] Primary School. The said M paid for her fare to Nairobi. She lived with him for 10 weeks from October 12, 2020. She got pregnant and later gave birth. She denied knowledge of the appellant saying she had not seen him before.
6. Pw-3 the father to the complainant gave evidence. He stated that the appellant's grandfather called MA is his relative. Pw-3 heard that the appellant and complainant were friends. The father of the appellant later approached Pw-3 indicating that his son (appellant) wanted to marry the complainant. Pw-3 said the complainant was a school going child and they had to wait till she completes school. Pw-1 (complainant) however later went missing. Later the appellant's father took to Pw-3 2kgs of sugar and Kshs 1,000/=. Pw -4, who is the father to the accused confirmed the evidence of Pw-3 to the effect that the appellant and the complainant were lovers. They wanted to marry but he declined saying complainant should first finish schooling. Pw-4 took to Pw-3 some sugar and Kshs.500/=. When complainant disappeared there were demonstrations as she was not going to school. Pw-4 called the appellant and told her to return the complainant.
7. Pw 5, the investigating officer stated on August 11, 2020 Pw-2 reported at Hindi Police Station that her child had disappeared. She alleged she was sure she was with one AA, a KDF officer at Kahawa. The report was entered into the OB as Noxxxx/2020 at 13.20hrs. On September 2, 2020 another report was made of defilement of complainant at Kahawa Wendani between July 17, 2020 and August 11, 2020. The complainant was consequently taken to Mokowe Health Dispensary on September 2, 2020. She was examined by Pw-7. Upon examination Pw-7 noted that the complainant had undergone FGM, hymen was not intact, pregnancy test was negative, Hepatitis positive, epithelial cells were seen, urine had pus cells and leucocytes cells, a sign of infection.
8. On January 19, 2021 ultra sound was done which revealed she was 30 weeks and 6 days pregnant.
9. Pw-6 on June 29, 2021 conducted a *DNA* test to ascertain whether the appellant was the biological father of the child born by the complainant, MR. The sample of the complainant was taken, that of the child and the appellant. The result showed the appellant is 99.99% the biological father to MR, son of HR, the complainant herein.
10. Pw-5 obtained the P-3 form as well as the DNA report. She as well obtained the Birth Certificate of the complainant showing she was born on May 18, 2003.
11. On the foregoing evidence the appellant was placed on his defence.
12. The appellant in his defence stated the family of the complainant and his family wanted to marry the girl to him and deliberated about it while he was working in Somalia.
13. The girl then went to another man in Nairobi. He was later summoned and charged. The girl said she never had sex with him but another man. He doubted the finding of DNA examination and report.
14. The trial court evaluated the entire evidence and relying mostly on the evidence of the DNA, that the appellant is 99.9% the biological father of the born child MR, must have had sex with the complainant who was by that time a minor, and hence must have committed the offence of defilement. He was found guilty of the offence in the main count and sentenced to serve 15 years imprisonment.



15. The appellant dissatisfied with the said conviction appealed to this court on the grounds that; -
  1. The prosecution case is contradictory and unreliable.
  2. The contradictions and variants in the medical evidence and the rest of evidence was not properly analyzed.
  3. The DNA evidence could not be relied on to arrive at a conviction.
16. The appeal was canvassed by way of written submissions of which I have well weighed against the evidence on record.
17. The three ingredients for an offence of defilement under section 8 (1) of *Sexual Offences Act* No3 of 2006 are; -
  1. The age of the victim which must be below 18 years, to the effect that the victim was a child at the time of the offence.
  2. Penetration which under section 2 of *Sexual Offences Act* should be partial or complete insertion of the genital organs of a person into the genital organs of another person.
  3. Identification or recognition of the accused as the real culprit.
18. In this matter the first two stated ingredients are not disputed. There is concrete and reliable evidence that by the time the complainant was penetrated she was a minor. Her produced birth certificate No xxxx shows she was born on May 18, 2003. The offence was allegedly committed between July 17, 2020 and August 11, 2020. She was therefore by simple calculation about 17 years old then. She was a minor or a child.
19. The fact that out of the said offence she conceived and gave birth to a boy child namely MR is not in dispute. As was well observed by the trial magistrate in his judgement, without evidence that conception was by another scientific process like in vitro fertilization, the conclusion is that it was by a natural process of having Sexual intercourse between the victim and a male. Given the foregoing, there is reliable evidence that the victim had sex with a male. This then leads us the third ingredient of whether the male was the appellant herein.
20. The appellant says he is not the one though his relatives wanted to marry him to the complainant at a time when he was working in Somalia. The complainant herself brought in the name of a person called M as the real culprit. Her mother also tried to exonerate the appellant in the evidence which made the two be declared hostile witnesses.
21. The two having been declared hostile witnesses, their evidence is of little value if any and is mostly worthless unless sufficiently credited by some other available credible worth evidence. The holding in the case of *Abel Monari Nyanamba & 4 Others v Republic* [1991]Eklr is to the said effect.
22. Though the complainant alleged she was impregnated by a man called Mwangi, it is not explained why all through before she gave evidence had held it was by the appellant herein. Apart from the name given, "Mwangi", the person was never availed and is unknown. There is evidence the complainant and the appellant were in love. The evidence of Pw-3 and Pw-4 shows there was attempt by the appellant to marry the complainant but he was discouraged as the complainant was still in school and a minor. He however called her to Nairobi where he was working as a KDF officer and lived with her for a short period. They had sex and he impregnated her. The evidence is sealed by the heavily reliable and credible



evidence of DNA which shows he is 99.9% the biological father of the born child. DNA evidence because of its reliability in terms of accuracy, unless there is other overwhelming reliable evidence to the contrary, on its own is dependable in establishing the culprit. It is more of passed as direct evidence as opposed to opinion evidence by an expert.

23. The trial court was therefore right in finding the appellant, relying on the undisputed DNA evidence, to be the real culprit. He simply influenced the complainant and her mother to turn hostile while he was not able to do likewise to Pw-3 and Pw-4.

24. Given the foregoing the appeal is unmerited and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF MAY, 2023**

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**S.M.GITHINJI**

**JUDGE**

**In the Presence of**

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

