



REPUBLIC OF KENYA



KENYA LAW
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**Salim v Republic (Criminal Appeal E007 of 2022)
[2023] KEHC 18032 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E007 OF 2022
SM GITHINJI, J
MAY 23, 2023**

BETWEEN

MOHAMED SWALEH SALIM APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence in lower court criminal case
file No. E007 of 2021 in the Principal Magistrate Court at Lamu before Hon
Temba Allan Sitati – Principal Magistrate in Chambers dated 7th January, 2022)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. Mohamed Swaleh Salim, 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* No 3 of 2006.
2. The particulars of this offence are that on the diverse dates in the months of May and July, 2021 within Lamu Central Sub-County, in Lamu County, the appellant herein intentionally caused his penis to penetrate the vagina of ZBC, a child aged 16 years.
3. In the alternative, the appellant faced a charge of committing an Indecent Act with a child, contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars hereof being that on the diverse dates in the months of May and July, 2021 within Lamu West Sub-County in Lamu County, the appellant herein intentionally touched the vagina of ZBC a child aged 16 years with his penis.



4. The prosecution case is that the complainant in this case who gave evidence as Pw-1, was born on June 9, 2005 in accordance to her produced Birth Certificate. As of 11/8/2021 she was a pupil in class 6 of [Particulars Withheld] Primary School. She was said by her mother, the Pw-3 in this case to be a slow learner.
5. On unspecified dates but accordance to the investigating officer between the month of May and June, 2021, the complainant alleged she had sex with the appellant three times in the bush. The said disclosure by her was made after Pw-2, the Head Teacher of [Particulars Withheld] Primary School, on 11/8/2021 at 2 PM called a clinical officer by the name of Daudi, of Borgoni Dispensary to do a routine pregnancy test to the girls in the school. The test were done and 5 girls were found pregnant, Pw 1 being one of them. Pw-2 convened a meeting of the school committee and the pregnant girls parents. Pw-3 went with her sister, the Pw-4 in this case.
6. The girls indicated the men who had impregnated each. Pw-1 indicated the culprit was Mohamed Swaleh Salim, the appellant herein. The area chief was also informed and he likewise informed the area children's officer. The parents took the girls for a second test at Hindu Magogoni Dispensary and the results were as before. The five girls were pregnant. A report was made at Hindi Police Station. Pw-5 investigated the case.
7. On 18/8/2021 the area chief (Pw-7) assisted in having the appellant arrested. He was taken to Hindi Police Station. Pw-5 interviewed him and he denied the offence. He was however charged.
8. The complainant on 12/8/2021 was examined by a clinical officer known as Joseph Njeru. Treatment notes were made, and P3 form and PRC form filled. There was also a laboratory test report and all were produced by Pw-6 as exhibits. They reveal that the complainant's hymen was torn at 12 O'clock position though not freshly. She was pregnant. The clinical officer conclude that defilement had taken place.
9. The trial court evaluated the evidence and found that the accused had a case to answer. He gave a brief defence where he denied the offence. He said he did not make her pregnant and requested for DNA test to be done. He had previously requested for DNA of which the court stated would be conducted when the samples would be available. However, the said DNA was not done in this case.
10. The court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve 15 years imprisonment.
11. Dissatisfied with the said conviction and sentence, he appealed to this Court on the following grounds;
 1. The court did not consider that the victim was mentally challenged and avail for her intermediary.
 2. The produced documents as exhibits were not produced by Pw-1.
 3. DNA test was not conducted to find out whether he was responsible for the pregnancy.
 4. His defence was not weighed.
12. I have as an appellate court considered the charges, evaluated the evidence adduced in the lower court, judgment of the trial court, sentence meted, the grounds of the appeal and submissions by both sides.



13. In a case of defilement there are three ingredients which the prosecution need establish beyond reasonable doubt as per section 8 (1) of the Sexual Offences Act No 3 of 2006. These are; -
 1. The age of the victim; she must be a child, below the age of 18 years.
 2. Penetration of a genital organ by a genital organ, whether full or partial.
 3. Proper identification of the alleged perpetrator.
14. On the first issue, the victim's birth certificate was produced as exhibit. It's No xxxx showing she was born on June 9, 2005. The offence was allegedly committed between the months of May and July, 2021. On June 9, 2021 is when the victim reached 16 years. The offence could have been committed when she was either 15 or 16 years old.
15. Indication of 16 years old was to the advantage of the appellant and whichever the year, the fact is that she was a child. There is no dispute as to this position.
16. The second issue is of penetration of the victim's genital organ, namely vagina, by a genital organ namely penis. The medical documents produced shows that the hymen was broken and she was pregnant. She indicated she became pregnant out of sex she had in the bush. The evidence when weighed together leaves no doubt on penetration. This fact as was noted by the trial court was not as well disputed.
17. The 3rd issue and is the one disputed is of identification of the appellant as the culprit. The evidence we have is of the complainant who stated it is the appellant who impregnated her. From the time she was found pregnant on August 11, 2021 she was consistent and firm to all those who questioned her that it's the appellant who impregnated her. I wish to state here that impregnation is not an ingredient for the offence of defilement. The prosecution only need to establish penetration of a genital organ by a genital organ. The evidence of Pw-1 of which the lower court found credible and reliable in accordance to section 124 of the Evidence Act, shows the appellant penetrated her.
18. The appellant did not deny it in his defence. He said he did not make her pregnant and added he needed DNA conducted just to be sure. The last words imply he had sex with her, but wanted DNA to ascertain whether he is the one who had impregnated her. Since court is concerned with the question of penetration and not impregnation unless it is the only way to ascertain penetration, I find that there is reliable evidence that the appellant penetrated the victim. The victim though said to be a slow learner and the doctor stated during examination she exhibited signs of mental instability, given her a clear and firm indication that it's the appellant who penetrated her, the evidence leaves no room where anyone else could have done it.
19. I therefore find that the conviction by the lower court was proper. He was given the minimum possible sentence of 15 years for the offence; Such cannot be disturbed unless upward of which I am not inclined to.
20. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD 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

