



REPUBLIC OF KENYA



**Changawa v Republic (Criminal Appeal E015 of 2020)
[2023] KEHC 21574 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E015 OF 2020
SM GITHINJI, J
JUNE 13, 2023**

BETWEEN

STEPHEN FONDO CHANGAWA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence in Criminal Case
No. 7 of 2019 of the Senior Principal Magistrate's Court at Kilifi
- Before Hon S.D.Sitati, - RM delivered on 29th October, 2019)*

JUDGMENT

CORAM: Hon. S.M.Githinji

The Appellant in person

Mwangi for the State

1. The Appellant herein, one Stephen Fondo Changawa 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.

The particulars of this offence are that on diverse dates between January 8, 2019 and January 23, 2019 in Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of (CKK), a girl aged 16 years.

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.

2. The particulars hereof are that on diverse dates between January 8, 2019 and January 23, 2019 at [Particulars withheld] Village within Kilifi County, the appellant herein intentionally and unlawfully caused his penis to penetrate the vagina of (CKK) a girl aged then 16 years.



3. The prosecution case is that the complainant in this case, according to her birth notification was born on August 29, 2003. She was living at [Particulars Withheld] Village with her mother. She was a pupil but at the time of the alleged offence the schools were closed. She knew the Appellant as her neighbour. On January 8, 2019 the Appellant who was by then aged 20 years invited her to his house. She went to his house secretly without informing her mother. She lived with the Appellant in his house for 2 ½ weeks and during the time they had sex daily. The first time they had sex she felt pain and bled from her private part.
4. The mother on not finding the complainant reported her missing at Kilifi Police Station vide OB No 26/xx/xx/xx. Pw-4, the investigating officer in this case circulated the report to the area chief and nyumba kumi elders. One of the elders was Pw-3 in this case. A colleague of his directed him to the house of the Appellant where it was alleged a school girl was taken into. On January 23, 2019 Pw-1 went to the said house. He knocked on the door and the Appellant emerged from therein. He was asked for drinking water. Meanwhile Pw-3 called upon his friends to join and help in arresting the suspect. One by the name Dado Hamisi arrived. When the Appellant saw Dado Hamisi appearing he urged the complainant to escape. The complainant dashed out of the house and runaway.
5. Pw-3 chased after her and managed to arrest her. He identified her as a girl of his neighbour. Pw-3 called another village elder and they escorted the Appellant and the girl to the chief's office. They were interrogated and taken to Kilifi Police Station. On January 24, 2019 the complainant was taken to Kilifi County Hospital for examination. According to her filed PRC and P-3 forms she had normal external genitalia, broken hymen, had no discharge, was not bleeding and pregnancy test, and infection test using urine and vaginal swab were negative. Doctor Henderson Kaingu made the opinion in PRC form that the complainant had been defiled.
6. The Appellant was then charged with the offences in the charge sheet. The Appellant gave unsworn testimony in his defence and called one witness, his sister. His defence is that he was aged 20 years then and was a security officer with Catch Security Limited. On January 23, 2019 he got home from work at 11.00am. Immediately he entered Hamisi Dadu Sulubu and Onesmus Kuti visited him. They knocked on his house door. They entered and told him that he was required by the village elder. He asked them it was about what, and they told him he will be told there. He declined to accompany them and he was beaten. He was forcefully taken before the village elder. His sister trailed them behind. Upon arrival they found other people in a meeting. The complainant was among them. He was shown the victim and asked whether he knew her and stated he did not. He was taken to chief Athman. The chief called the police from Kilifi who picked him up. He was later charged. He denied the offence.
7. The trial court evaluated the evidence and found that the prosecution had established the ingredients of the age of the victim, penetration and identity of the Appellant as the culprit, beyond reasonable doubt. The defence case was dismissed as being untrue. The Appellant was accordingly convicted of the offence in the main count and sentenced to serve 10 years imprisonment.
8. The Appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that;-
 1. The trial court erred by not finding that the medical evidence on record did not support the particulars of the charge.
 2. The trial court erred in finding that the age of the victim was proved beyond reasonable doubt.
 3. The trial court erred by failing to weigh his defence.



4. The trial court erred by failing to consider provisions of section 333 (2) of the Criminal Procedure Code.
9. The prosecution opposed the appeal and both sides filed their submissions of which I have well weighed.

On the issue of the victim's age, though the charge discloses that she was 16 years old, her birth notification of which was produced by the prosecution as Pex-1 shows that she was born on August 29, 2003. The trial court rightly relied on the same and did calculation which established that at the time of the alleged offence the complainant was aged 15 years old. Though the Appellant disputes the age, he availed no evidence to the contrary. The trial court was therefore correct when it held her age to have been 15 years old.
10. On penetration, the complainant was firm in her evidence that it is the Appellant who invited her to his house where she lived with him secretly for 2 ½ weeks. For the said period, they had sex daily. The evidence by the Doctor who examined her as indicated in PRC and P-3 forms shows that her hymen was broken. The evidence doubtlessly shows there was penetration of the victim's vagina by the Appellant's penis. The Appellant's defence on this is of mere denial and does not challenge the truth of the prosecution case. I agree with the trial court that penetration was as well established by the prosecution beyond reasonable doubt.
11. On identification of the Appellant as the culprit, the evidence of Pw-1 shows that he is a neighbour and was well known to him. The evidence of Pw-3, shows he was arrested with the complainant in his house. The question of mistaken identity cannot therefore arise. The three ingredients for the offence of defilement were therefore well established by the prosecution beyond reasonable doubt.
12. On sentence under section 8 (1) (3) of the Sexual Offences Act the Appellant ought not to have been sentenced for a period less than 20 years. However, the trial court then considered the decision of Francis Karioko Muruatetu and Another – Vs- Republic (2017) JELR 102165 (SC) and went below the indicated minimum sentence, to 10 years imprisonment. However, the Supreme Court later gave guidelines on its applicability and categorically indicated that it only applies to murder cases and not in any other offence. Given the position, I have just resisted the temptation to enhance the given sentence to 20 years imprisonment.

The bottom line is that the Appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JUNE, 2022

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. The Appellant in person
2. Mr Mwangi for the State

