



**Kariuki v Republic (Criminal Appeal E012 of 2021)
[2023] KEHC 21575 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E012 OF 2021
SM GITHINJI, J
JULY 21, 2023**

BETWEEN

WILSON WAWERU KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

((Being an appeal from the judgment of the PM's Court in Criminal Case No. 13 of 2020 by Hon. T.A Sitati delivered on 11th March, 2021 at Lamu Law Courts))

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

- 1 Wilson Waweru Kariuki was charged in the Lower Court with a main count of attempted defilement, contrary to Section 9 (1) as read with Section 9 (2) of the [Sexual Offences Act](#) No 3 of 2006.
- 2 The particulars of this offence being that on the July 1, 2020 at around 0100 hours in Lamu West Sub-County, within Lamu County, the Appellant herein intentionally and unlawfully attempted to cause his penis to penetrate the vagina of MNM a child aged 14 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 hereof being that on the July 1, 2020 at around 0100 hours in Lamu West Sub- County within Lamu County, the Appellant intentionally and unlawfully committed an indecent act with a child namely MNM, a child aged 14 years by touching her vagina using his penis.



- 5 The prosecution case as per evidence adduced in the lower court is that PW-4 and PW-5 in this case are a husband and a wife. The two are blessed with two daughters, PW-2 and PW-6 in this case. PW-6 has a young child who was aged 4 years in the year 2020. As a family they lived in Lamu West Sub-County. The appellant also lived in the same village and traded in local brew.
- 6 The complainant herein (PW-2) was born on September 18, 2006 and by the time of the alleged incident on July 1, 2020 she was 13 years old. She was sharing a bedroom with the child of her sister (PW-5), called Y, aged then 4 years. The parents and PW-5 were sleeping in different bedrooms.
- 7 On July 1, 2020 at 1.00 am the Appellant got into PW-2's bedroom. He removed complainant's clothes and fondled her breasts. He urged her to suck his penis but she declined. He drew out a knife from his clothes and demanded that she complies with his requests. He caressed her back and ribs as he repeatedly urged her to have sex with him. To attract attention, the complainant coughed incessantly. Lucky enough, her sister, the PW-6 in this case had at the time gone outside to answer to a call of nature. She heard the odd cough by her sister and decided to find out what was happening. When she got to the bedroom she saw a stranger beside her sister's bed. She dashed outside quickly and closed the door from outside. She went and alerted her parents about it.
- 8 The parents woke up and rushed to the complainant's room. They asked her from outside what was happening. She said there was a man with her who had urged her to suck his penis but she had refused. He had also attempted to suck her breast to which she resisted. They called PW-8 who is their neighbor for help. PW-8 called another neighbor by the name of AT. They went and secured the door. The chief was notified of the incident by a member of local peace committee, called Dula. He reported to the OCS. The OCS sent PW-7 and two other officers to accompany the Chief (PW-1) to the scene.
- 9 They went to the scene. Upon entry into the complainant's room they found the Appellant therein huddled at a corner. The complainant and the infant called Y were also therein where the appellant was. They recovered a dagger. The appellant smelt of alcohol and seemed confused. He was asked what was happening and he said he was not aware. PW-7 interviewed those present before they re-arrested the appellant and took him to the station.
- 10 The complainant was taken to Mokowe Hospital for examination. Her P-3 Form, PRC form and examination notes were filled. The medical officers noted nothing which can be related to penetration. The accused was then charged with the offences carried in the charge sheet.
- 11 The appellant gave sworn evidence in his defence. He alleged that the charges were fabricated to fix him out of a grudge. He alleged PW-4 was his estranged wife. On the material night while in his house he heard PW-4 screaming outside alleging that he was with an underage girl. He was surprised as he had no girl with him. Three weeks prior to that he had found PW-4 and PW-8 embracing as if in love. They deliberated on the issue and he forgave her. It surprised her that PW-8 responded to her screams and he lived far from the place.
- 12 The trial court evaluated the evidence and found that the prosecution were able to establish the offence in the main count beyond reasonable doubt. The Appellant was thus convicted and sentenced to serve 10 years imprisonment.
- 13 Aggrieved by the said conviction and sentence he appealed to this court on the grounds that; -
1. The conviction and sentence meted was unjust and unfair as the age of the victim was not established.
 2. The prosecution case was full of contradictions and invariances.



- 14 The appeal was canvassed by way of written submissions and both parties filed their submissions.
- 15 I have considered the preferred charges, evidence adduced by both sides, judgment of the Lower Court and sentence, grounds of the appeal and submissions.
- 16 On the issue of age of the victim, an original birth certificate was availed in court and it gave the date of her birth as September 18, 2006. The offence was allegedly committed on July 1, 2020. It is therefore vivid that at the time of the offence the victim was 13 years old. Her 14th birthday would have been on September 18, 2020. The charge places her age at 14 years but this did not prejudice the appellant in anyway as whether she was 14 or 13 years old the fact is that she was a child, below 18 years; whichever the year, Section 9 (2) of the *Sexual Offences Act* is rightly applicable.
- 17 The Appellant herein was arrested from the complainant’s bedroom at night, 1.00 am. During his cross-examination he conceded that he was in the room. The complainant was firm and consistent in her evidence on what he did to her. He demanded for oral sex as he urged her to suck his penis. He also expressed with to suck her breasts as he caressed her on the back and ribs. She resisted his undesirable and illegal advances, and wisely coughed to attract attention for help. The circumstances are clear that he was there with intention of having sex with the minor, and actually did attempt to have it, which amounts to the offence in Count 1.
- 18 His defence is of mere denial. It is contradictory as he alleged he was not in the complainant’s bedroom but on cross-examination confirmed he was. The grudge he raised, was not captured during cross-examination of PW-4 and is an afterthought. The trial court was right in convicting him for the offence.
- 19 The sentence of 10 years is legal and well within the law. This court can only interfere with a sentence meted out by the trial court only if demonstrated to be manifestly excessive in the circumstances or if established that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. The finding in the case of *Benard Kimani Gacheru –vs- Republic (2002) e KLR* is to the said effect. In this case such is not established to warrant this court interfere with the discretion of the Lower Court on the said sentence. As such the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF SEPTEMBER, 2022

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S.M.GITHINJI

JUDGE

In the Presence of; -

PARA 1.

The Appellant in Person

PARA 2.

Ms Mkongo for the Prosecutio

