



REPUBLIC OF KENYA



**Kofa alias Obama v Republic (Criminal Appeal E018 of 2022)
[2023] KEHC 21686 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E018 OF 2022**

SM GITHINJI, J

JULY 3, 2023

BETWEEN

BARAKA SALIM KOFA ALIAS OBAMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from original conviction and sentence in lower court
criminal case file No. E014 of 2021 in the Principal Magistrate Court at
Holo before Hon B.N.Kabanga – Resident Magistrate dated 17th May, 2022)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. Baraka Salim Kofa alias Obama, was charged in the main count with the offence 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 diverse dates between March, 2020 and August, 2020 in Tana River Sub-County within Tana River, the appellant intentionally caused his penis to penetrate the vagina of BMM, a child aged 17 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 diverse dates between March, 2020 and August, 2020 in Tana River Sub-County, the appellant intentionally touched the vagina of BMM a child aged 17 years, with his penis.



5. The prosecution case is that the complainant in this case was born on 27/7/2003. She produced her birth certificate No.xxxx in support of that. She has a sister called AM. At the time of the alleged offence the complainant was a student at [Particulars Withheld] Secondary School in form 3. Together with her younger sister, AM, they used to work in the farm at M. In March, 2020 while working in the farm, they decided as well to catch fish as the farm was flooded. The appellant was also there in company of other two persons trying to catch fish. The appellant herein through AM, got the phone number of the complainant. A few days later the complainant received a text from a person who introduced himself as Obama. It was from the appellant. She asked him how he got her phone number and he disclosed it was given by AM. AM later admitted she gave him the number when she met him in Bondeni. They continued to chat through the phone but later met physically in the farm. She recognized Obama as the appellant. Later in August, 2020 they met at a burial in Maweni. They deliberated and arranged to meet in the farm. When they met as arranged in the farm they had unprotected sex. The complainant thereafter missed her periods and noted signs of pregnancy. She informed the appellant about it but he was none committal. He later told her to inform her mother. She was scared of reporting to her mother. Two months later she reported to her grandfather in Kipini. The grandfather told the mother who is Pw-2 in this case.

The father was also informed.

6. On 4/5/2021 the complainant and her mother reported the case at Hola Police Station. They were referred to Hola County Hospital for examination. She was examined by Pw-4 who noted she was almost 9 months pregnant. The P-3 form was thus filled.
7. The case was investigated by Pw-3 and Corporal Esther. The appellant had escaped to Madogo after the incident. They wrote to the OCS Garissa on 7/5/2021 to effect his arrest. He was arrested and escorted to Hola Police Station where he was charged with the offence.
8. The accused defence is that he had a brother who died and used to deal in mangoes. The mother to the complainant gave him 5,000/= to get mangoes for her. He got the mangoes but most of them were spoilt. The good ones were not worth the given 5,000/=. His late brother therefore owed Pw-2 some refund. He died before he refunded the money. Pw-2 pursued the debt with the mother of the complainant. She threatened the mother to the complainant on none payment of the same. For the reason they relocated from Bondeni to Maroro.
9. In the year 2021 police went to Maroro. They were in company of Pw-2 and an elder. Pw-2 said she was there to effect revenge on the issue of unpaid debt. He was then arrested and taken to Hola Police Station. He alleged he never met the complainant and did not know of her.
10. The trial court evaluated the evidence and found the main count proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 18 years imprisonment.
11. The appellant discontented with the said conviction appealed to this court on the grounds; -
1. That the Learned Trial Magistrate erred in both law and facts by failing to consider the appellant was denied his right to legal representation at the state expense in contravention of article 50 (2) (g) (h) of the constitution of Kenya 2010.
 2. That the Learned Trial Magistrate erred in both law and facts by failing to consider sharp contradictions in the entire prosecution in breach of section 163 (1) (c) of the Evidence Act.



3. That the learned trial magistrate erred in both law and facts by failing to consider the necessity of the DNA Test on the paternity of the complainant's child when the same was a material issue before him as the born child was alleged to be as a result of the Act of defilement for which the appellant was charged.
12. The appeal was canvassed by way of written submissions.
13. I have well evaluated the charge in place, the evidence adduced by both sides, judgment of the lower court and sentence meted, grounds of the appeal and submissions by both sides.
14. As rightly submitted by both sides, for an offence of defilement the court need to ascertain that three ingredients for the offence are established by the prosecution beyond reasonable doubt, to enable it arrive at a conviction.
15. These ingredients which are derived from section 8 (1) of the *Sexual Offences Act* are; -
 1. Age of the victim which must be below 18 years old.
 2. Penetration whether partial or complete of a genital organ of the victim by that of the perpetrator.
 3. Sufficient identification of the perpetrator as the real culprit.
16. In weighing the evidence on these three ingredients of the said offence, in relation to the age of the victim she produced a birth certificate No.xxxx showing she was born on 27/7/2003. The offence was allegedly committed between the months of March and August, 2020.
17. The complainant from 27/7/2020 was therefore 17 years old. In August, 2020 she was 17-year-old. She was therefore a child by the time of commission of the offence. A birth certificate is sufficient evidence to establish the age or the date of birth for the person to whom it refers.
18. On penetration, the complainant at the time was aged 17 years. She was a student in Form three. Given her age and class, she was mature enough to know what sex is about. It is her evidence that she had unprotected sex with the appellant in the farm. Out of it she conceived. Unless otherwise established, she must have got pregnant out of a sexual activity which involved partial or complete penetration of her genital organ by a genital organ of a male. The evidence on it leaves no doubt that there was penetration.
19. While the foregoing two elements are not contested by the defence, the element contested is the 3rd one of holding the appellant as the culprit. In relation to this, the complainant identified him as Obama. She had seen him and they had deliberated on phone. She could not have made a mistake of him or of the person she had consensual sex with. The appellant says he was fixed for a debt owed by his deceased brother, to the mother of the complainant. The debt was not owed to the complainant and by him. The reasons for the alleged grudge is too remote and out of place to be believable. The defence is an afterthought as it was also not captured during cross-examination of the witnesses. The complainant could not have been impregnated by someone else and her mother used her to fix the mother of the appellant, through the appellant. The alleged debt is not even well defined in terms of the actual sum which as alleged is below 5,000/=. The defence is a sham and was rightly dismissed.
20. The three ingredients for the offence having been well established beyond reasonable doubt, Conviction was right.



21. On sentence, the minimum for the offence under the Act is 15 years. The appellant herein was sentenced to serve the minimum period acceptable under the law. I have no reason to interfere with the same. The appeal therefore lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALIND001 THIS 3RD DAY OF JULY, 2023

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S.M.GITHINJI

JUDGE

In the Presence of

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

