



**Katana v Republic (Criminal Appeal E029 of 2021)
[2023] KEHC 22291 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E029 OF 2021
SM GITHINJI, J
SEPTEMBER 19, 2023**

BETWEEN

SHEDRACK KAZUNGU KATANA APPELLANT

AND

REPUBLIC RESPONDENT

*(From Original Conviction and Sentence in criminal case
No.75 of 2020 of the SPM's Magistrate Court at Kilifi)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mutua for the State

1. Shedrack Kazungu Katana was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with 8 (4) of the [Sexual Offences Act](#) of 2006.
2. The particulars of this offence are that on diverse dates between January 1, 2019 and September 2, 2020 within Kilifi county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SMC, a child aged 16 years.
3. In the alternative the appellant faced a charge of indecent act with a child contrary to section 11 (A) of the [Sexual Offences Act](#) of 2006.
4. The particulars hereof being that on diverse dates between January 1, 2019 and September 2, 2020 within Kilifi county, the appellant intentionally and unlawfully touched the vagina of SMC a child aged 16 years with his penis.



5. The prosecution case is that the complainant herein is a third born child of SZ who have a total of five children. They live at plantation area within Kilifi county. The complainant in accordance to her birth certificate No 1xxxx1, of which was produced as prosecution exhibit 3, She was born on October 26, 2003. By the time of giving evidence on November 10, 2020 she was a student at [Particulars Withheld] secondary school, in form 3. The appellant herein was a neighbour at plantation. The complainant's evidence is that in January, 2019 the complainant requested her to be his girlfriend and she accepted. On January 1, 2020 and September 2, 2020 they had sex in his house. On this latter date at 10.00Pm her mother who was asleep woke up and noted that she was missing in the house. Complainant appeared shortly thereafter and informed her mother that she was from the appellant's house. They went together to the appellant's house. The appellant got outside and confirmed that he was with the complainant (S). The mother took them to the security person who urged them to get back the following day. When they went back they were referred to the police station. They reported at Kilifi Police Station.
6. The matter was reported to Pw-4 on September 4, 2020 at 3pm. Pw-4 referred them to Kilifi County Hospital for examination. The complainant was examined by Dr Sidi Dzitso at Kilifi County Hospital on September 6, 2020. Her PRC and P3 forms were filled. The Doctor noted that her hymen was broken and had a whitish discharge in vagina. Laboratory tests revealed no infections. The pregnancy test was however positive. The doctor did not indicate his opinion in relation to the preferred offences. Pw-4 recorded witness statements and had the appellant charged with the offences carried in the charge sheet.
7. The appellant gave sworn statement in his defence. He denied the charges. The appellant alleges that the complainant was caught with another boyfriend and knowing that the appellant had known the story, went to his house at night to seek forgiveness. They did not agree and he sent her away. On the way she met her mother. It was the complainant's second time to escape at night.
8. The mother reported the matter. The complainant was examined and it was said she was defiled and impregnated. Complainant however indicated that she was not pregnant.
9. The appellant alleged the complainant was not 16 years old. She had repeated several classes in primary school. Her boyfriend was appellant's friend who was 19 years old. The said friend told the appellant that the complainant's mother told him to wait for the complainant to finish school as she was a year behind him, which places her age at 18.
10. The trial court evaluated the evidence and found that the offence in the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 15 years in prison.
11. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that; -
 1. Age of the complainant was not proved.
 2. Penetration was not proved due to lack of spermatozoa in the complainant's vagina.
 3. DNA was not conducted to establish who had impregnated the victim.
 4. The victim delayed in reporting the alleged defilement to the mother.
 5. Age of the victim was not properly established.



6. Minimum sentence under section 8 (4) of the *Sexual Offences Act* is discriminatory and unconstitutional.
7. The matter was not properly investigated.
12. The appeal was canvassed by way of written submissions. I have as an appellate court of the first instance re-evaluated the evidence, considered the judgment entered and sentence meted. I have as well weighed the grounds of the appeal and filed submissions.
13. In a case of defilement, the prosecution need establish the following three ingredients of the offence beyond reasonable doubt.
 - i. The age of the victim, who must be a minor or a child, that is below 18 years in age.
 - ii. Penetration, which should be of a genital organ by a genital organ.
 - iii. Identification of the accused or his recognition as the real culprit.
14. On the first issue the prosecution had a birth certificate of the victim, number No 1xxxx1 produced as exhibit 3. It shows one S, was born on October 26, 2003. A birth certificate unless there are sound grounds availed as to why it's corrections or authenticity should be doubted, is strong and reliable evidence as to the date of birth of the person in whose respect it's issued. The appellant in this case expressed doubt on the given age stating what he was told by his friend whom he did not call as a witness. Repeated classes claim, of which was not well expounded does not imply that a form 3 student cannot be 16 years old. The appellant's allegation did not offset the reliable evidence availed on the age of the complainant. I therefore find as the trial court did, that the victim was a child then, aged 16 years old.
15. On penetration, the complainant stated she had sex with the appellant twice. They had a love relationship. She said she had consented to it. She is not the one who reported the appellant but it's the mother who discovered about the illegal relationship and reported the case. The victim had therefore no cause to fix the appellant. She was mature enough at age 16 to know what sex is all about. When she says they had sex, it's clear that her sexual organ, namely vagina was penetrated by the appellant's sexual organ, namely penis. The medical examination reports produced in form of P-3 form and PRC supports her claim. The hymen was broken. The appellant does not clearly and vehemently deny the allegation. His defence implies that he was not the only boyfriend to the complainant as his friend also had a relationship with her, and he is the one who had her the date the mother found her missing. However, it does not matter on whether someone else may have committed a similar offence. What matters is whether the appellant himself committed the offence charged with. In his defence he stated the complainant had got to his house on the material night to seek forgiveness as he had discovered of her relationship with the other man. Such could not have happened if the victim had no love relationship with the appellant. I am convinced by the evidence in place that the appellant herein had a sexual relationship with the victim, in which he penetrated her.
16. On the last ingredient, the appellant is a well-known person to the complainant and her mother as a neighbour. When the complainant was found by the mother at night, having just left the appellant's home, they went back to the appellant who confirmed that he was with her. He could not have been mistaken for the real culprit or fixed.



17. He was sentenced to 15 years imprisonment. It is the minimum allowed in law for the offence. In the case of *Francis Karioko Muruatetu v Republic, Katiba Institute and 5 others* [2021]eKLR, the Supreme Court held that;-

“.....we therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.”

18. The sentence is therefore legal and this court has no sound ground to interfere with the same.

19. The bottom line is that the appeal is unmerited and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF SEPTEMBER, 2023

.....

S.M.GITHINJI

JUDGE

In the Presence of:-

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

