



**Ali v Republic (Criminal Appeal E018 of 2024)
[2024] KEHC 13348 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E018 OF 2024
SM GITHINJI, J
NOVEMBER 4, 2024**

BETWEEN

ALI MOHAMED ALI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of Hon. Flavian M. Mulama – Resident Magistrate in Lamu PM’s Court SO No.E001 of 2022 delivered on 5th March, 2024)

JUDGMENT

1. AMA was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on diverse dates between the years 2019 to the year 2022 in Lamu County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of FAM a child age 14 years.
3. In the alternative he was charged with 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 diverse dates between 2019 to 2022 in Lamu County, the appellant unlawfully and intentionally, with his penis touched the vagina of FAM, a child aged 14 years.
5. The prosecution case is that the victim in this case who offered her evidence as Pw-2 was born on 21st July, 2008. Her birth certificate No.1686xxx was produced as Pexhibit -6 by Pw-6 the investigating officer.
6. The victim was a resident of [Particulars Withheld] where she was living with her mother (Pw-3) and other siblings. She was a primary school pupil. The appellant was their neighbour for many years. Pw-3 knew him since he was a child. The victim knew him as A though Pw-3 stated he was well known in



the village as A B. The victim was in a friendship relationship with A. There is a time they went into a friend's house, near Faza Police Station, A had invited her into the house. They met on the road and walked together to the said house. It was at night, around 8.00Pm. They got into a bedroom within the house. They were only the two of them in the house. They got to bed, removed all clothes before A laid on her and inserted his sexual organ into hers. The act made her conceive. She noted of it later when she missed her monthly periods. She went to a local chemist and purchased a self-testing kit. She went home carried out the test. She discovered she was pregnant. She reported to her mother about it, and disclosed it's A who was responsible. On 7/11/2022 she was taken to Faza Sub-County Hospital. On 18/11/2022 the matter was reported at Faza Police Station. The complainant (victim) was issued with a P-3 form of which was filled on the same day by Dr Athman A. Aboud at Faza Sub-County Hospital. The Dr noted that she was 4 months, 2 weeks pregnant. Nothing else was noted. It was concluded that due to pregnancy and given her age, she had been defiled.

7. Pw-4 investigated the case. The victim disclosed that she was defiled by A B. A B had been trying to have sex with her before but she had declined, but in the year 2022 yielded to his request. They had sex and she became pregnant. Later A B was traced and arrested. Upon arrest he denied the offence. He denied having had sexual intercourse with the victim. He was however charged with the offences carried in the charge sheet.
8. In the course of hearing, the victim gave birth on 5/5/2023. When the appellant was placed on his defence, he requested on 9/5/2023 for DNA to be conducted before his defence. The Court granted the order. It appears the process was frustrated by the victim and her mother who refused to cooperate to have the DNA conducted, which prompted the prosecution on 5/9/2023 to apply for warrant of arrest against them. Thereafter the cost of the same became a challenge. It was to cost Kshs. 30,000/= of which was not easy to raise.
9. On request by the prosecution on 5/12/2023, to which the defence conceded, the process was deferred and the matter proceeded for defence hearing.
10. The appellant in his defence stated that he was working for KWS as a community scout. He knows the victim and the mother very well. There is a time the appellant was with his friend M along the road. The victim appeared and M sent her for cigarettes. She bought them and when she returned her mother found the three together at the place. She delivered cigarettes as they parted. He never met her again. He never had sex with her and he is not the one who impregnated her. He was just fixed. He was arrested later and charged. He was willing to undergo DNA to establish the truth but the victim frustrated the process.
11. The trial court evaluated the evidence and found the main count proved beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 20 years' imprisonment.
12. The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds which I summarize as follow; -
 1. The offence was not proved by the prosecution beyond reasonable doubt.
 2. Evidence relied upon was based on hearsay and was uncorroborated.
 3. DNA test earlier on order for was not conducted to establish whether the appellant is the one who had impregnated the victim.
 4. Defence was not sufficiently weighed.
 5. The victim's evidence was not corroborated.



6. The charge was defective and incapable of rectification.
7. Burden of proof was shifted upon the appellant.
8. The sentence was harsh and excessive.
13. Before the appeal was heard, an application was filed by the appellant by way of a Notice of Motion dated 18/3/2024. They applied for bond pending appeal, and for a DNA test to be conducted as had been earlier on ordered by the trial court. Application was granted and orders given on 7/5/2024. DNA was conducted as ordered and a report dated 8/7/2024 filed. It shows that A M A is excluded as the biological father of U, TAs daughter. Given the said finding the prosecution conceded to the appeal.
14. Having evaluated the charges, evidence adduced, finding of the lower court and sentence meted; grounds of the appeal and the DNA findings, the issue that sprouts for consideration is whether the DNA finding exonerates the appellant.
15. Before I consider the effect of DNA test in this matter, I wish to state that there were red flags in the prosecution case which should have informed the need for a DNA test to establish the truth.
16. The first one is of the given name of the suspect. The victim said she knew him well, but only as A. However, the mother said he was well known in the village as A B. Pw-4 stated the revealed culprit was A B. However, the charge sheet gave his name as AMA, with no Aas of A B. The question is, if the appellant was well known as A B, why did the victim say she only knew him as A? Could there have been another A who defiled her, but for some reasons, probably of financial ability decided with the mother to fix A B? The appellant was an employee of KWS and there is evidence that some money was demanded from him and he paid some though not all.
17. The other is of the dates of the offence. The charge discloses between years 2019 and 2022. According to Pw-4 it was in the year 2022. If on 18/11/2022 she was 4 months and 2 weeks pregnant, and she was defiled once and conceived, then the incident could only have happened in the year 2022. It's doubtful how the diverse dates between years 2019 and 2022 were picked given the evidence. It's possible that the victim had a relationship with someone else during the given period.
18. The appellant was consistent about his innocence. He told the investigating officer so upon arrest. He said so when he denied the charge and later on insisted on DNA, of which the victim and her mother to some extent frustrated.
19. I wish to state that DNA test is one of the most reliable methods for determining biological fatherhood. The evidential value of a DNA test in establishing paternity rests on the genetic analysis of specific DNA markers passed from parents to their children. It testing for paternity typically yields accuracy rates above 99.9% when confirming a biological relationship. It's established that in cases where a person is excluded as the father, the probability is 100% since the alleged father and child will not share the required genetic markers.
20. Though DNA test is not the only way to establish paternity, so far it's the most accurate and reliable way, which has made it's finding held as evidence of fact, rather than of opinion.
21. The victim in this case alleged she was defiled once by the appellant, out of which she conceived. The DNA test shows it's not the appellant who impregnated her. This shows she was not truthful in her evidence. Her evidence reveals she was a well-informed girl though a child. When she missed her periods she went to the chemist and bought a self-testing pregnancy kit. She went home and carried out the test. She confirmed she was pregnant. Such indicates she was exposed enough to harbor the ability to fix the appellant for financial benefit or child support.



22. Respondent/Prosecution as would be expected did not oppose the appeal. DNA finding discloses the appellant is innocent and deserved an acquittal. The appeal is therefore allowed, conviction and sentence quashed; he is set free unless otherwise lawfully held.
23. Cash bail be released to the depositor.

DATED, SIGNED AND DELIVERED AT MANDI THIS 4TH DAY OF NOVEMBER, 2024

S.M. GITHINJI

JUDGE

In the Presence of; -

Ms Mkongo for the State

Appellant present

Mr Kilonzo for the Appellant

