



**Khambu alias Juma v Republic (Criminal Appeal E109 of 2023)  
[2024] KEHC 14093 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14093 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E109 OF 2023  
SM GITHINJI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**MICRPHY KHAMBU ALIAS JUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction in MCSO No. E026 of 2021 at the PM's Court at Kaloleni delivered on the 25th day of July, 2021 by Hon R.Amwayi-SRM)*

**JUDGMENT**

1. Microphy Kambu alias Jumaa was charged in the lower court with a main count of defilement of a child, contrary to section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the diverse dates between 1<sup>st</sup> February, 2020 and 24<sup>th</sup> March, 2021 at Milalani Village, Kaloleni Location, Kaloleni Sub-County in Kilifi County within Coast region, the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of J.M, a child aged 15 years.
3. He also faced an alternative count of indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No.3 of 2006.
4. The particulars herein being that on the diverse dates between 1<sup>st</sup> February, 2020 and 24<sup>th</sup> March, 2021 at Milalani Village, Kaloleni Location, Kaloleni Sub-County in Kilifi County within Coast region, the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of J.M a child aged 15 years.
5. The prosecution case is that the victim in this case was born on 4/5/2005. She stated so as well as her father (Pw-2), both relying on her child Health Card which indicates she was first seen on 5/5/2005.



- She was living in Milalani village with her parents and other siblings. In the year 2021 she was in class five. The appellant who was known in the village as Jumaa was employed by a neighbour as a herdsboy.
6. In the year 2019 the appellant enticed her into a sexual relationship. They had sex in his house that year and had it thereafter several times. On 25/3/2021 she was unwell. The father (Pw-2) took her to Vishakani clinic where she was examined and found pregnant. She told the appellant that she was pregnant as he is the one who had impregnated her. He said he will take care of the child as she continues schooling. The father reported the matter at Kaloleni Police Station. The victim was questioned about the pregnancy and said it's the appellant who had impregnated her. Pw-3 recorded her statement and that of her father and issued them with a P-3 form. The P3 was filled at Mariakani Sub-County Hospital on 25/3/2021 by Pw-4. It was noted that she was 25 weeks pregnant and her probable date of delivered was 7/7/2021. Her hymen was absent. Out of the said pregnancy the clinical officer opined that there was defilement. When the appellant realized the matter had been reported, he went underground. The police traced him later at Kombe area and he was arrested.
  7. On 4/4/2021 the victim gave birth to a baby girl, but prematurely. Unfortunately, the child passed on later on 21/4/2021.
  8. Upon completion of investigations by Pw-3 the offences in the charge sheet were preferred against the appellant.
  9. The appellant in his defence opted to remain mute.
  10. The trial court evaluated the evidence and found the offence in the main count proved beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 10 years' imprisonment.
  11. The appellant dissatisfied with the said conviction and sentence preferred an appeal to this Court on the grounds that; -
    1. The trial court sentenced him to 10 years' imprisonment without consideration that he was the sole bread winner.
    2. That the Court in imposing 10 years' imprisonment against him, it did not consider that he was a first offender and remorseful.
  12. He promised to adduce other ground during the hearing of the appeal but no other grounds were availed.
  13. The appeal was canvassed by way of written submissions. The prosecution (Respondent) filed theirs and though the appellant claimed had sent via email were not traced by the time of writing this judgment.
  14. The appeal from the grounds raised is against the sentence of 10 years' imprisonment, meted against the appellant by the trial court.
  15. Section 8 (3) of the [Sexual Offences Act](#), the section that pronounces the sentence for the offence the appellant was charged and convicted states; -

“ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”



16. In the recently decided case by the Supreme Court, Petition No. E018 of 2023, Republic-vs-Joshua Gichuki Mwangi, the Court held that; -

“Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the Courts to impose a harsher sentence.”

17. Given the foregoing, the most lenient possible legal sentence for the offence is 20 years’ imprisonment. The appellant herein was lucky that the trial court may have been influenced by the decision in the original Muruatetu Case, which spirit implied the Supreme Court had done away with mandatory minimum sentences. However, clarification was made later in the very same matter; and Petition No. E018 of 2023 which decision was on 12<sup>th</sup> July, 2024 has put the issue to rest.

18. Definitely the correct legal position tempts this Court to enhance the sentence to at least 20 years’ imprisonment, but I have resisted such to enable the appellant ride on the luck he had at the lower court.

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

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024**

.....  
**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Present (Appellant)

Ms Ochola for the State

