



REPUBLIC OF KENYA



**Kai v Republic (Criminal Appeal E010 of 2022)
[2024] KEHC 3135 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E010 OF 2022
SM GITHINJI, J
MARCH 19, 2024**

BETWEEN

RAMADHAN KAHINDI KAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from Original Conviction and Sentence in lower court
criminal case file No.E003 of 2021 in the Senior Principal Magistrate Court
at Garsen before Hon E.Kadima – SRM delivered on 23rd September, 2021)*

JUDGMENT

Coram: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. Ramadhan Kahindi Kai was charged in the lower court with a main count of defilement, 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 20th day of November and 30th day of November, 2020 at Tana Delta Sub-County, within Tana River County, the appellant intentionally caused his penis to penetrate the vagina of HHG, a child aged 13 years.
3. To it there is an alternative count 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 30th day of November, 2020 at Idsowe Village in Tana Delta Sub County within Tana River County, the appellant intentionally touched the vagina of HHG, a child aged 13 years with his penis.



5. According to the victim's Birth Certificate No. A1XXXX61, entry No.08XXXX65, she was born on 2nd March, 2007.
6. At the time of the alleged offence, that is 30/11/2020 the victim was allegedly aged 13 years and was living with her aunt (Pw-4) at Idsowe. The victim was a pupil in class 6 at [Particulars Withheld] Primary School.
7. On the material day the victim was sent by her aunt to the water well to fetch water. She carried a jerrycan for the said purpose and went to the well which was about 50 metres away. She met the appellant herein, whom she referred to in short as "Rama". Rama was described as a Unique individual with a distinctive style, characterized by his adorned dreadlocks and a noticeable limp.
8. Rama grabbed the victim. He was armed with a knife of which he used to threaten her. He held her hand and covered her mouth. He led her to an abandoned shanty nearby. He removed her skirt and pant. He as well lowered his trousers and pant before he inserted his penis into her vagina. After he was done he told her not to tell anyone.
9. Complainant went back to the house and kept the secret. However, in December, 2020 and January, 2021 she missed her monthlies. She got concerned and informed her aunt. The aunt suggested she could be pregnant. She called a medic by the name of Imani Buko who went with pregnancy testing kits to the house. The victim was examined and the result as suspected, was positive. The aunt asked the victim about it and the victim said a boy who limps and wear rasta hair was responsible. The aunt informed the victim's father about it. The father reported to the chief who advised him to report to the police. He reported at Idsowe Police and was advised to take the victim for examination at the hospital after she was issued with a P-3 form. The victim was taken to Garsen Health Centre where she was examined on 9/2/2021 by Pw-3. It was noted that she had no bruises, cuts or lacerations but the hymen was absent. Pregnancy test revealed she was 8 weeks pregnant.
10. The P3 form was thus filled.
11. The appellant realizing that the issue was turning against him, planned to escape. He carried his belongings on a motor cycle at Idsowe but he was noticed by members of the public who arrested him. Pw-5 re-arrested him and confirmed he was the suspect in this case. After investigations were concluded he was charged with the offences carried in the charge sheet.
12. The appellant in his defence stated that he worked at Idsowe. However, on 20/11/2020 he got information that his father had suffered a stroke. He went home on 21/11/2020 and returned on 30/11/2020. On 9/2/2021 he sought permission from his employer to go back home. While at Minjila set to go home he was arrested by police officers at a road block. He was told there was a complaint raised against him. He was taken to Garsen Police Station where he was charged.
13. The trial court weighed the evidence and found the appellant guilty of the offence in the main count. He was convicted of the same and sentenced to serve 20 years' imprisonment, to run from 10th February, 2021.
14. The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that; -
 1. *Voire Dire* was not conducted on Pw-1 who was a minor, before she testified.
 2. The appellant was not informed of his right to legal representation.
 3. DNA was not conducted to ascertain who had impregnated the victim.



15. The appeal was canvased by way of written submissions and both sides filed their respective submissions.
16. I have re-evaluated the charges, evidence on record, Judgment of the lower court and sentence meted, the grounds of the appeal and filed submissions.
17. The offence of defilement under section 8 (1) of the [Sexual Offences Act](#) No.3 of 2006 has three ingredients which the prosecution need establish to the required standard in law, that is beyond reasonable doubt. These ingredients are; -
 1. The age of the victim; he or she should be a child below 18 years of age.
 2. "Penetration" partial or complete insertion of genital organs of one person in that of another.
 3. Proper identification or recognition of the suspect as the real culprit.
18. The complainant (victim) who gave evidence as Pw-1 stated her age then as 14 years. A birth certificate No. A1XXXX61 was produced, showing she was born on 2/3/2007. Between 20/11/2020 and 30/11/2020, she was 14 years old as her 14th birthday was on 2/3/2020. There is no evidence to the contrary and the issue is well settled. The victim was therefore a child.
19. On penetration the complainant stated what was done to her that led to conception. The appellant undressed her, then himself and the two had sex at a shanty near the water well.
20. The said act led to her conception and when she was examined on 9/2/2021 she was found to be 8 weeks pregnant. Her hymen was also missing. These facts show that the conception was through an act of sex, which involved penetration of the victim's genital organs, by the genital organs of a male. Penetration is therefore well established in this case.
21. The only issue which the appellant disputes is of his involvement. The complainant described the assailant to her aunt when she said he was wearing dreadlocks and was limping. The appellant did not dispute fitting the said description. He was arrested on the verge of getting underground. The victim from the evidence had no cause to fix him. Her evidence shows she pointed at the real culprit, the appellant herein. The appellant's defence was of an alibi which was not supported at all. It was an afterthought and posed no meaningful challenge to the prosecution case. The evidence when weighed as a whole show that he committed the offence convicted and sentenced of.
22. The victim was not a child of tender years as she was 14 years old. She gave evidence and was cross-examined by the appellant. Representation by an Advocate and carrying out of DNA test were not mandatory. The proceedings shows that the appellant was not prejudiced in anyway and there was no miscarriage of justice occasioned in the trial. He was sentenced to serve 20 years' imprisonment. He impregnated a school going minor, posing a risk in her life, with physical, emotional, and social consequences. The 20 years' sentence was therefore deserved and this court finds no cause to disturb the same.
23. The upshot is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF MARCH, 2024

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S.M.GITHINJI

JUDGE

In the Presence of; -



The Appellant in Person
Ms Mkongo for the Prosecution

