



REPUBLIC OF KENYA



**Changawa v Republic (Criminal Appeal E041 of 2023)  
[2024] KEHC 13536 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13536 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E041 OF 2023  
SM GITHINJI, J  
OCTOBER 31, 2024**

**BETWEEN**

**AHMED MWALIMU CHANGAWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon Onalo – Resident Magistrate delivered on 23rd June, 2023 in SO Case No.26 of 2019)*

**JUDGMENT**

**Representation:**

Mr Soita Appellant

Mr Mulamula for the State

1. Ahmed Mwalimu Changawa was charged with a main count of defilement contrary to section 8 subsections (1) as read with subsection (4) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on diverse dates between 1<sup>st</sup> day of September, 2018 and 30<sup>th</sup> day of September, 2018 in Malindi Sub-County within Kilifi County, the appellant unlawfully caused his penis to penetrate into the vagina of MCM a girl aged 16 years.
3. In the alternative, the appellant faced a charge of committing an indecent act contrary to section 11 (1) of the [Sexual Offences Act](#) No.3 of 2006.
4. The particulars hereof being that on diverse dates between 1<sup>st</sup> day of September, 2018 and 30<sup>th</sup> day of September, 2018 in Malindi Sub-County within Kilifi County, the appellant unlawfully committed an indecent act by touching the vagina of MCM a girl aged 16 years by using his penis.



5. The prosecution case is that Pw-2 is the mother of the victim who offered evidence as Pw-1. They lived within Malindi Sub-County. Pw-2 is a farmer and is blessed with 8 children, Pw-1 being the first born. Pw-1 in accordance to her evidence of which was corroborated by a Birth Certificate produced as PExhibit-2, No.748xxxx, she was born on 1<sup>st</sup> June, 2002. According to her mother (Pw-2) she had a hand and leg disability. At the time of the alleged offence, that is, in September, 2018 she was 16 years old and was a pupil at (Particulars Withheld) Primary School in class 7. The appellant herein was living at (Particulars withheld) where he was selling water and operating a grocery store. The victim knew him well as she used to be his customer.
6. In September, 2018 on a date she did not disclose, she went at noon to the appellant's store for water. She had three jerricans and Kshs.15. She was sold water and when she requested the appellant to assist her put a jerrican on her head, the appellant held her hand and pulled her towards the shop. She fell down and injured her left leg, but that did not discourage the appellant. He pulled her to the shop as she screamed. Inside he ordered her not to scream. He removed her inner wear as she struggled to have it back in position. He held her hands and tied them together using a vest. He then took some lubricant and applied it on her vagina. Using his penis, he penetrated her vagina. After he was through she threatened to report him to the parents but he warned her against, saying if she does he will do something bad to her. She took her water and went home. She did not tell anyone about it.
7. The second time he did sex with her was still within the same month when she was sent to buy flour. The victim gave no details of how it happened, as well on the claimed third time when they had sex within the very same month.
8. The victim had conceived and continued going to school. In March, 2019 her teacher noted she had changed. She was withdrawn and her uniform was very tight. The teacher suspected she was pregnant and summoned the mother on 15/3/2019. She was questioned and said she was okay. She was taken to Bao Lala dispensary for examination. She was examined and confirmed to be pregnant. They went back to school and when she was asked who was responsible for it she started crying. The teacher took her aside and questioned her. She disclosed it was Ahmed Mwalimu. They left for Lango Baya Police Station where they reported the matter.
9. The victim was issued with a P-3 form which was filled on 18/3/2019 by Dr Rimba who examined her. She was found to be 22 weeks and 3 days pregnant. Hymen was broken and had a whitish discharge. The Doctor was of the opinion that there was vaginal penetration and was pregnant at age 16.
10. On 9/7/2019 the victim gave birth to a boy child, IAC. However, no DNA was conducted to confirm his paternity.
11. Pw-4 investigated the matter and had the appellant arrested and charged with the offences carried in the charge sheet.
12. The appellant offered his defence and called two witnesses. He said he lives at (Particulars withheld) where he operates a shop and sells water. The victim was known to him as she was his customer. He denied the offence and alleged between 1/9/2018 and 30/9/2018, he and his two witnesses were away at Bamba where they had gone for burial of a relative. When he got back the police arrested him on 16/3/2019 on allegation that he had defiled the victim in the said month. He alleged that he operates the shop together with his wife (Dw-2) and the business is frequented by many customers. There are also close neighbours and if the victim screamed they would have heard.
13. The trial court evaluated the evidence and found that the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of the offence and sentenced to serve 20 years' imprisonment.



14. The appellant dissatisfied with the said conviction and sentence preferred an appeal to this court on the grounds that; -
  1. The Court did not appreciate great contradictions, inconsistencies and un-corroboration in witnesses' evidence.
  2. The burden of proof was shifted to him.
  3. The Court used misleading facts and information to convict the appellant.
  4. The case was poorly, inadequately and shoddily investigated.
  5. DNA test should have been ordered by the court in the interest of justice.
15. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
16. As the first appellate Court I have re-evaluated the charge, evidence adduced, judgment of the lower court and sentence meted; grounds of the appeal and submissions.
17. The offence of defilement is outlined in section 8 (1) of the *Sexual Offences Act* No.3 of 2006. In accordance to this section and as was rightly held in the case of DS-Vs-Republic [2022] eKLR, the ingredients for this offence are; -
  1. Age of the victim, who should be a child below 18 years of age.
  2. "Penetration" which under section 2 of *Sexual Offences Act* is partial or complete insertion of the genital organs of a person into the genital organs of another person. "Genital Organs" includes the whole or part of male or female genital organs and for the purposes of the S.O.A includes the anus.
  3. Proper identification or recognition of the accused as the real culprit.
18. On age, the Court of Appeal in Edwin Nyambogo Onsongo-vs-Republic [2016]eKLR held that;-

"the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."
19. In this case a Birth Certificate No.74xxxxx in the name of the victim was produced as exhibit 2, showing the victim was born on 1<sup>st</sup> June, 2002. In September, 2018 she was therefore aged 16 years as indicated in the particulars of the offence. The fact is not disputed by the defence and the issue is settled beyond reasonable doubt.
20. For "penetration" there is the evidence of the victim. She gave impressive and detailed evidence of what the appellant did to her three times in the month of September, 2018. The details in the first incident reveals he removed her pants, applied lubricant in her genital organ, and using his genital organ penetrated her. Out of the said engagement(s) she eventually conceived and gave birth to a boy child namely Ibrahim Amani Charo. The facts when considered together, and also the fact that her hymen was broken, leaves no doubt on "penetration." Conception though not an ingredient for the offence of defilement, can well corroborate evidence of penetration as it happened in his case.



21. The appellant denies that he is the one who committed the offence. The victim pointed out at him firmly as the one who committed the offence. She knew him well as she was his customer. Her evidence and that of her mother reveals no cause why she would fix him. She was consistent throughout the process of investigation and offering of the evidence, that the appellant was the real culprit. Though where the offence leads to pregnancy and birth of a child DNA test can confirm the culprit, it is not the only way to proof involvement beyond reasonable doubt. Under section 124 of the *Evidence Act*, if the court believes the victim is truthful and records the reason for so believing, the victim's uncorroborated evidence can lead to a conviction. Evaluation of the victim's evidence shows it's reliable and credible in that it's the appellant who committed the offence.
22. The "alibi" defence by the appellant was an afterthought. He did not cross-examine on it, and the defence lacks details of who had passed on (name) and any document in support of the same. It was just a made story which was rightly dismissed by the trial court.
23. Having considered the foregoing, I do conclude as the lower court did that the offence in count was proved by the prosecution beyond reasonable doubt and the appellant was rightly convicted of the same.
24. On sentence, the minimum possible under section 8 (4) of the *Sexual Offences Act* is 15 years' imprisonment. The lower court considered the mitigation, circumstances under which the offence was committed, Victim Impact Assessment Report and settled at 20 years' imprisonment.
25. The victim was a primary school pupil. The appellant defiled her not once or twice, but thrice. She conceived and gave birth to a baby boy. She will have to live with the consequences of the crime committed by the appellant, in her entire life. This is an aggravating factor which called for more than the minimum possible sentence. I find no ground in which to alter the sentence in favour of the appellant.
26. The upshot is that the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. The Appellant
2. Ms Ochola for the State

