



REPUBLIC OF KENYA



**KENYA LAW**  
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**Swaleh v Republic (Criminal Appeal E090 of 2021)  
[2023] KEHC 3057 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 3057 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E090 OF 2021  
A. ONG'INJO, J  
FEBRUARY 28, 2023**

**BETWEEN**

**ATHUMAN SWALEH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of Hon. C. Kauka (RM) in Kwale  
Sexual Offences Case No. 53 of 2018 delivered on 10th May 2021)*

**JUDGMENT**

**Background**

1. Athuman Swaleh, the Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the offence were that on the 14<sup>th</sup> day of May 2018 at about 10.30 am in Kinango Sub-county within Kwale County, intentionally caused his penis to penetrate the anus of JM a child aged ten (10) years.
2. In the alternative, the Appellant was charged with an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 in that on the same day and place, he intentionally and unlawfully touched the anus of JM a child aged ten (10) years.
3. The Appellant was convicted of the offence of defilement contrary to S. 8(1) of the *Sexual Offences Act* as read with S. 215 of the CPC Act and sentenced to serve 15 years imprisonment.
4. Aggrieved by both his conviction and sentence, he preferred the appeal herein and raised the following six (6) amended grounds of appeal filed together with submissions on 19<sup>th</sup> December 2022:
  - a. That the learned trial court magistrate erred in law and fact by making an erroneous judgment that the complainant was mentally challenged without proper finding that her findings were not supported by a proper psychiatric report.



- b. That the learned trial court magistrate erred in law and fact by failing to find that the complainant PW3 and her mother PW1 reported in their first report made to the police that the complainant was defiled by a person not known to them and thus their evidence in court was dock identification.
- c. That the learned trial court magistrate erred in law and fact by failing to find that evidence given in court by PW1 was hearsay evidence as the brother who looked like the appellant was never called to testify in the trial.
- d. That the learned trial court magistrate erred in law and fact by failing to find that the police did not conduct conclusive investigation into this matter as the evidence of PW4 is silent about the alleged defilement.
- e. That the learned trial court magistrate erred in law and fact by giving a harsh and excessive sentence.
- f. That the learned trial court magistrate erred in law and fact by failing to consider the time spent in remand custody prior to conviction and sentence.

### **Prosecution's Case**

- 5. PW1, the complainant's mother testified that she left the complainant at home on 14<sup>th</sup> May 2018 at 10.30 am to go and sell cakes at the school and when she returned 15 minutes later, the complainant told her that someone had done bad manners to him. That the Complainant held her by the hand and led her to the accused person's house and took her around the house and pointed at the accused person. PW1 took the child to Kinango Hospital after reporting to the police and the child was examined and treated. PW1 said that the complainant is disabled.
- 6. PW2, Moses Kasyoki Mutuku, the clinical office at Kinango Su-county Hospital testified that he examined the complainant, a child of cerebral palsy who could not express himself, on the allegations that he had been defiled. That the anal region was lacerated but tests on anal swab did not detect anything. He was treated and P3 Form filled. He concluded that the child had been defiled.
- 7. PW3, the complainant who is a child with special needs was declared vulnerable and he testified through the mother as an intermediary and demonstrated to the court what the accused did to him. He said that he was with the accused at home and his brother was not there. He went to the accused and held his hand and said that it is the accused who wronged him.
- 8. PW4, Sgt Michael Kisingu took over the matter from PC Ireri who was the initial investigating officer after all the witnesses had testified and produced certificate of birth of the complainant.

### **Defence Case**

- 9. The appellant was placed on defence and he gave an unsworn testimony and said that he was a neighbor to the complainant and denied that he defiled the complainant on the material day as he had gone to work on the material day in the morning. He said that they had an issue with the complainant's family who told him that they would teach him a lesson. He said that he did not meet the complainant on the material day but he used to play with his siblings.
- 10. The Appellant filed his submissions together with an application to amend grounds of appeal on 19<sup>th</sup> December 2022 and this court has considered the amended grounds of appeal together with the submissions and reevaluated the evidence on record for the prosecution and the unsworn statement of the appellant and finds that it is not in dispute that the complainant was 10 years old as it is shown



in the certificate of birth produced as ExP2 by PW4. It is also not in dispute that the complainant was defiled as PW1 said so and PW2 the clinical officer found that the complainant had lacerations on the anal region and concluded that he had been defiled.

11. The issue in dispute is the identity of the perpetrator. In PW1's evidence, she said that the child led her to the accused person's house and identified him as the one who did bad manners to him. PW1 said she had left the child with a neighbor but did not identify who the neighbor was. It is confusing that the complainant's mother again said that she met the accused's brother who looks like him and upon inquiry, the brother said that it is the accused and the accused's mother was called and the accused brought.
12. If the child had identified the accused as the perpetrator, it is not understood why PW2 indicated in the P3 Form that the person who defiled him is unknown when they are neighbours. The police officer who investigated this case PC Ireri did not testify to say how he came to arrest and charge the appellant with the offence of defilement. The evidence of the complainant through the intermediary who is the mother is too scanty to be used against the appellant.
13. This court finds that there are doubts raised in the prosecution's case which should have been resolved in favour of the appellant. The appeal therefore has merit and the same is allowed. The conviction is quashed and sentence set aside. The appellant is therefore set at liberty forthwith.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS  
28<sup>TH</sup> DAY OF MARCH 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

