



REPUBLIC OF KENYA



**Malingu v Republic (Criminal Appeal 234 of 2018)
[2023] KEHC 1153 (KLR) (Crim) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL 234 OF 2018**

**DO OGEMBO, J
FEBRUARY 21, 2023**

BETWEEN

BONEX BWIRE MALINGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment, conviction and sentence of the Hon. E. Boke, SPM, in Kibera Chief Magistrate's court Sexual offences case No. 33 of 2017, dated 30.10.2018.)

JUDGMENT

1. Bonex Bwire Malingu, the appellant herein was charged before the lower court with the offence of defilement contrary to section 8(1) as read with 8(4) of the [Sexual Offence Act](#), No 3 of 2006. The particulars of the charge read that on 24.4.2017 at [Particulars Withheld] within Nairobi County, he unlawfully and intentionally caused his genital organ (penis) to penetrate the female genital organ (vagina) of MAO, a child aged 17 years.
2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#), No 3 of 2006. That on the April 24, 2017 at [Particulars Withheld], within Nairobi county, he intentionally touched the vagina of MAO, a child aged 17 years with his penis without her consent.
3. The case against the appellant went through full trial. He was eventually convicted on the main charge and sentenced to serve 16 years imprisonment. This was on October 30, 2018.
4. The appellant, dissatisfied by the conviction and sentence, has a appealed before this court. In his memorandum of appeal filed herein on November 13, 2018, the appellant has listed the following grounds of appeal.



1. That the learned trial magistrate erred in law and in fact in holding that the offence of defilement was proved against the appellant beyond reasonable doubt.
2. That the learned trial magistrate erred in law and facts by failing to find that enough doubt was created to secure his acquittal for the offence of defilement.
3. That the learned trial magistrate erred in law and in facts in basing the appellant's conviction on scanty and unsupported evidence.
5. He prayed that this appeal be allowed in its entirety. The state, has on the other hand urged that this appeal be dismissed for lack of merit.
6. By agreement of the parties this appeal was canvassed by way of written submissions. Both sides complied and filed their set of submissions.
7. In the submissions of the appellant, the appellant appears to have abandoned the initial grounds of appeal and raised fresh grounds on which submissions were based. This was done obviously without any leave being sought or granted before any amendment to the grounds of appeal.
8. It was first submitted that the charge sheet was defective. He relied on [*Jason Akumu Yong Versus republic*](#) (1983)KLR, where it was held:

In our opinion, a charge is defective under section 214(1) of the [*Criminal Procedure Code*](#) where

- a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charge offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses, or
 - b. It does not, for such reasons, accord with the evidence given at the trial, or
 - c. It gives a mis-description of the alleged offence in its particulars.
9. That the name of the appellant is Bonex Bwire Malingu and not Bonex Kiema Masumba, as shown on the particulars of the charge.
 10. The appellant further submitted that the prosecution were under a duty to prove penetration and identification. That no injuries were noted on complainant on examination, neither were there any discharge. That the trial court only relied on the fact that on examination, her hymen was broken and there was tenderness on her genitalia as proof. He relied on [*John Mutua Musyoki Versus Republic*](#) (2017)eKLR, on the need to prove the 3 ingredients. Also [*David Ochieng Aketch Versus Republic*](#) (2015)eKLR, on the effect of tenderness if not linked to the act.
 11. On the issue of identification, the appellant submitted that he was not positively identified. That the landlord who brought up these allegations did not witness the incident and only locked the house because of suspicion that the appellant must have been defiling the minor in the intervening period. He relied on [*Mary Wanjiru Gichira Versus Republic*](#) Criminal Appeal No 17 of 1998, that;

Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”
 12. He went on that failure to call the landlord was critical to prosecution's case.



13. The appellant further submitted that a critical witness was not called to give evidence. He specifically pointed out, once more, the landlord, who apparently was mentioned many times. On the effect of failure to call a crucial witness, he relied on David Waweru Githii Versus Republic (2019)eKLR, Stephen Mungai Maina Versus Republic (2020)eKLR and Paul Kanja Gitari Versus Republic (2016)eKLR .
- The appellant also submitted on alleged inconsistencies in the evidence of the prosecution. He gave the following examples.
- i. Inconsistency on how long the child was in the house, page 15 and 16.
 - ii. The names of the victim ie whether M or MAO.
 - iii. How long appellant had stayed in the plot, page 23 lines 8 -9.
14. He relied on John Mutua Musyoki (*supra*), that;
- To my mind, these contradictions and inconsistencies are not minor as submitted by the Respondent. They were critical and go to the root of the prosecutions case and whether the complainant was a credible and truthful witness.”
15. On his defence, the appellant submitted that the court the burden of proof remained with the prosecution who failed to discharge the same. That the benefit of doubt ought to have been given to the appellant.
16. From the Respondent’s side, it was submitted that the one issue that arises in this appeal is whether the ingredients of the offence of defilement were proved i.e age of the victim, proof of penetration and identification of the assailant. That the certificate of birth proceed (Exh-3) shows date of birth as July 11, 1999, confirming the age at 17 years old at the time of the offence.
17. On penetration counsel relied on section 2(1) of the Sexual Offences Act, that
- The partial or complete insertion of the genital organs of a person into the genital organs of another person.”
18. That the post rape care form produced (Exh-R) and the P3 form (EZCL-4) and the Laboratory Test Report confirmed that on examination, the hymen was broken and there was tenderness on the complainant’s genitalia. That this was in agreement with the complainant’s testimony that the appellant inserted his penis into her vagina. And on identification, it was noted that the appellant was known to the complainant as her neighbour (also evidence of PW3).
19. It was consequently submitted that this appeal lacks merit and ought to be dismissed.
20. This court is seized of this matter as a 1st appellant court. It is the duty of this court, therefore, to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusion – see David Njuguna Kariuki Versus republic (2010)eKLR. It is therefore mandatory that this court relooks at the whole evidence as was tendered by the parties before the trial court.
21. The case of the prosecution set off with the evidence of PW1 MAO, 18, a form 4 student at [Particulars Withheld] Secondary School, that on April 24, 2017 at about 9:00AM, she had found the appellant and the landlord called Ndicho outside the house of the appellant. That appellant gave her money to buy tomatoes and dania from her mother’s stall. That on presenting the items she found the appellant alone and he invited her into the house. She had only known him for 2 weeks as he had only recently moved into the plot. That the appellant told her that his parents wanted her to become his wife and that she would stay in there till 4:00PM. Appellant told her that he loves her. And when she declined to sit



as he requested, he slapped her and ordered her to sit down which she did. That the appellant pushed her to the bed behind the curtain and removed her dress and inner wears. He then inserted his penis in her vagina as she struggled with him. That she then heard the door being locked from outside by a padlock. She saw it was the landlord. She then heard noises from outside. The door was opened and she got out. She was then taken to hospital. Where she was treated and a post rape care form (MFI-1) was filled for her. A P3 form (MFI-2) was also later filled for her. Her testimony was that she was born on July 11, 1999 and she identified her birth certificate (MFI-3).

22. On being asked questions, she confirmed that they were neighbours and that the incident took place between 1PM and 2PM. And that she did not scream because appellant threatened and slapped here. And that the landlord, who witnesses the incident refused to come to court.
23. FAO was PW2. Her testimony was that she works as a maid and also operated a grocery near her residence. She recalled that on 24th (full date not given), at about 12:00 Noon, her neighbor Mwendu called and told her that he child M had been raped by a neighbor. Her daughter is also known as MAO. She advised that they lock the door till she comes. She caught up with the victim in hospital. She identified the appellant. She confirmed the date of birth of the complainant.
24. PW3, JW, recalled that on April 24, 2017, at about 12:00 Noon, he came out of his house to find a crowd outside his neighbours' house. He knew the neighbours house. He knew the neighbours as B. The door was locked from outside, but he saw the appellant and a girl inside the house through the window. His testimony was that the appellant apparently removed iron sheets and escape, but that the police who responded, found him inside the house of the witness.
25. Dr Joseph Maundu was PW4. His testimony was that on May 3, 2017, he examined PW1, then 17 years. he confirmed that her vagina was normal with no injury but her hymen was broken. He produced the P3 form (Exh 3). And Kinuthia Edward Mbugua, PW5, produced the post rape care form of the complainant as exhibit (Exh 1). His testimony was that on examination, she had no physical injuries on the body her vagina had no discharge and she had pain in her vagina entry. And that high vaginal swab disclosed puss cells.
26. The investigating officer, PC Joyce Mathahama was PW6. Her testimony was that on April 24, 2017 was that on receipt of the report, she took the witness statements and later had the appellant charged in court. This witness went to the scene and saw where the appellant had escaped through before entering the house of PW3. She went to produce the birth certificate as exhibit (Exh 3).
27. Upon the appellant being placed to his own defence, the appellant chose to give a sworn defence. In his defence, he testified that on April 24, 2017 at about 5:00pm he had been at Mountain View in Kangemi, when he was suddenly arrested and handcuffed by 3 men, and ferried to Kabete police station. He was then charged in court with charges he denied. He challenged the prosecution regarding the name on the charge sheet i.e Bonex Bwire Malingu and Bonex Kiema Masumba, while confirming that he is Bonex Bwire Malingu.
28. I have considered the above evidence as produced by the 2 sides side by side the submissions filed herein. This is a case of defilement and it is therefore necessary that the court considers what the offence entail. Section 8(1) of the *Sexual offences Act*, No 3 of 2006 states:-

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”



29. And the sentence at section 8(4) of the Act, stipulates;
- A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than 15 years.”
30. It is also important to note that under section 2 of the Children Act, No 8 of 2001, a child is;
- Child means any human being under the age of 18 years.”
31. And section 2(1) of the Sexual Offences Act defines penetration, thus,
- Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person”
32. It is therefore not in doubt that even partial penetration would constitute penetration under the law. It is also important to consider the ingredients of the offence of defilement. The court of appeal in the case of Charles Wamukoya Karani Versus Republic Criminal Appeal No 72 of 2013, held;
- The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.”
33. For a case of defilement, the prosecution is under duty to prove the above ingredients. In our instant case, of the 3 ingredients, 2 have without a doubt, proved and unchallenged by the appellant. First, the fact that the complainant was 17 years old and a minor at the time of this incident is not in doubt. Her birth certificate showing that she was born on July 11, 1999 was produced as exhibit herein (Exh-3). Secondly, the fact of identification of the appellant is also not in doubt. PW1, the complainant, confirmed that they were neighbours and that she knows the appellant well. Both her mother, PW2, and other neighbours, JW (PW3) have similarly confirmed this fact.
34. The issue that demands of determination is therefore whether the complainant was indeed defiled by the appellant. It is appreciated that by its nature an offence such as this is ordinarily committed away from public review and so hardly would there be a direct eye witness to the act itself. It is therefore important that the court considered the evidence of the complainant keenly side by side those of the other witnesses to determine whether indeed the appellant defiled the complainant.
35. The evidence of PW1 was the appellant first sent her to go and buy for him some tomatoes and dania, and on return, the appellant welcomed her into his house. This was at about 9:00AM. That once inside the house, the appellant talked to her for several hours as he expressed his love for her. He then proceeded to place her on his bed behind the curtain, undressed her. He then had sexual intercourse with her. In the process, the landlord, suspicious of the happenings in the house of the appellant locked the door from outside. A crowd gathered outside. In the process, the appellant managed to remove the iron sheets of the house and escape arrest. The door was opened and the complainant was rescued from the house of the appellant. The appellant himself was traced and arrested by police officers who had been called to the scene from the house of PW3.
36. The evidence of PW3 corroborated that of the complainant. This witness was part of the crowd that had gathered outside the house of the appellant. He confirmed being the appellant and the complainant, both inside the house, through the window, as the appellant begged for MAO from the crowd outside who were baying for his blood. He further witnessed as the arresting officers fished the appellant from his house where the appellant had hidden. And both him and the investigating officer, PW6 confirmed that the appellant had escaped from his house by damaging the mabati, damage of which these witnesses witnessed after the arrest of the appellant.



37. The evidence of the above witnesses, which the appellant has not denied, clearly shows that the appellant was caught red handed with the complainant in his house. And according to the complainant (PW1), the door was knocked and locked from outside while the 2 were in the act.
38. The complainant from the evidence on record, was referred to Hospital on the same day and examined. A post rape care examination form was accordingly filled, same was produced in court as exhibit by PW5, Kinuthia Edward Mbugua (Exh-1), whose evidence was that on examination, it was noted that PW1 had pain in her vagina entry. To me, this was prove that there had been partial penetration in view of the fact that the knock on door occurred while the appellant and the complainant were still in the act. I am in the circumstances convinced that the prosecution only proved the element of penetration as against the appellant.
39. The appellant, on the other hand, gave a sworn defence in which he dwelt only on how he was arrested at Mountain View estate. He did not challenge in any way the prosecution's case as put across by PW1, PW3 and PW6. It is noted also, that both PW3 and PW6 gave evidence that appellant was arrested from inside the house of PW3. It is unbelievable that the appellant was arrested away in Mountain View estate, without him raising this issue of his place of arrest with the prosecution witnesses. The defence of the appellant was unconvincing and lacking in merit. I dismiss it.
40. On sentence, as already seen above, the Act prescribes for a term of not less than 15 years imprisonment. The court sentenced the appellant to serve 16 years' imprisonment. This sentence was both legal and proper.
41. It is noted however, that through his trial, the appellant had been remanded in custody. The court in sentencing the appellant ought to have given account of the period the appellant spent in custody pursuant to section 333(2) of the *Criminal Procedure Code*.
42. It is incumbent upon the prosecution to prove the guilt of an accused person beyond any reasonable. In this case, I am convinced that the prosecution duly discharged this burden. The appeal of the appellant filed herein on November 13, 2018, lacks merit and is dismissed. The appellant is ordered to serve 16 years imprisonment as ordered by the trial court. The sentence of the appellant shall run from April 26, 2017, the date he was first arraigned in court. It is so ordered.

JUDGMENT READ OUT IN OPEN COURT (ON LINE) IN THE PRESENCE OF THE APPELLANT (KAMITI MEDIUM), AND MS. JOY FOR THE RESPONDENT.

D. O. OGEMBO

JUDGE

21ST FEBRUARY, 2023

Court:

Judgment read out in open court (on line) in the presence of the appellant (Kamiti Medium), and Ms. Joy for the Respondent.

D. O. OGEMBO

JUDGE

21ST FEBRUARY, 2023

