



REPUBLIC OF KENYA



**KENYA LAW**  
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**Baya v Republic (Criminal Appeal E013 of 2022)  
[2023] KEHC 19374 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19374 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E013 OF 2022**

**A. ONG'INJO, J  
JUNE 27, 2023**

**BETWEEN**

**MAITHA TOYA BAYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision by Hon. D. Odhiambo, Resident Magistrate on 29th October 2021 in Shanzu Sexual Offences Case No. 79 of 2020, Republic v Maitha Toya Baya)*

**JUDGMENT**

**Background**

1. The accused Maitha Toya Baya was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that Maitha Toya Baya on diverse dates between the 1<sup>st</sup> June 2020 and 30<sup>th</sup> June 2020 in Mtwapa Township within Kilifi County of Coast Region, intentionally and unlawfully caused his penis to penetrate the vagina of DDB, a child aged 16 years old.
2. In the alternative charge Maitha Toya Baya was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that Maitha Toya Baya on diverse dates between the 1<sup>st</sup> June 2020 and 30<sup>th</sup> June 2020 in Mtwapa Township within Kilifi County of Coast Region, intentionally and unlawfully touched the vagina of DDB a child aged 16 years old with his penis.
3. The trial magistrate considered the evidence of 5 prosecution witnesses and found that there was sufficient evidence to put the accused on his defense. The trial magistrate was satisfied that the prosecution was able to prove the case of defilement against the accused person to the required standard beyond any reasonable doubt. The accused person was then sentenced to serve fifteen (15) years imprisonment.



4. The appellant was aggrieved and dissatisfied by the decision of the trial court and preferred the appeal herein on the following amended grounds: -
  1. That the learned trial magistrate court erred in the points of law and fact by imposing 15-year term imprisonment to the appellant herein without observing that the prosecution side failed to prove all the ingredients of the charge of defilement as it was stated in the case law of *Remmy Wanyonyi Wanjoki v Republic* (2020) eKLR. Thus rendered the appellant herein to suffer prejudice.
  2. That the learned trial magistrate court erred in the points of law and fact by failing to observe that the prosecution side failed to prove its case beyond reasonable doubt
  3. That the learned trial magistrate court erred in the points of law and fact by failing to conduct a *voire dire* examination on the alleged complainant PW1. Thus rendered a blow to the prosecution case.

### **Prosecution Case**

5. PW1, DDB the complainant herein gave a sworn statement that she was born on 1.3.2004 and that the accused was their farm boy. She informed court that between 1.6.2020 and 30.6.2020, she was taking food to the dogs around 50 meters from the house and that the dogs were in an unused bathroom. That the accused followed her and closed the door. That he removed her dress, hanged it on the wall, blocked her mouth and removed her panty. That he then removed his penis and put it into her vagina forcefully. That he then tried it from behind when PW1 pushed him, opened the door and escaped leaving him inside.
6. PW1 stated that she went to the house and closed the door and that the accused followed her and tried talking to her against telling anyone as her dad had a bad temper. That when her sister and father returned from Kilifi, on 1.7.2020 at 9.00 am, she told her sister what had happened and the sister went and informed her father. That the following day, the accused was confronted about what had happened and that he denied but when he was threatened with a curse, he admitted to everyone. That her father and sister went to the police and returned with two police officers who arrested the accused. That PW1 went and recorded her statement and was escorted by a female police officer to hospital where the forms filled include the PRC Form – MFI-1, treatment notes – MFI-2, P3 Form – MFI-3 and copy of birth certificate – MFI-4.
7. PW2, AB, informed court that the complainant is her sister and while the accused was their garden boy for five years. She testified that on 1.7.2020, she was in the kitchen when her sister followed her and told her there was something she needed to tell her. That she went with her to the room and she started crying and told her that the shamba boy had damaged her. That the complainant to PW2 that she had taken food to the dogs when the shamba boy followed her and closed the door and forcefully had sex with her. That she then got a chance and escaped and that the shamba boy followed her to the room window and warned her not to tell anyone.
8. PW2 further stated that she went and told her father who called the complainant. That the following day, the accused was asked what he had done and that at first he denied but when Ustadh called him, he admitted that he had made a mistake and asked for forgiveness. That they then went to the police and the accused was arrested. PW2 stated that she recorded her statement and the complainant was taken to hospital.
9. PW3, DB, testified that the complainant was his daughter while the accused was his farm boy for 5 years. That on 1.2.2020, Moza and Ambrea went and told him that something bad had happened to



the complainant and that the accused had defiled her. That PW3 called the complainant and asked her to explain what had happened and she told him that the accused followed her when she went to feed the dogs then closed the door and defiled her. That the following day they reported to the police and he was arrested. That the accused admitted that he had defiled the complainant and asked for forgiveness. That PW3 recorded his statement and that they went to hospital. He identified the accused in court.

10. PW4, John Musau, a Clinical Officer from Mtwapa Health Centre testified that he had treatment notes for NDB, aged 16 years old which was filed on 2.7.2020. That she reported being attacked and defiled by someone known to her and went to the hospital after one month. PW4 stated that the hymen was broken with healed tears at 3 and 6 O'clock, and tests done were normal. PW4 produced the report as PExh-2. He stated that he also had a PRC Form for the complainant which was filled by Annrita Sebastian on 2.7.2020 which showed that the girl was attacked and defiled by the farm boy when she was attending to the family dogs and that she went to the hospital one month later. That the report also stated that her hymen was broken with healed bruises on the vagina wall. PW4 produced the PRC Form as PExh- 1. PW4 also filled the P3 Form on 3.7.2020 as per the treatment notes and the PRC Form. He produced it as PExh-3.
11. PW5, No. 66xxx Sgt. Haru Al, the Investigating Officer in the case informed court that on 2.7.2020, he received a report about a defilement case. That the father of the complainant told him his shamba boy had defiled his daughter. That PW5 went to the scene and arrested the accused. That the complainant showed PW5 the dog's pen where the incident had taken place. PW5 testified that he advised them to go to hospital where the PRC form was filled and that he then issued them with a P3 Form. That PW5 was given treatment notes and that the girl was 16 years old as per her birth certificate which showed she was born on 1.3.2004. PW5 produced it as PExh-4. PW5 identified the accused in court as the person who was arrested.

### Defence Case

12. The accused, Maitha Thoya Baya gave sworn statement and stated that the allegations are not true and that the doctor who treated the complainant did not come to court. The accused testified that he does not have parents, that his brother depends on him to survive and that he has a wife and children. He admitted that he worked for the complainant's family for 7 years but disagreed with the father of the complainant, and could be the reason why the case herein was brought to court.

### Appellant's Submissions

13. The appellant submitted that of the three ingredients of the offence of defilement, penetration was not proved beyond reasonable doubt. The Appellant relied on the holding in *Remmy Wanyonyi Wanjoki v R*, H. C. Cr. Appeal No. 53 of 2019 at Bungoma where Riech, J. held as follows: -

When the prosecution does not prove all the ingredients of the offence, it follows they have not proved the charge against the accused beyond reasonable doubt. In this appeal, I find the prosecution did not prove the charge beyond reasonable doubt.

14. The appellant submitted that in the PRC Form, the probable type of weapon causing injury was not indicated. He further stated that PW1 was taken to hospital after one month and that she took a shower and changed clothes, which rendered a blow to the prosecution's case. That this position is supported by the cases of *Mark Oiruri Mose v Republic* (2013) eKLR, *Republic v Muiruri* (1993) KLR at page 819, *Arthur Mshilla Manga v Republic*, Cr. Appeal No. 24 of 2014 at Mombasa Court of Appeal, and *Dickson Amalemba Lianza & Another v Republic*, Cr. Appeal No. 67 of 2016.



15. The appellant pointed out that *voire dire* examination was not conducted on the minor and as a result, it vitiated the trial process. The appellant relied the cases of *PMK v Republic*, H.C. Cr. Appeal No. 13 of 2016 at Nairobi and *Nyasani s/o Bichana v Republic* (1985) E.A. 190. The appellant further relied on Section 19(1) of the *Oaths and Statutory Declarations Act* which provides as follows: -

Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth;

### **Respondent's Submissions**

16. The Respondent contended that there was proof to the required threshold of beyond reasonable doubt and that the evidence tendered established all the ingredients of the offence as was stated in *Remmy Wanyonyi Wanjoki v Republic* (2020) eKLR. The Respondent submitted that the ingredients of the offence of defilement which the prosecution must prove beyond reasonable doubt include the age of the complainant, that there was penetration and that it was the accused who did the act of penetration.
17. On the age of the complainant, the Respondent stated that the Investigating Officer produced the complainant's birth certificate as PExh-4 which showed her date of birth as 01.03.2004, putting her age during the material time as 16 years and therefore a minor.
18. On penetration, the Respondent averred that it was the testimony of PW4 that the complainant's hymen was absent with healed tears on her vaginal wall and that he gave the approximate age of the injuries to be one month which is reflected in the treatment notes, P3 and PRC Forms which show that she was examined on 2<sup>nd</sup> July 2020. The Respondent stated that the said evidence is corroborated by PW1 who testified that the incident took place sometime in the month of June. That she did not tell anyone until 1<sup>st</sup> July 2020 when PW2 and PW3 returned from Kilifi, and therefore, the age of the injuries is consistent with her testimony.
19. On whether it is the appellant who did the act of penetration, the Respondent pointed out that the complainant in her testimony positively identified the accused as the person who on the material day forced her to the dog house where he defiled her. The Respondent submitted that the complainant confirmed that she knew the accused prior to the incident as he had worked as a farm boy for 4 years.
20. The Respondent contended that the court properly evaluated the evidence and found that the prosecution had established the case against the appellant beyond reasonable doubt. That the conviction and minimum sentence imposed for the offence were therefore proper.
21. On the ground that failure to conduct a *voire dire* examination on the complainant was detrimental to the prosecution's case, the Respondent stated that the complainant was 16 years old when she testified, therefore, lack of *voire dire* examination was not prejudicial to the prosecution case as she was not a child of tender years. The Respondent relied on the case of *Maripett Loonkomok v Republic* (2016) eKLR where it was held as follows: -

The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of *Kibageny Arap Kolil v R* (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14



years. The only statutory definition of a “child of tender years” is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in *Patrick Kathurima v R*, Criminal Appeal No.137 of 2014 and in *Samuel Warui Karimi v R* Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination.

22. The Respondent submitted that the conviction and sentence of 15 years were therefore proper and should not be disturbed. The Respondent therefore prayed that the appeal be dismissed for lack of merit and that the court upholds both conviction and sentence.

### **Analysis and Determination**

23. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

24. After considering the amended grounds of appeal, records of the trial court and submissions, issues for determination are as follows: -
- i. Whether failure to conduct voir dire examination was fatal to the prosecution’s case
  - ii. Whether the prosecution proved its case beyond all reasonable doubt
  - iii. Whether the sentence of 15-year imprisonment was harsh and excessive in the circumstances

### **Whether failure to conduct voir dire examination was fatal to the prosecution’s case**

25. Section 125 (1) of the *Evidence Act* states: -

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.

26. Section 19 (1) of the *Oaths and Statutory Declarations Act* provides: -

“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed



of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.

27. In the case of *Samuel Warui Karimi v Republic* [2016] eKLR it was held: -

“...voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the *Evidence Act*, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.”

...

“This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children’s Act has remained a guide in regard to criminal responsibility.”

28. The Appellant submitted that it was fatal for the prosecution’s case where the complainant who was a child aged 16 years was not examined to establish that she understood the nature of an oath and the duty of speaking the truth before her evidence was received. He relied on the holdings in *PMK v Republic* (2018) eKLR and *Nyasani s/o Bichana v Republic* (1958) EA 190 to support his position that voire dire examination was a prerequisite of taking the evidence of the complainant herein.

29. In *John Muiruri v Republic* (1983) KLR 445, Criminal Appeal No. 44 of 1982 Court of Appeal at Nairobi, Madan, Porter JJA and Chesoni Ag JA held: -

“Where in any proceedings before any court a child of tender years is called as a witness, the court is required to form an opinion on a voire dire examination whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

...

When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the course the court took is clearly understood ....”

30. In *Patrick Kathurima v Republic*, Criminal Appeal No. 137 of 2014, the Court of Appeal held: -

“We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of *Cap 15*. We are aware that Section 2 of the *Children’s Act* defines a child of tender years to be one under the age of ten years. The definition has not been applied to the *Oaths and Statutory Declaration Act*, Cap 15. We



have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”.

31. From the charge sheet, the complainant NDB is indicated as 16 years old at the time she was defiled having been born on 1<sup>st</sup> March 2004 as per Exh-4 certificate of birth produced by the father PW5 the Investigating Officer Sgt. Haru Al from Mtwapa Police Station. By 8<sup>th</sup> February 2021 when she was testifying, the complainant had turned 17 years old and she gave a sworn testimony. By all standards, she was not a child of tender years as envisaged in the case of *Patrick Katburima v Republic*, Criminal Appeal No. 137 of 2014 (supra) and was therefore competent to testify without voire dire examination. It has not been shown that there was anything to prevent her from understanding the questions put to her or even from giving rational answers to those questions. This ground cannot be sustained.

#### **Whether the prosecution proved its case beyond all reasonable doubt**

32. The appellant’s submissions are that the ingredient of penetration was not proved beyond all reasonable doubt because the complainant took a bath, had a change of clothes and went to hospital almost one month after the date of the alleged defilement. He said that there were doubts raised in the prosecution’s case as to whether or not there was penetration and that such doubt should be resolved in his favour.
33. The evidence supporting the prosecution’s case that the complainant was defiled was given by the complainant herself when she said that the appellant who was their farm boy defiled her when she was taking food to the dogs in an unused bathroom 50 metres away from their main house. She said that the appellant followed her and closed the door, removed her clothes, blocked her mouth and forcefully put his penis into her vagina. That he tried from behind, she pushed him away, opened the door and ran to the main house. That although her aunt and grandmother were at home, she did not tell them until her sister and father were at home on 1<sup>st</sup> July 2020 she reported to them. That when the accused was threatened with a curse, he admitted that he committed the offence and he was arrested.
34. The Clinical Officer, PW4 examined the complainant on 2<sup>nd</sup> July 2020 at Mtwapa Health Center and confirmed that her hymen was broken with healed scars at 6 and 3 o’clock. He produced P3 Form as Exh-1 and PRC Form as Exh-3.
35. From the evidence of PW1 and PW4, and the P3 Form and PRC Form, this court finds that the trial magistrate rightly concluded that evidence of penetration had been tendered by the prosecution and therefore proved beyond reasonable doubt.

#### **Whether the sentence of 15-year imprisonment was harsh and excessive in the circumstances**

36. Section 8(4) of the *Sexual Offences Act* provides: -
- 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 fifteen years.
37. The words of Section 8(4) connote that it is a mandatory sentence. However, it is now settled that a law that deprives the trial court the discretion to pass sentence in consideration of the merits of each case is unconstitutional. Refer to the holding in *Philip Mueke Maingi & Others v AG & Others*, Petition No. E017 of 2021, High Court of Kenya at Machakos. The trial magistrate was therefore under obligation to explain how he arrived at the sentence of a maximum 15 years in consideration of the current precedents and the *Sentencing Policy Guidelines*.



38. It is indicated on the charge sheet that the appellant is a young adult of 23 years and that he had worked for the complainant's father for 5 years. He also said that he is an orphan with a wife and child. The prosecution said that the appellant was a first offender. In consideration of the mitigating factors, this court therefore substitutes the sentence of 15 years with 10 years from the date of sentence i.e. 1<sup>st</sup> October 2021.
39. In conclusion, the appeal on conviction has no merit and the same is dismissed. The appeal on sentence succeeds partially in that the sentence of 15 years is substituted with 10 years to take effect from 1<sup>st</sup> October 2021. The appellant has 14 days right of appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 27<sup>TH</sup> DAY OF JUNE 2023**

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

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

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

**JUDGE**

