



REPUBLIC OF KENYA



**Bahati v Republic (Criminal Appeal E089 of 2022)  
[2023] KEHC 22187 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 22187 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E089 OF 2022**

**A. ONG'INJO, J  
AUGUST 3, 2023**

**BETWEEN**

**ABDUL YUSUF BAHATI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of Hon. S. Ogot (SRM) delivered on 7th October 2022 in Msambweni S. O. Case No. E018 of 2018, Republic v Abdul Yusuf Bahati)*

**JUDGMENT**

**Background**

1. The Appellant, Abdul Yusuf Bahati was charged with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006.
2. Particulars were that Abdul Yusuf Bahati on the April 19, 2019 at around 0200hrs in Kingwede – Shirazi Location of Kwale County in association of another not before court unlawfully and intentionally caused your penis to penetrate the vagina of MSM a child aged 15 years.
3. Based on the evidence by the prosecution and the defence witnesses' sworn statements, the trial magistrate found the appellant guilty and he was convicted and sentenced to serve 15 years imprisonment.

**Prosecution case**

4. PW1, MSM the complainant herein testified that she was born on July 25, 2003, according to the Child Health Clinic Card – Pexh 1 and that she knew the accused. She said that on April 19, 2019, she went to a wedding ceremony where she met her friend Juma who went with her to the ocean and that they stopped under a tree. She testified that they saw a group of people heading towards the ocean and who



- went up to where they were and that Abdalla Sadati slapped Juma and he fell and that they held her by her hand and lifted her up in the air.
5. PW1 said that others were groping her breasts and others her vagina. That Abdalla Sadati took her to the mangroves by the ocean and defiled her. That when he was done, he called Abdalla Yusuf and told him to do what he wanted with the complainant. That Abdalla Yusuf had sex with her and when he finished, he left her there. That she got up and headed home and slept but she was bleeding at that point and couldn't even sit as it was too painful. That her mum noted that she was restless and asked what was going on and that she told her. That her mum informed her dad and that they went and reported to the police who referred them to hospital where she was also treated.
  6. PW2, BMZ, testified that on April 20, 2019 on Saturday night when he got home, he found the complainant being questioned by her mum. That the complainant said she had been at a wedding and Abdul Sadati and Abdul Bahati defiled her even though there were many people around. That she did not speak up earlier because the two had threatened her. That he reported to the area chief and to Funzi Police Post. That he was advised to take the complainant to hospital and that he took her to Msambweni Hospital. That they went to Msambweni Police Station where they were given a P3 Form which was filled by the doctor and that the complainant was given medication. PW2 testified that the complainant was born in 2003.
  7. PW3, Philip Kibet Chebii, a clinical officer at Msambweni County Hospital informed court that his colleague Dr Melaki Juma Boi who was away on study leave filled the medical documents. That he had worked with her for one year and knew her handwriting. He said that the colleague filled the P3 Form for MSM on April 23, 2019 and that she was 15 years old then. That the complainant was taken to hospital on allegations of being defiled by someone well known to her and that she was in fair general condition. He said that on genital examination, the hymen was absent although there was no discharge or venereal disease. That urine was clear, she was not pregnant, she was HIV negative and that high vaginal swab confirmed some kind of infection. That she was given postinor 2 to prevent pregnancy, medication to prevent HIV and antibiotics for the infection she had. PW3 produced the treatment book as PExh 2, lab request forms as PExh 3, and the P3 Form as PExh 4.
  8. PW4, No xxxx Corporal Dickson Kiros, the Investigating Officer from Msambweni Police Station testified that on April 22, 2019 at 1600 hrs, he was in the crime office when the complainant, a juvenile girl of 16 years in the company of her step father arrived at the station and handed him a letter from Funzi Police Post requesting for assistance. That the letter showed a defilement case and that he spoke to the complainant who told him that on April 19, 2019, there was a wedding ceremony within Funzi village which the complainant attended and that she was approached by a boy called Juma who was their neighbour and who asked her to take a walk with him.
  9. PW4 testified that they were approached by about 15 young men whereby Juma was chased and the complainant left with Abdalla Sadat and Abdalla Yusuf and the two appeared to be leaders of the group after Juma was chased. That the two warned the complainant not to make noise or raise an alarm. That the complainant was taken to the nearby bush and was repeatedly defiled by the two. That PW4 booked the report in the OB and told the complainant to go and get treatment at Msambweni Hospital and PW4 later issued a P3 Form which was filled at the hospital. That PW4 recorded the statements of the complainant and her witnesses. That the two accused disappeared to an unknown place and when the accused resurfaced, he was arrested and taken to Msambweni Police Station where charges were preferred against him.



## Defence Case

10. The accused, Abdul Yusuf Bahati, gave sworn evidence that on the material day, there was a wedding at Funzi Island and there was a group of around 11 men and that he was one of them. He stated that the wedding was not too far from the beach and that they went to the beach and found a girl with her boyfriend, Juma, doing whatever they were doing. That Abdul Sadat took off with the girl and that they did not know where he had taken off to. That they found him in the mangroves and he was with the girl. That he had already raped her at that point and he told them that the rest could proceed to rape her as well. That the girl was crying and that the appellant decided to help her. That he got her out of the bush and walked her to the road so that she could go home.
11. DW2, Patrick Andenyi Ondenyo testified that he was a caretaker of cottage on Funzi Island. He testified that he knew the accused who was his friend. That on April 15, 2019, there was a wedding where the accused's sister was getting married. That they were about 11 boys who decided to go and relax at DW2's place then proceed to the wedding and finish partying there. That DW2 waited for his friends including the accused to go to his place but they did not. That DW2 proceeded to the wedding but he did not find them there and that he tried to call them and the only one he found was Bahati, the accused. That it was about 2.05 am when he told them that he had gone down to the beach. That DW2 followed them and when he got there, he saw Abdul Sadat and another girl who was crying. That Abdul Sadat said he had wanted the girl for a long time and was finally able to find her. That the girl said she had been raped anally and vaginally. That DW2 together with Abdul Yusuf took the girl to the wedding and that they continued to party and left later.
12. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following amended grounds: -
  1. That the learned magistrate erred in law and fact by making a finding that the charges facing the appellant were proved beyond reasonable doubt.
  2. That the learned magistrate erred in law and fact by making a finding that the appellant was present at the scene of the gang rape which finding was contrary to the evidence tendered before the honourable court.
  3. That the learned magistrate erred in law and fact by making a finding that the offence of gang rape had been proved beyond reasonable doubt.
  4. That the learned magistrate erred in law and fact by failing to consider the evidence tendered by the appellant.
13. This appeal was canvassed by way of written submissions.

## Appellant's Submissions

14. The appellant's submissions basically reiterated the grounds of appeal and urged the court to quash the conviction and acquit the appellant.

## Analysis and Determination

15. This being the first appellate court, it is 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 appellate 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.'

16. After considering the grounds of appeal, records of the trial court and the appellant's submissions, the issue for determination is whether the prosecution at trial proved the offence of gang rape beyond reasonable doubt.

17. Section 10 of the *Sexual Offences Act* provides: -

'Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.'

18. The complainant said she was with her friend Juma at the ocean under a tree when a group of about 10 people including Abdulla Sadati and the appellant herein Abdul Yusuf Bahati confronted them, slapped Juma and he fell and then held him by the hand and lifted him up in the air and while groping her breasts and other groping her vagina, they took her into the mangroves by the ocean and that Abdulla Sadati defiled her after which he called Abdul Yusuf who also defiled her and when he finished, she got up and headed home.

19. The complainant who indicated to have been very emotional in court said she was bleeding and could not even sit up. She said that the following morning her mother noticed that she was restless and inquired what the problem was and she reported that she had been defiled. Her father, PW2, BMZ took her to the Police Post where they reported and subsequently took her to Msambweni Hospital where she was treated and a P3 Form filled. The complainant said she was 15 years at the time of the incident.

20. The complainant said that when Abdulla Sadati told the appellant that he could also defile her, the complainant pleaded with him not to defile her but he went ahead and defiled her. While the appellant was cross examining the complainant, he took upon himself to explain and the court recorded as follows: -

' When I got there, Sadati was in boxers and the complainant was crying and I asked whether I can continue to do her and she said the man had hurt her but if I wanted to do her then I do her from the anus and I took her from that place to the road. I never defiled you.'

21. The complainant was adamant that the appellant defiled her and she could not lie about it.

22. The medical evidence was produced by PW3 confirming that the complainant's hymen was perforated and that is proof that she had been defiled.

23. It was PW4's evidence that after the offence was committed, the two suspects disappeared to an unknown place and when the appellant herein resurface, he was arrested by the officers from Funzi Police Post on December 13, 2020.

24. Although the appellant denied having committed the offence, the complainant was very categorical that he also defiled her and that they were in a group of about 10 people although only 2 defiled



her. The complainant knew the assailants who were not strangers to her. They were from the same village and that may be the reason why the two suspects including the complainant's boyfriend went underground. It appears the young men found the complainant having sex on the beach and they took advantage of the situation and also had sex with her.

25. The provision of Section 10 of the *Sexual Offences Act* is very clear that one did not have committed the actual defilement or rape but if they are in the company of another or others who commit the offence with common intention of committing the offence, then they are culpable. The appellant has in cross examination of the complainant expressly confirmed that he had the intention of having sexual intercourse of the complainant after Abdalla Sadati had defiled the complainant.
26. The evidence of the prosecution as well as the evidence of the appellant and his witnesses, squarely places him at the scene of the offence of gang rape.
27. In conclusion, this court finds that the prosecution proved its case beyond reasonable doubt. The appeal on conviction is dismissed. The appellant's sentence is substituted with sentence of 10 years. Right of appeal within 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 3<sup>RD</sup> DAY OF AUGUST 2023**

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

**JUDGE**

**In the presence of: -**

Barile- Court Assistant

Mr. Ngiri for the Respondent

Mr. Were Advocate for Appellant

Appellant present in person

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

**JUDGE**

