



REPUBLIC OF KENYA



**Chaka v Republic (Criminal Appeal 28 of 2019)  
[2023] KEHC 22660 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22660 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL 28 OF 2019  
SM GITHINJI, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**ALEXANDER NDORO CHAKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of Hon N.S.Lutta – SPM in respect of  
Criminal Case No.738 of 2016 delivered at Mariakani on 18th day of July, 2017)*

**JUDGMENT**

**CORAM:** Hon. Justice S. M. Githinji

Appellant in person

Ms Mutua for the State

1. Alexander Ndoro Chaka was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of this offence are that on the December 7, 2016 at about 18:00hours within Kwale County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of NN, a child aged 14 years.
3. In the alternative, the appellant 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.
4. The particulars hereof being that on the December 7, 2016 at about 18.00hours within Kwale County, the appellant intentionally and unlawfully touched the vagina of NN a child aged 14 years with his penis.



5. The prosecution case is that PW 2 in the case is the complainant's mother. She stated that on December 8, 2016 she sent the complainant to the shop. The complainant at the time was aged 13 years and was schooling at [Particulars Withheld] Primary School in class 1.
6. The complainant who gave evidence as PW 1 stated that as she was going to the shop she met the appellant herein who was their neighbour at [Particulars Withheld] road. She referred to the appellant as Chaka. He asked her to go to his house as he will give her shoes. She followed him to his house. He removed her pants at the place and defiled her. She went and told PW 2 about it. PW 2 had noted that PW 1 had delayed in returning from the shop. When she returned she was crying. She reported that she had been defiled by Chaka. She examined her private parts and noted there was a discharge. She reported at Mackinnon Police Post on December 9, 2016. The complainant was issued with a P-3 form and referred to the hospital.
7. PW 3 examined her and filled her P-3 form. He noted that her private parts were swollen. The hymen was freshly broken. She had bruises on her private parts and there was dry semen on the labia majora. Her vagina canal had sperms. Samples were taken to the laboratory and confirmed had spermatozoa and epithelial cells. PW 3 concluded that vaginal penetration had taken place. He thus filled the P3 form.
8. PW 4 investigated the case. The suspect name was given as Nadzua Nduri. It was alleged the complainant was told by the appellant that he had mangoes to be delivered to her mother. She followed him to his house where she was defiled. The complainant was referred to hospital. Age was assessed to be 14 years. The doctor confirmed that she had been defiled. The appellant was arrested and charged.
9. The appellant gave a brief unsworn testimony in his defence. He said he hails from [Particulars Withheld] road and works for Kenya Railways. On December 7, 2016 he was going home from work. The police officers went and arrested him. He did not commit the offence.
10. The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. The appellant was convicted of it and sentenced to serve 20 years imprisonment. Dissatisfied with the said conviction and sentence he appealed to this court on the following grounds; -
  1. That given his mitigation he deserved a non-custodial sentence and not 20 years imprisonment.
  2. The prosecution case was contradictory.
  3. Sentence of 20 years imprisonment is harsh and excessive.
  4. His defence was not properly weighed.The prosecution opposed the appeal, and the same was canvassed by way of written submissions.
11. The respondents filed their submissions but appellant did not.
12. I have considered the charges, evidence adduced by both sides, judgment made in the case and sentence meted, the grounds of the appeal and submissions by the respondent.
13. As the first appellate court I have evaluated the entire evidence. I do agree with the respondent that for the offence of defilement, three ingredients need be established which are; -
  1. The age of the victim who must be below 18 years old; that is a child and for purposes of sentencing the age need be specifically disclosed.
  2. Penetration; which may be partial or full, of a genital organ by a genital organ.



3. Proper identification or recognition of the suspect as the culprit.
14. On age of the victim, the complainant in her *voire dire* stated she was 14 years old. This was on January 31, 2017. The offence allegedly took place on December 8, 2016 and the mother (PW 2) stated she was then 13 years old. PW 4 stated the age assessment done placed her age at 14 years old. The said age assessment was done on January 31, 2017 and the report made shows she was 13 years old.
15. The discrepancy in the evidence is whether she was 13 or 14 years of age at the time of the offence. This however does not prejudice the appellant in any way as both given ages falls within provision of section 8 (3) of the *Sexual Offences Act*, that is between the age of 12 and 15 years of age.
16. On penetration, the complainant stated she was defiled of which it's a legal technical term. I do not know the actual words she may have used while giving evidence, but the trial court recorded it as such. The same applies to her mother's evidence. The evidence by the two witnesses which suggests there was penetration is for the complainant, that the appellant removed her pant. PW 2 on her part stated she examined the complainant's private parts and there was discharge. PW 3's evidence buttresses the evidence that there was penetration. He noted upon examination of the complainant that the private parts were swollen, hymen was freshly broken, and there was dry semen on labia majora. Laboratory examination disclosed vaginal canal had spermatozoa and epithelial cells. Weighing this evidence together with that of PW 1 and PW 2, shows that there was penetration which led to ejaculation in the vaginal canal.
17. The last ingredient is of proper identification or recognition of the culprit. PW 1 disclosed him as Chaka. She gave the same name to her mother the PW 2 in the case. He is said to be their neighbour at Mackinnon road. However, PW 4 says he was given the name of Nadzwa Nduri as the suspect. He however, did not say who gave him that name. He as well did not disclose who identified the suspect to him during the arrest. The evidence of PW 1 and 2 is however clear that the suspect was Chaka. They identified him in court as Chaka. He is their neighbour and knew him before then.
18. The appellant's name is given as Alexander Ngoro Chaka and not Nadzwa Nduri. The appellant did not raise an issue about his name as stated in the charge sheet. It's strange how the investigating officer introduced the name of Nadzwa Nduri and alleged the complainant went to his house for mangoes. I am convinced by the evidence adduced that the appellant was properly identified as the culprit.
19. The appellant was therefore rightly found guilty by the trial court and convicted.
20. In mitigation he prayed for forgiveness. The offence carries a minimum sentence of 20 years imprisonment. The sentence is within the law and does not pass as harsh and excessive. I find no ground for disturbing the same in favour of the appellant.
21. The appeal therefore fails for want of merit. It is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**S.M.GITHINJI**

**JUDGE**

**In the Presence of;** -

1. Appellant in Person(absent). Be informed of the outcome.
2. Ms Mutua for the Prosecution

