



**Chenze v Republic (Criminal Appeal E031 of 2020)
[2022] KEHC 17170 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 17170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E031 OF 2020
SM GITHINJI, J
SEPTEMBER 20, 2022**

BETWEEN

ALEX HEBA CHENZE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence in Criminal Case
No. 9 of 2020 of Judgement delivered on 16th November, 2020
before Hon G.N. Wasige - Principal Magistrate's Court at Kaloleni)*

JUDGMENT

CORAM: Hon. S.M.Githinji

The Appellant in person

Mwangi for the State

- 1 Alex Heba Chenze, the appellant herein was charged in the lower court with the offence of defilement of a child, 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 diverse dates between April 25, 2020 and June 10, 2020 at unknown time at Kaloleni sub-county in Kilifi county, within Coast region, the appellant herein intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of AP, a child aged 13 years.
- 3 In the alternative, the appellant faced charges of 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 diverse dates between the April 25, 2020 and June 10, 2020 at Kaloleni sub-county in Kilifi county within Coast region, the appellant herein intentionally and



unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of AP, a child aged 13 years.

- 5 The prosecution case is that at the time of the alleged offence, the complainant who gave evidence as Pw – 1 was aged 13 years, having been born on March 26, 2007. She produced a birth certificate to that effect. She was living at {Particulars Withheld} with her mother who gave evidence as Pw-2. She was in primary school in class 8. The appellant herein was a bodaboda operator in the area. He was well known by Pw -1, Pw -2 and Pw-3. In April, 2020, on a date Pw-1 could not remember, the appellant found the complainant (Pw -1) walking home from a friend’s place. He offered her a lift home. She agreed. When she got home she offered to pay him but he declined. He first requested for her phone number and the complainant gave him her mother’s number. The appellant thereafter started sending her messages through the given number. In the messages he said he loved her and would want to marry her. She responded by saying she was a pupil to which he said he can wait for her to complete schooling.
- 6 The complainant was unwell and would frequently go to the house of Pw-3 at Rabai for prayers. The appellant was paid to ferry her to the place and back home. She was his regular customer. On June 10, 2020 she had gone to Rabai for prayers. She called the appellant to take her home after the said prayers. He turned up late at about 8.00Pm. They commenced on the trip home. When they got to Masaani area, the appellant halted the motor bike. he demanded that the complainant gives in to having sex with him at the place or he abandons her there to walk home. She was still far from home and was scared of walking alone at night. She gave in to his demand. They had sex in the bush. However, the appellant after having sex with her deserted her in the bush to walk home. She walked home and arrived late at 11.00Pm. Pw-2 questioned why she was late and she stated that the appellant had defiled her.
- 7 Pw-2 delayed in reporting the incident and the complainant called a prison officer by the name of Joram to whom she reported the incident. The officer directed her to report at {particulars withheld} station to which she did on June 27, 2020. Pw-5 issued her with a P3 form of which she took to Mariakani Sub-County hospital. She was examined by Pw-4 on July 3, 2020 who found that the external vagina was normal but unkempt. However, sphincter vaginal muscles were loose and hymen broken. She had no discharge and pregnancy and HIV tests were negative. The clinical officer made an opinion that she had been defiled.
- 8 Pw-5 completed the investigations and the appellant was charged.
- 9 The appellant in his defence stated that he was aged 26 years and was residing at Rabai. He denied the charges and knowledge of the complainant stating that he met her for the first time in court. He also alleged that he is not a bodaboda rider but deals in secondhand clothes. He categorically stated that he never ferried complainant to Rabai for prayers and he never had sex with her. He urged the court to note that his name as given in the main count as Alex Heba Chanze and in the alternative count is Alex Heba Kazungu which implies that she was defiled by another person. He invited the court to take cognizance of the fact that there was a curfew on June 10, 2020 and the complainant could not have been out at night. He further alleged that he lived in Rabai all his life and could not tell where {Particulars Withheld} is.
- 10 The trial court evaluated the evidence and found the main count established by the prosecution beyond reasonable doubt. The appellant was hence convicted of the offence and sentenced to serve 15 years imprisonment.
- 11 Dissatisfied with the said conviction and sentence, he appealed to this court on the grounds that; -
 1. The trial magistrate erred in law and fact by holding that the case was proved beyond reasonable doubt.



2. The prosecution case was inaccurate, inconsistent and contradictory and hence unreliable.
 3. There was no positive identification of the appellant as the culprit.
 4. The defence was dismissed on not sound legal basis.
- 12 The appeal was canvassed by way of written submissions. The appellant submitted that the prosecution case is inconsistent, incredible and therefore fails below the required standard in law to warrant a conviction.
- 13 The prosecution on their part submitted that the ingredients for the offence of defilement were well established. On the issue of the complainant's age, she stated her age of which was corroborated by her mother and the birth certificate.
- 14 On identification of the appellant as one culprit, Pw-1, Pw-2 and Pw-3 knew him before and were able to identify him. Penetration allegation was corroborated by the medical evidence of Pw-4. The respondent urges this court to find that the defence was a sham and the conviction and sentence is lawful.
- 15 I have weighed all that is before me for consideration in this appeal. The first issue I have noted is that the facts in the alternative count of indecent act are not in support of the offence of indecent act with a child. They disclose there was penetration which reveals an offence of defilement rather than indecent act. However, the error does not prejudice the appellant in any way as he was found guilty on the main count of defilement.
- 16 Turning to the evidence adduced by the prosecution case, the trial court was on point when it found that the three ingredients for the offence of defilement were well established by the prosecution beyond reasonable doubt. The age of the victim was disclosed by her and was well corroborated by her mother. The issue was sealed with presentation of the birth certificate which revealed that she was born on March 26, 2007 and therefore by the time of the offence she was 13 years old. The issue was not challenged at all by the appellant during the cross-examination of the witnesses and in his defence. He may not have disputed the fact.
- 17 Penetration which can be full or partial for the purposes of the offence was well established by the evidence of the complainant. She said they had sex, and sex plainly involves penetration of the vagina by a penis. Pw -4, the clinical officer who examined her noted that the hymen was broken and sphincter muscles of her vagina loose of which is a sign of penetration. He thus opined that she was penetrated. The appellant did not as well challenge the evidence on penetration.
- 18 The third ingredient and which the appellant challenges is of identification or recognition. However, it should be observed that the appellant was not a stranger to Pw-1, Pw-2 and Pw-3. All of the three witnesses knew him well before then as he used to operate a bodaboda in the area and the complainant was his regular customer as he used to ferry her for prayers and back home. The three could not have made a mistake of him. They also had no cause to fix him with the offence if actually he was not the real culprit. His defence is of mere denial whereby he denied even well-established facts in the prosecution case. He was not truthful.
- 19 Having analyzed the entire evidence, judgment and sentence meted against the appellant, I do find that the appeal is not merited. The girl(victim) was aged 13 years old then. As such the offence attracted a minimum sentence of 20 years imprisonment. The trial court placed it at 15 years and the appellant was lucky in that. I have resisted the urge to push it upward to 20 years imprisonment.
- 20 The appeal is thus dismissed for want of merit.



DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2022

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S.M.GITHINJI

JUDGE

In the Presence of: -

1. The Appellant in Person
2. Mwangi for the State

