



**Birya v Republic (Criminal Appeal E010 of 2021)
[2022] KEHC 15556 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E010 OF 2021
SM GITHINJI, J
NOVEMBER 23, 2022**

BETWEEN

CHARO KAINGU BIRYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence from the Original Kilifi S.O Case No. 24 of 2019 delivered by Hon S.D.Sitati – Resident Magistrate on 17th December, 2020)

JUDGMENT

- 1 The Appellant herein, one Charo Kaingu Birya, 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 being that on the 20th day of February, 2019 at around 4.00am at {Particulars Withheld}, Ganze Sub – County in Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of GFJK, a child aged 13 years.
- 3 In the alternative, the Appellant faced a charge 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 20th day of February, 2019 at around 4;00am at {Particulars Withheld} in Ganze Sub-County within Kilifi County, the Appellant intentionally and unlawfully touched the vagina and breasts of GFJK, a child aged 13 years, with his penis.
- 5 The Prosecution Case is that the complainant in this case who gave evidence as Pw-1, was born on November 11, 2005. There is a copy of Birth Notification No 3xxxx6 indicating so of which was produced as prosecution Exhibit -3. The Appellant herein was employed by Pw-2, who is the mother to Pw-1 as a herdsman. He was taking care of goats and was living with them at {Particulars Withheld}. The complainant and her brother called J were sharing a room within the compound. Pw-2 was



- sleeping in a different room as well as the Appellant herein, but within the homestead. In the wee hours of February 20, 2019 the complainant was asleep in her room. At around 4.00am she felt pain in her vagina and woke up. There was a hurricane lamp which was on. She saw the Appellant who was having sex with her. She asked him what he was doing and he responded by telling her “*pole*”. As he spoke she as well recognized his voice. She screamed and he ran away. The complainant went outside the house. Pw -2 was woken up by her scream and joined her outside. Using her phone torch, she saw Pw -1 and noted that she was walking with her legs apart. Her clothes had a whitish substance at the front, as well as on her thighs.
- 6 Pw-2 asked Pw-1 what had happened and she said she woke up in pain. Pw-2 then saw the Appellant rushing to his house. She followed him there. She called him out two times and he did not answer. When he was called out for the third time, he got out of the house. Pw -2 asked him what he had done to Pw-1 and he said that “*hayo ni madogo, yaishe tuongee asubuhi*” meaning, “*it’s not a big issue, we can deliberate about it in the morning.*”. Pw-2 left and went to report to the village elder while in company of Pw-1. The village elder (Pw-3) questioned the Appellant about the allegation and he said he had gone to drink water and then went to Pw-1’s room where he defiled her. He alleged the devil misled him in doing so. Pw-3 urged them to report to the police. The Appellant pleaded that the issue be settled at home. They were referred to Bamba Police Station. They reported the incident at 5.00am and were referred to the hospital. They went to Kilifi County Referral Hospital. The complainant was examined and her PRC form filled. Later a P3 form was filled at the same hospital by Dr Mwanumba. It was produced on his behalf by Dr Belda Mdaru, the Pw-4 in this case. According to him, the complainant was depressed at the time of examination. She had a normal outer genitalia but vagina was bruised and hymen broken. There was no discharge or blood from genitalia. Pregnancy, VDR2 and HIV tests were all negative. The girl was in low mood. She was put on antibiotics.
- 7 The Appellant was then charged with the offences in the charge sheet. The investigating officer was not availed to offer evidence.
- 8 When the Appellant was placed on his defence he opted to remain mute and left it upon the Court to decide the matter on the evidence on record.
- 9 The Court in it’s Judgment dated December 17, 2020 analyzed the entire evidence and found that the prosecution had established the main count against the accused beyond reasonable doubt and convicted him on the same. He was consequently sentenced to serve 20 years imprisonment.
- 10 Dissatisfied with the said conviction and sentence he appealed to this Court on the grounds that; -
1. There was no positive identification of him as the culprit as the alleged identification was made in difficult circumstances.
 2. The alleged age of the victim lacked factual support.
 3. The adduced evidence is inaccurate and inconsistent and failed to establish the offence beyond reasonable doubt.
 4. Prosecution case is baseless and unfounded.
 5. His defence was dismissed unfairly.
- 11 The Appeal was canvassed by way of written submissions and both parties filed their respective submissions. I have evaluated all that was presented before me in relation to the matter at hand.
- 12 The obvious issues for determination are; -



1. Whether the age of the victim was established beyond reasonable doubt.
 2. Penetration of the victim's genital organ whether partial or complete, by the genital organs of the Appellant.
 3. Identification or recognition of the Appellant as the culprit.
- 13 The foregoing is in line with the finding in GOA-Vs-Republic [2018] eKLR where the Court held that the key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.”
- 14 The complainant in this case knew the Appellant very well as he was taking care of goats as an employee at their home. He was living with them. She knew him physically and could as well recognize his voice. When she says she saw him on the material night with the assistance of a hurricane lamp, and recognized him, such evidence unless there is good reason to doubt it is acceptable as the correct position.
- 15 When she questioned him and he responded by telling her “*pole*”, though this is a single word, it was sufficient for her to recognize his voice. These two modes of identification combined, leaves no doubt that she positively recognized the Appellant as the culprit. Her evidence is well corroborated by that of her mother the Pw-2 in this case. She saw the Appellant as he escaped and entered into his house after the complainant screamed. Using her phone light she recognized him, and the fact that he got into his house buttresses the fact. When he was pursued and questioned about the issue his response shows he is the real culprit. He said, “*bayo ni madogo, yaishe tuongee asububi*” Meaning, “*It's not a big issue, we can deliberate about in the morning.*” What followed at the village elder's place leaves no doubt of the Appellant's involvement. He conceded to the act and blamed the devil for it. He pleaded the issue be resolved at home.
- 16 All the foregoing when weighed together, pushes the gauge on his involvement to proof beyond reasonable doubt. I have no doubt that the evidence leaves no reasonable doubt as to his involvement in commission of the alleged crime.
- 17 On the age of the victim, the charge states she was aged then 13 years. Most reliable evidence on age was produced, which is a Birth Notification showing she was born on November 11, 2005. In February, 2019 she was therefore 14 years old. Defilement under section 8 (1) as read with section 8 (3) of the Sexual Offences Act covers victims between the age of twelve years and fifteen years. The complainant falls within the said range and the error in the charge sheet did not prejudice the Appellant in anyway. Such an error is curable. The age of the girl was therefore also doubtlessly established.
- 18 The last issue is on penetration. The victim felt pain in her vagina. The PRC form and the P-3 form as well as the evidence of Pw-4 supports allegation of penetration beyond reasonable doubt. The victim was depressed, the vagina was bruised and the hymen broken. I do find as the trial court that penetration was established to the required standard in law.
- 19 The Appellant offered no defence when he was given a chance to do so. The prosecution case was left unchallenged after it's closure. He was rightly found guilty and convicted.
- 20 The minimum sentence for the offence under section 8 (3) of the Sexual Offences Act, is 20 years imprisonment. He got the sentence. There is nothing in the matter inviting this Court for intervention. The Appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF NOVEMBER, 2022

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S.M. GITHINJI

JUDGE

In the Presence of: -

1. The Prosecutor and in the absence of the Appellant

