



**Malogho v Republic (Criminal Appeal E029 of 2022)
[2024] KEHC 27 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 27 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E029 OF 2022
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

JOHNSTONE MALOGHO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO. E024 of 2020 of the Chief Magistrate’s Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. Johnstone Malogho, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 26th day of October 2020, in Jomvu sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of FA, a child aged 11 years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and facts for not appreciating that the prosecution case was not proved beyond reasonable doubt.
 - b. That the learned trial magistrate erred in law and facts by failing to consider that the prosecution party failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt.
 - c. That the learned trial magistrate erred in law and facts for not noticing that the medical evidence was not established to corroborate the complainant’s evidence.



- d. That the learned trial magistrate erred in law and facts for not considering that a crucial witness was not summoned in court.
 - e. That the learned trial magistrate erred in law and facts for dismissing the defence without any legal basis.
4. The appeal was opposed by the state through M/s. Keya Ombele learned counsel. She contended that the prosecution proved all the ingredients of the offence to the required standards.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
 6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
 - a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they are proven.

7. The narration of the incident by FA (PW2) was that another child was used to lure her. Her evidence was that the other child, M. went to her home and asked her to go and wash utensils for the appellant. When they were in the process of washing the utensils, the appellant asked her to go and get soap from the house. Upon her entering the house, M. closed the door and told her to sit down. M. blocked her mouth and the appellant proceeded to defile her. After he was through, he gave M. some Kshs.200 and asked her to give her (FA) Kshs.50. The appellant threatened her with a knife and warned her not to tell anybody. She volunteered the information to her mother when the latter noticed her bleeding from her genitalia.
8. CW (PW1) the mother of the complainant testified that when she returned home on the 26th day of October 2020, she found the clothes of the complainant on the floor and her panty was blood-stained. When she asked her what had happened, the complainant attributed the blood stains to a fall. However, after insisting on an explanation, she implicated the appellant. She said he had defiled her.
9. When she was examined by John King'ori (PW3), a clinical officer, he established that there was penetration due to the broken hymen and a whitish discharge from her vagina. He said when she was seen at the facility on the 27th day of October 2020, there was obvious evidence of penetration.
10. The appellant in his defence contended that the complainant's mother had threatened him with dire consequences but did not say why she did so. He never confronted her with this allegation during cross-examination. This defence was an afterthought. The learned trial magistrate was therefore justified to dismiss it.



11. A copy of the birth certificate of F.A. was produced as an exhibit. It indicates that she was born on the 4th day of October 2010. At the time of the offence, she was ten years old. Section 8 (2) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The prosecution therefore proved the age of the complainant.

12. The appellant contended that a material witness was not called. This witness is M.W. and this must be the witness the complainant said was present and gave her name as M. The prosecution explained that it had proved difficult to avail this witness. Failure to call a material witness can lead the court to draw an inference that had he/she been called; he/she would have adverse evidence to the prosecution case. This was held by the Court of Appeal for Eastern Africa in the case of *Bukenya vs. Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

13. In the instant case, the failure to call MW cannot be blamed on the prosecution. The complainant testified that this witness was told by her mother not to attend court. In any case, even without the evidence of this witness, the prosecution had adduced sufficient evidence against the appellant. The proviso to section 124 of the *Evidence Act* states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

I have not, from the record, been persuaded that the complainant is not telling the truth.

14. The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

