



**OA v Republic (Criminal Appeal E019 of 2020)  
[2024] KEHC 2139 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E019 OF 2020  
SM GITHINJI, J  
MARCH 4, 2024**

**BETWEEN**

**OA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from conviction and sentence in Criminal Case No.27 of 2017 of Chief Magistrate’s Court at Malindi before Hon Dr. Julie Oseko on 31st May, 2018))*

**JUDGMENT**

**Representation;**

Appellant in person

Ms. Mkongo for state

1. OA was charged in the lower court with the offence of Defilement contrary to Section 8 sub section (1) (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of this offence are that on the 17<sup>th</sup> day of July 2017 in Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the anus of MHM, a child aged 14 years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child, contrary to section 11 sub-section (1) of the *Sexual Offences Act* No. 3 of 2006.
4. The particulars hereof are that on the 17<sup>th</sup> day of July 2017 in Malindi Sub-county within Kilifi County, the appellant intentionally and unlawfully committed an indecent act by touching the anus of MHM, a child aged 14 years using his penis.



5. The prosecution case is that according to the victim's clinic card of which was produced as prosecution exhibit -1, the victim who gave evidence as PW-1 was born on 22/9/2003. At the time of giving evidence on 28/7/2017, he was schooling at [Particulars Withheld] School, in class 3. He stated that he was 14 years old.
6. On 17/7/2017 he was at Majengo in Malindi playing with his friends. The appellant herein who was a friend to the victim's father called the father telling him that the victim was at the place and he could go and collect him. The victim's father according to PW-2 who's his younger brother, is mentally retarded. When the victim's father arrived, the appellant welcomed him to a seat for deliberations. They deliberated whereby the appellant urged the father to leave the victim to spend the night in his house and return home the following day. He sodomised the boy and the following day at 8.00pm placed him on a motorcycle and took him home. He met the father. The appellant requested to spend the night at their home in Mtangani. The father agreed. He spent the night there but did not sodomise him again.
7. The following day the victim went to school but was chased away for lack of school fees. He went back home. The appellant was still there. In the evening neighbours to his father said the appellant was not a nice person as he was in the habit of sodomising young boys. The father was shocked and sent appellant away. The victim went to PW-2 who is his paternal uncle. He narrated to him the ordeal he underwent in the appellant's hands. The uncle went and physically quarreled the victim's father for it. PW-2 was led by the victim to the home where the incident took place. He then took the victim to Marereni police station where they reported the incident.
8. PW-3, the investigating Officer booked the report on 21/7/17 at 4.30pm. He then issued the victim with a P3 form. The P3 form was filled by PW4 at Malindi Sub County Hospital. The medical officer noted that the victim's anus had lacerations and injuries in the inner surfaces. They were healing and were painful on touch. They were about a week old. The medical officer thus formed the opinion that sodomy of the 13 years old boy was highly possible. He thus filled the P3 form of which was produced as prosecution exhibit 4. The appellant was then traced, arrested and charged with the offences carried in the charge sheet.
9. The appellant offered a brief sworn testimony in his defence. He alleged that he's a mason and was living at Maweni. On the material day he was from the Mosque. He went home and prepared food for his children. They then slept. At 9.00pm he was called by his boss to go and paint a house at night. As he was doing the work Omar went with the police officer. He alleged the appellant was the man he had been tracing. He was then arrested. It was alleged he had committed an offence. He denied commission of the said offence.
10. The trial court evaluated the evidence and found that the offence in the main count had been proved by the prosecution beyond reasonable doubt. The appellant was thus convicted of it and sentenced to serve 20 years' imprisonment.
11. The appellant dissatisfied with the said conviction and sentence appealed to this court on the following grounds: -
  1. The charge sheet in this case is defective.
  2. The prosecution failed to prove their case beyond reasonable doubt.
  3. The appellant's alibi defence was not weighed.
12. The appeal was canvassed by way of written submissions but the appellant failed to file his. However, the prosecution did file their submissions as directed.



13. The prosecution opposed the appeal on the grounds that the age of the victim was firmly established by the produced clinic card. The appellant was well and sufficiently identified by the victim as they had ample time together for two days. The victim also gave a vivid account of how he was penetrated, evidence of which is buttressed by that of PW4, the clinical officer.
14. As an appellate court of the first instance, I have re-evaluated the entire evidence adduced in the lower court in relation to the offence preferred, considered the decision of the lower court, grounds of the appeal and submissions by the prosecution.
15. Under Section 2 of the *Sexual Offences Act*, genital organs are described to include the whole or part of male or female genital organs and for purposes of the act includes the anus. "Penetration" still under the same section, means the partial or complete insertion of the genital organs of a person into the genital organs of another person.
16. Section 8(1) (3) of the *Sexual Offences Act* which constitutes the offence the appellant was convicted and sentenced of, state as follows: -

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- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

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- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

17. The issues therefore for determination are whether the victim as at the time of the alleged offence was aged between 12 and 15 years; Whether the appellant, using his penis, penetrated the anus of the victim; and whether the appellant was properly identified as the real culprit.
18. On the first issue of age, the victim indicated that he was aged 14 years then having been born on 22/9/2003, in accordance to his clinic card. The offence allegedly took place on 17/7/2017. The boy would have celebrated his 14-year birthday on 22<sup>nd</sup> September, 2017. In July 2017 he was therefore 13 years old as was properly indicted in his P3 form. The particulars of the offence in the charge sheet are not therefore correct on his age, which is indicated as 14 years. However, given that age 13 and 14 are both within the range given under Section 8(3) of the *Sexual Offences Act*, that is between 12 and 15 years, the error occasions no prejudice to the appellant and is therefore curable under Section 382 of the *Criminal Procedure Code* as it has not occasioned a failure of justice.
19. On penetration, the victim gave consistent firm and therefore credible evidence that the appellant herein using his penis penetrated his anus, which discloses the offence he was convicted of. The victim and PW2 had no cause to fix the appellant and their evidence was honestly offered. The evidence of the clinical officer buttresses the evidence that the victim had been penetrated. Though he was initially penetrated with a finger, the penis which is a genital organ was eventually used. The trial court was right in finding that there was penetration.
20. As was rightly submitted by the prosecution, the victim and the appellant were together for a long period, at night and during the day. The appellant is their neighbor and the evidence is more of recognition as opposed to identification. Given the disclosed circumstances, the victim could not



have made a mistake of the culprit. He was properly recognized. His alibi defence is not sufficiently established. Its flimsy and could not stand in the light of the strong prosecution case to the contrary. It was rightly dismissed.

21. The sentence of 20 years' imprisonment is provided for under the law. The circumstances under which the offence was committed does not mitigate in favour of a lesser sentence, but probably a stiffer one.
22. Having observed the foregoing, I conclude that the appeal is in want of merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 4<sup>TH</sup> DAY OF MARCH, 2024**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Ms Ochola for the State
2. Appellant in Person

