



**Katana v Republic (Criminal Appeal E013 of 2020)
[2024] KEHC 12595 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E013 OF 2020
SM GITHINJI, J
OCTOBER 22, 2024**

BETWEEN

KAHINDI MWALIMU KATANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. Julie O. Oseko – Chief Magistrate in SO Case No.58 of 2017 delivered on 26th October, 2018)

JUDGMENT

1. Kahindi Mwalimu Katana was charged in the lower court with a main count of defilement, contrary to section 8 (1) as read with sub-section 3 of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the 9th day of December, 2017 within Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of SGJ, a girl aged 12 years.
3. In the alternative he faced a count of committing an indecent act contrary to section 11 (A) of the [Sexual Offences Act](#) No.3 of 2006.
4. The particulars hereof being that on the 9th day of December, 2017, within Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully committed an indecent act by touching the vagina of SGJ, a girl aged 12 years, by using his penis.
5. The prosecution case is that at the time of the alleged offence the victim was aged 14 years old. The prosecutor informed the court so before she gave evidence and her age assessment certificate filled on 13/12/2017 indicates she was 14 years. She was a pupil at [Particulars Withheld] Primary School in class 4. On 9/12/2017 at 9.00am her mother (Pw-3) sent her to go and sell vegetables to raise money for buying Christmas clothes. She went and before she had sold any, the appellant appeared. He was a



stranger to her. He gave her Kshs.5/= and urged her to follow him as there was someone who would buy all her vegetables. She followed him with the vegetables. The man led her into a forest and she questioned why they were going there. The man said there was a path ahead. When they got into the forest he opened his eyes wide and stared at her. The complainant said she did not know him. He hit her with a stick on the foot. She was injured and dropped the vegetables. He held her neck and stuck his hand in her mouth. He removed his pant and stripped her naked. He told her that was her day of death. He laid her on the ground and inserted his penis in her vagina. He indicated if she screamed he will kill her. She felt pain. When he finished he dashed in the forest. The victim run out of the forest. On the way she saw Pw-2 who was tapping palm wine. Pw-2 saw her running holding a lesso and shouting that she had been “raped”. Pw-2 asked her whether she knew the culprit and she said yes as he lives at Mshoroni, though she did not disclose his name. She proceeded running towards the village. Pw-2 later saw a crowd of people gathered around her. They then walked towards Mshoroni direction.

6. The victim after reporting the incident to Pw-2 went on to her mother and reported. She was taken to Malindi Sub-County Hospital. Her treatment notes of 9/12/2017 shows she was depressed, in pain and her dress had dirt on the back though not torn. There was presence of tenderness and Oedema at the right leg below the knee. Her pant was wet at the lower part, with blood. She had fresh bleeding from the vagina. There were fresh tears and bruises at labia minora and vagina. The hymen was freshly broken and there was tenderness on penetration.
7. The matter was reported at Malindi Police Station on 10/12/2017. Pw -5 recorded witness statements. P3 form was issued. It was filled on 13/12/2017. It shows the estimate age of complainant/victim as 14 years. According to the medical officer who filled it, the hymen was freshly broken, there were fresh tears and bruises on the vagina orifice. There was fresh bleeding from the vagina. He concluded that there was vaginal penetration or rather, defilement of the 14 years old girl.
8. The victim’s age was assessed on 13/12/2017 in the same institution. The filled certificate shows she was 14 years old. According to the evidence of Pw-5 and Pw-6, the appellant was arrested by members of the public and was identified by the victim at the police station. He was then charged with the offences carried in the charge sheet.
9. The appellant in his defence stated that he lived at Barani and was a shamba boy at Gahaleni. On 9/12/2017 he was at Gahaleni at 9.00am cooking. He heard noises outside the house. He opened the door and saw a crowd of people. They asked him whether that was his house. He said he was not from there. They alleged it’s him who had defiled a child and started beating him. Police arrived and rescued him. He was then taken to Malindi Police Station. The victim was availed later and said he was not the culprit. Corporal Marian told her that he was the defiler. The victim still refused. She was told in court she should say he was the defiler. On 11/12/2017 he was charged. He requested for DNA but it was not done.
10. The trial magistrate evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentence to serve 20 years in prison.
11. The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that; -
 1. Identification by a single witness was not proper and there is high possibility of error or mistaken identity.
 2. The court relied on dock identification which is worthless.
 3. His arrest had no link to the offence charged with.



4. The case against him was not proved beyond reasonable doubt.
5. His defence was not given due consideration.
12. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
13. As the first appellate Court I have re-evaluated the charges, evidence adduced, judgment entered and sentence meted; the grounds of the appeal and the submissions.
14. At the onset, I wish state that I have noted on the ground of improper identification of the culprit, the state does not oppose the appeal. However, this court is obliged to re-evaluate the evidence and establish whether the position is correct.
15. Under section 8 (1) of the [Sexual Offences Act](#) No.3 of 2006, the three ingredients for the offence of defilement as are now well settled are; -
 1. Age of the victim, who must be a child; that is under 18 years old.
 2. Penetration, which is partial or complete insertion of a person's genital organs into the genital organs of another person.
 3. Identification/Recognition of the accused as the real culprit.
16. On the age of the victim, there is variance between the age carried in the charge sheet and the age revealed in evidence. The prosecutor informed the court prior to *voire dire* that the girl was aged 14 years. However, she made no effort to correct the age in the charge sheet. Though the girl did not reveal her age and nor did the mother, the otherwise available evidence reveals she was 14 years old. Her treatment notes, P-3 form and age assessment certificate indicates she was 14 years old. This shows the 12 years age carried in the charge sheet is wrong and should have been corrected. Under [Sexual Offences Act](#), the age of the victim informs the offence and the sentence. Where the victim is under 11 years the offence attracts life imprisonment. If between 12 and 15 years, imprisonment is for not less than 20 years. Between 16 and 18 years, imprisonment is for not less than 15 years. It is therefore important wherever possible, to establish the correct age of the victim and reveal it in the charge sheet. In this case the stated age is 12 years while the victim was 14 years old. This did not however prejudice the appellant in anyway whatsoever, as it does not change the nature of the offence and the range of the years on sentence. It's therefore a curable defect under section 382 of the Criminal Procedure Code as it did not occasion a failure of justice.
17. On penetration, the victim's evidence is vivid and cogent to the effect that she was penetrated. Her evidence is well corroborated by the available medical evidence to the said effect. The evidence is not challenged in anyway by the defence, and the fact is well settled. She was penetrated.
18. The 3rd issue is what is mostly challenged and forms the basis of the appeal. The state also concedes to it.
19. The victim in her evidence stated in court, "I met this man", referring to the appellant, this amount to dock identification. When the assailant had opened his eyes wide staring at her, she said she did not know him. In her evidence she did not disclose anywhere that she had known the appellant or assailant before then. She identified him at the police station after his arrest. It is clear that no identification parade was conducted at the police station. The victim did not even attempt to describe the assailant or state how she was able to identify him. It is not clear how the appellant was arrested or who identified him to those who arrested him.



20. In *Ajode v Republic* [2004] eKLR, as well submitted by the state, the Court held; -

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.”

21. In a case where identification of the accused is in question, the Court should place great emphasis on the accuracy and reliability of the identification evidence to prevent wrongful conviction which may arise out of mistaken identity. In this case such was not done by the trial magistrate and there is possibility that the appellant was mistaken for the real culprit. He deserves the benefit of doubt. As such, the appeal is allowed, conviction quashed and the sentence set aside. The appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF OCTOBER, 2024

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S.M. GITHINJI

JUDGE

In the Presence of;

1. The Appellant

2. Ms Ochola for the State

