



REPUBLIC OF KENYA



**Khaemba v Republic (Criminal Appeal E047 of 2021)  
[2023] KEHC 18558 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E047 OF 2021  
SM GITHINJI, J  
MAY 18, 2023**

**BETWEEN**

**DENNIS MASIA KHAEMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in So Criminal Case No.2 of 2020 of the  
Principal Magistrate's Court at Hola - Hon. B.Kabanga – RM , dated 3RD November, 2021)*

**JUDGMENT**

**CORAM:** Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. Dennis Masika Khaemba whose apparent age is given in the charge sheet as 63 years, was charged in the lower court with a main count of attempted defilement, contrary to section 9 (1) as read with section 9 (2) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of this offence are that on the 7<sup>th</sup> day of January, 2020 at about 1700Hours in Tana North River County, the accused (appellant) intentionally attempted to cause his penis to penetrate the vagina of AM, a child aged 5 years.
3. To this main count, there is an alternative count 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 7<sup>th</sup> day of January, 2020 at about 1700 hours in Tana North Sub-County within Tana River County, the appellant herein intentionally touched the vagina of the AM, a child aged 5 years with his penis.



5. The prosecution case is that the complainant in this case at the time of the alleged offences was aged 5 years. Though the mother who gave evidence as Pw-2 did not state specifically when she was born, Pw-6 assessed her age and using dental formula, found on 8/1/2020 that she was about 5 years old. During her *voire dire*, the complainant told the court she was 5 years old. She was at the time in Baby class at [Particulars Withheld]. She was a neighbour to the appellant at [Particulars Withheld]. The appellant had a Television set and the children in the village were used to going into his house to watch videos. They were referring to him as Babu (grandfather).
6. On January 7, 2020 at about 5.00Pm the complainant went to the appellant's house to watch video. She was alone. The appellant removed her pant. He then using his penis and finger throbbed her vagina while they were on a sofa set. Her brother, the Pw-3 in this case while in company of another child called K witnessed the alleged incident. Pw-3 stated the appellant and the complainant were standing on the sofa set. He as well alleged another child namely M, who was younger than the complainant in the case was in the house, and the appellant slept on her also. Pw-3 and K went and reported the incident to their grandmother, the Pw-4 in this case.
7. Pw-4 got outside her house. She saw the complainant running but she stopped and started weeping. She saw the appellant standing outside his house shouting to the kids telling them, "if you come here to play, don't bring fights here."
8. Pw -2 was cleaning clothes behind her house. K explained to her that the appellant had sex with the complainant. The complainant was crying. The mother (Pw-2) called her. She examined her private parts and noted it was reddish. There were scratches and sperms on it. She felt weak and called Z to clean the complainant. There was heavy down pour and they could not reach the hospital. The following morning, they reported at Bura police station. They were issued with a P3 form and referred to Bura Health Centre by Pw-5. She was examined by Pw-6 on 8/1/2020. He noted that she had abrasions in her private parts. There was also dirt in her vagina. The abrasions were at position 9 o'clock. The hymen was intact. The dirty discharge was on the upper part of the vagina. The clinical officer filled the P3 form and post Rape Care Form. He as well assessed her age at 5 years. Pw-5 completed investigations and had the appellant arrested and charged.
9. At the close of the prosecution case, the trial court found that the appellant had a case to answer and placed him on his defence.
10. The appellant gave a sworn statement in his defence and called 3 witnesses. The appellant stated that he was rarely at home as during the day he was usually working in the farm and at night he was working as a watchman at M Primary School. His daughter the Dw-2 in this case stated that on 7/1/2020 she returned home before her father. She had been in the field selling eggs. Her daughter was also taken home by the boda boda before the appellant had arrived. The appellant arrived thereafter and prepared to go to school for work as he was late. He called his brother to assist him in closing the water. He is a water users leader. He went to do so as he left the appellant, Dw -2 and her daughter in the house – He went, shut the water and returned the keys.
11. Dw – 4 who is a neighbour, witnessed what was happening. Earlier at about 5.00Pm the complainant in this case was playing with other children, including Dw-4's child called MK. A child called S wanted to follow MK into Dw-4's house. Dw-4 restrained the child. His brother called F went and picked him (S). Later S's mother arrived and they roasted maize till 8.00Pm.
12. On 9/1/2020 as the appellant was getting home from the farm, he saw some police officers from Bura Police Station. He was told to dress up and go with them. He did so. At the police Station he was informed that a neighbour reported that he had slept with her child. Dw -3 was called and was shocked



- by the allegation. They had lived with their neighbours well and there was no complaint. DW -2 was also told about the arrest. Dw -4 alleged on 7/1/2020 the kids were playing in her compound.
13. The trial court evaluated the evidence and found the offence in Count 1 established by the prosecution beyond reasonable doubt. The appellant was convicted and sentenced to serve 10 years imprisonment.
  14. Dissatisfied with the said conviction and sentence, the appellant appealed to this court on the grounds that; -
    1. Prosecution case is not concrete and cannot hold water against his defence.
    2. The offence was not proved against him beyond reasonable doubt.
    3. Prosecution case is contradictory and full of inconsistencies.
    4. There is no tangible evidence in support of the charge.
    5. His defence was not properly weighted against the prosecution case.
    6. The sentence meted is harsh and excessive.
  15. The appeal was to be canvassed by way of written submissions but no submissions were filed in the case. I will therefore re-evaluate the evidence against the charge, consider the verdict of the lower court and the sentence meted and make my own finding.
  16. The evidence on record for the prosecution shows that there were three eye witnesses to the alleged incident. These are the complainant, her brother, (Pw -3) and K, a neighbour aged then about 14 years. It is the said K who told Pw-2 what had taken place.
  17. Pw-1 is the complainant in this case. Pw-2 is her mother. Pw-3 is her brother and Pw-4 her grandmother. All these are members of one family. The only independent eye witness would have been K who is older than Pw-1 and probably also Pw-3 who is said to be a minor, though his actual age was not stated. The prosecution gave no reason as to why K was not called as a witness. We do not even know whether she had recorded a statement as an eye witness. The legal position on this is that failure to call a crucial witness by the state entitles the court to make an adverse conclusion against the prosecution's case See *Bukenya-vs-Uganda* [1972] EA 549. I therefore conclude that if this witness was called, her evidence would have been adverse to the prosecution's case.
  18. I have as well noted that Pw-1 said on cross-examination that accused was alone in the house as he lives alone. She later contradicted herself when she said that day appellant's kids were in the house. She went on to say they did not witness the incident without offering any explanation how, if they were in the house. While she also discloses that her brother (Pw-3) witnessed the incident, she does not speak of K as having witnessed it as well.
  19. Her position on this is contradicted by the evidence of Pw-3 who indicated that the complainant was with another young girl called M. He went on to allege that the appellant as well slept on her(M). The prosecution by closure of their case did not clear the contradiction or explain why the serious allegation by an eye witness was not investigated.
  20. Evaluating the appellant's defence which is well corroborated by the evidence of his three witnesses, whose evidence was not shaken on cross-examination, the appellant alleges he was not present in the house at the time of the alleged offence; had not quarrelled at all with the complainant and her relatives who are neighbours, and does not know why he was fixed.



21. The trial court in its evaluation of the evidence erred in shifting the burden of proof on the accused person. In paragraph 17 of the judgment, the court indicated,
- “.....On the other hand, I find the defence case too weak to dislodge the prosecution case as it fails to explain why six (6) prosecution witnesses would conspire to fix him yet it is clear there was no prior disputes with any one of them.”
22. In respect to the foregoing finding, the appellant was honest in his defence when he stated that he had no dispute whatsoever with his neighbours. His brother (Pw-3) expressed the same. If he was not aware as to why his neighbours wanted him in prison, he had no obligation to create a story to make his case good and convincing. It may be a “weak point” in his defence, but of concern to the court is whether it’s based on the truth. On issue of facts one can only disclose what he knows or witnessed. In paragraph 18 the court has posed some questions of which also the answers do not lie with the accused.
23. Under article 50 (2) (a) of the *Constitution*, an accused person is presumed innocent unless the contrary is proved by the state. The burden of proof rest with the state and at no time and point does it shift to the accused person. The degree of proof is beyond reasonable doubt and nothing short of that can suffice.
24. An accused person can only be convicted on the strength of the prosecution case and not the weakness of his defence. In this case weighing the evidence on the scale of truth, the appellant gave a plausible defence while prosecution case is contradictory and weakened by failure to call an obvious crucial eye witness. This is a case where the appellant deserved being accorded the benefit of doubt and acquitted.
25. The bottom line is that the offence against the appellant in the main count and the alternative count were not established by the prosecution beyond reasonable doubt. I therefore find the appeal in his favour. The conviction and sentence are quashed. He be set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF MAY, 2023**

.....

**S.M.GITHINJI**

**JUDGE**

**In the Presence of; -**

1. The Appellant in Person
2. Ms Mkongo for the State

