



REPUBLIC OF KENYA



**KENYA LAW**  
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**Baya v Republic (Criminal Appeal E015 of 2022)  
[2023] KEHC 21170 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21170 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E015 OF 2022  
SM GITHINJI, J  
JUNE 5, 2023**

**BETWEEN**

**JUMA HAZIZI BAYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in Criminal Case No. 78 of 2020 of the Resident Magistrate's Court at Kilifi Law Court-S. D Sitati, SRM dated 2nd March, 2022)*

**JUDGMENT**

CORAM: Hon. Justice S. M. Githinji

Minyazi & Associates for the Appellant

Ochola for the State

1. The Appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* no 3 of 2006. The particulars of this offence being that on the 20th day of July, 2020 in Kilifi South Sub County within Coast Region, he unlawfully and intentionally caused his penis to penetrate the vagina of MMS a girl aged 13years.
2. He was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars being that on the 20<sup>th</sup> day of July, 2020 in Kilifi County within Coast Region, he unlawfully and intentionally touched the vagina of MMS, a juvenile aged 13 years with his penis.
3. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:



1. That the Learned Trial Magistrate erred in law and fact when he failed to observe that the prosecution did not provide enough evidence to prove the offence alleged to have been committed.
2. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant on the basis of contradictory and uncorroborated evidence.
3. That the Learned Trial Magistrate erred in law and fact in applying the wrong standard of proof thus arriving at an erroneous decision.
4. That the Learned Trial Magistrate erred in law and fact by not analyzing the evidence adduced by the Defence witnesses hence the wrong finding that the prosecution case was proved beyond reasonable doubt.
5. That the Learned Trial Magistrate erred in law and fact by dismissing/ ignoring the evidence of the alibi raised by the Appellant, which evidence was corroborated by the other defence witnesses.
6. That the Learned Trial Magistrate erred in law and fact by failing to apprehend that the prosecution did not prove each of the ingredients of the offence of defilement beyond reasonable doubt.

## **Background**

4. PW1 MMS, the victim was sworn after *voire dire* examination was conducted. She told the court that she is now 14 years old but in 2020, she was 13 years. She narrated to the court that on 20<sup>th</sup> July, 2020 at 9:00 a.m, she went to the bush in the company of HSM, DDM, RKA and OVR. That they harvested sisal ropes and then went into the bush to fetch firewood. She also stated that when she came out, she saw the accused covered with a piece of cloth on his face. That the accused told them that he was fetching poles “fito”, he in turn borrowed a piece of sisal which HSM handed over to him.
5. It was her evidence that when she bent to pick her firewood, the accused got and grabbed her below her breasts and carried her away into the bush. She further narrated how the accused removed her pant, undressed his pant and inserted his penis in her vagina. She went ahead and told the court that his penis did not enter her vagina but he urinated on her and told her to go. That upon going back to the scene, they did not find the accused person.
6. She testified that they went back home, took a motorcycle to Kilifi District Hospital where the doctor examined her and gave her drugs. That the matter was later reported at Kijipwa Police Station where she recorded statements. She further stated that the accused was known to her before the incident, he lives in Benesi and she had seen him twice. That he removed his face cover before he told them to relax. It is her testimony that they screamed but he threatened to kill her.
7. On cross examination by the accused person, she stated that she knew him and that she saw him passing on the way. That his name is Juma and that he was with his friend. She also testified that the accused never seduced her or sent her to the shop. She finally told the court that when he carried her, her friends were there but when he took her away, they ran home which was far away.
8. PW2 HSM was sworn after *voire dire* examination was conducted. She told the court that the accused is Juma Baya Azizi and that she used to see him pass on the way to the market. That on



20.7.2020 at 9:00 a.m, they had gone to fetch firewood in the bush in the company of DDM, RKA and MMS. That upon finishing removing the firewood, the victim said that she had seen a person leave the bush. She testified that they got out with the firewood to the place they had left the sisal ropes and the person then borrowed their rope but they informed him that they also needed the ropes. That the accused pretended to leave them but he turned and went to where they were.

9. She told the court that she saw him holding the victim while the victim was telling him to set her free. That they started screaming when the victim started struggling with him and that they ran home with RKA and left DDM there. According to her, she later saw DDM following them from far. She later stated that they told neighbors who took pangas and ran to the bush and that they afterwards ran home and reported to their parents who went to the scene but did not find the accused. She testified that the victim got out of the bush and her panty had been cut and put on a tree. She told the court that she did not see the accused carrying the victim away but she saw him struggling with her. That they were afraid they could not save the victim, so they ran home to report the incident. She also told the court that it was not a fight and that the victim was struggling for the accused to let her go. It was her testimony that when she saw the accused, he had uncovered his face and tied the clothing on his head, she confirmed that she saw the accused's face.
10. PW3 DDM was sworn after *voire dire* examination was conducted. She told the court that the accused is Juma Aziz and that she saw him in the bush for the first time. Her testimony is that on 20.7.2020, she went to fetch firewood in a bush near Mzungu wa Lumwe in the company of the victim, HSM, RKA, OVR and JNT. That they cut firewood and placed it outside the bush. That the victim called and said that there was a man. That they saw the man who told them that he had gone to cut building material. That the accused borrowed their ropes and the victim cut a piece of her rope and passed it to PW2 who gave it to him.
11. It was her testimony that she went back to the bush in the company of JNT to remove her firewood and while in there, they heard noises. That they got out and saw RKA, HSM and OVR fleeing and that she also saw the victim and the accused struggling outside the bush.
12. That the victim was trying to free herself from the accused. That they ran and told neighbors and upon returning to the scene, they saw the victim coming towards them and later informed them that the accused had defiled her. They searched the bush but did not find the accused person. She confirmed that she saw his face and identified him as the man in court.
13. PW4 Doctor Ruth Nyangi pathologist from Kilifi County Hospital told the court that the Post Rape Care (PRC) Form dated 17.8.2020 was for the victim born on 25.4.2007. That she was examined on 25.7.2020 and observed that there was attempted defilement. According to her, the stranger did not penetrate her and that there was no significant medical and surgical history. That upon examination, she had normal abdominal, intact genitalia, intact hymen and there was no discharge on both labia. She concluded that that was attempted defilement and the victim was put on PEP. The Post Rape Care Form was produced as Prosecution Exhibit no 1. The treatment notes were produced as PExh. no 3.
14. PW5 no 98xxx PC Nancy Mungumbu based at Kijipwa Police Station told the court that on 17.8.2020 she was assigned to investigate this matter *vide* OB 18/17/8/2020 reported by the victim who was aged 13 years. That the victim had already been examined and the Post Rape Care form filled. She testified that she interrogated the victim and witnesses and recorded their statements.



15. PW6 EMK told the court that on 20.7.2020 at 9 am, children passed outside her house including the victim. They were 5 in number. Soon thereafter, she saw them running back and told her that the victim had been held. That she followed them and saw the victim running away. She also told the court that the accused had held the victim and that the victim led her to the scene where she saw pangas, ropes and footprints.
16. It was her testimony that the victim told her that the accused grabbed and carried her into the bush. That she also informed her that the accused grabbed her and tore her pants but failed to penetrate her twice.
17. PW7 MSA the victim's father stated that on 20.7.2020 he was at his farm near Mavueni when he heard screams from his home. He also told the court that the other children told them that the victim had been caught at the scene and taken to the bush by the accused.
18. Upon the close of the prosecution's case, the court made the finding that the accused had a case to answer, the accused person opted to give sworn evidence and called 4 witnesses.
19. DW1 the accused person told the court that he left Majajani on 10<sup>th</sup> April, 2020 to take his sister to Lango Baya since she had delivered twins at Kilifi General Hospital. That at Lango Baya he met his brother-in-law who promised to enroll him to an adult school. That he opted to start school and opened a business to allow him earn some income. He stated that once he set up the business in September, 2020, his mother called him on 6.9.2020 and informed him that there was an issue at home since Majibu Stoo had gone with a panga and was causing trouble.
20. He testified that he went back home on 7.9.2020 and on the next day, 8.9.2020 he went to Kijipwa where his mother explained to the OCS who later called the chief to confirm. He also told the court that the statements of the witnesses did not have the name of the victim's father and he had an issue with this as it was recorded later on. That the victim's father stated that he took the victim to hospital on 20.7.2020 but the doctor's report, the Post Rape Care and the P3 read 17.8.2020.
21. He further informed the court that the victim alleged that she was defiled for two hours but SLA said that she screamed for five minutes and ran, and that in five minutes' people had arrived. According to him, all witnesses did not support the 15 minutes' timeline. They all gave an indication of about 30 minutes.
22. Upon cross examination by the prosecution, he stated that the alleged incident occurred in July, 2020 when he was in Lango Baya with his sister.
23. DW2 Rehema Baya Azizi told the court that she left Majajani with the accused on 4.10.2020 to Lango Baya as the accused was to help her take care of her twins since her husband was locked down in Mombasa during the covid-19 period. She testified that they stayed there for about 2 weeks and the accused left Lango Baya to Majajani on 7.9.2020. It is her testimony that he left Lango Baya because of this case.
24. On cross examination, she told the court that it was her mother who rang the accused to go home over this case. She told the court that the incident occurred at Majajani and she was surprised since she was staying with the accused since 10<sup>th</sup> April, 2020.
25. DW3 Mbucho Ngoro Beweu the accused's mother told the court that Majibu Stoo got to her home on 14.8.2021 and threatened her life. That when he returned on 15.8.2021, she reported him to the village elder but he did not honour the summons. That when the matter



was reported to the police, Majibu brought an unknown child and alleged that the accused had defiled her. It was her testimony that she initially thought that the case was about the threats, but Majibu made it to be a defilement whereas the accused was in Lango Baya since April and stayed there through May and June.

26. DW4 Raphael Madena Muyesi stated that he was the village elder of Benesi village and that the accused person was his constituent. It was his testimony that on 15<sup>th</sup> August, 2020, DW3 reported to him that Majibu threatened her with a panga and accused her of being a witch. He stated that the accused person was born in his village and that throughout he lived there, and he had no criminal record. That the accused person left for Lango Baya in April, 2020 to stay with his sister.

### **Analysis and Determination**

27. In criminal cases, the trial court has an obligation to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person by the prosecution. The issue of proof is a matter of evidence. In *R v Subordinate Court of the First Class Magistrate at City Hall* (2006) EA 330 it was held that:

“When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person.”

28. The general provisions on the legal and evidential burden are to be found in Section 107, 108 and 109 of the *Evidence Act*. It is trite Law that the state or the prosecution in criminal cases has the burden of proof, to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the *Constitution*. The state has to establish the ingredients of the offence preferred against an accused beyond reasonable doubt.
29. Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only make due allowance for that. See *Okeno v R* (1972) EA 32, *Eric Onyango Odeng' v R* (2014) eKLR.
30. I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant beyond reasonable doubt.
31. In order for the offence of defilement to be proved, the prosecution must prove all the three elements of defilement, being the age of the Complainant, proof of penetration and the positive identification of the perpetrator as was held in *Charles Wamukoya Karani v Republic* Criminal Appeal no 72 of 2013.
32. On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years hence the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing as was held in *Moses Nato Rapheal v Republic* (2015) eKLR.
33. In the present case, a medical age assessment report dated 17<sup>th</sup> August, 2020 was presented from Kilifi District Hospital which was to the effect that the victim was 13 years old. This evidence was also corroborated by the testimony of PW7 the father of the victim, who told the court



that his daughter was 13 years. In *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited with approval *Francis Omuromi v Uganda*, Court of Appeal Criminal Appeal no 2 of 2000, it was held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”

34. I am of the view that the issue of age was proved sufficiently by the prosecution, it was proved that the victim was a child aged 13 years at the time of the alleged offence.

35. On the element of penetration, Section 2 of the *Sexual Offences Act* defines penetration as:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

36. The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the Appellant. In determining penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in *Dominic Kibet Mwareng v Republic* (2013) eKLR where the court stated that:

“In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence...”

37. The victim narrated the events of that day and told the court that as she was bending to pick firewood, when the appellant went and grabbed her, then led her into the bush. That he removed his pant and undressed himself and inserted his penis into her vagina but his penis did not enter into her vagina. That he urinated on her and told her to go. As to whether there was penetration based on the charge that was preferred against the accused person, the trial court associated itself with Section 179 of the *Criminal Procedure Code* which provides that:

“ 179.

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”



38. In this regard, I am guided by the holding in the case of *Robert Mutungi Muumbi v Republic* (2015) eKLR where the court held as follows;

“As is apparently clear, section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.”

39. In my view and for consideration by this court is whether the offence the appellant was convicted for is cognate to the offence he was charged with. In addition is whether the accused person was prejudiced for having been convicted for an offence that he was not charged with. Similarly, whether sufficient notice was given to the accused person to put up a proper defence in the circumstances. I have gone through the proceedings and I note that the prosecution sought leave to amend the charge sheet which leave was granted but amendment was not done.
40. In the judgment by the trial court, the court had this to say

“...for purposes of conviction, I find the accused person guilty of the minor cognate offence of attempted defilement contrary to Section 9 (1) as read with section 9 (2) of the *Sexual Offences Act*, 2006; and I convict him for that offence under section 215 of the *Criminal Procedure Code*, Cap 75.”

The Black’s Law Dictionary 9<sup>th</sup> Edition page 1186 defines a cognate offence as: -

“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”

In the case of Ngenye-Macharia, J in *David Mwangi Njoroge v Republic* (2015) eKLR it was held that:

“...the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.”

41. In this appeal, this court has considered that attempted defilement is a minor and cognate offence to defilement which the accused was charged with. The elements of the offence of attempted defilement are deeply ingrained in the elements of the offence of defilement and as such, I am satisfied that the appellant was properly convicted of attempted defilement



under section 179 of the Criminal Procedure Code even though he was not charged with that particular offence and had not pleaded to it.

42. On the last ingredient of identification, I have carefully analyzed the evidence by the prosecution witnesses particularly PW1, PW2 and PW3 who all pointed to the accused as the person that they saw in the bush that day. PW1 told the court that she saw the appellant, and though he had a piece of cloth on his face, the appellant unveiled the piece of cloth and told her not to fear. PW2 and PW3 also stated that they saw the accused person's face and recognized him.
43. As regards the standard of proof, I have considered the evidence adduced by the prosecution which evidence was not offset by the appellant. It is my view that the testimonies of the prosecution witnesses were not shaken in cross-examination by the appellant as he claims. In the premises prosecution case was proved beyond reasonable doubt. The appeal therefore lacks merit and the same is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**S.M.GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Miss Munyasi for the Appellant
2. Appellant absent

