



**Mwangirani v Republic (Criminal Appeal E076 of 2023)
[2024] KEHC 14094 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14094 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E076 OF 2023
SM GITHINJI, J
NOVEMBER 13, 2024**

BETWEEN

JOSEPH CHENGO MWANGIRANI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Magistrate's Court at
Malindi before Hon E.K.Usui – CM delivered on 3rd August, 2023)*

JUDGMENT

Representation:

Mr Soita Appellant

Ms Ochola for the State

1. Joseph Chengo Mwangirani was charged in the lower court with a main count of defilement contrary to section 8 (1) as read with section (8) 3 of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the diverse dates between 1st day of March, 2021 and 21st day of June, 2021 in Magarini Sub-County within Kilifi County, the appellant intentionally caused his penis to penetrate the vagina of HDM a child aged 14 years.
3. In the alternative he faced a charge of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars hereof being that on the diverse dates between 1st day of March, 2021 and 21st day of June, 2021 in Magarini Sub-County within Kilifi County the appellant intentionally touched the vagina of HDM a child aged 14 years with his penis.



4. The prosecution case is that Pw-1, the victim in this case, according to her Birth Certificate No. A1XXXX85, was born on 16th April, 2007. She was living with her grandmother (Pw-3) at Adu Location. In the year 2021 she was in class five at [Particulars Withheld] Primary School.
5. The appellant is their neighbour. The victim had met him before June, 2021. The appellant left the place briefly and returned in June, 2021. He met the victim and seduced her. He told her that he was in love with her and after completing class 8 will marry her. She agreed. The appellant however did not wait for her to complete class 8. On 20/6/2021 he invited her into his house at Chanjalo for sex. She went at night and they had sex at the place, where he inserted his penis into her vagina. Other children back at home made noise to their grandmother, alerting her that the victim was not in the house. It was at around 9.00am. Pw-3 went to where they were sleeping and confirmed that she was not there. The victim got back at 2.00am. She was asked where she was and said to answer a call of nature. She was taken to the village elder where she disclosed she was in the appellant's house. She however returned back there and Pw-3 reported her to the father, the Pw-2 in this case.
6. The father sent some men to go for her as he was at his place of work in [Particulars Withheld] Secondary School. The men went and found her. The father was able to speak to her on phone and she resisted leaving the place saying she was already married. The father went for her at the place. He got her and took her to Adu Police Station where they reported the case. Pw-4 recorded the report and issued her with a P-3 form. The P-3 form was filled at Malindi Sub-County Hospital by a clinician, Moses Rimba. He noted that her hymen was broken and had no discharge. He was of the opinion that there was vaginal penetration at 14 years of age. The appellant was traced in his house, arrested and charged with the offences carried in the charge sheet.
7. The appellant in his defence alleged the charges were fabricated. He averred that on the alleged date of the offence he was away in Mombasa. He returned home in April and he heard of no complaint. He went back to Mombasa and later to Kilifi where he had been transferred. On 1/10/2021 he was given five days off duty. He went home. On 6/10/2021 while taking tea in his house the police went and arrested him. He was shocked when he heard of the offences.
8. The trial court evaluated the evidence and found the offence in the main count proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 20 years' imprisonment.
9. Dissatisfied with the said conviction and sentence, he appealed to this Court on the grounds that; -
 1. The Learned Trial Magistrate erred in both law and facts by relying on unreliable and questionable documental exhibits to convict the appellant.
 2. The Learned Trial Magistrate erred in both law and facts by failing to appreciate the witness contradictions and uncorroboration.
 3. The Learned Trial Magistrate erred in both Law and facts by convicting the appellant on circumstantial evidence that never met statutory requirements.
 4. The Learned Trial Magistrate erred in both law and facts by failing to appreciate that the matter was fabricated, poorly, shoddily and inadequately investigated.
 5. The Learned Trial Magistrate erred in both law and facts by convicting the appellant on a charge that he was never charged with.
10. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.



11. As the first appellate court I have re-evaluated the charges, the evidence on record, judgment of the lower court and sentence meted; considered the grounds of the appeal and submissions.
12. As derived from section 8 (1) of the *Sexual Offences Act* No.3 of 2006 and from the holding in the case of George Opondo Olunga-vs-Republic [2018] eKLR, the ingredients for the offence of defilement are; -
 1. Age of the victim, who must be a minor below the age of 18 years.
 2. Penetration, which is partial or complete insertion of the genital organs of a person into the genital organs of another person – section 2 of the *Sexual Offences Act*.
 3. Proper identification or recognition of the accused as the real culprit.
13. In this case the age of the victim is not in dispute. A birth certificate No. A1XXXXX85 was produced in court as exhibit, and reveals that she was born on 16th April, 2007. From the evidence it's clear the alleged offence was committed in the night of 20th and 21st June, 2021. By simple calculation the complainant was 14 years old as of the time of the alleged offence. In the case of Edwin Nyambogo Onsongo-vs-Republic[2016] eKLR the Court held;

“the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents evidence such as birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
14. The victim corroborated the age evidence in the birth certificate as she said she was 14 years old. The father said she was 15 years old of which was definitely an error as he referred to her birth certificate which indicates otherwise. The evidence is explicit that she was 14 years old and therefore a minor. She referred to the appellant as her husband. She had consented to have sex with him, but the law is that the age of consent is 18 years and therefore a child lacks the legal capacity to consent to sex under section 42 of the *Sexual Offences Act*.
15. On penetration, the complainant said she had sex with the appellant where he inserted his penis into her vagina. Under section 2 of the *Sexual Offences Act* the two stated organs are genital organs. The clinical officer's finding as indicated in the P-3 is that the victim's hymen was broken, leading to an opinion that there was vaginal penetration of the 14 years old girl. The law is that even the slightest penetration would suffice for the offence. Given the foregoing it's my finding that there is reliable evidence of penetration.
16. The appellant was well known to the victim. She had met him severally and was living with him as a “wife”. She could have not made a mistake of him. The evidence is of recognition and I am satisfied that it's credible so far as recognition is concerned.
17. The appellant raised a defence of alibi of which is not otherwise supported. It is not clear on the exact dates he was away. Given the weight of the prosecution case, on the scale of justice the defence weight is negligible. It was rightly dismissed by the trial court.
18. Having so found, it goes without saying that the appellant was rightly convicted for the offence of defilement of a child aged 14 years.



19. The slight issue that arises is that on sentencing, the magistrate erroneously stated that she was convicting him for the offence of incest. However, the judgment is clear that he was convicted for defilement. The child was aged 14 years. Section 8 (3) of *Sexual Offences Act* reads; -

“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.”

20. Irrespective of the said error, the appellant was sentenced rightly to 20 years’ imprisonment for the offence committed and convicted of.

21. The error occasioned no injustice upon him and is curable under Article 159 of *the Constitution* of Kenya, 2010.

22. The bottom line is that the appeal is unmerited and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF NOVEMBER, 2024

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S.M. GITHINJI

JUDGE

In the Presence of; -

Appellant in person

Ms Ochola for the State

