



REPUBLIC OF KENYA



**Abdallah v Republic (Criminal Appeal E124 of 2023)  
[2024] KEHC 16049 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E124 OF 2023  
SM GITHINJI, J  
DECEMBER 17, 2024**

**BETWEEN**

**ABDALLAH HASSAN ABDALLAH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the whole decision/ruling in Malindi Magistrate's Court Criminal Case No. MCSO/E003 of 2023 before Hon James Ongondo – SPM delivered on 21st December, 2023)*

**JUDGMENT**

**Representation**

Appellant in person

Ms Ochola for the State

1. Abdalla Hassan Abdalla was charged in the lower court with a first count of defilement, contrary to section 8 sub-section (1) as read with subsection (2) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on diverse dates between 1<sup>st</sup> May, 2022 and 23<sup>rd</sup> November, 2022, within Malindi Sub-County, in Kilifi County, the appellant herein intentionally and unlawfully caused his penis to penetrate into the vagina of MWO, a girl aged 9 years.
3. To this Count, there was an alternative count of committing an indecent act, contrary to section 11(1) of the [Sexual Offences Act](#) NO.3 of 2006.
4. The particulars hereof are that on diverse dates between 1<sup>st</sup> May, 2022 and 23<sup>rd</sup> November, 2022 within Malindi Sub-County in Kilifi County, the appellant intentionally and unlawfully committed an indecent act by touching the vagina of MWO, a child aged 9 years using his fingers and penis.



5. The appellant also faced a second count of Sexual Assault, contrary to section 5 sub-section (1) (a) (i) (b) as read with sub-section (2) of the *Sexual Offences Act* No.3 of 2006.
6. The particulars of this offence are that on diverse dates between 1<sup>st</sup> May, 2022 and 23<sup>rd</sup> November, 2022 within Malindi Sub-County in Kilifi County, the appellant unlawfully caused his fingers to penetrate into the vagina of MWO a girl aged 9 years.
7. The prosecution case is that in accordance to a birth certificate No.0936900, issued on 16/5/2013, the complainant in this case was born on 5<sup>th</sup> July, 2013. Between 1<sup>st</sup> May, 2022 and 23<sup>rd</sup> November, 2022 she was therefore before 5<sup>th</sup> July, 2022 aged 8 years old and thereafter within the said year, 9 years old. She was a pupil at Malindi [Particulars withheld] Primary School in class 5.
8. On 2/1/2023 the grandmother of the complainant (Pw-2) was informed by an Aunt to the complainant by the name of WN, that the complainant had bad behavior of kissing, a visiting girl and sucking her boobs.
9. Pw-2 called the complainant and asked her where she got the behavior from. The complainant said the person who ferries her to school using boda boda used to lead her to the bush and defile her or rather had sex with her. He could use Vaseline whenever she felt pain. She alleged she could not tell her mother for if she did so, the man could kill her using a Jembe or a panga. She urged the grandmother not to tell her mother as the man had threatened to kill her. She revealed the name of the assailant as Abdalla. Pw-2 informed the mother and they took the complainant to Malindi Sub-County Hospital.
10. The complainant herself stated the family members got concerned when they noted she was using sanitary pads and questioned whether she had commenced experiencing her menses. Her mother and two aunties took her to Malindi Sub-County Hospital for examination. The doctor indicated that she had been defiled. When the doctor questioned her, she told him she was defiled by a boda boda rider called Abdallah. When she was taken to the police station she told the police officer that the accused used to take her to the bush. He could spread a leso and tell her to lie on it. He could then tell her to remove her clothes. He then inserted his penis into her private parts. She felt pain. He applied oil on her private parts, told her to close her eyes and then inserted his private parts again. He then told her to put on clothes, warning her not to tell anyone for if she did he will kill her. She was afraid to tell anyone. She went home and took a bath. The accused had done that to her two times. He started doing it when she was in grade 4.
11. The doctor filled her P-3 form on 4/1/2023. She had lost her virginity. Since the loss was not fresh the doctor could not tell when she lost it.
12. The offence was reported at Malindi Police Station on 4/1/2023 by the complainant's grandmother and mother. They stated that a boda boda rider who used to drop and pick the complainant from school had defiled her between May, 2022 and November, 2022. The accused was then arrested and charged with the offences carried in the charge sheet.
13. The trial magistrate evaluated the evidence and found that a prima facie case had not been established against the accused on all the counts, and therefore acquitted him under section 210 of the Criminal Procedure Code.
14. The state aggrieved by the said acquittal preferred an appeal to this Court on the grounds that; -
  1. The trial court based the acquittal on extraneous issues.
  2. The prosecution case outweighed that of the defence.



3. The accused was acquitted against the weight of the evidence adduced by the prosecution witnesses.
  4. Mandatory provisions of section 169 of the Penal Code were not complied with.
  5. The ingredients of the offences facing the accused were not evaluated or analyzed.
  6. The law was not properly applied to the facts and hence the court got into a wrong decision.
15. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
16. A perusal of the impugned ruling dated 21<sup>st</sup> December, 2023 shows that the acquittal was on the grounds that; -
- i. The alleged time of the offence, between May, 2022 and November, 2022 was not established by any of the prosecution witnesses.
  - ii. Some crucial witnesses were not called to corroborate the prosecution allegation in the case. These are the girl who used to be dropped to school and picked together with the complainant by the accused, the complainant's auntie and the girl the complainant had allegedly kissed and sacked boobs.
  - iii. Accused was not identified as the boda boda rider who was dropping and picking the complainant from school.
  - iv. The court concluded that there is no iota of evidence that links the accused to the offence.
17. The issue to determine is whether the said grounds are correct and their effect on the case. The key principles for determining whether a prima facie case has been made are drawn from section 210 of the Criminal Procedure Code and Judicial precedents. The leading case is R.T Bhatt-vs-Republic [1957]EA 332, which outlines the test for a prima facie case. The key elements of a prima facie case are; -
- a. Sufficient Evidence
    - There must be credible evidence on every element of the offence that would warrant a conviction if uncontroverted.
    - If the evidence is so discredited or insufficient, then no prima case exists.
  - b. The Court does not evaluate whether the evidence is strong enough for a conviction but only assess if the prosecution have established a prima facie case. The defence does not have to prove innocence.
18. The Courts have consistently emphasized that a prima facie case is not a case that must succeed at the end. It's one on which a reasonable tribunal properly directing it's mind to the law and the evidence could convict if no explanation is offered by the defence.
19. At the onset, looking at the offences preferred against the accused person, one gets impression that the prosecution was not certain of the offence which was actually committed. The offences are of defilement with an alternative count of indecent act and a count two of sexual assault, which implies the prosecution was not certain of whether the complainant was actually penetrated and with what or which organ. As observed by the trial court the evidence does not reveal how the dates of the offence indicated in the charge sheet were picked. There is no evidence at all on when or the period the offence was allegedly committed. The law does not require that specific date be indicated if unknown, but



when it's indicated it must be supported or established by way of evidence. Failure to do so raises suspicion on credibility of the prosecution case.

20. The evidence of the complainant that she was defiled by the accused person is uncorroborated. The doctor's evidence could not relate the broken hymen to the alleged defilement. Under section 124 of the *Evidence Act*, though the Court can convict on uncorroborated evidence of a minor in Sexual Offences, the Court need be convinced of it's veracity and documents it's reasoning.
21. The trial court which had advantage of hearing and seeing the victim testify was not convinced on the veracity of her evidence and this court can hardly find otherwise. There are revealed witnesses who would have corroborated part of her claims or allegations if were called as was revealed by the trial court, but the prosecution failed to call them.
22. In *Bukenya-vs-Uganda* [1977]EA 549, the Court held that:-The prosecution must call all material witnesses to prove it's case.Failure to call crucial witnesses gives rise to the presumption that their evidence would have been adverse to the prosecution case.
23. In *Mwangi-vs-Republic* [1984] KLR 595, it was held that withholding crucial witnesses might amount to a miscarriage of justice.
24. Having weighed the foregoing, I find that the trial court was right in finding that at the close of the prosecution case, the evidence fell short of establishing a prima facie case, and hence acquitted the accused under section 210 of the Criminal Procedure Code. The appeal therefore lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024**

.....

**S.M.GITHINJI**

**JUDGE**

In the Presence of; -

1. Ochola for the state
2. Respondent in person

