



**Birya v Republic (Criminal Appeal E007 of 2024)
[2024] KEHC 15375 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E007 OF 2024
SM GITHINJI, J
DECEMBER 6, 2024**

BETWEEN

SULEIMAN CHENGO BIRYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from Original conviction and Sentence in Criminal
Case No.71 of 2020 of the Senior Principal Magistrate’s Court at
Kilifi before Hon Ivy Wasike – PM on 11th January, 2024)*

JUDGMENT

1. Suleiman Chengo Birya 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 March, 2018 and May, 2018 at [Particulars Withheld] within Kilifi County, the appellant caused his genital organ namely penis to penetrate the genital organ namely vagina of AE, a child aged 15 years.
3. In the alternative, the appellant 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.
4. The particulars hereof being that on the diverse dates between March, 2018 and May, 2018 at [Particulars Withheld] within Kilifi County, the appellant willfully and intentionally touched the genital organ namely vagina of AE, a child aged 15 years with his genital organ namely penis.
5. The prosecution case is that the complainant in this case was born in October, 2003. I could not get the actual date of her birth as in her evidence she said she was born on 20/10/2003 and referred to a copy of her birth certificate which was marked PMFI-1. The father who gave evidence as Pw-2 also referred to the said copy of her birth certificate and stated that she was born on 3/10/2003. However,



- the said birth certificate was not produced as an exhibit and is not in the court's file to ascertain the date of birth. What is therefore certain is the month and the year of her birth.
6. In the year 2018 she was schooling at [Particulars Withheld] Primary School in class 8. Between March, 2018 and May, 2018 she was attending madrassa classes at [Particulars Withheld] Mosque and the appellant herein was her Madrassa teacher. The appellant also used to attend Friday prayers at [Particulars Withheld] Primary School. Madrassa classes were ending at 1.00Pm and the appellant developed a habit of requesting the victim to remain behind as others left. He would then lead her to a bush where they had sex. For the two months they had sex several times leading to her pregnancy in April, 2018. When she missed her menses she informed the appellant that she was pregnant. The appellant said he will help her procure an abortion. He took to her two tablets which he told her to take. She took one and started bleeding. She informed her mother about it and the mother asked the appellant who told her to tell the victim not to take the second tablet. The victim avoided the second tablet.
 7. On 15/10/2018 Pw-4 who is a teacher at [Particulars Withheld] Primary School went to the school at about 11.00am. He summoned the victim to find out why she was deteriorating in school performance. When the victim appeared she said she was pregnant and the culprit was the Madrassa teacher, one S. Pw-4 informed the headteacher, ES and they both took the victim to Ganze dispensary where she was confirmed pregnant. The father (pw-2) was informed about it. The matter was reported at Ganze Police Station.
 8. The victim was issued with a P-3 and PRC forms of which were filled on 15/10/2018 at Kilifi County Hospital. The medical officer who examined her noted that she was 6 months pregnant and her hymen was broken. The forms were thus filled. In January, 2019 the victim gave birth to a boy. The appellant is said to had gone underground and was only arrested on 14/8/2020. He was charged with the offence.
 9. The appellant in his defence gave his name as Suleiman Chengo Biryia. He said he lived at Dzikudzhe and is an Imam. He had stayed in the area for two years and there was a Kadhi. In September, the Kadhi asked him whether he was being paid. He was urged to go to a Mosque in his local area. He went to his home area Mosque in 2018. In 2019 he went to the market and received a call from the area chief who requested him to get to the office for cards in relation to Covid-19. When he went he found two police officers. He was arrested and taken to Ganze Police Station. He was later taken to Bamba Police Station where he was informed of the allegation in this case. He denied it.
 10. The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve 15 years' imprisonment.
 11. Dissatisfied with the said conviction and sentence he appealed to this court on the grounds that; -
 1. The prosecution failed to prove their case beyond reasonable doubt.
 2. The trial court failed to weigh properly the evidence adduced and arrived at a conviction that is not safe.
 3. Serious sharp contradictions and invariances in the prosecution case were not considered.
 4. His defence was not considered.
 12. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
 13. I have re-evaluated the charges, evidence on record, judgment of the lower court and sentence meted; and considered the grounds of the appeal and submissions filed.



14. The offence of defilement is defined under section 8 (1) of the *Sexual Offences Act* No.3 of 2006. The essential ingredients required to prove the offence of defilement are; -
- i. Proof of the age of the victim. Defilement involves a child who must be under the age of 18 years. The prosecution must establish that by the time of the alleged defilement the victim was a minor, below 18 years of age. This can be established through the evidence of the child, parents or guardians, birth certificate, age assessment report, school records, or other reliable official documentation and the apparent age as may be observed by the court and noted in the proceedings.
 - ii. Proof of Penetration Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Even the slightest penetration would suffice to prove this element. The evidence of the victim and medical evidence usually supported through production of treatment notes, P-3 and PRC forms is used to establish penetration.
 - iii. Identification or recognition of the Accused as the real culprit. The prosecution must prove that it's the accused who committed the alleged offence. [See *George Opondo Olunga-vs-Republic* [2016] eKLR].
15. Turning to the case at hand there is evidence that the victim in this case was born in October, 2003. The victim said so as well as her father. They both relied on a copy of her birth certificate. The discrepancy is only on the actual date of birth of which I could not ascertain from the said Birth Certificate as it was not produced as an exhibit though was earlier on marked. The offence was allegedly committed between the months of March and May, 2018. At the time of the offence, going by simple calculation, the victim was 14 years old. She would have attained 15 years in October, 2018. I therefore find existence of reliable evidence that she was a minor at the time of the alleged offence.
16. On the issue of penetration, the victim said she had sex with the appellant in the bush several times between the months of March and May, 2018. Out of the said sessions she conceived and in January, 2019 gave birth to a boy. The medical evidence by Pw-3 shows her hymen was broken and she was 6 months pregnant at the time of examination. The foregoing evidence when weighed together shows that the victim's genital organ namely vagina was penetrated by a male genital organ namely penis. Penetration was therefore established by the prosecution beyond reasonable doubt.
17. The last ingredient which appears to be the one mostly contested by the appellant is of his identification/recognition as the real culprit.
18. The evidence of the victim and that of Pw-4 shows that the appellant was well known by the victim as he was her Madrassa teacher. He also used to appear for Friday prayers in the school where the victim was schooling. There is evidence that when Pw-1(victim) told him that she was pregnant he tried to assist her procure an abortion. He gave her two tablets of which she took one and after she bled was advised by him through her mother not to take the other.
19. The victim from the evidence of Pw-4 was consistent from the onset that the culprit was a madrassa teacher, namely S. The entire evidence suggests no cause why the victim would be inclined to victimize the appellant, for the "real" culprit. The defence does not suggest otherwise. The evidence is compelling beyond reasonable doubt that the appellant is the real culprit. He was therefore rightly convicted of the offence in the main count.
20. The trial court on sentencing him stated, "pursuant to *Sexual Offences Act*, I do sentence the accused to 15 years imprisonment."



21. Section 8 (3) of the *Sexual Offences Act* however states otherwise that:
- “ 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.”
22. As established, the victim in this case though stated was aged 15 years was actually aged 14 years but both ages fall within the ambit of section 8 (3) of the *Sexual Offences Act*. In Petition No. E108 of 2023, Republic-vs-Joshua Gichuki Mwangi [2024]KESC 34, the Supreme Court made it clear that the minimum mandatory sentences under *Sexual Offences Act*, are Constitutional.
23. As such the 15 years’ imprisonment imposed against the appellant herein is illegal as it falls below the allowed minimum in law of which is 20 years’ imprisonment.
24. The appellant was a religious teacher who committed the offence against his pupil, a minor. He was expected to instill principles that promote moral integrity through his teachings, and serving as a good example. He went contrary to the said expectation and committed an offence which have significant repercussions to the victim, in her physical health, emotional well-being, education and social life.
25. He is a convict who deserved a stiff sentence, probably above the minimum allowed. I will however simply correct the illegality and keep it to the allowed minimum which is 20 years’ imprisonment.
26. The bottom line is that the appeal lacks merit and is hereby dismissed. The sentence is enhanced from 15 years’ imprisonment to 20 years’ imprisonment in light of provision of Section 8 (3) of the *Sexual Offences Act*.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF DECEMBER, 2024

S.M. GITHINJI

JUDGE

In the Presence of; -

Ms Ochola for the State

Appellant at Malindi Prison

