



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. E007 OF 2021**

**EDISON THOYA BAYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence in criminal case No. 61 of 2019*

*of the SPM's Court at Mariakani by Hon N.C.Adalo – SRM delivered*

*on 3<sup>rd</sup> day of September, 2020)*

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

**Appellant in person**

**Mr. Mwangi for the state**

**J U D G M E N T**

**EDISON THOYA BAYA** was charged in the main count with the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of this offence are that on the 6<sup>th</sup> day of July, 2019 at unknown time in [particulars withheld] area in Rabai Sub-County within Kilifi County of the Coast Region, the appellant herein committed an act which caused his male genital organ namely penis to penetrate into a female genital organ namely vagina of N.N.A, a child aged 3 years and 6 months. In the alternative the appellant faced an offence of indecent Act with a child, contrary to section 11 of the Sexual Offences Act No. 3 of 2006.

The particulars hereof being that on the 28<sup>th</sup> day of July, 2019 at about 15:00hrs in [particulars withheld] area in Rabai Sub-County within Kilifi County of the Coast region, the appellant unlawfully and intentionally committed an indecent act with a child aged 3 years and 6 months, namely N.N.A by touching her private parts.

The clinic book for the complainant which was produced by the mother (Pw-2) shows that she was born on [particulars withheld] April, 2016. By the time of the alleged offences, in July 2019, she was therefore aged about 3 years and 3 months. The said minor in her unsworn evidence disclosed that the appellant herein, whom she pointed at in court as the culprit, in his house, applied saliva at her private part and then inserted his finger into it, before he inserted his “*mdudu*”. He then gave her mangoes and bananas to take home. When she told the mother (Pw -2) about it she was beaten up before she was taken to the hospital. She referred to the appellant as Babu Chonga.

The mother, the Pw-2 in this case stated that on 6<sup>th</sup> July, 2019 she was from the farm with the complainant. When they got to the house the complainant remained outside. She then heard the voice of the appellant, whom she referred to as Babu Chonga, calling out saying, “*Njoo uchukue ndizi na maembe*” – (come collect mangoes and bananas). The appellant was their neighbor for a period of about 5 months and was living just about 5 metres from her house. The complainant went and took too long there, about an hour. When Pw 2 went outside she called out on the complainant who emerged from the appellant’s house carrying mangoes and bananas. She asked the complainant whether that is what she had gone to collect from Babu Chonga’s house. She said Babu Chonga inserted his fingers into her “*mdudu*”. The mother beat her and waited to inform the father. When the father arrived she told him and he said they should investigate.

On 28<sup>th</sup> July, 2019 Pw -2 was in the home. The appellant called out from outside. She responded and he asked where the complainant was.

Pw-2 answered that she was in the house. The appellant said he had a lot of bananas and mangoes and the complainant should be sent for them. The complainant went. She however took long to return. The mother got outside and called her out. She responded and got out of the house while carrying a bag of bananas and mangoes. The mother asked her whether that is all she was given. She said yes and added that Babu Chonga had again placed her on his bed, put saliva on his fingers and inserted the fingers inside her genitalia. Pw-2 got so angry and decided to wait for the father. When the father got home she told him. He said he was tired and should wait till the following day. The following day they looked for the appellant but in vain. He surfaced at 7:00am and the complainant reported in his presence what he had done. The appellant remained mute. He then denied the allegation. He then said he will not repeat it, and will change. In September the complainant experienced stomach pains and was taken to Ribe for treatment. The doctor said that her hymen was broken and orifice was wider than usual. She was referred to Shika adabu where urine and blood samples were taken before she was referred to the police station.

The matter was reported on 9<sup>th</sup> September, 2019 at Rabai police station. Pw-4 investigated the case. She referred the complainant to Mariakani sub-county hospital for filling of the P-3 form. Pw -3 examined her and found that her hymen was broken. She filled the P3 form on 10<sup>th</sup> September, 2019. The appellant was traced on 11<sup>th</sup> September, 2019 and arrested. He was charged with the offences carried in the charge sheet.

The appellant in his sworn defence stated that he comes from Ribe and is a mason. On 10<sup>th</sup> September, 2019 he went for money at Maziwani trading centre. On his way back at about 9.15Pm he was arrested by the police. He was not told the cause for arrest. At Ribe chief's office he saw the complainant's mother (Pw-2). Appellant was asked whether he knew her and said she was his neighbour, she was told to go home and get to Rabai Police Station the next morning. When he thought of the reason why he could have been arrested, he made out it was because he chased the complainant's children from his compound as they were defecating at the place and trampling on his crops. They were as well picking vegetables from his farm of which he stopped. This caused a grudge between him and the complainant. At Rabai Police Station he was accused of defiling a young girl. He denied it. He alleged he had lived in the said neighbourhood for a period of 3 years and were many young girls and if he was inclined of defiling a girl he would have done it before the alleged incident in this case. The complainant had lived at the place for only 5 months. He denied the charge.

The trial court evaluated the evidence and exonerated the appellant from the main count of defilement. He however found as of fact that the appellant had inserted his finger in the genital organ of the complainant and by doing so the fingers must have come into contact with the genitalia. He concluded that the alternative count was thus established and convicted the appellant of it. He was sentenced to serve 10 years imprisonment.

Dissatisfied with the said conviction and sentence, the appellant appealed to this Court on the grounds that; -

- 1. The trial magistrate erred in failing to consider that crucial witnesses did not offer evidence.**
- 2. The alternative charge could not subsist where the main charge had collapsed.**
- 3. The defence case was dismissed without proper evaluation.**
- 4. In sentencing the period spent on remand was not considered.**

The appeal was canvassed by way of written submissions and both sides filed their submissions.

I have gone through the charge sheet, evidence adduced by the prosecution witnesses, the defence case, judgment passed and the sentence, grounds of the appeal, as well as the submissions by both sides.

As concerns the charge sheet, there are two issues which need be considered. One is the age of the girl as indicated in the particulars of the offence and the date of the offence also stated in the particulars. The complainant was born on 17<sup>th</sup> April, 2016. In the main count particulars of the offence indicates it was committed on 6<sup>th</sup> July, 2019. This would mean the victim was 3 years and 2 months old by the time of the offence and not 3 years and 6 months old as indicated in the charge sheet. Likewise, the alternative count reveals the date of offence as 28<sup>th</sup> July, 2019. By this date the complainant was 3 years and 3 months old and not 3 years and 6 months old as the charge particulars indicates. While such errors may not be of great significance as the wrongly stated age and the right age are both below 11 years and does not therefore prejudice the appellant in any way, the prosecution is called upon to endeavor to have the particulars of the charge always right.

Where there is a main count and an alternative count, the charges must be derived from the same incident. An alternative count is weighed when the main count fails and the two are not independent offences that would stand independently. That is why the Court cannot dream of convicting on both but either of them. It is therefore wrong for the offence in the main count to carry a different date from the offence in the alternative count. In such case the counts are independent and each stands on its own, and is not and cannot be an alternative to the other. It is therefore wrong to have the offence in the main count allegedly committed on 6<sup>th</sup> July, 2019 and its alternative on 28<sup>th</sup> July, 2019.

The evidence is that similar offences were committed on the both alleged days. Having the charge as it is, the appellant was prejudiced in not knowing the actual offence he was defending. Probably prosecution should have had two independent main counts and two alternative counts, or one main count with its properly related alternative count as per the date of its alleged commission.

Before I evaluate the weight of the evidence adduced, I wish to point out that there is a procedure adopted in the hearing of which I do not understand. The appellant gave sworn evidence in his defence and was rightly cross-examined. However, there are some proceeding thereafter stated as re-examination by the accused. The question is how the accused re-examined himself having answered questions on cross-examination. He was not represented in which case one would assume the Advocate did the Re-examination. Whatever happened is a mystery.

I now turn to the weight of the evidence. Pw -1 who gave unsworn evidence did not indicate of any date when the incident allegedly took place. Her evidence is brief and is as follows; -

***“Babu chonga put his finger here then put saliva there (gesture to her private parts) then he put his “mdudu” here. He then called me to take mangoes and bananas home. I felt pain. I felt so much pain. He got his mdudu from here “gestures at between her legs.” I told my mother, she beat me up. She then took me to hospital. Babu Chonga is here, (points at accused using her index finger without directly looking at him).”***

On re-examination she said; -

***“He inserted his “mdudu” twice that day. I was with my friends N, S and M.”***

The girl used the word “here” five times and the court explained it twice as a gesture to her private parts and a gesture to between her legs. When she said Babu Chonga put his finger “here”, “here” was not explained. We are not certain of where the finger was placed. When she said he then put the saliva “here”, here is said to be her private parts. While private parts generally means human external genital organs, the words are not used in Sexual Offences Act to define any offence and can bring in confusion when used in relation to any of the offences under Sexual Offences Act. The Court as much as possible should use terms used in the Act. However, using plain English definition, one can conclude she alleged saliva was put on her genitalia or vagina. She went ahead and said appellant placed his “mdudu” here. “mdudu” in ordinary language is a fly or an Ant. The Court should have clarified with the witness what she meant with “mdudu” or with her mother (Pw-2) or an intermediary, for it to be brought within the terms used in the Sexual Offences Act. Where it was placed, indicated as “here” is also not explained. It is not clear where the alleged “mdudu” was put and would be wrong to purely assume. The Court should be certain. Further, she says; -

***“He got his “mdudu” from here “gestures at between her legs.”***

Previously when the word “**here**” was used and there was a gesture, the Court explained the gesture was to her private parts. Here the Court explains the gesture to be between her legs. The question is whether the different use of terms refers to different organs or body area. The leg is the whole body part from the hip joint to the feet. Though common usage of the words between the legs implies the common sexual organs, the terms are not carried in the Sexual Offences Act and their use may bring in confusion. The Court should have clarified it and termed it as per the definition in the Act. Otherwise between her two legs can be any area between the legs from the hip joint to the feet.

On re-examination when she said, “he inserted his “mdudu” twice on that day,” the date is not given, what is “mdudu” is not clarified and where it was inserted. There were dangerous assumptions made in the proceedings. Under the Sexual Offences Act, the offences are defined in relation to the organs, and objects used, and the manner in which they are used to different categories of persons, mostly in accordance to their age and relationship. This is what informs the difference between the offences like indecent Act, defilement, rape, sexual assault, incest and sexual harassment.

Pw -2, the mother to the complainant gave evidence to the effect that on 6<sup>th</sup> July, 2019 the complainant was defiled by the appellant. She narrated the circumstances under which it happened but she did not report about it to the police as the husband suggested they investigate first. It is therefore a surprise and unbelievable that on 28<sup>th</sup> July, 2019 the appellant is said to have gone to her with the same trick to have the complainant visit his house, and Pw-2 readily allowed it. It was easier for her to tell the appellant to avail the mangoes and bananas himself, given the sad experience of 6<sup>th</sup> July, 2019. What she alleged happened on 28<sup>th</sup> July, 2019 is illogical and doubtful.

The trial magistrate analysed the evidence very well and in paragraph 18 found that there was penetration of the genital organ of the complainant by the appellant, using his finger. This clearly indicates that the offence disclosed is of sexual assault and not defilement. He forced a conviction on the alternative count when he found that ***“the court finds that the alternative charge was proved beyond any reasonable doubt as to have inserted his finger inside the genitalia of the complainant that hand must have come into contact with that said part.”***

It’s wrong for the facts to establish a certain offence, and because it is not preferred in the charge sheet, the Court convicts of a preferred offence which is not established per se. *Mens rea* for the offence the appellant was convicted of is lacking as it was for the offence of Sexual assault. There was penetration.

The appellant was referred to by Pw-1 and Pw-2 as Babu Chonga, of which is not the name carried in the charge sheet. While it may not be in doubt that Babu Chonga and Edison Thoya Baya is one and the same person, it pays to indicate the pseudo or alias name as well in the charge sheet.

Having carefully weighed the foregoing, it’s vivid that the alternative count is defective as it alleges the offence was committed on a different date from the one in the main count. The prosecution through the adduced evidence also failed to establish either of the offence beyond reasonable doubt. For no given reason they failed to call alleged 3 other crucial eye witnesses. The existing doubts are resolved in favour of the appellant. The appeal therefore succeeds. Conviction and sentence are hereby quashed, and the appellant is set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2021.**

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**S.M. GITHINJI**

**JUDGE**

**In the presence of: -**

1. Mr Mwangi for the State
2. The Appellant in person