



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 53 OF 2017**

**BAKARI MALUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Msa**

**CM SO Case No. 42 of 2016 (Hon. I. RUGURU SRM)**

**delivered on 26/1/2016)**

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

1. **Bakari Maluki (“the Appellant”)** was charged with the offence of defilement contrary to *section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006*. It was alleged that on 22/1/2016 at Approved area in Likoni District within Mombasa county, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of NH, a child aged 14 years.
2. There was an alternative charge of committing an indecent act with a child contrary to *section 11 (1) of the Sexual Offences Act No.3 of 2006*.
3. The appellant denied the charge and after trial, he was found guilty and convicted of the offence and sentenced to 20 years imprisonment. He has now appealed to this court against both conviction and sentence.
4. This being a first appellate court, the court is enjoined to re-appraise and re-evaluate the evidence afresh and come to its own independent findings and make its own conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.
5. The prosecution case was that on 22/1/2016 at 1.00 am, **PW1** discovered that one of her daughters, NH was missing from her bedroom. Going outside, she found her in the appellant’s house struggling with the appellant. She freed the complainant and took her to her house. She saw the complainant bleeding on her vagina.
6. The complainant told **PW1** that the appellant had called her to his house where he defiled her. **PW1** took the complainant to Likoni District Hospital where she was treated and referred to Coast General Hospital for further examination. The appellant was a neighbor but he fled after the incident. He was arrested 3 months later. The complainant was 13 years at the time.
7. The complainant narrated how on the material day at about 1 am she heard the appellant call her at her window. She went out to meet him. He grabbed her left hand and dragged her to his house. She tried to scream but he covered her mouth with his hand. He threw her onto a mattress and penetrated her with his penis. She felt a lot of pain and bled. When she was struggling after the ordeal, her mother came and rescued her. Her mother took her to hospital. She left behind in the appellants house her underwear and headscarf.
8. Dr. Mohamed Munir (**PW3**) produced the P3 and PRC forms. When examined, the complainant’s genitalia had reddened with blood stains. She had bruises on her vagina and the hymen was broken. While the P3 was filled on 15/8/2016, the PRC form was filled on 22/1/2016, the same day of the incident.
9. The case was investigated by **PC (W) Kagendo (PW4)**. She established that, on the material day when the parents of the complainant realized that she was missing from their house, they went out looking for her. They found her in the appellant’s house. The appellant escaped after the incident.
10. Accompanied by another officer, **PW4** visited the scene. They found the house empty. On the bed, they found the complainant’s

underwear and headscarf which she produced in evidence. Her investigations revealed that the appellant had dragged the complainant to his house where he defiled her. The appellant was arrested in May, 2016 at Ujamaa area.

11. **PW5 Athman Kassim Mabeya**, told the court how he received information about the defilement. He accompanied the complainant and **PW1** to Inuka Police Station where they reported the incident.

12. In his sworn statement, the appellant narrated how **PW1** had rented a house for him because he was needy. He later moved out when he had some differences with her. It is after he had moved out that he heard rumors that he had defiled the complainant. He took himself to the police who arrested him. The complainant came and identified him. That **PW1** had sworn to teach him a lesson after he had differed with her.

13. The appellant raised five grounds of appeal; **that the charge sheet was defective; that the age of the complainant was not proved; that it was not clear if the charge he was facing was one of defilement or rape; that the medical evidence was wanting.**

14. The appellant submitted that the charge sheet was defective. That he was charged under **section 8(1) (3) of the Sexual Offences Act** which the trial court found to be incurably defective but nevertheless convicted him. That the evidence on record was that the complainant had been raped. That the age of the complainant was not proved and that the PRC relied on belonged to one Agnes Mkambela Zoggori and not the complainant. That no DNA analysis was undertaken.

15. **Mr. Mulamula**, Learned prosecutor opposed the appeal and submitted that the charge had been proved to the required standard; that the error in the charge sheet was curable under **section 382 of the Criminal Procedure Code (“CPC”)** and the trial court had found as such. That although the PRC form on record was of a different person, the prosecution would rely on the evidence of **PW3**.

16. On the defective charge sheet, I note that the charge read **“defilement contrary to section 8(1) (3) of the Sexual Offences Act”**. The charge sheet was not amended at any stage of the proceedings. In its judgment, the trial court noted the error and indicated that the same was not incurable as the appellant knew the charge he was facing from the onset. The trial court made a finding that the error was curable by invoking the provisions of **section 382 of the CPC**.

17. The charge sheet should have read **“ ... defilement contrary to section 8(1) as read with section 8(3) ...”**. Although the same was not amended until judgment, I find that it never prejudiced the appellant. In my view, the error was minor and as quite rightly observed by the trial court, it was curable under **section 382 of the CPC**. Indeed, no prejudice was suffered by the appellant as a result of that error. See **Amedi Omurunga v Republic [2014] eKLR** where the Court of Appeal held that where an accused suffers no prejudice, the error is excusable.

18. In the present case, the particulars of the charge were read to the appellant in the language he understood. He thoroughly cross-examined all the witnesses that were proffered by the prosecution which showed that he understood the case he was facing. Further, he never raised the issue with the trial court until after he saw it in the judgment of that court. I find that the error, which was the absence of the words **“... as read with section 8 ...”** was minor and curable under **section 382 of the CPC**. More importantly, the appellant was not prejudiced at all. That ground fails.

19. The appellant complained that while he was charged with the offence of defilement, the evidence produced was that of rape. He relied on the case of **Mwanguo Gwede Mwarua v. Republic [2015] eKLR**. Further, he complained that the age of the complainant was not proved as the person who prepared the assessment form of the complainant did not testify.

20. The record shows that **PW1** and the complainant told the court that the complainant was aged 13 years. The P3 form and the age assessment report showed that the complainant was aged 13 years. When **PW3 Dr. Munir** produced the age assessment report dated 15/08/2016, the appellant did not object to the same nor did he challenge the contents. He cannot now turn around and allege that the maker of that report should have testified.

21. In **Francis Omuroni v. Uganda Court of Appeal in Criminal Appeal No.2 of 2000**, it was held:-

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

22. In the present case, not only did Dr. Sumbi of Coast General Hospital assess the age of the complainant to be 13 years, the complainant’s mother herself testified and confirmed that fact. To this court’s mind, the age of the complainant was proved to the required standard.

23. In view of the foregoing, the question of rape being the offence that was proved at the trial does not arise. It does not matter what the witnesses called the act, whether rape or any other name, once it is shown that there has been sexual penetration on a person of less than 18 years, the offence committed is defilement.

24. The case of **Mwanguo Gwede Mwarua** (supra) is not applicable. In that case it related to the use of the wording of the repealed provisions of the Penal Code instead of those of the Sexual Offences Act.

25. As regards failure to undertake DNA analysis, that was not necessary as the evidence of **PW1, PW2** and the medical reports was sufficient in the circumstances. In any event, the appellant disappeared for 6 months after the incident. He was nowhere to be found. Those grounds fail.

26. The other complaint was that the medical evidence was insufficient. That the P3 form was filled 6 months after the incident and that the PRC form did not belong to the complainant. The prosecution seemed to agree with the submission that the PRC form was that of one Agnes Mkambela Zogori and not the complainant.

27. I have perused both the record before this court and the trial court. I have seen the original PRC form dated 22/01/2016. It was issued by the Likoni District Hospital and it is PRC reg. No.19/16. It was in respect of NH, the complainant. It was produced as **PExh.2**. It is therefore wrong to allege that it related to one Agnes Mkambela Zogori.

28. According to that PRC, the incident occurred on the same day it was filled. The complainant was complaining of vaginal bleeding and lower abdominal pain. There was blood stains on her dress. Her vaginal walls were blood stained with minor bruises on the walls. The hymen was broken.

29. As regards the P3 form, the same was filled 6 months after the incident, but the information contained therein was backed by the PRC form. The doctor found that there had been defilement. The totality of the evidence on record is that the complainant had been defiled and the perpetrator was the appellant. I reject that ground.

30. As regards the sentence, the court meted out the minimum sentence allowed in law. Sentencing is in the discretion of the trial court unless it is shown that it is excessive or that the trial court failed to take account the necessary factors or took into consideration unnecessary matters. In the present case, the trial court duly considered all the relevant factors. I see no reason to disturb the same.

31. Accordingly, having carefully considered the record, I am satisfied that the trial court arrived at the correct decision. The offence of defilement had been proved against the appellant beyond any reasonable doubt. The sentence meted out was lawful and reasonable in the circumstances, I find the appeal to be without merit and dismiss the same.

**DATED and DELIVERED at Mombasa this 11<sup>th</sup> day of September, 2019.**

**A. MABEYA**

**JUDGE**