



**Malianya v Republic (Criminal Appeal 64 of 2020)
[2023] KECA 1123 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1123 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 64 OF 2020
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
SEPTEMBER 22, 2023**

BETWEEN

PETER MALIANYA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(G. Ngenye, J.) dated 20th April, 2017 in HC. CR. A. No. 198 of 2013)*

JUDGMENT

1. The appellant, Peter Nailianya, was charged before the Principal Magistrate’s Court, Githunguri, for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 it being alleged that on 23rd April, 2013 at the time and place stated in the charge sheet he intentionally and unlawfully committed an act causing penetration with his penis into the vagina of “MW”, a child aged 4 years. The prosecution called 6 witnesses; the trial court found that there was a case to answer and the appellant gave an unsworn statement whereafter he was convicted and sentenced to serve imprisonment for life. His appeal to the High Court of Kenya at Nairobi was dismissed in a Judgment delivered on 20th April, 2017 by G.W. Ngenye-Macharia, J. (as she then was). The appellant has come to us in this second appeal. Our mandate in such an appeal is confined to a consideration of issues of law only (Section 361 (1) (a) *Criminal Procedure Code*) and we must resist the temptation to consider matters of fact which have been considered by the trial Court and re-evaluated on first appeal. That mandate on what to consider on a second appeal has received many judicial pronouncements in such cases as *Stephen M’Irungi & Another v Republic* [1982-88] 1 KAR 360 where it was stated:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with



the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

2. We visit the facts of the case only to satisfy ourselves that the two Courts carried out their mandates as required in law.
3. "MW", who testified as PW2, stated that she was 4 years old and on the material day she was playing with two other children one of who was "PN" (PW3) when the appellant approached them. He gave some money to PN and sent him to the shops to buy a certain item they called "*ngumu*". He then led her to the nappier grass farm nearby, removed her clothes and proceeded to defile her. When PN came back and called out her name the appellant covered her mouth with his hand so that she could not answer. When he was finished he took off and PN saw him going out of the farm and he found MW holding her panties, which was produced in court by the investigating officer PC Dorcas Mureu of Kibichoi Police Station. She narrated to PN of the ordeal she had gone through.
4. MW's mother, "ANM", who testified as PW1, found her daughter and PN near the road and was informed by both of them how the appellant had sent PN to the shops and defiled the child. She examined the child and saw an injury to her vagina. She took the child to the police station where a P3 form was issued and then to hospital. The appellant was arrested the following day by the Assistant Chief of the area – SMG (PW5) as he was about to be lynched by members of the public who accused him of defiling the child.
5. PN confirmed that he found MW holding her panties in her hands and she informed him that the appellant had done "... bad manners to her ..."
6. Paul Wambugu Gikungi (PW4), a Clinical Officer at Kigumo Health Centre produced in evidence P3 form in respect of the child. He confirmed that she was 4 years old and that on examination he found that she had been defiled and there was injury on her labia minora and the hymen was broken.
7. In his defence the appellant denied the offence stating that he was a herdsman and that on the material day he had carried on with his usual duties and was surprised when he was arrested and charged with the offence.
8. As we have seen the appellant was convicted and sentenced accordingly.
9. When the appeal came up for hearing on a virtual platform on 28th September, 2022 the appellant appeared in person from Kamiti Maximum Prison while Miss Ngalyuka, learned counsel, appeared for the office of Director of Public Prosecutions. Both sides had filed written submissions which we have perused and considered.
10. In the homemade "Grounds of Appeal" the appellant says that he was wrongly convicted as the charge sheet was defective; that the sentence passed was "inconsistent"; that his constitutional rights under Article 50(2) (c) were violated; that the evidence of PW2 had no probative value and that the prosecution case was not proved to the required standard.
11. As stated earlier our mandate in a second appeal like this one is limited to an examination of issues of law only.
12. The issue whether or not the charge sheet was defective was not raised before the trial court or at the High Court on first appeal and that is a matter of fact which we have no mandate to address here.



13. We have gone through the whole record and cannot see anywhere where the appellant's rights to a fair trial were violated. Witnesses were called and he cross examined them and in the end he chose to give an unsworn statement which was considered.
14. The case that faced the appellant was straight forward. He sent PN on an errand to the shop and took the opportunity to take MW, a 4 year old child to the nappier grass farm nearby where he defiled her. MW informed PN and her mother immediately after the incident and she gave the name of the appellant to the police when she went to report the incident the same day. The appellant defiled the child and he was properly convicted on the evidence presented by the prosecution. There is no merit in this appeal which we hereby dismiss in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

