



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shitambasi v Republic (Criminal Appeal 45 of 2020)  
[2023] KEHC 2886 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 45 OF 2020  
PJO OTIENO, J  
MARCH 27, 2023**

**BETWEEN**

**DAVID SHITAMBASI ALIAS INDUTU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentencing of  
Hon. W. Lopokoiyit in Kakamega S.O. Case No. 32 of 2018)*

**JUDGMENT**

1. The appellant was arraigned before the Chief Magistrate at Kakamega in Sexual Offence Case No. 32 of 2018 charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006 and the particulars of the offence were that on the 16<sup>th</sup> day of April, 2018 at [Particulars Withheld] market in Kakamega East district within Kakamega County, the appellant intentionally caused his penis to penetrate the vagina of PM, a child aged 12 years.
2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006 and the particulars of the offence were that on the 16<sup>th</sup> day of April, 2018 at [Particulars Withheld] market in Kakamega East district within Kakamega County, the appellant intentionally touched the vagina of PM, a child aged 12 years.
3. The accused person pleaded not guilty and the matter was set down for hearing with the prosecution calling a total of three (3) witnesses.
4. PW1 was the victim and the complainant who upon being subjected to voire dire examination and the trial court satisfying itself on her ability to tell the truth testified that she was a class three pupil at [Particulars Withheld] primary school and that on 16/4/2018 at about 8 PM, she had been sent by her grandmother when on returning, she was approached by the appellant who grabbed her and took



- her to his place where he prepared a meal for them, ate and then headed to sleep. The appellant then removed his short and 'kitu yake' and inserted it in her vagina. She started screaming and it was at that point that the neighbors and police came to her rescue.
5. PW2, No. 225942 APC Moses Kisaina from Khayega police post testified that he arrested the appellant on 17/4/2018 at about 1AM following reports that a child was being defiled. He arrived at the scene where he found the complainant and appellant in the house.
  6. PW3, a clinical officer at Shinyalu Model Health Center testified that the complainant was examined at the hospital on 17/4/2018. She had torn inner pants which had blood. On vaginal examination, her hymen was torn and she had pains in her vagina.
  7. The court ruled that a *prima facie* case had been established and the accused person was put on Defence.
  8. The Defence called one witness, the appellant, who testified that on 16/4/2018 he was at his house sleeping by himself when he was arrested and informed that he had raped the complainant whom he claimed not to know.
  9. Judgment was subsequently delivered and the accused person was convicted and sentenced to 20 years' imprisonment.
  10. Aggrieved with the decision of the trial court, the appellant has lodged a petition of appeal dated October 22, 2020 which is premised on the following grounds: -
    - a) That the Honourable Magistrate erred in law in convicting the appellant where there was no conclusive evidence to warrant the conviction.
    - b) That the trial magistrate misdirected himself in law by not finding that the prosecution did not prove or adduce any evidence to prove the age of the minor thus causing an injustice to the appellant.
    - c) That the trial magistrate erred in law by convicting the appellant when the ingredients of the offences and charges before the court were not proved by the prosecution.
    - d) That the trial magistrate erred in fact in appreciating and adopting the evidence of PW2 whose evidence did not in way connector link the appellant with the offence of defilement.
    - e) That the learned trial magistrate misdirected himself in fact and law by not attaching requisite weight on the defence of the appellant."
  11. The appeal has been canvassed by way of written submissions with only the appellant having filed his submissions.

### **Appellant's Submissions**

12. It is the submission of the appellant that the ingredients of the offence of defilement was not proved. He argues that the age of the complainant was not proved since no birth certificate, baptismal card or even the evidence of her custodian was tendered. In stressing the importance of the age of a victim in a sexual offence matter, the appellant places reliance in the case of *Kaingu v R* Criminal Appeal No. 504 of 2010.
13. On identification of the accused, the appellant argues that in the cross examination of the complainant, she claimed not to know the appellant.



14. On the element of penetration, the appellant argues that it was not clear what was penetrated in the complainant's vagina since said 'kitu yake'.

### **Issue For Determination**

15. Having considered the proceedings of the trial court, the petition of appeal and the submissions by the appellant, the issue that arises for determination by this court is whether the respondent proved the offence of defilement to the required standard against the appellant.

### **Analysis**

16. Section 8(1) of the [Sexual Offences Act](#) provides as follows on the offence of defilement:

“8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) 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.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
- (5) It is a defence to a charge under this section if -
  - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
  - (b) the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the [Borstal Institutions Act](#) and the Children's Act.
- (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees.”



17. To establish a case of defilement, it was the holding of the court in *George Opondo Olunga vs. Republic* [2016] eKLR that three ingredients must be proved namely the age of the victim, penetration and the proper identification of the perpetrator.

### **Age of the victim**

18. This is the bone of contention by the appellant as he argues that the age of the appellant was not proved. The importance of proving the age of a victim of defilement was stressed by the court of appeal in *Hadson Ali Mwachongo v Republic* [2016] eKLR where it was held as follows: -

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim.”

19. There are several ways in which the age of a victim can be proved and these ways are addressed by the court of appeal in the case of

*Edwin Nyambogo Onsongo v Republic* [2016] eKLR where it was held:-

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

20. In establishing the age of the victim, the trial court settled that the victim was 12 years old since she testified that she was 10 years old and a standard three student at Mugomari primary school whereas PW2, the arresting officer testified that the victim was 12 years old. The trial court subjected the victim to voir dire examination and was satisfied that the victim understood the meaning of oath and was intelligent enough to testify. The trial court also had the opportunity to see and interact the victim and was of the opinion that it was apparent that the victim was aged 12 years. I do believe where a court is faced with uncertainties of the age of a victim, the court has the discretion to determine the apparent age of the victim. This position has been buttressed in *Peter Wabome v Republic* [2018] eKLR where the court observed:-

“Therefore, the court has discretion to find what the apparent age of a victim is from the documents and evidence presented to it.”

21. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. This was the holding of the court of appeal in *Moses Nato Raphael v Republic* [2015] eKLR where it was held that: -

“On the challenge posed by the uncertainty in the complainant’s age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanja v R*, Mombasa CRA No 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim



is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.”

22. I therefore find that the trial court was correct in determining that the victim's apparent age was 12 years.

### **Penetration**

23. Penetration is defined under section 2 of the *Sexual Offences Act* as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

24. The evidence of a victim on penetration is sufficient by itself as espoused in section 124 of the *Evidence Act*, cap 80 which provides as follows:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

25. Nonetheless, it is important that the evidence of a victim is corroborated by medical evidence.
26. In this instance, the victim testified as follows, “He then removed his short and he removed ‘kitu yake’ and put in me. Blood started coming out and I started screaming.....”. The appellant argues that ‘kitu yake’ could mean anything else but penis. The victim testified that she was a class three student and I believe the Kenyan curriculum student does not introduce students to reproductive health at class three so it would be possible she might not have known that a penis is called a penis. Also, the fact that she stated that ‘kitu yake’ was removed from the appellant's shorts, that is to mean it was a penis and not a finger as was insinuated by the appellant in his cross examination at the trial court.
27. I therefore find that the ingredient of penetration was established by the respondent.

### **Proper identification of the perpetrator**

28. The appellant argues that he was not identified by the victim since he was not known to the victim. The law on identification demands that the court ought to be satisfied that the identification of a perpetrator is positive and free from possibility of error. This was the position of the court in *Mercy Chelagat v R* [2022] eKLR.
29. Prior to the incidence, the appellant and the victim had not met. The events leading to the arrest of the appellant however depict the appellant as the perpetrator of the offence because of several reasons namely; it was the screams of the victim that captured the attention of the neighbours and when the appellant was asked to open his door, he refused and the neighbours were forced to call the police and according to PW2, the arresting officer, when they arrived at the appellant house they found him



with the victim, by themselves and had him arrested. There could not have been any error on who was arrested and charged.

30. I therefore find that the appellant was properly identified as the perpetrator.

31. Accordingly, for the reasons set out above, it is my finding that this appeal lacks merit and thus fails. The conviction and sentencing of the appellant is hereby upheld.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27<sup>TH</sup> DAY OF MARCH 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Appellant in person

Ms. Chala for the Respondent/State

**Court Assistant: Polycap**

