



REPUBLIC OF KENYA



KENYA LAW
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**Achongo alias Shida v Republic (Criminal Appeal E033 of 2023)
[2025] KEHC 7227 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 7227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E033 OF 2023
A. ONG'INJO, J
FEBRUARY 13, 2025**

BETWEEN

PETER OLUOCH ACHONGO ALIAS SHIDA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant Peter Oluoch Achongo alias Shida was charged with the offence of defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offence [Act No. 3 of 2006](#).
2. Particulars are that the Appellant on 17th day of October, 2022 at around 0100hours at West Kanyamkago Location in Uriri Sub County within Migori County intentionally and unlawfully caused his penis to penetrate the vagina of D.A.O. a child aged thirteen (13) years old.
3. In the alternative the Appellant was charged with the offence of indecent act contrary to Section 11(1) of the [Sexual Offences Act](#) No.3 of 2006.
4. Based on the evidence of four (4) Prosecution witnesses and sworn statement of the Appellant the trial Magistrate convicted the Appellant and him to serve 20 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he lodged his Petition of Appeal dated 22nd June, 2023 as follows;-
 1. That he pleaded not guilty to the charge herein;
 2. That the trial court erred in both law and facts by failing to comply with Article 50(2) (g) (h) of the Kenyan Constitution 2010.
 3. That the trial court erred in both law and facts by failing to consider that the ingredients of the offence herein were not proved to the required standard in law.



4. That the trial court erred in both law and facts by not considering that there were serious contradictions which could not sustain a conviction but rather a total acquittal.
6. Reasons wherefore, the Appellant prayed that ;-
 - a. Leave of the court to supplement / amend more grounds of Appeal after receiving the lower court proceedings;
 - b. Conviction be quashed and sentence be set aside;
 - c. Retrial or any other order
7. The Prosecution's case was that the Complainant was sleeping in the kitchen with her siblings on 17th October 2022 when 'Shida' the Appellant herein went to where she was sleeping and started removing her panty and said 'nitakupiga na kisu'. That the said Shida then defiled her. PW1 said she was able to recognize the Appellant who held her tightly as there was moonlight that helped her recognize him as the door was open. PW1 said she knew the Appellant very well. That when the Appellant left PW1 informed her mother that it was Shida who broke into the kitchen and defiled her. PW1 went further to testify that when Shida went back a second time and tried to open the door to the kitchen she started making noise and her mother came out from the main house and she reported that Shida had defiled her. That her mother also started screaming as she called out the Appellants name and he ran away.
8. The Complainant's mother PW2 took her to Sibuoche Hospital the following day and when they did not find anyone to attend to her they went to Uriri Hospital where she was treated and referred to Uriri Police Station where the report of defilement was made.
9. The Complainant identified the Appellant in court as the person who defiled her on the material night. She also identified Lab test results, treatment notes, P3 and PRC forms, and Certificate for Birth as exhibits P,P2, P3 and P4 respectively.
10. In cross examination PW1 was categorical that the Appellant defiled her and that she was not coached on what to come and say in court.
11. PW1 said that they arrived at the Police Station at 9.00pm and she was given a place to sleep as her mother went back home and the next day she was taken back to hospital and by Police Officers and her mother. The Complainant said that apart from having defiled her she had no problem with the Appellant. She said she did not know if the Appellant owed her mother any money. PW1 said she knew the Appellant as Shida. She said she had not been defiled prior to the incident herein. That it was the Appellant who was the 1st to have sex with her. She was emphatic that the Appellant defiled her and that what she said was the truth. She said that her mother reported the matter to her father but he was not concerned with the issue.
12. PW2 the Complainant's mother also gave her testimony to the effect that she was asleep in her house when she heard her daughter the Complainant herein screaming as if someone was strangling her. She said her husband was not around on the material night as he was working in a nearby home. She said she went out of the house and saw someone passing behind the house and the person told her he will kill her and her children. PW2 said she spoke with Shida the Appellant herein on the material night and they exchanged words. She said she saw the Appellant as he came from the kitchen where the children were sleeping and went behind the kitchen. PW2 said there was moonlight that enabled her identify the Appellant.
13. PW2 said she was in fear and she went and sat at a neighbour's fence as she saw the Appellant go towards the road and returned again and tried to open the kitchen's mabati door. That the Appellant then



fetches water from a drum near the kitchen but when she raised alarm nobody responded and the Appellant just walked away.

14. PW2 said the Appellant was known for defiling young girls and when she saw him she suspected he had defiled the Complainant as she heard her scream that someone was strangling her and PW1 also told her she had been defiled by Shida.
15. PW2 said that the following day she went to look for money and took the Complainant to Sibuoche Hospital and later to Uiri Hospital at around 8.30pm and to the Police Station at around 9.00pm. That at the minor was left to spend the night at the station as she went back home and returned the following day.
16. PW2 identified the Appellant in the dock as the person who went to her home on the material night and defiled her daughter. She said she had never had any conflict with the Appellant before the incident herein and the Appellant did not owe her any money. She said that when the Appellant went back after the incident he insulted her and threatened to kill her and her children.
17. In cross examination the witness said that she was afraid the Appellant could kill her and her children. She said she never asked if the Appellant was circumcised and she never gave him any alcohol or even undressed him. She said that although she sells alcohol she had never sold to the Appellant. PW2 went further to say that she did not have Appellants panga neither did he owe her any money.
18. The witness said further that she did not know Jeremiah and she did not send him to till the Appellants land. PW2 said she had an exchange of words with Shida on the material night when he threatened to kill her and her children. She also said that she knew her husband was away but she just called him out. She said she did not know any other Shida in the village except the Appellant. She said she had not used any money at the police station or at the hospital.
19. PW3 P C Luciana Akoth Moses investigated the offence herein. She testified that on 17th October 2022 at around 21:00hours she was called to attend to a defilement case that had been reported at Uiri Police Station by the Complainant's mother.
20. That she booked the report and escorted the girl to Uiri Sub_ County Hospital the following day and she was examined and treated and P3form duly filled. PW3 recorded statements of witnesses and visited the scene which she established that the house from which the Complainant was defiled was a mud house and there was a hole near the door such that someone could open the mabati door from outside.
21. That she was led to the home of the suspect by the complainants mother and she was assisted to arrest him by her colleagues. PW3 produced the Certificate for Birth for the Complainant.
22. In cross examination PW3 said she did not take photographs of the scene to confirm there was a hole. She said the Complainant was examined and it was established she was defiled.
23. PW4 the Clinical Officer Maureen Adhiambo Omondi produced treatment notes for the Complainant, P3 and PRC forms and Laboratory request form, She said she examined the Complainant who was presented with history of defilement and she made an impression of defilement although the broken hymen was not fresh and there was no laceration noted, Lab tests were negative on VDRC, pregnancy, HIV and Hv did not reveal spermatozoa. She said blood cells seen in urinalysis was a sign of infection and STD of Trychomoniasis, That PW1 was put on emergency contraceptive and treatment for STD and HIV.
24. In cross examination the Clinical Officer said she did not examine the Appellant as he was not presented to him and he did not compare results for the Complainant to those of Appellant. She said she did physical examination and that penetration is established by broken hymen and injuries. She also said



- that vaginal discharge was present and penile penetration was reported. She also said that the discharge did not have foul smell and that the minor could have been involved in sex earlier as she had no lacerations, pain or tenderness on examination. She said it was not the 1st time the Complainant's vagina was penetrated.
25. The Appellant in his sworn testimony said that he was arrested on 24/10/22 at around 1:00p,m when he was at home. That three police officers in civilian clothes told him that somebody had reported that he defiled their daughter. He said that he didn't commit the offence and pleaded not guilty. The Appellant testified that a certain woman in her village known as Nyagoro is ill gotten and always refused to greet him that it is that lady who claimed that he defiled his daughter. The Appellant further said that the said lady gave him 800/= and said she wanted to plant on his land and she gave her the go ahead. He said that his mother had hired the same land to somebody else but that person was sent away to allow Nyagoro to use it. The Appellant also claimed that one time he met the complainants mother and she asked him if he was circumcised. The Appellant also said that the complainants mother welcomed him to take his visitors to drink because she brewed alcohol. That one time when he went with 6 of his friends to drink the complainants mother refused to take 1000/= and gave them liquor for free.
 26. That later he found the complainant mother naked and he also removed his clothes that when he asked the complainants mother she just laughed about and he did not know the motive of undressing him. The Appellant said he has never defiled a child and the charges are not true.
 27. The Appellant also said that the medical evidence didn't established that defilement was there as no spermatozoa and bruises, he also said that the complainant refused to talk during cross examination because she was forced to testify. That although the complaint said that the assailant carried a knife it was not indicated in her statement.
 28. In cross examination, the Appellant said that the complainant's mother was after him but he didn't bring the people he was drinking with as witnesses and he could not remember the date when he undressed him in the kitchen. He said that he owed the complainants mother 800/= but he didn't owe the minor any money. He confirmed that the minor knew him.
 29. In the Appellants submissions he argued that he was confused when the trial court did not specify which part of Article 50 (2) it was referring to and that is why he faulted the court that the provision of Article 50(2) (g) and (h) were complied with. The Appellant submitted further that the P3 Form didn't support the evidence that the offence was committed on 17.10.22 at 0100 hours. According to the Appellant the complainant made a report to Uiri Police on 17.10.22 at 2105 hours meaning the report was made before the offence was committed. He also submitted that the confirmation by the prosecution on 13.12.22 that they had supplied him with charge sheet was against the provisions of Article 50 (2) and (c) of *the Constitution*.
 30. The Appellant further submitted that since the offence was committed at midnight there was 100% possibility that he was a mistaken identity. He also said that the ingredient of penetration was not proved because the medical officer told the court that the hymen was not freshly broken and the Complainant was diagnosed with STI but he was not tested to confirm that he had an infection that was transmitted to the complainant. The Appellant argued that he was fabricated because of the grudge he had with the complainant's mother.
 31. The Respondent's submissions are dated 16th October 2024 and are to the effect that the Prosecution proved all the ingredients of the offence of defilement to the required standards. It was argued that the evidence of the Complainat as to penetration was cogent and the same was corroborated by PW4 the Clinical Officer that the hymen was broken



32. It was further submitted that the age of the Complainant was also proved by production of Certificate of Birth to show minor was born on 14.01. 2009.
33. On identification of the perpetrator the Prosecution contended that the Appellant was identified by the use of light from the moon when he was seen opening the door to get into the kitchen and when leaving as he was known to the Complainant.
34. The Respondent in a rejoinder to the Appellant's submissions said the he was informed of his rights to legal representation and he chose to represent himself. That the charge against him was clear and the Appellant was supplied with statements of witnesses and matter proceeded to full trial.
35. Further that there was reasonable explanation why it took 34 hours before the minor was taken to hospital.
36. On issue of mistaken identification, the Respondent argued that the Appellant was known to the Complainant and he was identified with the use of moonlight when he held her tightly and closed her mouth.
37. Concerning sentence the Respondent submitted that the trial court exercised discretion to pass sentence which was just and proportional in the circumstances.
38. The court was urged to dismiss the appeal as it lacked merit.

Analysis and Determination

39. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose v R* [2013] eKLR thus;

“... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
40. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are whether the ingredients of the offence of defilement were proved beyond reasonable doubt.

Section 8 (1) as read with 8(3) of the *Sexual Offences Act* provides:

- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.....
- A person who commits an offence of defilement with a child between the age
- (3) of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

41. The key ingredients of the offence of defilement are:-
 - a) age of the victim,
 - b) proof of penetration and
 - c) identification of the assailant.



42. The Court of Appeal in the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR stated as follows on proof of age.
- “... 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.”
43. The age of complainant was proved by production of exhibit 4 Certificate of birth which shows that she was born on 14.1.2009. The treatment notes from Uriri Sub County Hospital Exhibit 1 and P3 Form Exhibit 2 shows that the complainant was 13 years. Evidence by the complainant that she was born on 14.1.2009 is therefore corroborated.
44. Whether there was prove of penetration Section 2 of the Sexual Offence Act defines penetration:-
- “As partial or complete insertion of the genital organs of a person into the genital organs of another person.”
45. The complainant testified that the Appellant broke into the kitchen where they were sleeping at 1:00 a.m and while threatening to stab her with knife did bad manners to her. While pointing at her vagina she said alichukuwa kitu chake akaweka kwa kitu changu she said that the Appellant held her tightly and closed her mouth. That she saw her eyes and saw that it was Shida as there was moonlight which came through the open door. Although medical evidence did not establish physical injuries on the complainant’s genitalia. Absence of such physical injuries in not necessarily evidence of lack of penetration. The trial magistrate observed that eth complainant was a truthful witness and evidence was corroborated by that of the mother PW2 that on the material night the Appellant went to their home and sexually abused the complainant. This court therefore finds that there proof of penetration and the prosecution proved that ingredient beyond reasonable doubt
46. On whether the Appellant was properly Identified as the Perpetrator
47. The Appellant was known to complainant (PW1) and her mother (PW2). She narrated vividly how Appellant broke into the kitchen held her tightly and defiled her after holding her mouth to prevent her from screaming and threatened to stab her with a knife. When he came a second time and attempted to enter the kitchen again the complainant screamed and her mother came out and saw the Appellant whom he called by name and he ran away. The complainant and her mother recognized the Appellant who was known to them as the assailant. The complainant said she had no problem with the Appellant save for the issue of defilement.
48. The complainant said she was not aware her mother owed Shida any money and that it was only the appellant who was the 1st to have sex with her. The complainant said she had said the truth.
49. PW2 Millicent Auma (complainant’s mother) said when she was sleeping at 1:00a.m she heard the complainant scream like someone was strangling her and she got out as her husband was not around and she saw someone pass behind the house. She said the person told her “I will kill you with your children and she recognized the person as Shida the Appellant herein. She said she exchanged words with the Appellant as he went behind kitchen where the children were sleeping and walked to the road. PW2 said the Appellant returned and pushed the kitchen door again and she screamed.



50. From the evidence of PW1 and her mother it is clear that they were able to recognize the Appellant on material night as the one who intruded to their home and defiled the complainant. PW2 said they exchanged words with the Appellant who threatened to kill her and her children.
51. The Appellant claimed that there was bad blood between him and the complainant's mother but PW2 denied the allegations in cross examination and said that the Appellant did not owe her any money. The Complainant also said that she was not coached to fabricate the Appellant and that she had no problem with Appellant save for the fact that she was defiled she was also not aware that her mother owed the Appellant any money. The Appellant did not call any evidence to prove that he had differences with PW2 that would make him to be fabricated.
52. The Appellant was sentenced to serve 20 years imprisonment upon the trial Magistrate considering his mitigation and the circumstances which the offence was committed in that the Appellant threatened to kill the complainant's mother and her children leading to the Complainant being traumatized and even broke in court. That sentence is lawful and this court cannot interfere with trial magistrates exercise of discretion.
53. This court therefore finds that this appeal has no merit and the same is dismissed.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF FEBRUARY, 2025

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HON. JUSTICE A. ONGINJO

JUDGE

In the presence of: -

