KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Shiundu v Director of Public Prosecution (Criminal Appeal E056 of 2023) [2025] KEHC 1688 (KLR) (10 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1688 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E056 OF 2023

S MBUNGI, J

FEBRUARY 10, 2025

BETWEEN

DICKSON OMWATA SHIUNDU .... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION .... RESPONDENT

(Being an appeal from the conviction on 11.10.2023 sentence on 11.11.2023 by Honorable E. Wasike- PM at Butere in Sexual Offence No. E026 of 2021)

JUDGMENT

Introduction

1. The appellant was charged defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 26th day of March, 2021 at Kakamega County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.A(name withheld) a child aged 13 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* of 2006. on the 26th day of March, 2021 at Kakamega County, the Appellant intentionally touched the vagina of S.A(name withheld) a child aged 13 years with his penis.

3. During trial the prosecution called four witnesses who testified in support of their case. The appellant was placed on his defence and testified as the only defence witness. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and proceeded to sentence him to serve twenty (20) years imprisonment.

Facts at Trial.

4. PW1 S.A, was the complainant. After the court ascertained that she understood the importance of oath, she gave a sworn testimony. She told the court that she could not recall the date of the incident but it happened at 8:00 pm. She stated that earlier on, she was in their compound playing with her friends J and R She recalled that she was on the road with a stolen phone which belonged to a certain woman, whose name she could not remember. She stated that she stole the phone when she visited her friend. She stated that she was afraid to go home and instead went on the road, where she met the accused person who held him by the hand and told her that he was taking her to Marenyo police station for stealing the phone. She recalled that the accused took her to the bush instead, forcefully removed her clothes and underwear, removed his trousers only and did "bad manners" to her. She stated that she tried to scream but the accused threatened that he would kill her. She further recalled that they were in the bush for about an hour then parted ways. She told the court that she spent the night in an unknown woman's house and went to her mother's friend's house the next day, where her parents came to pick her and took her to Marenyo Police Station. She stated that she was interviewed by a policeman and she told her what had happened. She was taken to Butere sub-county hospital for examination, then back to Marenyo police station where his father paid for the stolen phone. She identified the accused person and told the court that he did not know him but they resided in the same area.

5. On cross examination, she stated that she was away from home for 4 days and not 3 weeks. She stated that she stole the phone from her friend Purity's home. She stated that after church, she went to Sandra's place where she stayed for the night and left the next day. She stated that she was confronted by the accused person at their gate for theft. She further stated that she did not give the accused person's description to the police.

6. PW1 testified that he saw the accused person in the moonlightI cannot remember what kind of clothes he was wearing. She stated that she never screamed because she thought the accused was taking her to the police station and only tried to scream while at the bushes.

7. PW2 was IE, mother to PW1. She told the court that PW1 was 13 years at the time and produced her birth certificate. She recalled that PW1 left home with her friend to go to a church function and did not return home. She stated that they began searching for her in the area until she was informed by a herdsman that he had spotted PW1 walking along the road. She left with PW1's father to get her and as they approached PW1's friend's home, they spotted her. She told the court that since they did not want PW1 to flee, they sent the bodaboda operator to go and start conversing with her while they hid in a bush, they then grabbed her and took her away. She stated that PW1 was unkempt, and upon being asked about her whereabouts and what happened to her phone, she started crying and told them that her phone had been taken away by 'Shiundu'. They then took her to Marenyo Police Post and went home. Later on, she was called by a police woman and told to go to the police post immediately. She was informed that PW1 claimed she had been raped and she checked her private parts and confirmed that she had been defiled. She took PW1 to Butere Hospital the next day.

8. Upon inquiring from PW1 what had happened, she stated that PW1 told her of what had transpired and that thereafter, PW1 recalled that the accused carried her on his shoulders, took her home, and locked her in his house for two days. She told her mother that she escaped on the 3rd day and went to her friend's home where she was spotted by the herdsman.

9. She further stated that the accused was known to her, and upon realizing that they had reported the matter, he tried to plead with them to settle the matter, but they declined. On cross examination, she stated that PW1 had been missing for 3 days.

10. PW3 was Kamila Khaemba a clinical officer formerly attached Butere sub-county hospital produced treatment notes and a P3 form in respect to the complainant. On examination, it was found that the hymen was absent, P.T.T.C was negative, pregnancy test was negative, pus cells and epithelial cells were present and urinalysis showed leucocytes(milky). Based on these, she concluded that PW1 had been defiled. On cross-examination, she stated that she filled the P3 form, but PW1 was not examined by her.

11. PW4 No. 245795 PC Nancy Kaei, standing in for PC Ideal Ituku who had been transferred. She recalled that PW1 had reported that she had been defiled by the accused person who was well known to her. She stated that she recorded witness statements, issued a P3 form to the complainant and referred her to hospital where she was examined and treated.

12. The evidence of PW4 marked the close of the prosecution case after which the Court ruled that a prima facie case had been established and the accused person was placed on Defence.

Defence Case

13. The Appellant elected to give unsworn evidence and recalled that on 26.03.2021, he was at home with his wife and children. He told the court that he did not defile PW1, and if he did, considering her age, she would not be able to walk. He stated that no evidence had been submitted from school to show that she had been absent. He also questioned the duration of absence, stating that PW2 had stated that PW1 had disappeared for 3 days whereas the doctor had said 3 weeks. He also stated that the medical report did not find any abnormalities in PW1's vagina. Further, he stated that the evidence showed that PW1 was rescued by a good Samaritan, who was not called as a witness. He told the court that PW1's mother used to be his girlfriend before the complainant was born and that the matter was a vendetta.

14. The trial court considered the evidence adduced and found the Appellant guilt of the offence of defilement. In mitigation, the appellant maintained his innocence, and pleaded for the court's leniency and consideration. The court called for a pre-sentencing report. None was filed. The trial magistrate proceeded to sentence the accused to twenty (20) years imprisonment.

15. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on the following grounds: -

    i. That the learned trial magistrate grossly erred in law and facts in convicting me without considering that the main ingredients of defilement was not proved beyond reasonable doubt.

    ii. That the learned trial magistrate erred in law and facts by erroneously basing my conviction on evidence that was contradictory, inconsistent, uncorroborated, fabricated, afterthought and malicious in nature.

    iii. That the learned trial magistrate erred in both law and facts by convicting him on evidence which did not meet the required standard.

    iv. That the learned trial magistrate grossly erred in both law and facts by failing to consider that the medical evidence adduced were inadequate and were not enough to proof the said offence.

    v. That, the learned trial magistrate erred in law and facts by not appreciating and evaluating my plausible defense.

    vi. That, the learned trial magistrate erred in both law and facts by failing to consider that I was a layman in who deserves to be represented by an advocate which really offended Article 50 (2) (g) (h) of the C.O.K 2010

vii. That more grounds will be adduced during the hearing of and after receiving the proceedings of the trial court.

16. The appellant prayed that the appeal be allowed, conviction quashed, sentence set aside, or a retrial be ordered.

17. The merits of this appeal were canvassed by way of written submissions.

Appellant’s submissions

18. The appellant filed supplementary grounds of appeal together with his submissions as follows:

    i. That, the trial court erred in law and in fact in conviction the appellant relying on inconclusive evidence of identification of a single eye witness under difficult condition uncorroborated and without testing with greater care.

    ii. That, the trial court erred in law and in fact in conviction the appellant relying on prosecution evidence that did not prove the charges.

    iii. That, the trial court erred in law and in fact in proving penetration by the appellant where the victim had a Sexually Transmitted Infection and the appellant did not have the same.

    iv. That, the trial court erred in law and in fact in not weighing the conflicting evidence in the prosecution case that were inconsequential to conviction.

    v. That, the trial court erred in law and in fact in not appreciating the appellant's defence that overwhelmed the prosecution case.

    vi. That, the trial court erred in law and in fact in not making a finding that the appellant's sentence should run from the day he lost liberty.

19. It was the appellant’s submission that the trial court erred by relying on inconclusive evidence of identification of a single witness under difficult condition without testing with greater care. The appellant submitted that there were gaps in PW1’s testimony who said that the incident happened at 8.00 pm for a period of one hour, in the darkness the only source of light was moonlight. The appellant averred that despite PW1 stating that she did not know the perpetrator, she was able to identify him at the dock and stated that he was from their area. The appellant further avers that there was no properly conducted identification parade to corroborate PW1's dock identification. He placed reliance on the case of Benard Gitonga Karanu Vs Republic (2019) eKLR.

20. The appellant submitted that PW1 did not testify to the court that she gave her mother (PW2) the name of her perpetrator as a person known to her as ‘Shiundu’ hence PW2's evidence contradicted PW1's evidence on the same.

21. The appellant further submitted that PWl’s identification was only inclined to the person she was seeing at the dock at that moment, as she did not give the police the description of her attacker, neither could she remember what kind of clothes her attacker was wearing,

22. It was the appellant’s submission that the prosecution evidence did not prove the charges since the charge sheet indicated that the incident happened on 26.03.2021, yet PW1 testified that she could not recall the day of the incident. To add on this, PW2 recalled that PW1 left home on 10.04.2021 hence there was likelihood that she was home on 26.03.2021 and not defiled. The appellant submitted that PW3 did not inform the court when PWl was treated, treatment notes given, or P3 form filled and neither did PW4 state the complainant reported the accident and was given the P3 form.

23. The applicant further averred that both the testimony of PW1 and PW2 had inconsistencies regarding her whereabouts, before, during and after the incident and it was impossible to know who was telling the court the truth.

24. Lastly, the appellant submitted that the trial court did not consider his defence that there was a grudge between him and PW2 with whom he previously had a relationship with.

Respondent's submissions

25. On grounds 1, 3 and 4 raised by the appellant in his petition of appeal, the respondent submitted that the offence of defilement is rooted on three main ingredients being proof of age of the victim (must be a minor), proof of penetration and proper identification of the perpetrator.

26. The respondent submitted that the ingredient of age was proved by the production of a birth certificate of the victim which showed that she was born on 04.07.2008 hence she was 12 years and 8 months at the time. Additionally, the mother of the victim also in her testimony confirmed the age of the victim.

27. The respondent submitted that the ingredient of penetration was proved by the victim in her testimony in court where she narrated that the Appellant forced her to have sex with him in bushes where he dragged her to. Her testimony was collaborated by P3 who was a clinician by the name Kamila Khaemba who testified that on examination it was found that; hymen was broken, puss cells were present, epithelial cells were present and there was a whitish discharge from the vagina.

28. On the Proper Identification of the perpetrator, the respondent submitted that the complainant testified that she identified the Appellant when he approached her on the road and spoke to her (by use of moonlight), further in the victim's testimony it was clear that the victim knew the Appellant before the incident as she used to meet him on her way to school, he was also their neighbor as confirmed by PW2 the victim's mother.

29. The respondent further submitted that PW2 testified that the Appellant after a report was made to the police approached them to have the issue settled at home thus the Appellant was well identified.

30. Further, the respondent averred that the Appellant has not specified what contradiction and inconsistency was in the evidence given in the trial court as the evidence given by the victim was collaborated by PW2 and the medical documents produced save for some minor details on dates and number of days she had disappeared, which can be credited to the fact that the victim was a minor and thus do not affect the credibility of a witness and cannot vitiate a trial.

31. On whether the trial court evaluated the appellant's plausible defence, the respondent submitted positively and averred that the defence tendered by the appellant was a mere denial and discrediting the evidence advanced and which fell short in comparison to the overwhelming evidence by the prosecution.

32. The respondent further submitted that the record showed that the appellant was sufficiently informed of his right to legal representation, hence could not claim ignorance on the same since he opted to proceed with the case in person.

33. On sentence, the respondent submitted that the sentence that was meted to the Appellant was lawful and commensurate to the offence as provided by Section 8 (3) of the *Sexual Offences Act*. The respondent submitted that the Supreme Court in Petition No. E018 Of 2023 Republic V Joshua Gichuki Mwangi affirmed that sentences meted under section 8 of the *Sexual Offences Act* are lawful and prayed that the appeal be dismissed in its entirety and the conviction and sentence be upheld and confirmed.

Analysis and Determination.

34. This being first appellate court, it is guided by principles set out by the court of appeal in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the court stated as follows:

> "The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

35. I have looked at the grounds of appeal, the submissions filed by the parties, the lower court proceedings and the trial court's judgment.

36. The issue for determination is I find the following broad issues for determination.

    I. Whether the prosecution proved the case beyond reasonable doubt.

    II. Whether the defence of the appellant was considered.

    III. Whether the sentence meted by the trial court was commensurate.

Issue 1: Whether the prosecution proved the case beyond reasonable doubt.

37. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provides:

    8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    8(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."

38. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    i. Age of the complainant

    ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*

Positive identification of the assailant.

39. The Court of Appeal in Edwin Nyambogo Onsongo Vs. Republic (2016) EKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... 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

40. The ingredient of age was proved by the production of a birth certificate of the victim as PEXH 3 which showed that the victim was born on 04.07.2008 thus was 12 years 8 months' years old at the time of the offence. PW2 who was the victim's mother also testified that PW1 was aged approximately 13 years at the time.

41. The essence of proving the ingredient of age was stated in the case of *Benard Kiptoo v Republic (Criminal Appeal 1 of 2020)* [2021] KEHC 1125 (KLR) where the court stated:

> " Age of the victim in sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the evidence to the imposed will be dependent on the age of the victim. See also the case of Hadson Ali Mwachongo Vs R by the court of Appeal in Mombasa, where the court stated:
>
> "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 the victim."

42. On the proof of penetration, penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person."

43. The act of penetration can be proved by the testimony of the victim or medical evidence or any other evidence.

44. In the case of Andrew Runya Munga VS REP (2021) Eklr the court held that:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and collaborated by the medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration..."

45. PW1 testified that the appellant dragged her into the bushes and defiled her for a period of approximately one hour. Her evidence was corroborated by the medical evidence of PW3 who was the clinician.PW3 testified that upon medical examination, it was found that the hymen was broken, puss cells and epithelial cells were present, and there was a whitish discharge from the vagina, all which were consistent with penetrative sexual intercourse. So I find this element proved.

46. The question remains, was the appellant the perpetrator? The minor stated that the accused lived about a kilometer from their home and that she usually met him on her way to school. She told the court that she knew the accused person as 'Shiunda' and identified him as the person on the dock. She testified that she was able to see the accused person in the moonlight. PW2 also Told the court that PW1 informed her that she had ben defiled by 'Shiunda' who was known to PW2 and was their neighbor. The trial court in finding that the appellant was the assailant stated that the victim's demeanor in court, when cross-examined by the Accused's counsel regarding the identity of the perpetrator was firm and

resolute. She was able to connect the accused person with the offence. There is no plausible reason why PW1, a child, would lie regarding the identity of her defiler.

47. In the case of R vs Turbull and Others (1976) 3 ALL ER 549. Lord Widgery C.J had this to say: -

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" was the observation impended in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before" How often" if only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

48. The law requires the trial court to carefully scrutinize evidence of a single identifying witness and only convict if satisfied that it was free from possibility of error or mistake. In Wamunga versus Republic [1989] KLR 424 the Court of Appeal stated thus:

> 'It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction'.

49. In my view, the evidence by the prosecution leaves no doubt that it was the appellant who defiled the minor. He was very well known by the complainant as a neighbor.

50. In the upshot, I find that the Appellant was positively identified as the assailant herein. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not commit any error in finding the appellant guilty and convicting him for the offence of defilement.

Issue 2: Whether the defence by the appellant was considered.

51. In his defence, the appellant stated that there was no evidence from PW1's school that showed she has been absent. He also stated that there was inconsistency in the period as to which PW1 had been away from home. The appellant averred that the medical report did not find abnormalities in PW1's vagina. He further contended that the good Samaritan who rescued PW1 was never called as a witness and insisted on his innocence, stating that the whole matter was a personal vendetta since PW2 used to be his girlfriend.

52. I have gone through the lower court proceedings and judgment. The trial magistrate, in his judgment, clearly stated despite the efforts by the accused person to discredit the whole case, his defence fell short of controverting the overwhelming evidence that clearly implicated him. I therefore find that the accused's defence was considered by the trial court before it pronounced its judgment.

53. The appellant in his defence, also told the court that the person who rescued the accused was not called in as a witness by the prosecution.

54. Under Section 143 of *Evidence Act* (Cap 80) Laws of Kenya,

> no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

55. As is clear, even the evidence of a single witness if believed would be sufficient to prove a fact in issue and essential to secure judgment on conviction. In the case of Alex Kapunga & 3 others v R CR Appeal No. 252 of 2005 the Court of Appeal Tanzania revisited the issue and stated that:

> " The fact that there are discrepancies in a witness testimony does not straight away make him or her unreliable witness and make the whole of his or her evidence unacceptable."

56. The Court of Appeal of Uganda in Okwang Peter v Uganda held as follows: -

> " Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favoring correct identification were difficult.
>
> In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error"

57. In the case of Keter v Republic [2007] 1 EA 135 the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

58. In the case of Bukenya & Others vs Uganda [1972], the court was clear that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will therefore only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. I therefore find that this defence by the appellant fails since the prosecution proved its case beyond reasonable doubt.

Issue 3: Whether the sentence meted by the trial court was commensurate.

59. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 which states as follows:

> " (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" (emphasis mine)

I therefore find that the sentence of twenty (20) years' imprisonment meted by the trial court was proper.

60. From the record, the appellant was arrested on 24.04.2021 and arraigned in court for plea taking on 25.04.2021. He was released on bond on 28.06.2021. The accused was in custody for one month from the date of judgment being 11.10.2023 to the date of sentencing on 11.11.2023.

Conclusion.

61. The appeal succeeds on sentence only. The conviction is upheld.

62. I order that 3 months be subtracted from the 20-year sentence meted to the accused person in accordance to the provisions of Section 333(2) of the *Criminal Procedure Code*. For avoidance of doubt, the accused shall serve a sentence of 19 years and 9 months.

63. Orders accordingly.

64. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Appellant – present

Court prosecutor - Ms. Osoro present

Court Assistant – Elizabeth Angong'a