Shakir v Republic (Criminal Appeal E059 of 2024 & E001 of 2025 (Consolidated)) [2025] KEHC 5914 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5914 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E059 OF 2024 & E001 OF 2025 (CONSOLIDATED)

JN ONYIEGO, J

MAY 9, 2025

BETWEEN

MOHAMMED ABDIRIZAK SHAKIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Dadaab SPM Criminal Case No. E015 of 2023 delivered on 18.12.2024 by Hon. E. Muleka (SPM)

JUDGMENT

1. The appellant was charged on Count I with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 19.10.2023 and 20.10.2023 in Dadaab Sub-County within Garissa County in association with another not before the court intentionally and unlawfully caused his penis to penetrate the vagina of IAGM, a child aged 16 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 19.10.2023 and 20.10.2023 in Dadaab Sub-County within Garissa County in association with another and in turns intentionally touched the vagina of IAGM a child aged 16 years with his penis.

3. On Count II, he was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. Particulars of the charge were that on 19.10.2023 and 20.10.2023 in Dadaab Sub-County within Garissa County in association with another not before the court and in turns he intentionally and unlawfully caused his penis to penetrate the vagina of SAA without her consent.

4. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 19.10.2023 and 20.10.2023 in

Dadaab Sub-County within Garissa County in association with another and in turns he intentionally touched the vagina of SAA with his penis without her consent.

5. He pleaded not guilty to the charges and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case.

6. At the close of the prosecution's case, the trial court ruled that a prima facie case had been established against him thereby placing him on his defence.

7. The appellant was subsequently convicted and consequently sentenced to 15 years imprisonment.

8. Being aggrieved by the determination of the trial court, the appellant, through his Advocates Ongegu & Associates filed a petition of appeal dated 23.12.2024 citing the following grounds:

    i. That the learned magistrate erred in law and facts by convicting him notwithstanding the fact that the prosecution did not prove its case.

    ii. That the learned magistrate erred in law and facts by convicting the appellant notwithstanding that the prosecution's case was marred with inconsistencies.

    iii. That the learned magistrate erred in law and facts by shifting the burden of proof to the appellant.

    iv. That the learned magistrate erred in law and facts by convicting the appellant notwithstanding that the charges herein were defective.

9. Besides this appeal, the appellant filed another appeal being Cr. Appeal No. E001/2025 which was consolidated with Cr. Appeal No. E059/2024 which is the lead file.

10. The court directed that the appeal be canvassed by way of written submissions.

11. The appellant via submissions dated 11.03.2025 urged that the evidence by the prosecution did not prove the elements of the offence herein beyond any reasonable doubt. That in the case of George Opondo Olunga vs Republic [2016] eKLR the Honourable Court laid out the ingredients of an offence of defilement as identification or recognition of the offender, penetration and age of the victim.

12. It was urged that the prosecution's evidence was laced with inconsistencies more so in regards to the destination of the complainant. It was contended that the complainants gave varying testimony as to whether they were abducted while on the way to the salon or market. In the same breadth, counsel submitted that the Somali sword allegedly used to threaten the complainants was never produced in court.

13. That the medical evidence did not support the allegations by the complainant as the same noted that the vagina was not bruised, the anus was normal and everything else appeared to be in order. It was counsel's contention that the complainants' clothes were never presented before the court nor DNA evidence produced to support the allegations by the complainants. That there was lack of phone records and inconsistencies regarding contact information and therefore, the appellant could not authoritatively be linked to the perpetration of the offence herein.

14. It was contended that the Honourable Court convicted the appellant with an offence he was not charged with. That the trial court on page 27 paragraphs 1 – 4 of the judgment noted that the minor was gang raped by the 1st and 2nd accused persons while at pages 32 paragraphs *10 – 23* it proceeded to convict the appellant for defilement. The appellant wondered why the court had to single him out and convict him of the offence unlike his co-accused. That the court in its judgment acknowledged the fact that the complainants' evidence was marred with confusion. Further, that the appellant was

neither the owner of the two houses where sexual assault allegedly took place nor was he placed at any of the scenes of the alleged crime.

15. It was submitted that the medical evidence showed that the complainant was sexually active and as such, no lacerations was found in her vagina. That the court introduced evidence that had not been tendered. Further, that the investigating officer's evidence was based on hearsay as the critical witnesses were never called to testify in court. In the same breadth, counsel opined that the investigating officer's evidence is to the fact that only Ahmed and Sagal defiled the complainants. In conclusion, the appellant urged that names are important and noting that his did not appear in the complainant's evidence, this court ought to quash his conviction and set him at liberty.

16. The respondent in its submissions dated 12.03.2025 urged that the prosecution proved all the elements required to prove the offence herein and therefore, the appeal lacks merit. Counsel reminded the court that it was obliged to re-asses and re-evaluate the evidence afresh and make its own findings as was held in the case of Okeno vs Republic [1973] E.A32. It was contended that prosecution had proved the salient elements constituting the offence in question interalia; age, penetration and identification of the perpetrator. That in regards to age, the complainant was categorical that she was 16 years old and the same was corroborated by the medical evidence by PW5. In support of its case, the respondent relied on the case of Mwalongo Chichoro Mwanjembe vs Republic [2016] eKLR where the court held that the question of age can be proved by documentary evidence such as birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent.

17. On penetration, it was submitted that the complainant's testimony on how the appellant while holding a knife ordered her to remove her clothes and consequently, defiled her was sufficient. Counsel opined that pw1's testimony was well corroborated by the testimony of PW5 the clinical officer. On identification, it was urged that the appellant was a person well known to the complainant and therefore, there was no room for mistaken identity.

18. On sentence, the respondent relied on the case of Onesmus Safari Ngao vs Republic, Criminal Appeal No. 5 of 2020 where the court confirmed a mandatory sentence in a sexual offence case. That the appellant did not demonstrate that the trial court acted in excess of its powers or acted on evidence that was perverted. To that extent, this court was urged to uphold the finding of the trial court.

19. Learned counsel urged that sexual intercourse need not be proved by medical evidence. Additionally, that the appellant's case lacked merit and therefore, ought to be dismissed.

20. This being a first appeal; this court is duty bound to re-evaluate and re-assess the evidence afresh and arrive at its own independent conclusion bearing in mind that it did not see nor hear witnesses testify so as to be able to assess their general demeanour. See (Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.

21. Briefly, PW1, IA stated that she was aged 16 years at the material time and that she lived with her grandmother. That on 19.03.2023, together with her cousin S (PW2), they left her home to go to Ifo market where along the way, they bumped into a motor vehicle Alto by make. That the occupants of the said vehicle offered them lift. She stated that an occupant by the name of Mohamed was a person known to them and that after boarding the vehicle, the driver sped off and declined to stop at the market.

22. According to her, the said driver was not before the court. That the they were taken into a house within block A11 where they found a sick goat and therein, Mohamed and Ahmed forced them out of the car to the said house.

23. In the said house, they found Abdullahi who went to prepare them some tea as Ahmed and Mohamed removed their clothes and while armed with Somali swords ordered them to undress. That the appellant slapped her, removed her clothes and then proceeded to defile her. She stated that given that S was also in the same room, she could also see what was happening at her end.

24. That when the appellant was defiling her, Ahmed was on the other end defiling S. On the 2nd day, Abdullahi arrived at 8.00 p.m. having brought them some chapati and soup after which he took her to his room and defiled her. On 19th, they slept at Abdullahi's house from where she was taken to another room where the appellant and the suspect who is still at large spent the night. On 20th, they took them to Block A8 in the 3rd accused person's house where they found two people and therein, the 3rd accused slept with Sumeiya while the person who is still at large defiled her. That they were rescued on the 21st in the morning when her aunties and uncles arrived to the scene and took them away. She stated that the appellant was arrested when she called and told him to go to the market.

25. PW2, S testified that she was 18 years old at the material time and that on the fateful day, together with PW1, they had gone to the market to buy vegetables when they bumped into an alto car and the occupants offered them lift to Ifo market. That to the contrary, the driver of the said motor vehicle did not stop at the market and instead took them to a certain house where they were made to remove their clothes before being sexually assaulted. It was her evidence that Ahmed raped her and thereafter, the other person he was with also defiled her.

26. She stated that on the first day, the appellant and 2nd accused person raped her. That on the 3rd day, they took them to the 3rd accused person's house where they were also sexually assaulted. That they were helped by a certain lady, a neighbour known as Jocelaw by calling her mother who thereafter rescued them. The matter was reported to the police station and consequently, they were taken to the hospital for medical checkup and treatment. According to her, the appellant together with the other accused persons shared their numbers with them.

27. PW3, Barlin Mohamed Dudhe testified that he stays at Block x Ifo. That on 19.10.2023 at 1200 noon, he went for prayers at his house when S left home and never returned. He stated that he looked for her in vain and upon reaching 22.10.2023, a lady neighbour called and informed him that S was in block xx. That together with her two aunts, they went to the said Block xx where they found Ifrah, S and another boy who ran away. It was his evidence that he found them at 12 noon and that they were nude while the door was open. He stated that the gentleman that he found at the said house was not before the court. Later, they proceeded to Ifo Police station and recorded their statements. On cross examination, he stated that S was his daughter while Ifrah was his niece. That they were away for three nights.

28. PW4, Hani Mogadin testified that she stays at [Particulars Withheld] camp and that she knew PW1 and PW2 her niece. That on 19.10.2023, PW2's mother visited her thinking that she had the girls (complainants) at her house. Upon informing her that they were not around, they started searching for them. That at some point, someone called PW2's mother and informed her that they were at block xx. That they found the girls naked at Jocelow's house with another young man who upon seeing them ran away. They therefore locked the house and took the key to the police station. She stated that the house belonged to Jocelow and that the girls told them that the boys raped them.

29. PW5, Kiprop, medical officer testified that on 22.10.2023, PW1, a 16-year-old girl was presented to the Ifo hospital with a history of defilement. That she had gone missing together with her friends for several days. On examining PW1, it was his view that she was well oriented and that the alleged incident had been perpetrated between 48 – 72 hrs prior to the examination. That the clinical diagnosis was determined as harm. He stated that there was no discharge of blood, hymen was broken, vaginal swabs

were done and urine tested. He stated further that there was presence of epithelial cells and from the information, the complainant was sexually active. He presented the age report, P3 Form, treatment notes and Lab request form as Pex 1,2,3 and 7 respectively.

30. He also stated that he filled the P3 form for PW2 who was 17 years after complaining of having been defiled. That upon examination, the complainant was clean and dry and further, there were no physical injuries. On the genitalia, the hymen was broken. Upon performing lab tests on pregnancy, syphilis and H.I.V, all were found to be negative.

31. He also observed that the complainant was also sexually active and having reported for treatment late, the examination was inconclusive. He stated that the complainant reported that she was 17 years old while in real sense she was 18 years old. He produced P3 Form, Treatment notes, Age assessment report, and lab request form as Pex. 4,5,6 and 7 respectively.

32. PW6, No. 25xxxx Cpl. Erik Atambo testified that he was the initial investigating officer hence conversant with the matter. That the case was reported at Ifo Police Station that PW1 and PW2 were defiled. He reiterated the evidence of the other prosecution witnesses.

33. According to him, PW1 was 16 years old while PW2 was 18 years at the time when the offence was allegedly perpetrated. It was his evidence that the complainants were sexually assaulted in turns as the medical evidence supported the same. He stated that Ahmedrizak penetrated PW1 while Abdullahi and Sagal penetrated PW2. That the other suspect person was still on the run.

34. DW1, Mohamed Abdirizack in his sworn evidence denied committing the offence herein. He argued that he was simply framed. That the evidence by the prosecution did not prove that indeed the complainants were penetrated. It was his defence that it was not plausible for the complainants to be kidnapped at the market noting that such a place would ordinarily be full with people. He further stated that his co-accused were strangers to him.

35. DW2, Abdullahi Sygal Ahmed in his unsworn statement denied the offence. He denied ever communicating with the complainants. He stated that at the time when the incident allegedly occurred, he was not within the camp. That he had gone to Garissa to visit his sick dad and only returned because of his sick mother. He stated that the evidence of the complainants was contradictory in nature as one stated that they were taken into the said houses at 2.00 p.m. while the other stated that it was 2.30 p.m. He wondered how the complainant could fail to scream yet there were neighbours around.

36. DW3, Ahmed Abdullahi Shurie in his unsworn evidence denied committing the offence charged. He stated that PW2 was an adult and further, she did not scream for help. That the parents of the girls stated that they were missing for three days yet the complainant stated that they were away for only two days. That he was a family man and the same notwithstanding, the medical officer stated that the girls were not virgins.

37. I have considered the grounds of appeal, the trial court's record and parties' written submissions. Grounds that arise for determination are:

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the sentence imposed was manifestly harsh or excessive.

38. The appellant was charged with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* which provides as follows: -"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence

termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life."

39. Elements of the offence of gang rape or gang defilement under Section 10 of the *Sexual Offences Act* can therefore be sieved as: -a. Unlawful sexual act committed in association with another or others or b. Being in the company of another or others who commit the offence with the common intention of committing the offence.

40. Accordingly, a person who may not have engaged in the actual sexual act of defilement can be found guilty of gang rape or defilement if, with the common intention of committing the offence, he is in the company of another or others who actually commit the offence.

41. For gang defilement to be proved besides the above, the three ingredients of defilement age of complainant, penetration, and identification of assailant must be proved. See Charles Wamukoya Karani vs Republic criminal appeal No.72 of 2013 where the court held that;

> " the critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailants".

42. Similar position was held in the case of Fappyton Mutuku Ngui vs Republic (2012) eKLR where the court held that;

> " ...that "conclusive proof of age in cases under *sexual offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases".

43. In the instant case, the complainant(pw1) confirmed that she was 16 years old. The medical assessment report produced by pw5 equally, confirmed that she was 16 years old. From these evidence, I have no doubt the complainant was 16 years old at the material time.

44. The next issue which is critical is whether there was proof of penetration. Pw1 and pw2 gave detailed testimony how the appellant and his two co-accused offered to give them a lift to ifo market. That upon reaching the market, they did not stop. That they took them up to some house where they forcefully had sex with them in turns for three days. They further stated that the assailants kept moving them from one house to the other.

45. According to pw5 the clinical officer who examined the complainants, merely did routine examination which did not reveal that the two had been defiled. The report indicated that the two complainants were sexually active hence hymen was missing. On cross examination by the 3rd accused, pw5 said that the complainants had reported late hence his report was inconclusive. From the medical evidence, there is little help offered in establishing sexual contact or assault.

46. The question is whether a court can convict based on the evidence of the victim alone even without proof of medical evidence on penetration. It is trite that medical evidence is not the only method of establishing penetration. In circumstances where it is clear that the assailant did indeed make love with the victim and the court is satisfied of the truthfulness of the victim, it can convict. In the instant case, there was no independent witness who saw the appellant defile the complainant.

47. It therefore means, the evidence available is that of the victims alone. I am aware that under section 124 of the *evidence Act* a court can convict based on the evidence of a single witness(victim) in sexual offences if the trial court is satisfied that the victim is telling the truth. In the circumstances of his case,

the court did not caution itself of the truthfulness of the victims. See Arthur Mshila Manga vs Republic (2016) eKLR where it was held that;

> " From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

48. In the case of John Mutua Munyoki v Republic [2017] KECA 376 (KLR) the court had this to say;

> " As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant".

49. However, the trial court was skeptical about the victims' testimony thereby stating that the boys and girls knew what they were doing. At page nine of his judgment the learned must Magistrate expressed doubt in the complainant's testimony by stating that;

> " It is difficult to tell how one can be raped by more than one man for two days continuously yet she had no tears or lacerations and her orientation was good, so that raises doubt and it is difficult for the court to arrive at a contrary conclusion from the doctor's"

50. The court went further to state that;

> " the evidence against the 1st accused person is overwhelming he did defile this girl. He also appears to have been the one who took a lead role in the whole affair if it ever happened as narrated to the court."

51. From these kind of conclusion from the trial court, it was in doubt that the incident did happen. In law that doubt ought to have gone to the benefit of the appellant. The evidence of the victims was contradictory in material facts as to who defiled or raped who at what time and where. In any event, one would wonder why the victims could not scream for help for three days nor escape as they kept moving from house to house.

52. I take judicial notice that refugee camp settlement(houses)) is tightly close to one another hence they could have attracted attention of the neighborhood if they were indeed abducted and sexually assaulted. A careful scrutiny of their testimony leads to a conclusion that they are not honest witnesses. Whereas their testimony is clear that they were taken to some house by the appellant with two others which evidence is consistent, the element of having been defiled or raped is missing. As the trial court doubted the victims' testimony, and medical evidence have pasted a negative result, the critical element

of penetration is missing. By a woman and a man merely sharing a room or a house does not translate to the two having sex. Therefore, it is my finding that penetration was not proved to the required degree.

53. I have made a general observation in the judgment delivered by the trial court on 18.12.2024. The trial court in convicting the appellant noted that the prosecution failed to prove beyond any reasonable doubt the offence of gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 against the appellant and his two co-accused.

54. The appellant took issue with the finding of the court that he was guilty of an offence he was not charged with in the first place. For avoidance of doubt, these are the words used by the court;

> "I find the prosecution has proved the case beyond any reasonable doubt and I find the 1st accused person guilty of defilement contrary to section 8(1)(4) of the *Sexual Offences Act* No. 3 of 2006 and he is hereby convicted under section 215 of the *Criminal Procedure Code* accordingly".

55. The appellant urged that the trial court convicted him of an offence that was not charged and therefore urged this court to find in his favour.

56. It is curious that the trial court merely made one sentence finding that the appellant was guilty of the offence he was not charged with. Learned magistrate did not analyse the evidence and state reasons why he found him guilty of the offence.

57. Section 3 of the Second Schedule of the *Sexual Offences Act* provides that:

> " 186. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.".

58. In this case, the complainant was 16 years and therefore, the above section in my view cannot apply.

59. A further perusal of the judgment by the trial court only shows how the trial court was unsure of the evidence adduced before him. This is noted when he writes that, 'this case was quite challenging in that the victims seem not to have been sure how (sic) the houses the purported alleged incident took place.' The alleged 'challenge' is further pronounced in the judgment in general as the trial magistrate failed and or forgot to analyze the matter before him to a logical conclusion. I say so for the reason that the trial court simply dealt with Count II as preferred by the prosecution thus disregarding Count I, the offence under which the appellant herein was charged having in mind that he was acquitted on Count II.

60. Section 169 of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya) provides as follows:

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(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the *Penal Code* or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

61. In the case of Samwiri Senyange vs Republic, Criminal Appeal No. 84 of 2001, the court stated thus: "Where there had not been a strict compliance with the provisions of Sections 168 and 169 of the *Criminal Procedure Code* that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties."

62. Similarly, in the case of Hawaga Joseph Ansanga Ondiasa vs Republic, [1953] eKLR, the court held that: "It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated."

63. In this case, apart from the evidence gathered by the trial magistrate from the respective witnesses, it remained unknown how without analysis he ended up convicting and thereafter sentenced the appellant. Ordinarily, the trial court was expected to determine the elements under which the appellant was charged. Case in point, he was to determine the age, penetration and identity in order to fulfil the offence of defilement before he could sentence the accused person.

64. In the case of Dominic Kibet vs R [2013] eKLR where the court held as follows: -

> " To prove defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."

65. It is not lost to this court that in as much as it is an appellate court, its duty is to re-evaluate the evidence before the trial court and make its own findings. I must note that in as much as it behooves this court to make its own findings, the same becomes impossible for the reason that the trial court being the court of first instance, the court that not only saw but also heard the witnesses testify, determination of the elements under which the appellant was charged was very critical.

66. Although the magistrate failed to consider the critical ingredients of the offence and why he convicted on a charge other than the one the appellant was charged with, the same is remedied by the role of the appellate court in re-evaluating the evidence a fresh, In this case, I have already found that penetration was not proved nor indecent assault established and that the victims' evidence was not consistent nor corroborated and that the trial court did no caution itself of the truthfulness of the victims.

67. Having held as above, it is my finding that the prosecution did not prove its case beyond reasonable doubt hence the appeal is allowed, conviction quashed and sentence set aside. Accused shall be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF MAY 2025

J. N. ONYIEGO

JUDGE