



**Ali & another v Republic (Criminal Appeal E035 & E034 of 2023
(Consolidated)) [2024] KEHC 26 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 26 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E035 & E034 OF 2023 (CONSOLIDATED)**

**KW KIARIE, J
JANUARY 12, 2024**

BETWEEN

MOHAMED ALI 1ST APPELLANT

HUSSEIN SHEIKH 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in S.O case NO. 326 of 2017 of the
Chief Magistrate’s Court at Mombasa by Hon. F. Kyambia–Chief Magistrate)*

JUDGMENT

1. Mohamed Ali and Hussein Sheikh, the appellants herein, were convicted of the offence of gang defilement contrary to section 10 of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 23rd day of February 2017, at Bondeni Estate, Mombasa sub-County within Mombasa County, intentionally and unlawfully penetrated the vagina of N.A., a child aged 14 years.
3. The appellants were sentenced to fifteen (15) years’ imprisonment. They were aggrieved and filed this appeal against both conviction and sentence. They were represented by Mr. Magolo, advocate. They raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact in proceeding with the trial and proceeded to place the appellant on their defence and to a conviction on a charge that was fatally defective.
 - b. That the learned trial magistrate erred in law and fact in finding the prosecution had proved its case especially when the facts showed that:
 - (i) Interpretation was not reliable.



- (ii) Relying on the identification of the applicants based on gestures and signs.
 - (iii) At the same time the victim referred to a person who was not the court and the 1st accused who died before completion of the proceedings.
 - (iv) Material evidence like bed sheets said to be blood-stained were never produced in court.
 - (v) Common intention was never proved.
- c. That the learned trial magistrate erred in law and fact in shifting the burden of proof on the appellant by requiring the appellant to call witnesses and blaming the appellant for not doing so.
 - d. That the learned trial magistrate erred in law and fact in ignoring the inconsistencies and clear falsehoods which rendered the prosecution witnesses unreliable.
 - e. That the sentence was manifestly excessive considering the appellant's circumstances.
4. The state did not file any grounds of opposition or submission.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. It was contended that the failure to produce the blood-stained bed sheets was fatal to the prosecution case. Exhibits are not taken in isolation but conjunctively with the entire evidence on record. In some cases, the failure to produce exhibits can be fatal but in other cases, it only acts to augment the evidence. Each case will depend on its circumstances. The court will address its mind to whether in the absence of the production of the said bed sheets, the prosecution proved its case. In the case of *Pius Arap Maina v Republic* [2013] eKLR, the Court stated *inter alia* that:

It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.
 7. In the instant case I will evaluate the evidence to establish whether the prosecution proved their case against the required standards in the absence of the said exhibits.
 8. The use of an intermediary is provided for under Article 50 (7) of *the Constitution*. It stipulates as follows:

In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
 9. Section 2 of the *Sexual Offences Act*, defines an intermediary to mean:

...a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker.
 10. The evidence adduced through an intermediary is therefore reliable unless, at the time of the trial, it was brought to the attention of the court that the intermediary was not playing the role of an intermediary but that of a witness. In this case, it was not. It is therefore too late in the day to raise this issue.



11. Common intention can be inferred or deduced from the conduct of an accused person where two or more persons are charged with an offence. The Court in *Ismael Kiseregwa & another v Uganda* CA CRIM Appeal No. 6 of 1978 held as follows:

In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter.

I will, as I evaluate the evidence find if the prosecution established the element of common intention.

12. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
- a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they were proven.

13. The complainant in this case (PW1) was a child with mental challenges owing to some sickness she suffered at the age of 3. This was testified to by Dr. Charles Mwangome (PW5). She therefore testified through an intermediary. In her evidence, she testified that while taking water to their house, a man held her by the hand and took her upstairs. She found three other people in the house. The four people defiled her. They threatened her with a knife so that she did not raise an alarm. They also blocked her mouth. They later locked her in a toilet.
14. T.A (PW2) her mother testified that when the girl went missing as they were fetching water, she saw her in the company of her (PW1's) sister. She was bleeding. She was sweating and crying.
15. Zainab Walad Yasinur (PW4) was in the search party looking for the complainant. Her evidence was that they found her in a house where there were four men. The four had initially refused them access but she pushed one of them and entered. They found the complainant locked in a toilet. One of the four men escaped. They locked the three men in the house from where they were arrested. The evidence of Osama Bin Ali was to the same effect. He added that one of the men cut him with a knife.
16. When the complainant was examined by Dr. Tima, a clinical officer, it was established that she had lacerations of the labia minora, a cup wound on the fourchette, a laceration of the anal and loose sphincter. A high vaginal swab showed epithelia and pus cells. The medical conclusion was that she had been defiled.



17. Mohamed Ali in his defence contended that he was at his place of work when he was informed of a girl who had been raped where he was saying. When he went to find out, he was arrested. This contracts the evidence of the prosecution witnesses who said that they locked the three men in the house until police officers arrived. This was confirmed by the evidence of CPL. Stephen Okando (PW6) who arrested this appellant and two others. The learned trial magistrate was justified in dismissing his defence.
18. Hussein Sheikhe, equally gave a similar defence and contended that he returned from his place of work and found many people and he was arrested on the allegations of raping the girl. This defence was hollow and the trial court rightly dismissed it.
19. The prosecution proved its case to the required standards even if the blood-stained bed sheets were not produced as exhibits.
20. Section 10 of the *Sexual Offences Act* provides:

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 fifteen years but which may be enhanced to imprisonment for life.

The sentence meted out was legal.

21. The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 12TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

