



**Shehi v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 28 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 28 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E029 OF 2023
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

RAI SHEHI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO. E026 of 2021 of the Chief Magistrate's Court at Mombasa by Hon. R. Orora–Senior Resident Magistrate)

JUDGMENT

1. Rai Reshi, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 1st day of February 2021, at Likoni sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the anus of J.S., a child aged 5 years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact by sentencing the appellant to life imprisonment without considering that there were massive contradictions and discrepancies in the prosecution case.
 - b. That the learned trial magistrate erred in law and fact by sentencing the appellant to life imprisonment without considering that the prosecution did not prove its case beyond a reasonable doubt.



- c. That the learned trial magistrate erred in law and fact by sentencing the appellant to life imprisonment without considering that the doctor's evidence did not corroborate the complainant's evidence.
 - d. That the learned trial magistrate erred in law and fact by sentencing the appellant to life imprisonment without considering his defence which was unshaken.
 - e. That the trial magistrate erred in law and fact by sentencing the appellant to life imprisonment without considering the mitigation.
4. The appeal was opposed by the state through M/s. Vallerie Ongeti learned counsel. She contended that the prosecution proved all the ingredients of the offence to the required standards. She argued that the sentence was legal.
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 vs. Republic* [1972] EA 32.
6. 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 vs. 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 are proven.

7. The mother of the complainant (M.F.M. PW2) testified that the appellant was her neighbour. On the 1st day of February 2021, she was seated outside her house with her neighbours. While the appellant was passing by with a loaf of bread, the complainant accidentally hit it and it fell. The complainant became fearful. The appellant went and bought another loaf and upon his return, invited the complainant to join him for tea. The two went to the house of the appellant and after about 30 minutes, the complainant returned. When the complainant stood up after she had asked him to go and bathe, she noticed that his clothes were wet in the buttocks area. When she went to wash him and asked him to undress, he hesitated. She enquired from him what the matter was, he informed her that the appellant had defied him. She reported the matter to the police and took the complainant to the hospital.
8. J.S. (PW1) was initially reluctant to testify but he finally opened up and testified that the appellant "tickled him with his penis in the anus. This was after he (the appellant) had removed his (complainant's) pants. He said he felt pain.
9. Dr Felix Khissa Wambua (PW3) examined the complainant and found lacerations at the anus. There was reddening of the anal opening and he was of the opinion that there was penetration.



10. The appellant in his defence contended that the complainant's mother had approached him for a love affair but when he declined, she implicated him in the offence.
11. A copy of the birth certificate of J.S. was produced as an exhibit. It indicates that he was born on the 16th day of October 2015. At the time of the offence, he was five years and about four months old. Section 8 (2) of the *Sexual Offences Act* provides:

"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."

The prosecution therefore proved the age of the complainant.
12. Though the appellant contended that there were contradictions in the prosecution case, my evaluation of the evidence did not elicit any material contradictions.
13. The only direct evidence of what transpired in the house of the appellant is what the complainant told his mother and testified in court. The proviso to section 124 of the *Evidence Act* states:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, 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.

In the instant case, the complainant's evidence was corroborated by the evidence of his mother and the medical evidence. I have not, from the record, been persuaded that the complainant is not telling the truth."
14. The sentence that was meted out is legal and there is nothing on record that may invite this court to interfere with the prescribed sentence.
15. 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 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

