



REPUBLIC OF KENYA



**Shikuku v Republic (Criminal Appeal 54 of 2022)
[2024] KEHC 3019 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 54 OF 2022
SC CHIRCHIR, J
MARCH 14, 2024**

BETWEEN

DAVID SHIKUKU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against Judgment of Hon. D. Alego in kakamega Chief
Magistrate court sexual offence case No. 59 of 2018 delivered on 12/07/2022)*

JUDGMENT

1. The Appellant David Shikuku was charged with the offence of sexual assault contrary to Section 5(1) (a) (i) (2) of the [Sexual Offences Act](#) No. 3 of 2006(The Act).
2. The particulars of the offence were that on 15th day of June 2018 at Bunyala West Location, [particulars withheld] sub-county within Kakamega County unlawfully used his fingers to penetrate the vagina of YB a child aged 15 years.
3. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Act](#)
4. The particulars of the offence were that on the 15th day of June 2018 at Bunyala west location within Kakamega County intentionally and unlawfully touched the vagina of YB a child aged 15 years against her will.
5. He was convicted of the alternative charge and sentenced to 5 years in prison.
6. Being dissatisfied with the outcome , the appellant filed this Appeal and set out the following grounds;
 - a. That the learned trial magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt in spite of the glaring lack of evidence.



- b. That the learned trial magistrate erred in law and fact by dismissing the evidence tendered in defense by the appellant.
 - c. That the learned trial magistrate erred in law and in fact in sentencing the Appellant harshly and ignoring the mitigation tendered by the appellant.
 - d. That the learned trial magistrate erred in law and in fact by convicting the Appellant yet the complainant's evidence and medical evidence produced did not support the charges against the appellant.
 - e. That the learned trial magistrate erred in law and fact by convicting the Appellant on contradictory evidence.
 - f. That the learned trial magistrate erred in law and fact in relying on extraneous matters to convict the Appellant.
 - g. That the findings of the trial learned magistrate were against the weight of the available evidence on record.
 - h. That the learned trial magistrate erred in law in purporting to shift the burden of proof to the appellant contrary to the law.
 - i. That the decision of the trial court was made without proper justification and the same was totally biased on anticipation not warranted by evidence on record hence unsafe to make such a finding as it did which was contrary to the law.
7. The Appeal was canvassed by way of written submissions

Appellant's submissions

8. The appellant submits that the medical evidence did not corroborate penetration by any weapon.
9. He further submits that some of the charges were withdrawn and it was not clear from the judgment as to which charge the conviction was based on.
10. He also faults the prosecution for failing to call two witnesses who allegedly took the complainant to hospital.
11. He finally submits that the prosecution did not prove its case beyond reasonable doubt.
12. The Respondent did not file any submissions

Summary of the Evidence

13. PW1 was the clinical officer. She told the court that the complainant went for examination 9 days after the incident and therefore he could not determine if she had been assaulted by way of insertion of a finger to her vagina; that examination was not conclusive on whether she had been sexually assaulted.
14. On cross-examination, he testified that the hymen had broken but the scar was old.
15. PW2 was the complainant. She was taken through a voir-dire examination, after which she testified under oath. She told the court that she was 14 years old. She stated that on 15.6.2018 at 2pm she had gone to the river to take a bath when the Appellant emerged from a sugar plantation and asked her to have sex with him to which she refused. She was wearing her underpants only. The Appellant then threw her down and put his finger inside her vagina. She testified that she screamed and the accused set her free; she ran away naked since she left her clothes behind at the river. She then informed her aunt



- who called her mother who was in Nairobi then . when her mother came, they went to the hospital and then the police station.
16. She testified that the accused and her father were step brothers and that the accused had never attacked her before.
 17. On cross examination, she testified that on the material day, , she had gone to fetch water for washing before going back to school at around 2 pm. She stated that her daily routine was to eat lunch and then go to bath at the river. She testified that she lived with her twin brother who did not come for lunch that day. Her other siblings and mother were away.
 18. She further stated that on that day, there were no people at the river since it was between 1-2 pm; that she had just removed her clothes when the accused appeared . She claimed that the Accused had initially asked her how much she would want to be paid in exchange for sex but she decline the offer.
 19. On re-examination, she stated that she had gone to fetch water at the river after she had changed from her school clothes to her home clothes and that there was no other person at the river.
 20. PW3 the investigating officer stated that on 19.6.2018, a report was made to the station by the complainant over a sexual offence and that the complainant was taken to the hospital. She admitted that she had preferred a charge of attempted defilement initially.
 21. The accused was put on his defence and he opted for unsworn statement.
 22. DW1, gave an unsworn statement. He denied committing the offence and claimed that he stayed with the complainant and was taking care of her. He further pointed out that the women to whom the complainant allegedly reported the Assault did not testify.

Determination

23. This is a first Appeal and this court is mandated to review the evidence afresh, re- evaluate it and make its own findings (Ref *Mark Oiruri Mose v Republic* (2013) eKLR)
24. In my view the only issue for determination is whether the prosecution proved the charge of indecent act with a child.
25. It is appropriate at this point to clarify what charges were brought against the accused and which one(s) was the basis of conviction.
26. The accused was initially charged with two counts, each having an alternative charge. On the 1st count he was charged with attempted defilement and the alternative charge was committing an indecent act with a child . The 2nd count was sexual assault with an alternative charge of committing an indecent act with a child. On 20.6.2018 the prosecution applied for and was allowed to withdraw the first count and its alternative. Thus the remaining charge was one of sexual Assault , with an alternative of committing an indecent act with a child.
27. In the judgment, although the trial court simply stated that the Accused had been convicted , it is in the sentencing that it emerges that the accused had been convicted on the alternative count, that is of committing an indecent act with a child. To argue, as did the Appellant, that it is not clear on which count the Appellant is not true .

Did the prosecution proved its case beyond reasonable doubt?

28. The Appellant argues that there was no medical evidence to corroborate the complainant's testimony.



29. Section 11(1) under which the Appellant was charged provides as follows:
- “Any person who commits an indecent act with a child is guilty of the committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than 10 years”.
30. Section 2 of the Act defines an indecent act as
- “any unlawful intentional act which causes-
- a) any contact between any part of the body of a person with the genital organs , breasts or buttocks of another, but does not include an act that causes penetration
 - b)
32. The interpretation given in section 2 of the Act is clear and straight- forward . It does not need any expounding. Any touch or contact by any part of the body against a person’s genitals , breasts or buttocks is indecent
33. The children’s Act , No. 29 of 2022 defines a child an individual who has not attained the age of 18 years. From the record I notice that the age of the complainant was not in contention.
34. I agree with the Appellant that the medical evidence presented by PW1 did not prove any penetration. However the offence of an indecent act do not require penetration .I would go further and state that the testimony of PW1 was not necessary at all , for the simple reason that such contacts as envisaged under section 2 of the Act may not be medically ascertainable.
35. Further even if medical evidence could corroborate, such corroboration is not mandatory. Courts are empowered by the proviso to section 124 of the Evidence Act to convict an accused person solely on the evidence of the complainant as long as the trial states the reason why it believes the minor’s testimony. In the case of JWA v Republic (2014) eKLR, the court of Appeal held:
- “we note that the Appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act clearly states that corroboration is not mandatory. The trial court having conducted a voir dire examination of PW1 and being satisfied that the complainant was a truthful witness we see no error in law on the part of the high court
36. In the present case, the complainant was 15/ 16 years. The trial court did an elaborate voir dire examination which I have had the chance to read through. Further the complainant gave a detailed account of what transpired . Some of the portions of her testimony went as follows:
- “The accused (points at him), came from his sugarcane growing next to the river , he asked me how much money I want so that we can go have sex in the plantation... He asked me to go into the sugarcane to harvest but I said “no”, he got hold of me by the waist and put me down....He tried to insert his penis to my vagina but the penis failed to penetrate , he then inserted his right middle finger... I screamed; I ran stark- naked....”
37. Despite the lengthy and detailed cross- examination by the Defence counsel, the complainant’s testimony remained fairly consistent. If the complainant was lying, I doubt if her testimony would have remain firm under such thorough scrutiny. For this am inclined to believe the complainant’s account as



to what transpired. As earlier pointed out the charge of indecent act don't require proof of penetration. Am satisfied that the prosecution proved their case in this regard.

38. On the ground that the prosecution did not call- some two of the witnesses in support of its case ,Section 143 of the Evidence Act provides as follows:

“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.”

39. In the Court of Appeal case of *Keter v Republic* [2007] 1 EA 135, Bosire, Githinji and Onyango-Otieno JJA held as follows:

“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.”

40. In the instant case, the prosecution relied on the evidence of PW1, the clinical officer, PW2, the complainant and PW3, the investigating The testimonies of the aforesaid witnesses was sufficient to prove the offence of indecent act. In any event the two witnesses being referred to were not eye-witnesses. Their addition to the witnesses list would not have made any difference, in my view.

41. On sentencing, the appellant has alluded that it was too harsh. In the case of *Shadrack Kipchoge Kogo v. Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

42. Similarly, in the case of *Wanjema v. Republic* (1971) EA 493 the court stated as follows;

“An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

43. In the present case , there is no evidence that the court failed to consider a material fact or took into account an irrelevant fact. The sentence was also lenient when considered against the minimum sentence of 10 years prescribed under section 11(1) the Act.

44. I do not find any merit in this Appeal and I hereby dismiss it. The conviction and sentence by the trial court are hereby upheld.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF MARCH 2024.

S.CHIRCHIR

JUDGE.

In the presence of:-

Godwin- Court Assitant

Mr. Adek for Mr. Khayumbi for the Appellant

