



**Shako v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 5495 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E001 OF 2023**

SM GITHINJI, J

MAY 6, 2024

BETWEEN

FRANKLINE ODOYO SHAKO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from Original conviction and sentence in lower court
Criminal Case No.27 of 2020 in the Principal Magistrate’s Court at
Holo before Hon B.N.Kabanga – RM delivered on 20th August, 2022)*

JUDGMENT

1. Franklin Odoyo Shako was charged in the lower court with a main count of defilement, contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars of this offence are that on the diverse dates between 24th and 25th days of November, 2020 at [Particulars withheld] in Tana River Sub-County within Tana River County, the appellant intentionally caused his penis to penetrate the vagina of MMM, a child aged 14 years.
3. In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.
4. The particulars hereof being that on the diverse dates between 24th and 25th days of November, 2020 at [Particulars withheld] in Tana River Sub-County within Tana River County, the appellant intentionally touched the vagina of MMM, a child aged 14 years with his penis.
5. The prosecution case is that the victim in this case who gave evidence as Pw-1 was born on August 12, 2006. Her birth certificate No.xxxxxxx which was issued on February 1, 2019 carries the said date of birth.



6. The victim in her evidence stated at the time of the alleged offence she was a student in form one at [Particulars withheld] High School. Her mother used to cook food for workers at a construction site and the victim was assisting the mother to ferry water at the place. The appellant herein was working at the said construction site and was well known by the victim and her mother.
7. One day the appellant called the victim and promised that he will marry her and build for her a house. On another day the victim was sent to the market. The appellant whom she referred to as Frankline called her using her mother's phone number. He asked her where she was and if they could meet. The victim replied that she was in the market. He told her to meet him at [Particulars withheld] Guest House. She met him there in a room. At about 8.00Pm he urged her to strip naked but she was hesitant which made him to undress her. He kissed her and told her to lie on bed. She did so. He stripped his clothes and went on top of her. He caressed her private parts and then inserted a finger into her vagina. She was a virgin then and felt pain. He went ahead to insert his penis into her vagina. She felt pain as they had sex and he held her mouth to muffle her. She spent the night in the said room.
8. The day was on 24/11/2020 in the evening as the mother noted she was missing in the house. She searched for her the entire night but in vain. The following morning, she reported about her missing at Hola Police Station. The following night the victim used the appellant's phone to call her mother. She said "hallo" and the mother responded asking her where she was. The phone then went silent. The mother told her son about it. The son who was a *boda boda* operator saw the number used to make the call and said he knew it to belong to the appellant as he used to ferry him. She then called the appellant who said he was with the victim.
9. On 26/11/2020 in the morning Pw-3 met the appellant. The appellant expressed fear in entering the village. He was at a roundabout near the County Commissioner's Office. He told Pw-3 that the victim was at [Particulars withheld] Guest House and he wished the issue resolved out of court. Pw-3 informed Pw-2 about it. Pw-2 went to the place. The appellant took them to the lodging where the victim was. They got her and on their way met a police vehicle. The police stopped and arrested the appellant.
10. The victim was issued with a P-3 form. She was examined at Hola County Hospital by Pw-4. The Clinical Officer noted that her hymen was freshly broken. She also had vaginal *candidiasis*. However high vaginal swab revealed no presence of *spermatozoa*. The Officer was of the opinion that she had been defiled. The P3 form was thus filled.
11. Pw-5 completed investigations in the case as the initial Investigating Officer was found to be partisan. The appellant was then charged with the offences carried in the charge sheet.
12. The appellant in his defence stated he is a building and engineering technician. On 26/11/2020 he was working at the speaker's resident, in Bula Salama. At around 10.30am as he prepared to take some samples for analysis in Mombasa he was arrested on an allegation of defilement. He was taken to the station where the victim was. The victim was asked whether she knew him and said she did not. He also had not known her. Police had a birth certificate and had recorded witness statements. The certificate showed she was 14 years old but when she was asked her age by Corporal Zainabu said she was 19 years old.
13. The storekeeper at the construction site was an uncle to the victim. The appellant had received 1500 bags of cement and 39 tonnes of ballast. The materials were delivered on 19/11/2020 and auditors went for verification on 23/11/2020. The appellant noted there was a shortage of 150 bags of cement and reported at Hola Police Station. The victim's family had therefore a grudge with him.



14. On 24/11/2020 the victim was working at the site. At 11.00am the victim fought with her brother Ali. He heard the brother telling her, “*m^{xxxx}a utakufa na ukimwi.*”
15. The appellant contested the age of the victim, her being a student and that he was in a lodging at [Particulars withheld] Guest House with her. The trial court evaluated the evidence and found the offence in the main count proved against the appellant beyond reasonable doubt. He was convicted of it and sentenced to serve 20 years’ imprisonment.
16. Dissatisfied with the said conviction and sentence, the appellant appealed to this court on the grounds that: -
 1. The case against him was not proved by the prosecution beyond reasonable doubt.
 2. Sharp contradictions in the prosecution case were not properly weighed.
 3. There was no cogent evidence connecting him to the commission of the alleged offence.
 4. His defence was not properly weighed.
17. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
18. I have considered the charges, evidence adduced in the lower court, judgment entered, sentence meted, grounds of the appeal and submissions by both sides.
19. The offence of defilement under section 8 (1) of the *Sexual Offences Act* No.3 of 2006 is founded on the three ingredients, that is: -
 1. The age of the victim. She must be a minor: and that is a child under the age of 18 years.
 2. Penetration; that is complete or partial penetration of a genital organ by a genital organ.
 3. Proper identification or recognition of the culprit as the perpetrator.
20. The foregoing was well enunciated in the case of *George Opondo Olunga-vs-Republic* [2016] eKLR.
21. This being the first appellate court, it must consider whether the three said ingredients were established by the prosecution beyond reasonable doubt.
23. On the issue of age, a birth certificate No.xxxxxxx was produced as an exhibit. It was issued on February 1, 2019 having been registered on 12/4/2018. It shows the victim was born on 12/8/2006. The offence was allegedly committed between 24th and 25th days of November, 2020. The birth of the victim was therefore registered and the birth certificate issued before the alleged offence was committed. It cannot therefore rightly be argued that the birth certificate was obtained purposely for use in regard to this case as defence implied. The date of birth indicated on it shows her 14th birthday was on 12/8/2020. As of 24/11/2020 she was therefore 14 years old. There is no evidence to the contrary and the available evidence settles the issue sufficiently. I therefore conclude that the victim was 14years old as of the time of the alleged offence.
24. On penetration, the victim’s evidence disclosed what the appellant did to her. They had sex, which involved penetration of her genital organ namely vagina, by the genital organ of the appellant namely penis. Her evidence is well corroborated by the evidence of Pw-4 who on her examination noted the hymen was freshly broken. Absence of *spermatozoa* does not negate the fact on penetration as ejaculation is not an ingredient for the offence of defilement and such has nothing to do with penetration. The lower court was right in finding that there was penetration.



- 25. The last ingredient of which the appellant contests is of him being identified as the real culprit. Though the appellant at the onset of his defence alleged that the victim was a stranger to him and that she also indicated she did not know him at the police station; later on the appellant contradicted the position when he alleged that he had seen her working at the construction site where he was also working and even saw her later quarrelling with her brother. He as well disclosed her uncle was a store keeper at the said site.
- 26. On the prosecution side the victim and her mother were common at the building site. The mother was cooking food for workers and the victim assisted in ferrying water to her. The appellant who indisputably was working at the said site was well known to both. There is reliable evidence the victim called the mother using his phone. He approached Pw-3 on the issue. He is the one who led Pw-3 and the mother to [particulars withheld] Guest House room where the girl was. A record of the said Guest House was produced showing he is the one who booked on 24/11/2020, room No.5. His given identification card number and phone number on the said record are not disputed. He had no way of escaping from such strong overwhelming evidence, connecting him to the alleged offence. His defence was an afterthought as he never cross-examined Pw-1, Pw-2 and Pw-3 on the alleged grudge. The defence is also not substantiated as he produced no record to show the victim uncle was the store keeper at the site and that 150 bags of cement went missing and he was reported to the police at Hola. All this is a flimsy made story that does not add up. The trial court rightly dismissed the defence and held him as the culprit for the offence of the defilement. He was therefore rightly convicted of the said offence.
- 27. On sentence the lower court explained itself on how it settled on 20 years imprisonment. It's a sentence which is within the law for the offence. Sentence must always match the gravity of the offence, considering the actual and foreseeable impact of the crime to the victim and the community at large. The appellant deserved the sentence.
- 28. The bottom line is that the appeal is in want of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF MAY, 2024

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S.M.GITHINJI
JUDGE

In the Presence of;

- 1. The Appellant in Person
- 2. Ms Ochola for the Prosecution

