



REPUBLIC OF KENYA



**Shekuwe v Republic (Criminal Appeal E010 of 2024)
[2024] KEHC 8680 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E010 OF 2024**

**M THANDE, J
JULY 19, 2024**

BETWEEN

JAFAR ALI SHEKUWE APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the judgment of Hon. J. K. Olga Onalo, SRM
delivered on 19.1.24 in Malindi Sexual Offences Case No. 68 of 2021)*

JUDGMENT

1. The Appeal herein arises from the judgment of Hon. J. K. Olga Onalo, SRM delivered on 19.1.24 in Malindi Sexual Offences Case No. 68 of 2021 in which the Appellant was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* (SOA) and was sentenced to 12 years imprisonment. The particulars of the offence of which the Appellant was convicted, are that on diverse dates between 1.9.21 and 7.9.21 at Watamu village, Watamu location in Malindi sub county within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of M. H. (the Complainant), a girl aged 14 years.
2. The Appellant has filed the Appeal herein on 1.2.24, challenging both the conviction and sentence. The Appellant raised the following 11 grounds:
 1. That Trial Magistrate erred in law and fact by failing to notice the essential ingredients/elements of the offences as charged were not proved to the required standard of proof.
 2. That Trial Magistrate erred in law and fact by failing to take into cognizant the demeanor of the complainant at the time of examination in Chief as she



was too confident in her speech which is usually not the case in a form of such sexual offences charges.

3. That the Honourable Magistrate erred in Law and fact by failing to take cognizant of the fact that there were numerous contradictions as to the time the offence occurred. The complainant herein stated that the actual act began in August, 2021 while the charge sheet stated that the offence occurred between 1st and 7th September, 2021 while Pw 2 testified that the minor began misbehaving and missing her madrassa classes as from May, 2021.
4. That the Honourable Magistrate erred in Law by failing to take into consideration that the complainant had the free will of running away from the scene of crime when the Appellant allegedly went miles away to purchase a soda. The huge distance between where the Appellant went to get the soda and where the complainant was left to wait for the Appellant could have warranted the complainant or any other reasonable man to escape.
5. That the Honourable Magistrate erred in Law and fact by failing to recognize the number of times the complainant had allegedly availed herself to meet the Appellant.
6. That the Honourable Magistrate erred in Law and fact by failing to take cognizant of the glaring inconsistencies surrounding the occurrence of the offence. The minor stated the offence occurred twice being once in the month of August and once while the Doctor and the medical reports stated that the penetration was habitual.
7. That the Honourable Magistrate erred in Law and fact by ignoring the fact that the complainant allegedly went to hospital on the 7th September, 2021 in September, and upon examination the Doctor said there were some redness on the vagina and nothing more. Upon realizing that the results did not favour Pw 2 and in a bid to fix the Appellant Pw 2 ignored the results went to another hospital. The charges were therefore driven by ill will and vendetta.
8. That the Trial Magistrate erred in Law and fact when he failed to capture the averments presented by Pw2 the mother of the complainant who testified that the complainant was mischievous by failing to attend madrasa and the behavior commenced from the month of May, 2021.
9. That the Learned Trial Magistrate erred in Law and Fact by failing to realize that there is no evidence demonstrating the complainant's resistance during the alleged offence like struggling, screaming, shouting and yelling which actions could have attracted the guard and other fishermen around the alleged area where the offence occurred which is a public place.
10. That the Learned Trial Magistrate erred in Law and in fact by relying on shoddy investigations conducted by the Prosecution witnesses more so the clinical officer who failed to subject the complainant to a High Vaginal Swab (HVS) to collect traces of sperms that may have been present on her genitals and ascertain whether they matched the Appellant's sperms, thus out rightly failed to link the alleged penetration to the Appellant.



11. That the trial magistrate erred in Law and fact in making his judgment based on the extraneous matters that were full of assumptions which ultimately prevented him from making a sound judgment because the scene of crime expert was not called in as a witness.
3. He urged the Court to allow the Appeal, quash the conviction and set aside the sentence.
4. As a first appellate Court, I have also subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
5. The facts of the case according to the prosecution are that the around May 2021, the Appellant would follow the Complainant every time she went to the shop, telling he r he wanted to talk to her but she would pay no attention. One Monday evening at 7pm as she was going home from tuition she found him waiting for her at Marijani on the way to the beach, where she alights from the tuk tuk. Thereafter he began meeting her almost every Monday to Wednesday evening and warned her not to tell anyone or he would do something bad to her. Due to fear of him, she did not tell anyone and her family thought she was at Madrasa.
6. One Monday evening in September, she found him waiting for him as usual and told her to board a motorcycle and took her to the beach where hotels and homes had been burnt. While there he removed her clothes and his, put his penis in her vagina and defiled her. He then returned her to the spot he had picked her up from. He did the same on Tuesday 7.9.21. Upon her return home, her brother who had discovered from the Ustadh that she had not been attending madrasa beat her up for not telling him why she had been truant. She then told him she had been with the Appellant. The matter was reported to the Police on 8.9.21 who referred them to Malindi hospital. The doctor who examined her found there was penetration and filled in the P3 form and she was examined on 9.9.21.
7. Both the Appellant and Respondent filed their submissions which I have duly considered.
8. It is the Appellant's contention that the prosecution's case was fraught with contradictions and inconsistencies as to when the offence occurred. He submitted that the charge sheet indicated that the Complainant was defiled on diverse dates between 1.9.21 and 7.9.21, yet she testified that it all began in May 2021 when the Appellant told her he wanted to meet up with her. Indeed, PW7 the doctor testified that she told him that she had been having a sexual relationship since May 2021. Further that in cross examination, she stated that the act happened once in August and twice in September. Additionally, she stated that in May and June, the Appellant used to use his penis to brush her vagina. The Appellant submitted that further contradictions can be seen in the testimony of PW2, the Complainant's mother, that the Complainant's behavior of coming home late began in May. Further that her aunt PW4 who lived with her stated during the corona pandemic around the month of February, the Complainant began behaving differently and would return home late when sent to the shop.
9. The Appellant thus contended that the Complainant could not ascertain when between May, June, August or September the offence occurred and urged that the gaps left by the prosecution case ought to have tilted the scale in his favour.
10. In response to the Appellant's submissions, the Respondent asserted that all the ingredients of the offence of defilement, had been established. It was submitted that the prosecution proved that the Complainant was 14 years of age at the material time. The medical evidence by PW4 had proved that there was penetration. Finally, that it was proved that the Appellant had been identified as the



perpetrator of the offence as he was well known by name to the Complainant and that the incident happened over a duration of days and the Complainant could not have been mistaken.

11. The charge sheet indicates that the alleged offence took place on diverse dates between 1st- 7th September 2021. It can be seen from the record that the testimony of the Complainant is that the Appellant began pursuing her in May 2021 and demanded that she meets him Monday -Wednesday evening every week after tuition and took her to the beach where hotels had been burned. She stated that the meetings went on till September when on a Monday he took her to the beach, removed his penis and inserted it in her vagina. This happened again on 7.9.21. In cross examination, she stated that the Appellant used to brush over her vagina with his penis until August and September when he had sex with her. PW2, stated that the Complainant's behavior of coming home late began in May. PW4 stated that the Complainant began behaving differently and would return home late when sent to the shop during the corona pandemic around the month of February. PW7 testified that she told him that she had been having a sexual relationship since May 2021.
12. I have considered the arguments of the Appellant on the apparent contradictions. However, while the same are acknowledged, the Court finds that they are insignificant that they cannot render the prosecution evidence unreliable or negate the fact that the Complainant was defiled. They are also not sufficient ground to quash the conviction. In this regard, I am guided by the decision in *Willis Ochieng Odero vs. Republic* [2006] eKLR, where the Court of Appeal held:

As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code.
13. The Appellant faulted the trial court for ailed to take cognizance of the fact that the Complainant was taken to hospital after the alleged offence. He submitted that PW2 testified that the Complainant was taken to hospital on 7.9.21 and upon examination her private parts were found to be reddish and her hymen was found to have been broken due to habitual sexual intercourse. The Appellant contended that the prosecution failed to link him with the offence with all certainty.
14. The Respondent submitted that the Complainant narrated to court how the Appellant started luring her into having an affair with him in May up to September when they had sexual intercourse. It was further submitted that the doctor corroborated the Complainant's testimony. He produced the treatment notes, P3 form and lab results and confirmed the hymen had been broken which confirmed vaginal penetration.
15. In her testimony, the Complainant stated that it was the Appellant who defiled her. She described how this happened with him initially taking her to the area by the beach with burned houses, rushing her vagina with his penis and eventually penetrating her vagina with his penis.
16. It is noted from the record that the Complainant was the only witness to the alleged offence. The proviso to Section 124 of the *Evidence Act* allows the court to receive evidence of an alleged victim of a sexual offence, notwithstanding that it is the only available evidence and to record the reasons for believing the evidence. It provides as follows:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:



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.

17. Where the testimony of a victim of sexual offence is found to be truthful, the same need not be corroborated. The Court must however give reasons for believing such testimony. In the case of *Mohamed vs. Republic* [2006] 2 KLR 138 the Court of Appeal stated:

It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.

18. In her judgment, the trial Magistrate stated that she found the Complainant truthful and quite clear from the start to finish, of the history she had with the accused. I have considered the testimony of the Complainant and find that the same is credible. The day she was taken to hospital does not in any way affect her testimony.
19. The Appellant submitted that the Complainant did not scream, ask for help or run away when the golden opportunity presented itself. He further contended that the doctor failed to take a vaginal swab for purposes of generating a DNA profile that matched the Appellant. The Respondent submitted that there is no legal requirement on the part of the prosecution to conduct DNA to prove penetration. The prosecution's case is that the testimony of the Complainant combined with that of the doctor confirmed that there was indeed penetration.
20. The record shows that in her testimony, the Complainant stated that the Appellant told her to go change and return to the place and threatened that failure to do so, he would do something bad to her. Being afraid, she did as she was told and found him waiting for her. He took her to an abandoned hotel which had burned down and left her there. He then went and brought a soda from his hotel which he forced her to drink. He then returned her to the spot in Marijani where he had picked her from. He then told her to be meeting him every Monday to Wednesday and she did so and he would take her to the abandoned hotel and defile her. He threatened to do something bad to her if she told anyone what was going on.
21. As a 39 year old adult at the material time, the Appellant obviously had control and power over the Complainant then a 14 year old child. Clearly, due to this age difference and his threats and manipulation, she would do as he told her. Further, the incidents are said to have happened at night at an abandoned hotel by the beach. This no doubt would make a 14 year old fearful and kept her from running away or screaming. I accordingly find that the Appellant's argument that the Complainant did not scream or run away to be without substance.
22. On failure to consider the defence of alibi, the Appellant submitted that he testified in his defence that he was at his hotel on 7.9.21. This he asserted, was corroborated by DW2 who had taken visitors for a meal there and that it was the Appellant who cooked the same. He faulted the trial Magistrate for dismissing and not considering his alibi or scrutinizing the same.
23. In her judgment, the trial Magistrate did consider the alibi. She however noted that he raised it "at the defence stage yet he but never alluded to the same on (sic) the time of his arrest, to the prosecution or during trial at cross-examination, clearly showing it was an afterthought." She found that the defence of alibi was not plausible and did not dislodge the prosecution case. Reliance on the case of *Waka Evans Amira v Republic* [2021] eKLR where Aburili, J. found that the appellant therein raised the defence



of alibi during the defence hearing. The prosecution could thus not have started investigations at that time.

24. In the case of Joseph Waiguru Wang'ombe v Republic [1980] eKLR, cited by the Appellant, the defence of alibi was put forward for the first time at the defence stage. the Court of Appeal stated that even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. The Court however noted that however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. The Court added that if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it.
25. The record herein confirms that the Appellant did in fact raise the defence of alibi at the defence stage. Had the same been raised prior to the said defence hearing, the prosecution would have investigated it and the trial court would have been able to effectively scrutinize it. Having not been raised prior to the defence hearing, neither the prosecution nor the court can be blamed. In any event, even if the defence of alibi were to be accepted, it relates only to one day namely, 7.9.21. The offence is alleged to have been committed on diverse dates and not just on 7.9.21 when the Appellant claims he was at his hotel cooking for guests. Further, the trial Magistrate who had the opportunity of seeing and hearing the Complainant as she testified found that she was truthful and quite clear from start to finish of the history she had had with the Appellant. Accordingly, I have no reason to differ or interfere with her factual findings.
26. To sustain a conviction for the offence of defilement, the prosecution has to prove 3 ingredients. This was set out in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013. The Court in that case stated:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.
27. The Complainant was 14 years old at the time of the offence, a fact that is not disputed. The fact of penetration has been established. On identification of the assailant, the evidence on record shows that the Appellant knew him by name and the fact that he had a hotel near her home. Further the incidents occurred over a period of time. The evidence thus points at the Appellant as the perpetrator. As such, I find that all 3 ingredients for the offence of defilement have been established.
28. In the end, after reevaluating the evidence, my finding is that the Appellant was properly convicted. The Appeal is dismissed and both the conviction and sentence are upheld.

DATED SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF JULY 2024

M. THANDE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

