



**Achevi v Republic (Criminal Appeal 21 of 2024)
[2024] KEHC 12672 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 21 OF 2024
DR KAVEDZA, J
OCTOBER 22, 2024**

BETWEEN

SHADRACK ACHEVI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 26th October 2021 by Hon. E.Boke (S.P.M) at Kibera Chief Magistrate's Court Sexual Offences Case no. 70 of 2017 Republic vs Shadrack Achevi)

JUDGMENT

1. The appellant Shadrack Achevi was charged and after a full trial convicted for the offence of indecent act with a child contrary to Section 11 of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve ten (10) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; he challenged the contradicting evidence by the prosecution, the complainant's inconsistent evidence and the court's failure to consider his defence.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt.



5. Section 2 of the SOA defines an indecent act as:-

An unlawful intentional act which causes—

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;

exposure or display of any pornographic material to any person against his or her will.

6. The complainant gave unsworn evidence after a voir dire examination. She testified that on the day in question, which was a Sunday, she was playing alone at home when the appellant called her. She recalled that the appellant took her to his house, sat her on his seat, undressed her, and started touching her vagina with his fingers. During the ordeal, she started screaming, resulting in the appellant to stop. The appellant then gave her Kshs. 5 to calm her down, telling her not to tell anyone. When she returned home, she informed her mother, who then told her father.
7. Her father questioned her, and she directed him to the appellant's house. She accompanied him there, but the door was locked. Her father knocked, and when the appellant came out, he chased after him, eventually catching him and taking him to the police station. Following the incident, the complainant was taken to Nairobi Women's Hospital for examination and treatment. The complainant also stated that she knew the appellant who lived in the house behind the storey building.
8. During cross-examination, she clarified that she had only told her mother that the appellant touched her twice and had unfastened her skirt. She maintained that it was the appellant who undressed her and touched her in her vaginal area with his fingers.
9. In her testimony, the complainant gave a clear and graphic testimony of her ordeal. Her identification of the appellant as the perpetrator was not in doubt. She stated that she knew the appellant who lived in the house behind the storey building. Furthermore, the assault occurred in broad daylight, allowing the complainant to identify the appellant. Based on this evidence, I conclude that it was indeed the appellant who perpetrated the act of sexual assault.
10. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

“94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'birithia v R* High Court at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant



to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”

11. The complainant’s testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that the complainant testified with the innocence of a child and that the evidence as to what transpired remained consistent throughout. While I acknowledge that the complainant’s testimony was tendered with the innocence of a child, her grasp of the events was quite clear.
12. Regarding the additional corroborating evidence, the complainant’s father PW3 stated that on the day in question, after church, he heard screams outside his house. His wife informed him that their child had been locked inside a house. PW3 asked the complainant if she could remember which house, and she led them to it.
13. He confirmed the complainant’s account of the events at the appellant’s house. PW3 further testified that they reported the incident at Kabete Police Station and later took PW1 to Nairobi Women’s Hospital. PW3 stated that his daughter, was 7 years old, having been born in June 2011, and produced his birth certificate.
14. PW4, John Njuguna, testified that he worked at Nairobi Women’s Hospital and the Garden Recovery Centre. He testified on behalf of Dr. Ndolo who had examined the complainant but was not available to testify. He stated that upon examination of the complainant, no physical injuries were found on her body. The genital region showed no bruises or lacerations, the hymen was intact, and the anus was normal. The doctor concluded that the external genitalia appeared normal.
15. A medical lab report was also provided, which detected proteins and glucose in PW1’s urine, indicating a urinary tract infection. PW4 noted that all other tests were negative. PW1 was given treatment to prevent HIV and hepatitis infections. PW4 produced the PRC form. During cross-examination, PW4 confirmed that no spermatozoa were found and stated that the examination took place on the same day the incident was alleged to have occurred. He reiterated that the findings were normal.
16. The absence of injuries does not however negate the indecent act which was complete by the appellants’ finger(s) which form part of his body coming into contact with the complainant’s private parts. From the record, the evidence of the complainant was vividly corroborated with the evidence of her father PW3 who visited the scene after the incident and proceeded to apprehend the appellant.
17. On the age of the complainant, the trial court considered the birth certificate produced in evidence by her father PW3. From the record, the complainant was born on 25th June 2011 and was 6 years old at the time of the incident. There is therefore no doubt that the complainant was a child within the meaning of the law.
18. In his defence, the appellant stated that on the day in question, he was at home assisting his wife and daughters with cooking. Around noon, two neighbour’s children visited; one left, while the other stayed to watch television. Shortly after, neighbours stormed in, accused him of defiling the child, and assaulted him. They took him to the chief, where the complainant’s father suggested a settlement, but he refused. Later, at the police station, the complainant’s parents demanded Kshs. 50,000, which he could not pay. He maintained his innocence.
19. From the trial court record, the trial magistrate considered the appellant’s defence and found it to be unbelievable. The court weighed the evidence and found that the victim was telling the truth. The claim by the appellant that the charge was a fabrication by the complainant and her father was found



to have no basis. The issue was considered by the trial court and found to be an afterthought. For the foregoing reasons, I have come to the same conclusion as the learned trial magistrate. Taken together, the evidence proved an indecent act beyond reasonable doubt.

20. On sentence, the appellant was sentenced to serve 10 years imprisonment. During sentencing, the court considered his mitigation, and that he was a first offender. The court noted that the appellant was not remorseful. In addition, he deserved a deterrent sentence to rehabilitate him. In my mind, I have no doubt that the sentence imposed was legal and not harsh or manifestly excessive.
21. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF OCTOBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Ms. Omurokho for the Respondent

Achode Court Assistant

