



**Shitanda v Republic (Criminal Appeal E071 of 2021)
[2023] KEHC 2297 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E071 OF 2021
FG MUGAMBI, J
MARCH 17, 2023**

BETWEEN

JOEL PASTOLA SHITANDA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. R.R. Amwayi, SRM dated 18th March 2021 in Sexual Offence No. 28 of 2018 in the Chief Magistrate's Court at Mombasa)

JUDGMENT

1. The appellant was charged with the offence of sexual assault contrary to section 5(1)(a)(ii) and (2) of the *Sexual Offences Act*. The particulars of the offence were that on 18th April 2018 in Likoni sub-county within Mombasa county, he unlawfully and intentionally used a finger to penetrate the vagina of KN, a girl aged 13 years. He was also charged with alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. During trial, KN, who testified as PW1, stated that the appellant, who was a neighbour, went to their house. The appellant sent KN to get him air time for his phone. When she came back he began caressing her and inserted his finger in her vagina. He tried to penetrate her with his penis. The appellant had blocked the minor's mouth to stop her from screaming. A friend knocked at the door. When KN opened the door the appellant went away. It was the testimony by KN that the incident occurred at 3pm.
3. PW2 was the mother to KN. On the material day she returned from work at 6:00pm and KN told her what had transpired and what 'baba Brian' had done to her. She then took her daughter to Manyatta dispensary and reported the matter to the police. PW2 testified that the appellant was well known to her. They had been neighbours for 10 years and went to the same church.



4. PW3, a medical doctor, appeared on behalf of the medical doctor who examined KN. It was her evidence that upon examination the hymen of KN was found to be broken and there was a whitish discharge noted which is not normally found with children. The doctor testified that there were bacteria in the urine of KN pointing to a foreign body having been inserted in her vagina. KN had also complained of pain when passing urine, which was evidence of the infection. PW3 produced the treatment notes, P3 and PRC forms. PW4 was the last prosecution witness. He was an officer attached to Inuka Police Station and the investigating officer in this matter. He visited the house of KN and also arrested the appellant.
5. When put to his defence, the appellant gave sworn testimony. He did not deny that KN and her mother were well known to him and to his wife. He however denied going to their house and denied committing the offence. He simply stated that he was home at about 9:00pm when he was arrested.
6. The trial court found the appellant guilty of the offence and sentenced him to 10 years' imprisonment. The appellant seeks to appeal both the conviction and sentence and has raised the following five (5) amended grounds of appeal:
 - i. That the evidence presented was contradictory and full of inconsistencies.
 - ii. That the offence was not proved to the required standards.
 - iii. That the evidence produced at the trial court was not sufficient to convict the appellant.
 - iv. That the investigations were poorly done and not reliable.
 - v. That the appellant was not given a fair trial.

Analysis and Determination.

7. This being a first appeal, this court is enjoined to re-evaluate the evidence afresh and come up with a new finding or conclusion altogether. I have perused the submissions by the appellant and the rival submissions by the respondent as well as the trial court record.
8. Section 5 of the [Sexual Offences Act](#) provides that: -
 1. Any person who unlawfully;
 - a) penetrates the genital organs of another person with;
 - i. any part of the body of another or that person; or
 - ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
 - b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.
 - (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.
9. In the present appeal, the prosecution was required to establish penetration of the complainants' vagina, by the body part, in this case finger, of the appellant. The learned trial magistrate believed the testimony by KN which was corroborated by the evidence of the doctor and the medical evidence. KN



was able to identify the appellant by recognition. The trial court further faulted the appellant for the way that he acted when he knew that the police were looking for him. He went into hiding and this would explain why he was arrested a month later. If he had nothing to hide, it would not have been necessary to run away from the authorities.

10. Moreover, although the appellant claimed to have been at work on 18th April 2018, the day in question, between 6am up to 7pm he did not call any *alibi* to corroborate his evidence.
11. For these reasons, I find the appellants testimony implausible and I would believe KN's evidence regarding the incidence. The offence was proved to the required standards. I do not find any contradictions in the prosecution's case. I also find no reason to agree with the appellant that he was not given a fair trial.
12. Turning to the issue of sentencing, the minimum sentence provided for the offence of sexual assault is 10 years. While courts have the sole discretion to determine appropriate sentences on a case to case basis, nothing stops the court from also meting out a minimum sentence if it deems it fit. I see nothing from the judgment of the trial court to insinuate that the learned trial magistrate misdirected himself on this. I have taken note that the court took into account the mitigation presented by the appellant as well as the social context and circumstances of the offence. I see no reason to interfere with the sentence of the learned trial magistrate.
13. Consequently, this appeal is dismissed. The conviction and sentence of the trial court are upheld.

SIGNED, DATED AND DELIVERED AT NAIROBI IN OPEN COURT (VIRTUALLY) THIS 17TH DAY OF MARCH 2023

F. MUGAMBI

JUDGE

