



**Shungu v Republic (Criminal Appeal E063 of 2023)  
[2024] KEHC 12697 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12697 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E063 OF 2023  
SM GITHINJI, J  
OCTOBER 23, 2024**

**BETWEEN**

**STEPHEN YONGO SHUNGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal the Judgment of Hon E.K.Usui – Chief Magistrate in  
Malindi CM’s Court SO No.091 of 2018 delivered on 6th July, 2023))*

**JUDGMENT**

1. Stephen Yongo Shungualias Kilongawas charged in the lower court with a main count of defilement contrary to section 8 (1) as read with sub-section 8 (4) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the 29<sup>th</sup> day of August, 2018 at Magarini Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of GJM a child aged 16 years.
3. In the alternative, the appellant 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 are that on the 29/8/2018 at Magarini Sub-County within Kilifi County, the appellant intentionally touched the vagina of GJM, a child aged sixteen years with his penis.
5. The prosecution case is that the victim in this case who offered her evidence as Pw-1 was born on 25/6/2002. A birth certificate No.\*\*\*\*\* was produced as an exhibit indicating of the said date of birth. On 29/8/2018 at around 6.00Pm she was sent to fetch water at river Galana. There were many people at the river and one of them was Christine Kadenge the Pw-2 in this case. They fetched water and they saw the appellant herein whom they knew well as they are from the same village. The appellant had his motor bike. The appellant requested the girls to help him push the motor bike uphill. They



did and he told them to leave the water jerricans behind as he will assist in ferrying them for them. He urged the victim to remain behind as the rest went home. He went to the river and carried the jerricans. When he got to where the victim was he alighted and held her hand. He led her into the bush. He laid her on the round and removed her panty. He also undressed and used his genital organ to penetrate hers. He told her not to make noise as he did it. Thereafter they left together on the motor bike. She was taken home as he went back for water. She did not tell anyone of what happened. In September, 2018 she missed her monthly periods. She was pregnant. The mother took her to a dispensary where she was examined and the pregnancy confirmed. They reported the matter at Adu Police Station on 6/10/2018. Pw-3 received and booked the report. He recorded witness statements and issued her with a P-3 form.

6. The victim was taken to Malindi Sub-County Hospital on 10/10/2018. She was examined by Pw-4 who filled her P-3 form on 11/10/2019. It was noted that she was 2.5 months pregnant. The hymen was broken and had a whitish discharge from her vagina. The clinical officer concluded that there was vaginal penetration and pregnancy of the 16 years old girl.
7. The appellant was arrested and charged with the offences in the charge sheet.
8. The appellant defence is that he comes from Baricho. When the police arrested him they did not listen to him. He said he was in the river on the material day to fetch water. He had a motorbike. He went with the victim to the river. There were many people. He took the victim home using the motor bike. After one month it was alleged she was pregnant and he was responsible, of which was a lie. He denied commission of the offence. He alleged the victim was over 18 years at the time.
9. The trial court weighed the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve 15 years' imprisonment.
10. Dissatisfied with the said conviction and sentence, the appellant appealed to this Court on the grounds that; -
  1. The trial magistrate failed to consider contradictions in the prosecution case.
  2. The burden of proof was shifted to him by the trial magistrate.
  3. The prosecution case was poorly investigated.
  4. The produced exhibits were unreliable.
11. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
12. I have re-evaluated the charges, evidence adduced, judgment entered and sentence meted; grounds of the appeal and submissions.
13. This being a case of defilement, under section 8 (1) of the *Sexual Offences Act*, the prosecution needed prove beyond reasonable doubt that; -
  1. At the time of the offence the victim was a child, that is, below 18 years of age.
  2. The victim genital organ was penetrated by the culprit genital organ either partially or fully. Slightest penetration if established would suffice for the offence.
  3. The accused was properly recognized or identified as the real culprit.
14. On age, a birth certificate was produced as prosecution exhibit 1. It is No.\*\*\*\*\* , Entry No.0571403636 in the name of the victim. It shows she was born on 25<sup>th</sup> June, 2002. The offence was



allegedly committed on 29<sup>th</sup> August, 2018. The victim turned 16 years of age on 25<sup>th</sup> June, 2018. At the time of the alleged offence on 29/8/2018 she was therefore 16 years old. She disclosed of the said age in her evidence in chief and given that there is no reliable evidence to the contrary, her age was established beyond reasonable doubt.

15. On penetration, the victim gave a detailed account of how it happened. It was in the bush where she was laid by the appellant who removed her panty, undressed and then using his penis, penetrated her vagina. As a result of the said unlawful act, she became pregnant, a fact which was confirmed through medical tests which included an ultra sound examination. The evidence when weighed as a whole leaves no doubt that the victim was penetrated.
16. The last ingredient is whether it's the appellant who penetrated her. There is no doubt that the appellant and the victim were together on the material day. The appellant himself confirms so in his defence as well as Pw-2 in her evidence in-chief. The victim in her evidence revealed that she had not had sex with anyone else. She had it then with the appellant and he is the one who dropped her home thereafter and carried water for her from Galana River using a motor bike. The appellant concede to a greater extent to these facts and only denies having had sex with her then, in the bush. His defence is of mere denial. The evidence of the complainant is reliable and convincing beyond reasonable doubt that the appellant is the real culprit. Looking also at his mitigation in the lower court, having been found guilty he opened up and said; -

“I seek for mercy for the offence I committed. I have 7 children. I seek mercy. I will not repeat such an offence in future. I am 34 years old.”

17. Though mitigation does not generally affect the determination of guilty, it can hardly pass unnoticed when it's factual on commission of the offence. It's part of the trial process.
18. Having considered the foregoing, I do find that the appellant was rightly convicted of the offence in the main count.
19. The victim was aged 16 years then. Section 8 (4) of the *Sexual Offences Act* reads; -

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than 15 years.”

20. In Petition No. E018 of 2023, Republic-vs-Joshua Gichuki Mwangi, the Supreme Court of Kenya held that the imposition of mandatory minimum sentences under the *Sexual Offences Act* is constitutional.
21. The appellant herein was sentence to the minimum possible sentence for the offence. This court cannot therefore interfere with the said sentence downward. The appeal against the sentence is therefore equally dismissed. The bottom line is that the appeal is entirely is dismissed for want of merit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF OCTOBER, 2024.**

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Mr Mouko for the Appellant

Ms Ochola for the State

