



**Shiyuka v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 17069 (KLR) (Crim) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 17069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E028 OF 2023
AB MWAMUYE, J
DECEMBER 17, 2024**

BETWEEN

SALIM JUMA SHIYUKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence of 25 years for the offence of defilement contrary to section 8(2) of the Sexual Offences Act No.3 of 2006 by Hon. M. Thibaru RM delivered on 4th November 2022)

JUDGMENT

1. This is an appeal against the judgment delivered on 4th November 2022 by Hon. M. Thibaru, the Resident Magistrate's Court at Madaraka Law Court, in criminal case number 130 of 2021, wherein the Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars being that during the month of march 2021 in Mathare Gitathuru, within Nairobi County intentionally caused his penis to penetrate the vagina of M.E a child aged 11 years.
3. The Appellant in his defence denied the offence and gave a sworn statement but the Trial Court found him guilty and convicted him under section 215 of the criminal Procedure Code.
4. Upon mitigation by the Trial Court, the Appellant was sentenced to serve twenty-five (25) years imprisonment from the date of his arrest.
5. Being dissatisfied with the conviction and sentence, the Appellant lodged this appeal on grounds that:



- i. The Learned trial Magistrate erred in law and fact by failing to find that the age as the elements of the offence of defilement was not proved beyond reasonable doubt as required by the law.
- ii. The Trail Magistrate erred in law and in fact in sentencing the Appellant to serve 25 years imprisonment which excessive under the circumstances

Analysis and Determination

6. To determine whether the prosecution proved its case beyond reasonable doubt in a defilement charge under Section 8(1) as read with 8(2) of the *Sexual Offences Act*, the Court must be satisfied that the essential elements of the offence have been fully established. These are: Proof of the age of the complainant, Proof of penetration, Positive identification of the accused.

a. Proof of the Complainant's Age

7. The age of the complainant is a critical ingredient in defilement cases, as it determines both the offence and the applicable sentence. The Court of Appeal in *Hadson Ali Mwachongo v Republic* [2016] eKLR emphasized that age must be proven beyond reasonable doubt and not assumed.

“The age of the complainant is a critical factor in a charge of defilement under Section 8. It must be proved by credible evidence, which may include a birth certificate, age assessment report, or other cogent documentation.”

8. The Appellant argued that the complainant's age was not adequately proven. Under Section 8(2) of the *Sexual Offences Act*, the age of the complainant is critical in determining the appropriate sentence. In *Fappyton Mutuku Ngui v Republic* [2012] eKLR, the Court of Appeal held that the age of the victim is a key ingredient in the offence of defilement and must be proved beyond reasonable doubt.
9. In the lower court record, a birth certificate was produced (Exhibit P2) showing that the complainant was born on 30th December 2009, making her 11 years at the time of the offence. This documentary evidence was unchallenged and corroborated by the testimony of the complainant's mother (PW2). I am therefore satisfied that the Trial Court properly found that the age of the complainant had been proved beyond reasonable doubt.

b. Proof of Penetration

10. Under Section 2 of the *Sexual Offences Act*, penetration means the partial or complete insertion of the genital organs into the genital organs of another person. The prosecution must therefore demonstrate that this occurred.
11. In *Mark Oiruri Mose v Republic* [2013] eKLR, the Court held:

“Proof of penetration does not necessarily require that the hymen be broken. Medical evidence showing tenderness, lacerations, or spermatozoa is sufficient.”
12. In this case, the prosecution adduced medical evidence from a clinical officer (PW3), who examined the complainant and observed findings consistent with recent defilement (e.g., torn hymen, bruises, lacerations). This corroborated the complainant's testimony and established penetration beyond reasonable doubt.



c. Positive Identification of the Accused

13. The prosecution must also establish that the person who committed the offence is the accused. The Court of Appeal in *Anjononi & Others v Republic* [1980] eKLR distinguished between mere identification and recognition:

“Recognition of an assailant by someone who is well known to the victim is more satisfactory and reliable than identification of a stranger.”

14. The complainant in the Trial Court testified that the accused was well known to her. The incident occurred in conditions conducive to positive recognition. Her account remained consistent throughout examination and cross-examination.

15. Additionally, in *Kimeu v Republic* [2002] 1 KLR 756, it was held that recognition evidence must still be scrutinised carefully, but if found to be reliable, it can form the basis of a conviction even without corroboration.

16. The Appellant challenged the identification, claiming it was not proper. However, the complainant gave a clear and consistent narrative of the events, identifying the Appellant by name and stating he was well-known to her. The incident occurred in broad daylight, and the complainant had sufficient opportunity to see and recognise the Appellant. The Trial Court found the recognition credible and reliable. The complainant’s evidence was direct and unwavering. I see no reason to disturb this finding.

17. The standard of proof in criminal cases is beyond reasonable doubt. In *Woolmington v DPP* [1935] AC 462, a foundational common law case adopted in Kenya, the burden of proof lies with the prosecution throughout and never shifts to the accused.

18. The Court in *Miller v Minister of Pensions* [1947] 2 All ER 372 (approved in *Sawe v Republic* [2003] eKLR) explained that:

“Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt... but the evidence must carry a degree of compulsion that a reasonable and just tribunal can act upon it.”

19. The Appellant submitted that the prosecution’s case was riddled with inconsistencies. However, a careful examination of the Trial Court record reveals that the testimonies of the complainant, her mother (PW2), and the medical officer (PW3) were coherent and corroborative.

20. Minor discrepancies in witness accounts, especially when involving child victims, do not automatically discredit their testimony. As stated in *Patrick Kathurima v Republic* [2015] eKLR, courts must consider the totality of the evidence rather than isolate inconsistencies that do not go to the root of the case.

21. In the present case, the complainant’s testimony was clear, consistent, and credible. It was corroborated by medical evidence and supported by the complainant’s immediate report to her mother. There was no evidence of fabrication or malice. The defence of alibi raised by the Appellant was unsubstantiated and did not create a reasonable doubt.

22. In light of the above, the prosecution met its burden of proof beyond reasonable doubt by: Establishing the age of the complainant through official documents; Proving penetration through medical and oral evidence; Establishing recognition of the Appellant as the perpetrator.



23. The case meets the evidentiary standards required in law and is supported by strong, credible, and consistent testimony. The defence did not cast any reasonable doubt on the prosecution's case. Thus, the conviction was sound in law.
24. The Appellant contends that his alibi defence was not given due consideration. The Trial Court correctly observed that the Appellant did not call any witnesses to support his alibi and that the defence was unsubstantiated.
25. In *Wang'ombe v Republic* [1976-80] 1 KLR 1683, the Court of Appeal held that where an alibi is raised, the prosecution does not need to disprove it in advance but must adduce evidence that displaces the alibi. The prosecution's evidence was strong and unshaken under cross-examination, rendering the alibi untenable.
26. The Appellant argued that the sentence was harsh and excessive. Section 8(2) of the *Sexual Offences Act* provides for a mandatory minimum sentence of life imprisonment where the complainant is below 11 years. The Trial Court, however, imposed a term of 25 years.
27. In *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, the Supreme Court acknowledged the need for discretion in sentencing, but it expressly excluded sexual offences from the ambit of that decision in subsequent jurisprudence. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal held that mandatory minimum sentences under the *Sexual Offences Act* remain constitutional.
28. Given the age of the complainant and the gravity of the offence, a sentence of 25 years is lawful and not manifestly excessive.
29. Having carefully reconsidered the evidence on record and the applicable law, I find no merit in the appeal. The prosecution adduced strong and cogent evidence, and the burden of proof was discharged beyond reasonable doubt.
30. Having weighed the Appellant's case on appeal against the evidence on record, I am satisfied that the Appellant was convicted on strong evidence and the prosecution discharged its burden of proof beyond reasonable doubt. I therefore find no merit in the appeal on both conviction and sentence.
31. In the result, I affirm the judgment of the lower court and dismiss the appeal in its entirety.
File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH OF DECEMBER 2024.

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BAHATI MWAMUYE

JUDGE.

In the presence of:-

Appellant – present at Kamiti Maximum

Counsel for the Respondent: Mr. Mwandawiro

Court Assistant: Mr. Guyo

