SHA v Republic (Criminal Appeal E022 of 2024)
[2025] KEHC 13479 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13479 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E022 OF 2024

JN NJAGI, J

SEPTEMBER 24, 2025

BETWEEN

SHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. N.Wasike, SPM, in Garsen Senior Principal Magistrate's Court Sexual Offence Case No. E002 of 2023 delivered on 28/5/2024)

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 30th day of December, 2022 at around 0300hrs at Tana Delta sub-county within Tana River County he intentionally caused his penis to penetrate the vagina of H.Y. (herein referred to as the complainant), a child aged 12 years.

2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal as per the appellant`s memorandum of appeal are that;

    1) That the learned magistrate erred in law and facts by failing to consider that the prosecution did not prove their case beyond reasonable doubt as required by the law in breach of Section 109 and 110 of the *Evidence Act*.

    2) That the learned magistrate erred in law and fact by failing to consider sharp contradictions by the prosecution in contravention of Section 163(1)© of the *Evidence Act*.

3) That the trial magistrate erred in law and fact by failing to consider both conviction and sentence were against the weight of the evidence adduced by the prosecution.

4) That the learned magistrate erred in law and facts by failing to adequately consider his defence evidence.

3. The case for the prosecution was that the complainant who was PW1 in the case was at the material time aged 12 years and a grade 4 primary school pupil. She was living with her Mother, PW3, in the same compound but she was spending the nights in the room of her aunt PW2. She had her own bed in the room of her aunt. That on the material night, the complainant and her aunt PW2 were sleeping in their room when at around 3 am the complainant`s aunt woke up and realized that there was a person on the complainant`s bed. She went out of the house and woke up her brother called G (did not testify in the case). They went back to her room. G had a spot light from his phone which he directed onto the bed of the complainant and the person who was on the bed started to come out of the bed of the complainant. PW2 identified the person as the appellant. There was a struggle between the appellant and G. The Appellant went out of the room. The mother to the complainant heard the commotion and came out of her house and saw the appellant being chased. They chased the appellant up to his house, about 100 meters away. His father blocked them from gaining entry into the Appellant`s house. They went back home.

4. It was the evidence of the complainant that she did not feel the appellant doing anything to her. That she woke up by noise between the appellant and her uncle. In the morning she was taken to Garsen police station and to hospital where she was examined and told that she had been defiled.

5. It was the evidence of Buya Shevo, PW5, a clinical officer at Garsen Health centre that he examined the complainant on her vagina and found her with a missing hymen but there were no bruises or lacerations. A urinalysis examination was done that revealed presence of spermatozoa. He PW3 made a conclusion that the complainant had been defiled. He filled a P3 form to that end.

6. The case was investigated by PC Magdalene Wanja PW6 of Garsen police station. The Appellant was later on 2/1/2024 arrested by PC Khamasi PW4 at Garsen bus stage and taken to the police station. PC Wanja was given the birth certificate of the complainant that indicated that she was born on the 6th June 2011 that placed her age at the material time at 12 years. She charged the Appellant with the offence of defilement. During the hearing, the clinical officer PW5 produced the complainant`s treatment notes and the P3 form as exhibits, P.Exh.1 and 2 respectively. The investigating officer produced the birth certificate as exhibit, P.Exh.3.

7. When placed to his defence, the appellant stated in a sworn statement that he was on th material night sleeping at his house with his wife, DW2. That at 3 am his wife woke him up to escort her to the toilet outside their house. He took her to the toilet. That while he was waiting for her, he was attacked by a group of people who were armed with rungus. They started to beat him up while alleging that he was a thief. He feared for his life and ran away. A man on a motor cycle took him to his brother`s house at Minjila. He denied defiling the complainant on the material night. He said that he never knew her before the material date. However, that he knew her grandfather who was his neighbor with whom he had differences over borehole water which he was selling to residents yet it was supposed to be offered free. He further said that there were differences between his sister and PW2 over a fight between their children.

8. The appellant called 3 witnesses in the case. His wife DW2 supported his evidence that the two of them were sleeping in their house when the appellant escorted her to the toilet. That while in the toilet she

heard the appellant being beaten by some people. She went and reported to his father. The appellant escaped.

9. The other 2 witnesses, DW3 and DW4 were school mates of the complainant. It was their evidence that they asked the complainant about the incident and she told them that the incident never took place but it was her uncle who was forcing her to implicate the appellant.

Submissions

10. The appeal was canvassed by way of written submissions. The appellant through his counsel submitted that the complainant told the trial court that she did not know or even see the person who defiled her as she was asleep. That the trial court failed to consider the evidence of DW3 and DW4 that she told the said witnesses that she was forced to implicate the appellant with the offence. Further that the court failed to consider the evidence of the appellant that the home of the complainant was about 15 minutes` walk from the home of the Appellant. That the complainant was not a credible witness.

11. It was submitted that the trial court failed to consider the Appellant`s alibi defence which was corroborated by his wife, DW2.

12. The Respondent through the state prosecution counsel on the other hand submitted that the ingredients of the offence of defilement were proved beyond reasonable doubt. That the age of the complainant was proved by production of a birth certificate. That penetration was proved by the evidence that the complainant was on examination found with spermatozoa deposits in her vagina. That the Appellant was identified by the complainant`s aunt, PW2, who together with her brother chased the Appellant. That the prosecution witnesses, PW1, PW2 and PW3 confirmed that the Appellant was their neighbor and was well known to them. That they could not fail to recognize him. That his alibi defence was a mere sham.

13. It was submitted that the appellant was sentenced to the minimum sentence of 20 years imprisonment for defiling a child of 12 years as provided by the section under which he was charged. The respondent urged the court to dismiss the appeal.

Analysis and determination

14. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of Kiilu & another v Republic [2005]1 KLR 174, thus:

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

15. The elements of the offence of defilement that the prosecution is required to proof beyond reasonable doubt are: proof of the age of the victim, proof of penetration and identity of the of the perpetrator, see the Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.

16. Starting with the element of the age of the complainant, the law is that the age of a person can be proved in various ways. In the case of Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

17. The birth certificate of the complainant in this case was produced that showed that she was born on the 6th June 2011. The offence was reported to have been committed on 30th December 2022, which placed her age at 11 years and 6 months.

18. On the element of penetration, Section 2 of the *Sexual Offences Act* defines the same as:

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person."

19. The prosecution had the duty to establish that the complainant was partially or fully sexually penetrated by the Appellant.

20. Penetration can be proved by way of medical evidence or by oral or circumstantial evidence. In the case of Kassim Ali v Republic (2021) eKLR the Court of appeal stated that;

> " ....the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."

21. A laboratory examination done on the complainant at Garsen Health Centre revealed presence of spermatozoa in her vagina. The presence of spermatozoa in the vagina of the complainant was a clear indication that she had been penetrated into her vagina. Penetration on the complainant was therefore proved. The question was whether the Appellant was the perpetrator of the offence.

22. In finding the Appellant as the person who defiled the complainant, the trial magistrate in her judgment stated that though the complainant stated in her evidence that she was asleep when the incident took place and she could not tell who defiled her, the complainant was woken up by noise in her bedroom and found the Appellant in her bedroom. The court found that the presence of the Appellant in the bedroom of the complainant was corroborated by her aunt PW2 who saw the Appellant coming out of the complainant`s bed. That the Appellant was seen by the complainant`s mother coming out of the house where the complainant was defiled. That PW2, PW3 and a brother to PW2 chased the Appellant up to his house where they were denied entry by the Appellant`s father. The court consequently held that the Appellant is the one who defiled the complainant. The question is whether the trial court was right in so holding.

23. The incident took place at night at around 3am. It was the evidence of both the complainant and her aunt PW2 that an electric bulb was on in their bedroom when they were sleeping but they found it removed from its holder when they woke up. That it was dark in the room when they woke up.

24. It was the evidence of the complainant that she was deeply asleep and did not feel a person defiling her. That she was only woken up by some noise in her bedroom and found the Appellant arguing

with her uncle, Guracho. That the Appellant and her uncle came out of the house. She followed them outside but she did not find them. In the morning she was taken to hospital where she was examined and informed that she had been defiled.

25. The aunt to the complainant PW2 told the trial court that she saw a person on the complainant`s bed. That she got scared and went and informed her brother, Guracho with whom she went back into her bedroom. That Guracho flashed his phone torch on the bed of the complainant and she saw a person coming out of the mosquito net of the complainant`s bed. She identified the person as the appellant. Guracho and the Appellant were then involved in a struggle but the Appellant sneaked out of the house. They chased him up to his house about 100 meters away but the Appellant`s father prevented them from entering into their house.

26. The mother to the complainant PW3 said that she heard the noise and woke up. She saw the Appellant running out of their house. She joined in the chase up to his home but his father denied them entry into their house.

27. It is trite that the court before basing a conviction on evidence of identification should examine the evidence carefully and satisfy itself that the circumstances of identification were favourable and free from the possibility of error. This position was re-stated by the Court of Appeal in the case of Kariuki Njiru and 7 others v. Republic CR. Appeal No. 6 of 2001 that;

> The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

28. The same was stated in Wamunga v Republic [1989] KLR 424 where the Court of Appeal stated thus:

> It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

29. In addition, even where identification is by recognition at night, the evidence must be absolutely watertight to justify conviction, see Nzaro v. Republic (1991) KAR 212.

30. The complainant in this case told the trial court that she was woken up by some noise in her bedroom whereupon she found the Appellant arguing with her uncle after which the appellant and her uncle went out of her house. Though she stated that the Appellant is the person who was arguing with her uncle, she said that the electric bulb that she had left on in the room when she went to sleep had been removed from its holder and it was dark in the room when she woke up. She however did not tell the court the source of light that enabled her to identify the Appellant as the person who was arguing with her uncle. In face of this, there was no basis upon which the trial court held that the complainant identified the appellant as the person she saw inside her bedroom when she woke up.

31. The aunt to the complainant PW2 told the trial court that she identified the appellant as the person who was on the complainant`s bed when Guracho flashed his phone light on him. The witness however never stated which part of the Appellant`s body that she saw that enabled her to identify him. The court is mindful of the fact that it is possible for a witness to be mistaken on the identity of a person well known to him/her. In Wamunga v Republic (supra) it was held that in testing whether a witness positively identified an accused person at night, the court ought to consider such things as the nature of light that enabled the witness to identify the accused; the intensity of such light; the distance the witness

was from the accused; whether there was any obstruction between the witness and the accused, and such like matters. In this case no such evidence was led so as to test whether PW2 positively identified the Appellant. The trial court was thus in error in failing to test the evidence of PW2 with the greatest care so as to satisfy itself that the identification was free from the possibility of error.

32. The evidence of the mother to the complainant, PW3 suffers the same fate. She never told the court how far she was from the Appellant when she saw him running out of the house. She did not tell the court the nature of light that enabled her to identify him. I do not find credible evidence that PW3 identified the Appellant as the person she saw running out of their house.

33. The aunt to the complainant PW2 was the only witness who said that she identified the appellant when her brother flashed a phone torch light on him. PW2 can be regarded as the sole identifying witness in the case. A guide on how to treat the evidence of a single identifying witness in difficult circumstances was given in the case of Kiilu & Another v Republic [2005] eKLR, where the Court of Appeal held that;

> " Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error."

34. In Ogeto v Republic [2004] KLR 19, it was stated:

> It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

35. There was no other evidence to corroborate the evidence of PW2 that she identified the appellant as the person she saw on the complainant`s bed.

36. Though PW2 and PW3 said that they chased the Appellant and he entered into his house, which PW2 estimated to have been about 100 meters away, the witnesses never told the court the distance they were from the Appellant when they saw him entering into his house. They never said that they chased him without losing sight of him until when he entered into his house. In view of the fact that it was at night and the witnesses did not tell the court the source of light that enabled them to see the appellant entering into his house, the evidence to that end was not credible.

37. The Appellant raised a defence of alibi in which he stated that he was at the material time at his house with his wife, DW2. It is trite that the burden of proving the falsity of an accused`s defence of alibi lies on the prosecution, see Karanja v Republic (1983) KLR 501. In view of my finding that the prosecution witnesses did not sufficiently identify the appellant as the person who was in the house of the complainant when she was defiled, the prosecution did not dislodge the Appellant`s defence of alibi. The trial magistrate failed to scrutinize the evidence on identification with the necessary care as required by the law and as a result came to the wrong conclusion that the Appellant defiled the complainant. I find the conclusion of the trial court not to have been supported by strong evidence.

38. The upshot is that there was no sufficient evidence to support the conviction on the Appellant. I thus find the appeal to be merited. Consequently, the conviction entered by the trial court on the Appellant is quashed and the sentence thereof is set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 24TH DAY OF SEPTEMBER 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Komora for Appellant

Miss Mkongo for Respondent

Court Assistant - Rahma

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