Shally v Republic (Criminal Appeal E008 of 2024)
[2025] KECA 1817 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1817 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E008 OF 2024

AK MURGOR, F TUIYOTT & P NYAMWEYA, JJA

NOVEMBER 7, 2025

BETWEEN

HISHAM SHALLY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (F. Mugambi, J.) delivered on 17th April 2023 in H. Cr. A. No. E087 of 2021)

JUDGMENT

1. There has been concurrent findings by the two courts below that the complainant ZA positively identified Hisham Shally (the appellant) as the person who defiled her on diverse dates between May 2018 and February 2019. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.

2. At trial, the victim's evidence was that she was a victim of several acts of sexual assault. In the first, she was unable to either identify or recognize the assailant. In the next, on a night later, there was light, albeit "not very strong" and so she was able to recognize the appellant as the person who removed her panty and touched her vagina with his fingers. When she looked and saw him, the appellant run out of her room into the boys' room. In the morning, she informed her aunty Tima about the incident.

3. The next assault, which happened two nights after the second incident, was more invasive and audacious. On this occasion the appellant not only defiled the victim by penetration of her vagina using his penis but stayed on in the same bed with her until morning. Although her cousin Fatuma would ordinarily share the bedroom with her, she was not present on that night. The next day, on the prodding of her uncle Khalid Bakari, she told him what the appellant had done to her.

4. This evidence was the basis on which the appellant was convicted for defilement and sentenced to thirty (30) years imprisonment, both upheld by the High Court upon hearing the first appeal.

5. In this second appeal the appellant impugns the decisions of the two courts on two broad grounds: that the prosecution failed to prove all elements of the offence of defilement and that the prosecution case was not proved beyond any reasonable doubt.

6. The appellant who appeared at trial in person relied on his written submissions. He argued that the prosecution failed to prove two of the three essential elements of defilement: positive identification of the perpetrator and penetration. On the matter of identification, the appellant contended that the visual identification was an opinion whose value depended on the circumstances upon which it was given. The appellant stated that the light at the scene was not strong, a fact confirmed by the witness PW1. This weak lighting, along with the undisclosed duration of observation, raised doubts about the witness's ability to make a positive identification. It was further pointed out that although a torch was mentioned by PW5 referring to the statement by Fatuma saying she saw the appellant enter the room with a torch, it did not sufficiently light the place to overcome the poor visibility. The issue of identical twins was raised as another challenge to reliable identification, especially since PW1 noted that Hashim, the twin of the appellant, wore glasses whereas the appellant did not, a key distinguishing feature that was not considered. The appellant also challenged the identification process at the police station as biased because no identification parade was conducted. It was further submitted that the initial report did not name the appellant, and it was unclear why the name 'Isham' was used in the investigation diary or why the prosecution did not clarify if it was an alias name. The appellant argued that the circumstances were not conducive for a positive identification, especially as the witness was of a young age.

7. On penetration, the appellant argued it was not proved because the doctor's report was inconclusive. The doctor found reddened fresh vaginal abrasions and a broken hymen with an old scar, but there were no injuries on the anus. The appellant highlighted that the doctor could not identify the person behind the act or the object that caused the abrasions and only stated the cause of the old scar was a blunt object. The appellant suggested that a broken hymen could be caused by other activities such as swimming or cycling, and abrasions could result from tight innerwear, thus it could not be concluded that penetration occurred through sexual activity.

8. The appellant further submitted that the prosecution case was not proved beyond a reasonable doubt due to inconsistencies and contradictions. For example, the prosecution failed to produce the underwear that were allegedly removed during the incident, and the bedsheet mentioned by PW1 was not brought to prove the fact. Another contradiction alleged was PW1 stating that Fatuma was sleeping on the upper decker, while at another point stating she was not present that day. Finally, the appellant asserted that the case rested on mistaken identity and that his defence evidence was not legally "vitiated" by the prosecution, and therefore ought to be considered. For these reasons, the appellant prayed for the appeal to be allowed, the conviction quashed, and the sentence set aside.

9. Mr Omariba learned Prosecution counsel appeared for the respondent, and sought to rely on written submissions said to have been filed but which we did not see at the time of preparing this decision.

10. As a second appeal court, our remit is is delimited by the provisions of Section 361(a) of the Criminal Procedure Code to dealing with matters of law only. Elaborating on this remit, this Court in Njoroge vs Republic [1982] KLR 388 stated:

> " On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on the evidence."

11. It is common cause that the appellant has a twin identical brother with a not too dissimilar name. The twin is Hasham while the appellant is Hisham. Although the two are identical twins, the victim stated:

> " I can distinguish them because we grew up together. I can differentiate them as we were all raised by my aunt from childhood."

12. As to how she was able to see him, it was her evidence that in the night he shared a bed with her, a bulb lit the room. The victim spent a considerable amount of time with an assailant who was well known to her at the time of the assault and in a well lit room. To rule out mistaken identity she stated:

> " Hisham started to wear glasses recently. He used to wear glasses before but his glasses broke. During the incident when he defiled me, his glasses were broken and had no glasses for a while. He bought the glasses he has now after this incident."

13. PC Rehema Obare (PW5) recounted how the report of the incident was made to her and the two twin brothers brought to the police station. There the victim identified the appellant as the assailant.

14. The evidence of the victim was not broken in cross-examination. She remained firm. It is therefore not surprising that both the trial court and the High Court were persuaded that the complainant had positively identified the appellant as the assailant. Concurrent findings of fact by the two courts below are not to be whimsically interfered with by an appellate court. To warrant interference the findings of the trial court and reevaluated by the first appellate court must be manifestly wrong that no reasonable tribunal considering the evidence would come to the same conclusion (See for example M'Riungu v Republic [1983] KLR 455)). On this occasion we have no doubt that on the basis of the strong and unshaken evidence of the victim, the conclusion drawn was the correct one.

15. Once the medical evidence revealed that the victim's hymen was broken and she had a 'penetration, reddened vaginal abrasions, in the vagina,' then it became obvious that her complaint that she had been sexually assaulted was not fictional. The medical examination of the victim revealed that she was involved in recent sexual activity.

16. We make a comment on the sentence. At the time of giving evidence, the victim was 11 years old. Her certificate of birth produced at trial showed that she was born on 24th July 2008.

    She would have reached her eleventh birthday by the date of her last assault which was sometime in February 2019. Under section 8(2) of the *Sexual Offences Act*, a person convicted of defiling a child of 11 years or younger, is liable to life imprisonment and statute prescribes the sentence as the minimum never mind the unresolved debate as to whether the minimum sentences under the *Sexual Offences Act* are absolute. From that standpoint, the sentence of 30 years meted by the trial court, undoubtedly long, can be said to be generous.

17. In the end, we find no merit in this appeal which we hereby dismiss.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER 2025.

A. K. MURGOR

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.