



**Saidi v Republic (Criminal Appeal E054 of 2022)
[2025] KEHC 17084 (KLR) (21 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E054 OF 2022
M THANDE, J
NOVEMBER 21, 2025**

BETWEEN

ALEX SABWA SAIDI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein was charged with, and convicted of the offence of “defilement to a person with disability contrary to Section 7 of the *Sexual Offences Act*”. The particulars of the offence are that on 12.8.17 at Mayungu Location within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the anus of Benard Shukrani without his consent, a person with mental disability aged 17 years. Upon conviction, the Appellant was sentenced to 20 years imprisonment.
2. Being dissatisfied with both the conviction and sentence he preferred this Appeal on grounds that the prosecution did not prove its case beyond reasonable doubt.
3. In submissions dated 18.6.24, the Respondent conceded the Appeal on the ground that the prosecution case was that the victim of defilement was a child of unsound mind. The evidence as presented by PW1, PW2 and PW3 was at variance with Section 7 of the SOA as there was no child, family member or person with mental disabilities within whose view the offence was committed. As such, the Appellant ought to have been charged under Section 146 of the Penal Code which provides:

Any person who, knowing a person to be a person suffering from mental illness, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was a person suffering from mental illness, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.



4. The Appellant was charged under Section 7 of the SOA which provides:

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

5. The particulars of the offence of which the Appellant was convicted are clearly at variance with the particulars of the offence created under Section 7 of the SOA thereby rendering the charge fatally defective.

6. *The Constitution* guarantees to every accused person the right to a fair trial. That right includes inter alia, the right not to be made to plead or convicted of an offence not known in law. Article 50(2)(n) provides:

(2) Every accused person has the right to a fair trial, which includes the right—

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

7. The offence with which the Appellant was charged with and convicted of is not known in law. Remarkably, neither the prosecution nor trial court noted this fact and the matter proceeded to full trial. The proceedings and conviction of the Appellant therefore stand vitiated. This would call for a retrial.

8. The Respondent has however submitted that a retrial will not be in the interest of justice. This is because Exhibit 2 which was produced to prove that the victim had a mental disability, related to one Shuku Samson and the prosecution did not demonstrate that he and the victim Benard Shukrani referred to one and the same person.

9. In *Musa Kiprotich Kitilit v Republic* [2012] KEHC 876 (KLR) Ouko, J. (as he then was) considered a similar matter and stated:

In the circumstances of this case, it is clear that both the trial court and the prosecution did not notice that the charge with which the appellant was being tried was defective. In my view, both the trial court and the prosecution owed the appellant a duty to ensure that he was not made to plead to an offence that is not known in law. Ordering for a retrial presupposes that the appellant will be tried on the same defective charge. This will be of no use. This court will not order for a retrial in order to allow the prosecution to rectify the defect in the charge. To do so, would in my view, occasion injustice to the appellant considering that he has already served about four years for the wrong charge.

10. I associate with the sentiments of Ouko, J. in the cited case. For the reason that the charge was defective and that Exhibit 2 reflected the name of a person other than the Complainant, a retrial will not be in the interests of justice. The Court will therefore not order a retrial to allow the Respondent rectify the defect in the charge. A retrial will also occasion prejudice and injustice to the Appellant.

11. I accordingly allow the appeal, quash the conviction and set aside the sentence. The Appellant is forthwith set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 21ST DAY OF NOVEMBER 2025



M. THANDE
JUDGE

