



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA HIGH COURT

CASE NUMBER: HCCRA/E079/2025

SHARIFF SULEIMAN VS THE REPUBLIC

JUDGMENT

(Being an appeal from the Judgment delivered by Hon. G.A. Ollimo on 14th May 2025 in Mombasa CM's Court, Sexual Offence Case No. E033 of 2020)

Background

1. The appellant, together with one Reuben Mwakirembe, was charged with the offence of gang defilement contrary to Section 10 of the Sexual Offences Act. It was alleged that on 11th November 2020, at about 1900 hours in the Staff Area, Jomvu Sub-County, the appellant, jointly with Reuben, intentionally and unlawfully caused his penis to penetrate the vagina of M.W, a child aged 14 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
3. After trial, the court found that the prosecution failed to prove the element of "association" necessary for gang defilement. Reuben was acquitted under Section 215 of the Criminal Procedure Code.
4. The trial magistrate, however, found that the evidence disclosed the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, convicted the appellant, and sentenced him to 20 years' imprisonment.
5. Aggrieved, the appellant filed this appeal raising the following grounds:
 - a. The medical evidence did not prove penetration beyond reasonable doubt;
 - b. The prosecution evidence contained major contradictions;
 - c. The standard of proof was not met;
 - d. The court failed to comply with Section 329 of the CPC on mitigation.

Duty of the First Appellate Court



6. As established in *Okeno v Republic* [1972] EA 32, this Court is obligated to re-evaluate the evidence afresh while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Issues for Determination

7. The issues for determination are:

- a. Whether the evidence proved the offence of gang defilement;
- b. Whether the evidence proved the offence of defilement;
- c. Whether the conviction was lawful and safe.

Summary of the Prosecution and Defence Cases

8. PW1, M.W., the complainant aged 15 years at the time of her testimony, stated that on 11th November 2020 at around 6.00 p.m. while at her home, Shariff passed by, greeted her, and asked her to go to his home, but she refused. Later, while she was at a friend's house, Shariff sent Jeremy (later identified as Reuben, the 2nd accused) to call her. She went to Jeremy's house where Jeremy closed the door and Shariff was inside. It was around 8.00 p.m. Shariff asked her to cook spaghetti but she declined as she did not know how to do so. She instead borrowed his phone to play a mobile game.

9. PW1 stated that Shariff then switched off the lights while Jeremy was in the bathroom. He removed both his own clothes and hers and proceeded to have sexual intercourse with her. She testified that the act was painful and he did not use a condom. Afterward, he switched on the lights and Jeremy came out of the bathroom. They sat for some time while Shariff checked on the spaghetti. Shariff later opened the door and told PW1 to leave after confirming that no one was outside.

10. PW1 testified that she arrived home at around 8.00 p.m. and found no one. She checked on a neighbour but did not find her friend. She later returned home, where she spent the night alone. The following day, she informed her mother about the incident because she was experiencing abdominal pain. Her mother took her to St. Martin's Hospital. The matter was reported to the police thereafter and Shariff was arrested.

11. During cross-examination by Advocate Mukanzi, PW1 stated that she knew both Shariff and Reuben. She confirmed that she had never had sexual intercourse before the incident. She reported the matter to her mother after one day because she was experiencing pain. She was not afraid to enter the house as they had spoken, and Shariff's phone was playing music.

12. PW1 further stated that she did not raise any alarm when Shariff closed the door. She testified that he used both arms to remove her clothes and covered her mouth to prevent her from screaming. She heard Reuben bathing. After the incident, she did not scream and took about a minute to put her clothes back on. She was taken to hospital after three days.

13. PW2, Joshua Nandwa, a registered clinician at Port Reitz Hospital with three years' experience, testified that he was not the examining clinician. The examining clinician was Dr. Emily Kaburi, with whom he had worked for one year and whose handwriting he recognized. PW2 produced the clinical notes, P3 form, laboratory report, and PRC form. According to the notes, the minor was taken to hospital on 15th November 2020 with a history of sexual assault said to have occurred on 11th November 2020 at Mikindani by two boys who allegedly held her hands, dragged her into an isolated house, and locked the door with a padlock.



14. PW2 testified that one of the boys took the girl to a bedroom, removed her clothes, and forcefully had intercourse with her. The minor presented with abdominal pain, difficulty urinating, and difficulty walking. The PRC form showed the hymen to have an old treated scar. The genitalia examination revealed a non-intact hymen with healed old scar tissue and whitish discharge. Treatment notes were produced as Exhibit 2, laboratory results as Exhibit 3, the PRC form as Exhibit 4, and the P3 form as Exhibit 5.

15. During cross-examination by Advocate Shisia, PW2 confirmed that he was not the examining clinician. He stated that the complainant was examined seven days after the alleged incident. He further confirmed that the hymen had been broken long before and could not have been broken within two days. He stated that if penetration had been forceful, he would expect to see bruises. The whitish discharge indicated an infection.

16. PW3, Nancy Wanjiku, mother to the complainant, testified that the minor was 14 years old in 2020 according to her birth certificate. She stated that she came to know Shariff after her daughter narrated the incident. On 13th November 2020 at 5.00 p.m., she returned home and found M.W. holding her stomach. Upon inquiry, the minor informed her that on 11th November 2020, Shariff had met her, taken her to maskani, pulled her inside a house, switched off the lights, removed her clothes, and had sexual intercourse with her. PW3 stated that the other boy locked the door from outside to prevent escape.

17. PW3 further stated that the minor took her to Shariff's house where Shariff admitted knowing her but denied any wrongdoing. A friend advised PW3 to take the minor to Mikindani Dispensary. She subsequently reported the matter. The minor was later taken to Port Reitz Hospital, where she was examined and found to have a broken hymen and discharge.

18. During cross-examination, PW3 confirmed that she did not witness the incident and only learned about it from the minor. She stated that she was informed of the incident two days later and took the minor to hospital after three days.

19. PW4, Corporal Samson Kahindi of Mikindani Police Station, testified that he took over the investigation from CPL Makau, who had been transferred to Taita Taveta. He stated that on 14th November 2020, a report was made that a minor had been defiled by two boys. The minor was taken to Port Reitz Hospital where the P3 and PRC forms were filled. On 17th November 2020, the complainant and her mother recorded their statements. On 23rd November 2020, the suspects were arrested. PW4 produced the complainant's birth certificate as Exhibit 1.

20. During cross-examination by the appellant, PW4 stated that according to the complainant's statement, Shariff entered the room with the minor while Reuben locked the door from outside. In cross-examination by the 2nd accused, he clarified that he was not the investigating officer but was testifying based on CPL Makau's documentation. DEFENCE CASE.

21. DW1, the 1st accused, testified that he was 25 years old and resided in Mikindani. On 11th November 2020, he was a Form Four student. After school, he went home. He was arrested at 9.00 p.m. at his residence and taken to Reuben's home, where Reuben was also arrested. They were taken to the police station and informed of the charges. He denied having any friendship or interaction with the complainant and denied the allegations.



22. During cross-examination, DW1 stated that both he and Reuben lived in the Staff area, where Reuben was a caretaker. He denied interacting with the complainant on the material day and alleged that the complainant and her mother framed him.

23. DW2, Reuben Mzungu Mwashirembe, testified that he was 23 years old in 2020 and worked as a caretaker in Mikindani, having been there for only one month. He denied knowing the complainant or her mother. He denied that Shariff frequented his house and denied any involvement in the alleged offence.

24. The Respondent did not file submissions.

Relevant Law

25. Section 10 of the Sexual Offences Act creates and prescribes punishment for gang rape/defilement, with a minimum sentence of 15 years, which may be enhanced to life imprisonment.

26. Section 11(1) of the Sexual Offences Act creates the offence of indecent act with a child, punishable by a minimum term of 10 years.

27. The offence of gang defilement requires proof of:

- Penetration;
- Age of the complainant;
- That the penetration was committed in association with another or others or with common intention.

See:

- Fappyton Mutuku Ngui v Republic [2012] eKLR
- Elly Otieno Alose v Republic [2019] eKLR.

Findings of the Trial Court

28. The trial magistrate relied heavily on PW1's testimony, found it credible under Section 124 of the Evidence Act, discounted the inconclusive medical evidence, rejected the defence, and convicted the appellant for defilement.

Legal Principles on Single Witness Evidence

29. Under the proviso to Section 124 of the Evidence Act, a conviction may be based on the uncorroborated evidence of the complainant in sexual offences only if the court records reasons for believing the victim to be truthful.

30. However, courts must exercise great caution with single-witness identification, especially where conditions are difficult. See:

- John Muriithi Nyagah v Republic [2014] eKLR
- Abdala bin Wendo v R (1953) 20 EACA 166.

Analysis

31. The decision of the learned trial magistrate herein was as follows: -

i. "Shariff (1st accused) denied any interaction or sexual intercourse with PW1, claiming he was arrested without cause.



- ii. PW1's testimony is the primary evidence of penetration. Under Section 124 of the Evidence Act, the court may convict on the uncorroborated testimony of a victim of sexual offences if it believes the victim is truthful. PW1's account was consistent, detailed, and unshaken during cross examination. She described the incident, the setting, and the aftermath, including reporting to her mother due to pain.
- iii. The medical evidence on the other hand does not conclusively prove recent penetration, as the broken hymen was old, and no bruises were noted. However, the absence of recent physical injuries does not negate penetration, as defilement does not require proof of injury (see Dominic Kibet Mwarai vs Republic [2014] Eklr).
- iv. Shariff's denial is a bare assertion without corroboration. His claim of no interaction with PW1 is contradicted by PW1's testimony that they were neighbours and that Sharif invited her to his house, a fact he did not dispute beyond a general denial.
- v. Regarding identification, PW1 identified Shariff as her neighbor and the perpetrator. The incident occurred in his house, and she was lured through Jeremy. There is no evidence of mistaken identity and Shariff confirmed residing in the same neighbourhood.
- vi. The court finds PW1's identification reliable, as the incident occurred in a familiar setting, and she had prior interaction with Shariff.
- vii. The court further finds that the prosecution has proved beyond reasonable that Shariff Suleiman intentionally and unlawfully caused his penis to penetrate PW1's vagina. PW1's testimony is credible, consistent and sufficiently corroborated by PW3's account of her disclosure and physical discomfort.
- viii. The medical evidence, while not conclusive, does not contradict her testimony while Shariff's defense is unconvincing and fails to raise reasonable doubt." on the basis of which the trial Court convicted the appellant was by the complainant. Evidence of a single identifying witness especially where the conditions for positive identification are difficult must be tested with the greatest care especially where the life of an accused person is at stake and the predecessor of this Court in the case of Abdala bin Wendo and Another V.R. [1953] 20 EACA 166, held that what is needed in such circumstances is "other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, though based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

I have looked at this analysis against the evidence and found the following that there were very serious red flags. To begin with , PW 1 gave kept changing her story. To her mother (PW 2), PW1 said that Sheriffa sent a friend to call her then held her hand and pulled her inside. Then switched off the lights. That the other guy is the one who locked the door from outside so she could not escape. Page 23, of the record of appeal.

32. To the clinician – pw11 gave the history as hereunder;

"She was going to see her friend Maryam when two Boys came close to her and held her hands forcefully and dragged her to an isolated house in the same staff area they locked the house using a padlock and one of the Boys took her to the Bedroom removed her clothes and he also removed his clothes and forcefully had intercourse with her; then he opened the door and told her to put on her clothes and go out. Then on Friday evening mother noticed she was having low and pain was unable to urinate well and walk well. She then interrogated her. That when her daughter opened up. (see original medical booklet -PEXT. 2)".

33. In Court her evidence was:



“I told her I did not know how to cook spaghetti. (sic) They opened the door and left it open. I entered the house and the friend closed the door and Sheriff was inside it was 8.00pm. They then put on the lights, then I borrowed his phone to play game. They then switched off the light, I had sat on the bed the house has one room it has a bed and a toilet. Then spaghetti was being cooked by Sheriff. He is the one who was cooking. He switched off the light the friend was in the bathroom. He then removed my clothes. Sheriff removed my cloth. I had skirt pencil, he removed it and I remained naked, he removed his jeans trouser and started doing sex. He took his ‘kidude’ and inserted into mine. I felt pain, he did not use a condom. The friend was at that time in the toilet. He then lit the lights and the friend came out. The friend then came out of the bedroom. When he came I had already put on my clothes”.

Determination

34. The primary issue is penetration, which must be proved beyond reasonable doubt.

35. The complainant’s report was made on 14th November 2020, three days after the alleged incident. PW3 testified she only knew the appellant after the child’s narration.

36. The minor was examined on 15th November 2020, four days later.

37. The clinician testified that the hymen was broken long before and that he would have expected bruising if penetration had been recent or forceful. This, combined with the delay in reporting, rendered the medical evidence inconclusive.

38. PW1 gave three materially inconsistent accounts:

- To her mother: She was pulled inside the house, lights switched off, and another boy locked the door from outside.
- To the clinician: Two boys dragged her forcibly into an isolated house and locked it with a padlock.
- In court: She voluntarily entered the house, the door was open, she borrowed a phone to play a game, and spaghetti was being cooked.

39. These inconsistencies go to the root of the offence—how she entered, whether force was used, number of assailants, and the circumstances of penetration.

40. The investigating officer’s testimony did not reconcile with the contradictory accounts.

Medical Evidence

41. The clinician confirmed:

- Old-healed hymeneal tears;
- No bruises;
- No signs of recent penetration;
- Complaints of abdominal pain;

Examination four days after the alleged event

42. The medical evidence did not support penetration, and the trial court did not sufficiently address this gap.

Section 124 Evidence Act Compliance

43. The trial court did not record specific reasons for believing PW1 despite the glaring contradictions.



44. The conviction, therefore, lacked the statutory safeguards and was unsafe.
45. Given the contradictions and lack of corroborative medical evidence, the conviction was unsafe.
46. The trial court convicted the appellant for defilement under Section 8(3), although he had not been charged with that offence.
47. Defilement under Section 8(3) carries a minimum sentence of 20 years, whereas gang defilement carries a minimum of 15 years. Defilement (s.8(3)) is the more serious offence.
48. Section 179 CPC permits substitution only to a lesser offence, not a more serious one.
49. Therefore, the substitution was illegal and the conviction cannot stand.
50. For the foregoing reasons, the court finds that the conviction was unsafe.
51. The appeal is allowed.
52. The conviction is quashed and the sentence of 20 years' imprisonment is set aside. Unless otherwise lawfully held, the appellant shall be released from custody forthwith.

DATED, SIGNED AND DELIVERED IN OPEN COURT / VIRTUALLY VIA MS TEAMS
AT MOMBASA THIS 27TH DAY OF NOVEMBER 2025

HON. LADY JUSTICE W. K. MICHENI
JUDGE

In the presence of: -

- The Appellant - In person
- Mr. Sirima for the State
- Ms. Bebora – Court Assistant

SIGNED BY/FOR:
HON. LADY JUSTICE WENDY MICHENI



THE JUDICIARY OF KENYA.
MOMBASA HIGH COURT
HIGH COURT CRIMINAL
DATE: 2025-11-27 16:18:58

