Shitula v Republic (Criminal Appeal 55 of 2019)
[2025] KECA 12 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 12 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 55 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

REUBEN SHITULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kakamega (J. Njagi, J.) dated 21st February, 2019 in HCCRA No.7 of 2017)

JUDGMENT

1. The appellant, Reuben Shitula, was charged in the magistrate's court at Kakamega with the offence of defilement contrary to section 8(1) as read with section (3) of the *Sexual Offences Act*; the particulars being that on the 2nd February 2012 at [Particulars Withheld] village, he unlawfully and intentionally caused his penis to penetrate the vagina of PM[1] a child aged 10 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He denied the charge, and upon trial, he was convicted and sentenced to life imprisonment on the main charge.

2. Aggrieved by the outcome, he appealed in Kakamega High Court Cr. Appeal No. 27 of 2017, in which Njagi, J, in dismissing the appeal stated:

> " On my own analysis and evaluation of the evidence, I find that the appellant was convicted on cogent and credible evidence. The complainant's evidence that the appellant defiled her was supported by medical evidence. The fact that the appellant admitted that the complainant was at his home on the day of the commission of the offence led credence to the evidence of the complainant to that end. There was no reason to doubt the evidence of the complainant. The upshot of the foregoing is that the appeal is unmeritorious. The appellant defiled a girl of less than 11 years of age. He was given the minimum sentence of

life imprisonment that is provided by the law. The conviction and the sentence are thereby upheld. The appeal is accordingly dismissed."

3. Being aggrieved by both the conviction and sentence, the appellant filed the present appeal.

4. Briefly, the facts of the case were that PM, the complainant (PW3) was in the year 2012, a 10-year-old girl living with her aunt, FK (F), PW1 The appellant was a fellow villager who operated a phone charging business at his home. On the material day at 11 am F's husband PS, who is PM's uncle, sent PM to pick up his phone from the appellant to whom he had left the phone for charging. The complainant went to the home of the appellant where she found him all by himself at the home. She entered his house and asked him for her uncle's phone. The appellant did not give her the phone but instead grabbed her and pulled her to a bed. He forced her to lie on the bed covered her mouth and removed her skirt and panties and defiled her. After he finished, he locked her in the house and went out, came back, and gave her 2 mandazis. He told her not to tell anyone about the incident. He gave her the phone and she left for home. She did not disclose the incident to anybody on that day. On the following day, she started feeling pain in the pelvic area and on the head. She disclosed to F what had happened.

5. On receiving the report, F and two other women checked the private parts of the girl and saw sperms. They took her to the home of Josephine Olibo (Josephine), PW5, the village elder. Another villager, Rosemary Khayera, (Rosemary), PW4, joined them and together they went to the home of the appellant. Rosemary asked the appellant about the allegations but he denied it. PS escorted the complainant to Isulu Police Patrol base; the skirt and underpants which had been worn by PM at the time of the incident were handed over to P.C. Johnson Gichuhi, PW2. He was also given her birth certificate which indicated that she was born on 16th March 2003. The complainant was taken to hospital where she was examined by Alice Lihanda, PW6 a clinical officer, who, upon conducting a medical examination, noted bruises on the labia minora with the hymen absent, and stains on her underpants; and formed the opinion that PM had been defiled.

6. Placed on his defence the appellant gave a sworn statement and called one witness, his wife, Agneta Limisi (Agneta), DW2. The appellant stated that on the 2nd February 2012 ,he was at home watching television in his house with his grandchildren. His wives were outside. One of them was washing clothes while the other one was preparing vegetables. That at 11.30 a.m the complainant arrived at his home with a mobile phone that she had been sent by her uncle to take to him for charging. It was not the first time that the complainant had brought the phone for charging. The girl joined them in watching television. He then left the children in the house and went out to brush his teeth.

7. Shortly, the girl's uncle PS arrived, and asked for the girl and left with her leaving the phone behind. After 2 days the village elder went to his home and told him that there were rumours making rounds that he had defiled the minor. When he inquired from the complainant, she did not say anything. He was arrested the following day; and he attributed the allegations to a frame-up by his political enemies as he had an interest in politics and wanted to stand for an elective post.

8. Agneta testified that on 2nd February 2012 at 11.00am she was washing clothes at her house close to the phone charging room; the complainant brought a phone for charging and gave it to the appellant who was with his grandchildren. The complainant joined them in watching television and after about two hours the complainant's uncle came and found the appellant brushing his teeth. The uncle picked up the girl and left with her. The witness said that the appellant had not taken the complainant to any room and denied that he defiled the girl as she was close by.

9. The trial court disbelieved the appellant's narrative and convicted him.

10. The appellant preferred the first appeal faulting the learned magistrate for convicting him based on insufficient evidence, that the case was not established beyond reasonable doubt and the complainant's evidence was not corroborated. In dismissing the appeal, the learned judge found that the appellant was convicted on cogent and credible evidence. That the complainant's evidence that the appellant defiled her was supported by medical evidence and the fact that the appellant admitted that the complainant was at his home on the day of the commission of the offence led credence to the evidence of the complainant to that end as such there was no reason to doubt the evidence of the complainant.

11. Dissatisfied by the High Court's finding, the appellant is now before us, faulting the learned judge for:

    i. not diligently weighing the conflicting evidences in the instant case thus arriving at a wrong decision.

    ii. not making a finding that prosecution did not prove the ingredient of penetration beyond reasonable doubt.

    iii. disregarding the appellant's defence, and shifting the burden of proof on the defence for not cross-examining PW3 on the defense's pertinent parts.

    iv. Failing to make a finding that the mandatory nature of sentence under section 8(1) as read with section 8(2) of the *Sexual Offences Act* No.3 of 2006 is unconstitutional and so was the life sentence meted out. The appellant thus prays that the conviction be quashed, sentence set aside, and to be set free.

12. In support of the appeal, the appellant contends that the prosecution case had material contradictions and inconsistencies and could not sustain the charge as the evidence of the complainant was not corroborated; that the ingredients of defilement were not established; and that the two courts erred in law in not diligently weighing the evidence in the instant case thus arriving at a wrong decision.

13. The appellant also complains that his defence was disregarded and instead, the burden of proof shifted to the appellant; and that his alibi defence was not considered, instead the 1st appellate court claimed that DW2 was out to save her husband.

14. As regards sentence, the appellant submits that he was sentenced to a mandatory sentence which is unconstitutional; that the appellant is 70 years old and has spent 6 years in prison within which he has learnt a lesson; that he is reformed, rehabilitated and ready to be absorbed in society.

15. In reply, the respondent submits that in her testimony, the complainant was consistent and that the minor contradictions on the date when the complainant reported the incident do not affect the substance of the case.

16. On whether the elements of the offence of defilement were proved, the respondent contends that the evidence of the complainant corroborated the medical evidence which confirmed that the complainant had a bruised labia manora and the hymen was missing.

17. Further, upon hearing all the witnesses, the trial court was satisfied that all the elements of defilement were proved. On sentence, it is contended that the complainant was 10 years old at the time of the alleged offence as such the appellant was given a minimum sentence of life imprisonment as provided by the law.

18. The appellant contends that the evidence presented was contradictory. The respondent, in opposing this, argued that the complainant was consistent in her narrative of events leading to her being in the appellant's presence, where she was defiled by the appellant; and that this was corroborated by

PW1 who later realized that PM started complaining about some discomfort before she informed her that she had been defiled by the appellant; that the complainant was consistent about who and where she was defiled even during cross examination; and that her evidence was further supported by the medical evidence. The respondent argues that although there may be contradictions as to whether PW1 was informed about the incident on 2nd February, 2012 or 3rd February, 2012, that is such a minor contradiction that does not affect the main substance of the case. We are urged to take note that PW1 testified on 3rd December, 2012 almost 10 months after the date of the alleged offence and it is possible for witnesses to be confused about the dates; but even then, the said contradictions are not fatal. In this regard the respondent draws from the decision in Jackson Mwanzia Musembi vs. Republic (2017) eKLR in which the Court held that:

> "the Court will ignore minor contradictions unless the Court thinks that they point to a deliberate untruthfulness or if they do not affect the main substance of the prosecution's case"

19. As to whether the main elements of the offence were proved, the appellant argues that the evidence did not prove identification of the perpetrator, nor prove penetration as the clinical officer's evidence could not establish when the hymen was broken. He argues that if PW3 was defiled on 2nd February 2012, why would it take 2 (two) days while normal, playful and without any looming sign of defilement until 4th February 2012; that there is no way the defilement signs which had not surfaced on 2nd February 2012 could manifestly be seen after two days, particularly taking into consideration PW1's testimony that on 2nd February 2012, she had checked the complainant(PW3) and instructed her to remove her clothes, keep them and not to take bath; that whereas PW2 investigation Officer, states that the incident was reported on 2nd February 2012 PWI asserts that she learned of this defilement on 4th February 2012; and that the P3 form records that the incident was reported on 4th February 2012. The appellant points out that another line of contradictions is in the evidence of PWl, that PW3 (complainant) had not gone to school on 2nd February 2012 because she was sick and had a headache, yet by the same token she contradicts herself that PW3's problems of sickness began after she had come from the appellant's home. The appellant maintains that this raises eyebrows as to whether PW3 was sick when she absented herself from school; and if her sickness was as a result of defilement then it would raise the question as to when she was defiled; and that there was contradiction regarding whether or not there was a bed at the scene where the defilement occurred, with PW3 saying there was a bed, and PW4 and PW5 saying they never saw a bed.

20. The respondent contests this, pointing out that the complainant identified the perpetrator as the appellant, a person who was well known to her, and she had been to his house before.; that just apart from PM saying that she had been defiled, there was corroboration by the medical evidence which confirmed that she had a bruised labia minora both left and right, and the hymen was absent; that the complainant stated in her evidence that this was the first time to have sexual intercourse, and given her evidence and the history, the only logical conclusion is that it is the act by the appellant that led to the absence of the hymen.

21. As regards the burden of proof, and the appellant's complaint that the two courts below shifted this to the defence, the respondent submits that the burden of proof was never shifted to the appellant, as the trial court upon hearing all the witnesses, found that all the elements of the offence had been met, and rejected the appellant's version of matters as a general defense which appeared to be a concoction.

22. On the appropriateness of the sentence, the appellant faults the two lower courts for failing to make a finding that the mandatory nature of the sentence provided under the *Sexual Offences Act* is unconstitutional, contending that a life sentence that is equated to a person's natural life and goes

beyond a person's life expectancy violates the very right to life, pointing out that the life expectancy of a person in Kenya is 60 years. The appellant laments that he is 70 (seventy) years old; has served over 6 years in prison at the moment; and is living at the sunset age of his life. He urges us to find that he has served a sufficient term of his life sentence to meet the requirements of punishment and deterrence; and that rehabilitation has transformed him into a person who no longer pose any threat to the public. He also pleads that in case of dismissal of his appeal on conviction, this Court to consider complete leniency, grace and mercy, rather than condemnation, and mete out to him the least prescribed sentence, preferably time already served.

23. The respondent, on the other hand, urges us not to interfere with the sentence, pointing out that the complainant was 10 years old at the time of the alleged offence; and the appellant was only given the minimum sentence of life imprisonment as provided by law.

24. This is the appellant's second appeal therefore, the mandate of this Court is by virtue of section 361 (1)(a) of the Criminal Procedure Code, limited to consideration of issues of law only. This position has been reiterated by this Court in many of its decisions including in David Njoroge Macharia vs. Republic [2011] eKLR; where the Court in considering matters of law stated:

> "As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see Chemagong vs. R [1984] KLR 611."

25. Having considered the appeal, the rival submissions, the authorities cited and the law, and in view of the mandate of this Court on a second appeal, the main issues that fall for our determination are: whether the offence of defilement was established beyond reasonable doubt; whether there were substantial contradictions and or inconsistencies in the evidence of the prosecution witnesses such as to render the appellant's conviction unsafe; whether the burden of proof was shifted on to the defence; and whether any legal issues arise with regard to the appellant's sentence, and if so whether this Court should interfere with it.

26. As to whether the offence of defilement was established, the appellant was convicted and sentenced under Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* which provides as follows:

> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ...
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years ...

27. The main ingredients of the offence of defilement are, proof that the victim is a minor; that there was penetration of the victim's genital organs with the genital organs of another person; and that the accused person was the person who penetrated the victim's genital organs. For the purpose of the penal section under Section 8(3) of the *Sexual Offences Act*, there must be proof that the age of the victim fell between twelve and fifteen years. On the question of proof of penetration, it is clear from the record that the complainant's testimony was corroborated by medical evidence as confirmed by the evidence of the clinical officer who upon examining the complainant, observed that she had bruises on both labia minora and a missing hymen. The mere fact that the child went to play soon after the

incident, and only became symptomatic two days later does not negate the clinical findings. We note that the complainant's evidence was consistent with the evidence of the clinical officer who confirmed disruption of her genitalia including a missing hymen, as to make the correct conclusion, in our view, that there was penetration

28. As regards contradictions on description of the scene, that is the present vs absent bed, and the different dates, the same arguments were raised before the High Court and the learned judge observed as follows:

> "It is true that there were indeed some contradictions in the prosecution case. The complainant's aunt stated in her evidence in chief that the complainant informed her of the incident on the following day, i.e 3rd February 2012. In cross-examination she said that she learnt of it on 4th February 2012 on which date she checked her under pant and saw sperms. There was also contradiction as to whether the complainant had gone to the home of the appellant to deliver the phone for charging or to pick it up. There was contradiction as to whether there was a bed in the place/ shop the appellant was using for phone charging. The complaint said that there was a bed in that place/ shop while Pw4 said that when she went to the place she did not find any bed. The complainant said that she took people to the place who saw the bed.

29. The investigating officer testified in court on two occasions. On the first occasion he stated that he did not visit the scene. When he was recalled later on to clarify some issues after a duration of about 8 months, he stated that he had visited the scene after a while and had found a bed in the shop of the appellant.

30. In resolving the apparent contradictions, the learned judge pointed out that:

> "The contradictions on whether the complainant reported the commission of the offence on the 3rd or 4th February 2012 is not a crucial contradiction in the case. It is clear that the co-villagers PW4 and 5 learnt of the report on 4th February 2012. The P3 form indicates that the report was made to the police on 4th February 2012. It appears that the report was made to the police the day that the complainant reported it to her aunt PW1. The date therefore 4/2/12 The contradiction in the complainant's evidence that she had gone to pick the phone is not a material contradiction in the case. It doesn't go to the root. The point not in contention is that the complainant at the material time visited the home of the appellant. The contradiction is not fatal to the case.

31. As regards the bed or no bed contest, the learned judge noted that PM was not cross -- examined on the details of the day she said that she took some people to the shop of the appellant and showed them the defilement bed, so there would be no basis to hold that she was lying or that there was contradiction in the evidence.

32. We acknowledge that there were some contradictions as well pointed out by the learned judge, and we fully identify with the proposition that not every contradiction is fatal to the outcome of a case. The test is whether such contradiction goes to the material particulars of the case, as to warrant rejection by the two courts below. This Court differently constituted in Eric Onyango Ondeng vs. Repulic [2014] eKLR, quoting with approval the Ugandan case of Twehangane Alfred vs. Uganda (Crim. App. No

139 of 2001), [2003] UGCA, 6, the court was categorical that it is not every contradiction that warrants the rejection of evidence, summing it up thus:

> "With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

33. We have already alluded to the learned judge fleshing out the contradictions or inconsistencies, and it is not necessary to reproduce them; the critical issue is whether the identified contradictions and inconsistencies were of such magnitude as to make the conviction of the appellant unsafe. It is our considered view that the inconsistencies were a general reflection and recollection by different persons who went to the scene at different times and we echo the apt observation in the case of Phillip Nzaka Watu vs. Republic [2016] eKLR that:

> "...However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise, must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

34. Our own evaluation of the record, leads us to the irresistible finding that the ingredients of the offence of defilement were established to the required standard, and the concurrent findings of the two courts below were based on credible and cogent evidence. In light of the overwhelming evidence that was adduced against the appellant, his denial of having been involved in the commission of the offence was properly rejected and did not result in shifting the burden of proof upon him. Ultimately we detect no error or irrational application of the law or legal principals by the learned judge.

35. As regards severity of sentence, our jurisdiction as circumscribed by Section 361 of the Criminal Procedure Code, confines us to matters of law only; and severity of sentence statutorily stated to be a question of fact. In the instant appeal, the sentence imposed upon the appellant is the mandatory sentence provided under the law. In Republic vs. Gichuki Mwangi: Initiative for Strategic Litigation in African (ISLA) and 3 Others (amicus curie) 2024, 34 KLR, the Supreme Court asserted that:

> "Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law."

36. Needless to state that in passing the sentence of life imprisonment on the appellant, the trial Magistrate as well as the 1st appellate court had no room to exercise any discretion in determining an appropriate sentence to be imposed on the appellant, owing to the mandatory nature of the penalty provided under the law. The Supreme Court has spoken clearly through the Gichuki case (supra) and we are bound by that decision-age, rehabilitation and remorse notwithstanding, the minimum life sentence meted out was legal and must be upheld, as we hereby do. The appeal thus fails in its entirety and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR