



**Shekuwe v Republic (Criminal Appeal E047 of 2024)
[2025] KECA 291 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 291 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E047 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

JAFAR ALI SHEKUWE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Garsen
(M. Thande, J.) delivered on 19th July 2024 in HCCRA No. E010 of 2024)*

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Garsen (M. Thande, J.) dated 19th July 2024 in Criminal Appeal No. E010 of 2024. In her decision, the learned Judge upheld the judgment of the Chief Magistrate's Court in Malindi (Onalo J. K. Olga, SRM) dated 24th November 2023 in Sexual Offence Case No. E068 of 2021 in which the trial court convicted the appellant as charged with the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* (the Act) and sentenced him to 12 years imprisonment.
2. The particulars of the offence were that, on diverse dates between 1st and 7th September 2021 at [particulars Withheld] Village, [particulars Withheld] in Malindi Sub County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M.H, a child aged 14 years.
3. The appellant faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the alternative charge were that, on the diverse dates and at the place aforesaid, the appellant intentionally and unlawfully touched the vagina of M. H, a child aged 14 years, with his hands, contrary to section 11(1) of the Act.



4. The appellant denied the charges whereupon the trial proceeded with the prosecution calling seven (7) witnesses, including the complainant, who testified as PW1. When put on his defence, the appellant called one witness.
5. The prosecution's case was that the appellant defiled the complainant (PW1) on diverse dates between 1st and 7th September 2021. PW1 gave sworn evidence after a voire dire examination and testified that she was 14 years old; that she was in class 8 at [particulars Withheld] Academy; that she knew the appellant and occasionally saw him on the road or in his hotel near her home in Watamu; that, sometime in May 2021, the appellant began stalking PW1 insisting that he wanted to talk to her, but she did not pay any attention; that, one day on a Monday when heading home from school at around 7pm, PW1 met the appellant at [particulars Withheld]; that the appellant insisted that she goes home, remove her school uniform and put on her personal clothes, and meet him at the same spot, or else he would do something to her that had never happened before; that, out of fear, PW1 did as the appellant demanded; that the appellant then took her to the beach, briefly left for his hotel and brought her a soda; forced her to take it and, thereafter, escorted her back to [particulars Withheld]; and that he demanded that she meets him every Monday to Wednesday at [particulars Withheld] at 7:00 pm.
6. It was PW1's testimony that, after that incident, she kept meeting up with the appellant; that the appellant told her not to reveal this fact to anybody; and that PW1's family thought that she was attending madrasa whenever she met up with the appellant. PW1 further testified that this went on until Monday, 6th September 2021 when the appellant took her to the spot with burnt houses by motorcycle, removed her clothes, removed his clothes and rubbed his penis on her vagina; and that on 7th September 2021, the appellant took her to the same spot, repeated the same actions as the previous day, but that, this time round, the appellant went further and inserted his penis into her vagina.
7. It was her further testimony that, on returning home on 7th September 2021, PW1 found her uncle – OSA (PW3), who "craftly" informed her that the Ustadh at her madrasa had come over looking for her, inquiring why PW1 had not attended madrasa; that PW1 remained silent and did not respond nor reveal where she was; that PW3 slapped her and began beating her in an attempt to get her to respond; that PW1 eventually disclosed that she had been with the appellant that evening and severally, and what had transpired between them; and that the matter was later reported to the police, who referred her to a hospital for examination.
8. For coherence and flow, we proceed by first summarising Amina Shehe Ali's (PW4) testimony. PW4 testified that she resided with both her mother and PW1; that sometime in 2021 she noticed that PW1's behaviour had changed in that she would always arrive home late from madrasa; that, on 7th September 2021, PW4's mother requested her to visit the madrasa and investigate why PW1 was constantly late from Madrasa; that PW4 called at the Madrasa and did not find PW1; that she immediately called her brother (PW3), who came home and they both waited for PW1 to arrive; that PW1 arrived at 8.30pm and lied that she was from Madrasa; that PW3 demanded that PW1 discloses where she was; that, when PW1 did not respond, PW3 slapped her and beat her with a belt – forcing PW1 to come clean on where she was.
9. PW1's mother, MM, (PW2) largely restated PW4's testimony regarding what had transpired on 7th September 2021. She testified that PW1 was 14 years of age and produced her Certificate of Birth in evidence indicating her date of birth as 24th January 2007; and that, according to the Ustadh, PW1 had missed three consecutive Madrasas as at 7th September 2021.
10. PW3, the complainant's uncle, essentially restated PW4's testimony on the happenings of 7th September 2021, only going further to state that he knew the appellant; that, upon PW1 revealing



- what the appellant had done to her, he attempted to reach the appellant by phone but to no avail; and that, PW1 was later escorted to Malindi sub-County Hospital for examination after the matter was reported at Watamu Police Station by PW2 and PW4.
11. HHM, the complainant's other uncle (PW5), only testified that, at around 9.30pm on 7th September 2024, he received a call from PW2 about the incident; and that, on 8th September 2021, in the presence of PW2, PW1 repeated that the appellant had defiled her and threatened to harm her if she ever disclosed to anybody what he was doing to her.
 12. The investigation officer PC Naaman Omar (PW6), of Watamu Police Station testified that on 8th September 2021, PW1 accompanied by family members, reported that PW1 had been defiled by someone she knew; that PW1 stated that the appellant was the perpetrator; that he recorded PW1's statement; that, together with his colleague, he visited the alleged crime scene severally and prepared a report; that a fishing business is carried out in the morning and afternoon close to the scene; that members of the public never visited the scene at night since it was not lit; and that the scene was about 400 to 500 metres away from the appellant's hotel.
 13. Dr. Moses Rimba (PW7) of Malindi sub-County Hospital, testified that, on examining PW1 on 9th September 2021, he established that her hymen was broken, but had no injuries, and concluded that "there was vaginal penetration of the 14-year-old girl". It was his testimony that he recorded his findings in treatment notes which he subsequently used to complete PW1's P3 form, which were produced both as exhibits before the trial court alongside PW1's lab request and subsequent medical report.
 14. At the close of the prosecution case, the learned magistrate found that the appellant had a case to answer and put him on his defence.
 15. In his defence, the appellant gave a sworn statement and stated that, on 7th September 2021, he was at work in his hotel as a cook from 7 to 9pm as usual; that he could not leave for other activities as the hotel needed his presence at the time; that he was called by PW1's uncle at around 8pm, but that his phone was on silent mode; that he later called back and was informed about the incident with PW1, which he denied; that he did not know why the child mentioned his name; that he was a successful businessman and chairman of Watamu Youth Group; and that the allegations could be because of envy, hate, or the intent to sabotage or tarnish his name and business. When cross-examined, the appellant confirmed that his hotel operated a clock in and clock out recording system; that he had not availed a record of this system; and that this attendance recording system only applied to his workers and not to him.
 16. The appellant called a frequent customer at his hotel, one Joseph Ringa, a tour driver, who testified in his defence as DW2. DW2 testified that, on 7th September 2021, he was with a group of about 15 tourists who had made a reservation at the appellant's hotel; that they stayed there from 6:30 to 9pm; that the hotel had an open kitchen set up; that the appellant was the one cooking for them; that the hotel had two to three cooks; that the appellant never left the hotel and that they left him there at 9:30pm attending to other customers; and that he did not know PW1.
 17. In its judgment delivered on 24th November 2023, the trial court (J. K. Olga, SRM) held that the complainant knew the appellant as a neighbour and had interacted with him severally and that, therefore, her identification of him as the perpetrator was reliable; that the appellant secured the complainant's cooperation through threats for a long time until her psyche became participatory and the appellant eventually had sex with her; that the court found the complainant to be truthful and consistent; that the appellant's alibi defence only mentioned one day out of the other days mentioned in the charge sheet; that the alibi defence was never alluded to at the time of the arrest; and that the appellant never brought his colleagues to court and never furnished any evidence such as a clock in



or clock out register to corroborate the alibi. The court therefore convicted the appellant and, on 19th January 2024, sentenced him to 12 years' imprisonment.

18. Aggrieved by the trial court's decision, the appellant lodged an appeal to the High Court faulting the learned trial Magistrate for: failing to notice that the essential elements of the offence of defilement were not proved to the required standard of proof; failing to take into cognizant PW1's "too confident" demeanour; failing to consider the numerous contradictions and inconsistencies in the prosecution's case; failing to take into consideration that PW1 had the "free will of running away from the scene of crime"; ignoring the fact that the charges were "driven by ill will and vendetta"; failing to capture the averments by PW2 that PW1 was mischievous; failing to realise that there was no evidence to demonstrate PW1's resistance during the alleged offence; relying on shoddy investigations; and relying on extraneous matters.
19. In its judgment dated 19th July 2024, the High Court (M. Thande, J.) found and held: that any apparent contradictions were insignificant and could not render the prosecution's case unreliable, or negate the fact that the complainant was defiled; that the complainant's testimony was credible; that the appellant raised the alibi defence during the defence hearing and the prosecution could not scrutinise it effectively; and that there was no reason to interfere with the trial court's findings. Consequently, the court dismissed the appeal and upheld both conviction and sentence.
20. Dissatisfied, the appellant moved to this Court on five grounds set out in his undated "Memorandum Grounds of Appeal," namely that the "High Court judge" erred in law and fact: by upholding the conviction without considering that sections 110 and 111 of the *Evidence Act* were not fully applied, and the case was not established beyond reasonable doubt; by failing to appreciate that sections 33, 37, 77, 79, 163, and 164 of the *Evidence Act* were violated; by failing to consider that the case was fixed to ruin the appellant's future because of a mere grudge; and in failing to consider the appellant's defence.
21. In addition to the grounds aforesaid, the appellant filed an undated "Amended Memorandum Grounds of Appeal" containing four grounds, two of which are a repetition of some of the grounds originally advanced on appeal. The only additional grounds are that the 1st appellate court failed to: consider that the charge sheet was defective; and conclusively and freshly analyse and re-evaluate the prosecution's evidence.
22. In support of his 2nd appeal, the appellant filed undated written submissions citing two judicial authorities, namely: *Okeno v Republic* [1972] EA 32 for the proposition that this Court is expected to subject all the evidence to a fresh and exhaustive examination; and *Ozaki & Another v The State* [1990] NGSC 77, submitting that his Alibi defence raised reasonable doubt on the prosecution's case.
23. Opposing the appeal, Senior Principal Prosecution Counsel, Mr. Mwangi Kamanu, filed factual written submissions dated 10th October 2024, submitting that there was nothing wrong with the charge sheet; that the appellant understood the charges, cross examined all the witnesses and gave his defence; and that the 1st appellate court re-evaluated all the evidence as shown from paragraphs 79 to 81 of its judgment. Learned counsel prayed that we uphold both the conviction and sentence.
24. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In *Karingo vs. Republic* [1982] KLR 213, the Court stated:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."



25. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on three issues on points of law, namely: whether the prosecution proved the charge of defilement beyond reasonable doubt; whether the trial court disregarded the statutory requirements under sections 163 and 164 of the *Evidence Act* (Cap. 80), which relate to evidence on which to impeach the credibility of a witness, and circumstantial questions to confirm evidence; and whether the 1st appellate court failed to freshly analyse and re-evaluate the prosecution evidence.
26. Three of the remaining grounds of appeal on points of law, namely that the trial court disregarded the provisions of sections 33, 37, 77 and 79 of the *Evidence Act* (relating to the procedure for production of documentary evidence by persons other than the makers thereof); that his defence was not considered; and that the charge sheet was defective are raised for the first time on 2nd appeal to this Court.
27. Addressing himself to the prejudicial effect of new points of law or issues raised for the first time on appeal, Forbes VP had this to say in *Alwi A Saggaf v Abed A Algeredi* 1961 EA 767 CA 610:
- “But these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.
- In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it.”
28. This Court in *Alfayo Gombe Okello v Republic* [2010] eKLR underscored the importance of raising all issues in contention at the earliest opportunity at the trial and had this to say on the issue:
- “... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”
29. In the same vein, this Court in *Sudi Mnalo Mweke v Republic* [2023] KECA 1527 (KLR) identified itself with the holding by the predecessor to this Court in *Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi* [1961] EA 767 where, in its holding, the Court laid down the guiding principle that the course of taking on appeal a point of law which has not been argued in the court below ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:
- “The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions



which may be of the highest importance without having received any assistance at all from the judges in the courts below.

It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court.”

30. We need not overemphasise the general principle that trial by instalments militate against the discretionary powers of this Court in the administration of justice. That this principle continues to hold sway was demonstrated in *Wachira v Ndanjeru* (1987) KLR 252 where this Court spoke to the bar with Platt, JA. observing that:

“...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.”

31. The remaining ground, to wit, that the case was framed to ruin the appellant’s future because of a mere grudge raises a matter of factual evidence to which we cannot address ourselves on 2nd appeal. In *Adan Muraguri Mungara vs. Republic* [2010] eKLR this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court, in the following terms:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.” [Emphasis added]

32. A number of other grounds advanced on 1st appeal to the High Court appears to have been abandoned and, consequently, we need not say more in that regard.
33. On the 1st issue as to whether the prosecution proved the charge of defilement on the required standard, the appellant concedes the 1st ingredient of the offence of defilement, to wit, the age of the complainant. In his submissions, he states that he does not contest the fact that the complainant was under-age in that she was fourteen (14) years of age as shown in her original certificate of birth produced in evidence by her mother (PW2). The fact that nothing turns on this ingredient perhaps explains why the Senior Prosecution Counsel said nothing about it.
34. On the 2nd ingredient of defilement, to wit, penetration, the appellant denied having sex with the complainant and contended that the broken state of her hymen was not necessarily caused by sexual intercourse. According to him, her hymen might have been broken by other acts, including riding a bicycle or carrying out strenuous chores. It is noteworthy that the Senior Prosecution Counsel made no submissions in this regard.
35. We take to mind PW7’s testimony that, when he examined the complainant, her hymen was broken. He concluded that there was vaginal penetration as recorded in the treatment notes and the P3 Form, which were produced in evidence without any objection by the appellant. Consequently, on penetration, we have no reason to fault the concurrent findings of fact of the two courts below.



36. On the 3rd ingredient of positive identification, the appellant does not take issue therewith in his submissions. In any event, it is noteworthy that he was a well known businessman in the complainant's neighbourhood, and who the complainant easily recognised. Moreover, the incidents of defilement took place in such circumstances that the complainant could never have been in doubt as to whom she was meeting on the numerous occasions leading to the defilement complained of. In effect, his recognition was not in doubt.
37. Likewise, the Senior Prosecution Counsel does not address himself thereon, perhaps due to the foregone conclusion that the appellant and the complainant were well known to each other.
38. Be that as it may, it would be remiss of us not to clarify the law as is. On the issue of recognition, Madan, JA. in *Anjononi and Others vs. The Republic* [1980] KLR 59 had this to say:
- “... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”
39. In the same vein, this Court in *Peter Musau Mwanza vs. Republic* [2008] eKLR expressed itself thus:
- “We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question.”
40. Likewise, the High Court of Kenya at Voi in *AHM vs. Republic* [2022] KEHC 12773 (KLR) correctly observed that:
- “... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.”
41. In view of the foregoing, we form the considered view that the prosecution proved the offence of defilement to the required standard, beyond reasonable doubt.
42. Turning to the 2nd issue as to whether the trial court disregarded the statutory requirements under sections 163 and 164 of the *Evidence Act*. Section 163 makes provision for the means by which the credibility of a witness may be impeached. On the other hand, section 164 relate to the circumstantial questions to confirm evidence. Notably, both the appellant and the Senior Prosecution Counsel made no submissions with regard to the two sections and, consequently, we can only presume that this issue was abandoned, and that nothing turns thereon.
43. On the 3rd and final issue as to whether the 1st appellate court failed to freshly analyse and re-evaluate the prosecution evidence, the appellant contends that the High Court failed to do so, and that failure to do so deprived him of justice and violated the law. However, he does not elaborate what it is that the 1st appellate court did or failed to do and, specifically, the law thereby breached.
44. To our mind, the appellant's blanketing statement finds answer in the submissions of the Senior Prosecution Counsel, who correctly points out that “a look at the record confirms that the High Court



in its judgment at pages 78, 79, 80 and 81 re- evaluated all the evidence presented before the trial court and found that all the ingredients of the offence had been established.”

45. Having carefully considered the record of appeal, the grounds on which it was anchored, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed in its entirety. Accordingly, the judgment of the High Court of Kenya at Garsen (M. Thande, J.) dated 19th July 2024 is hereby upheld. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

