



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shitubi v Prosecution (Criminal Appeal E005 of 2023)  
[2025] KEHC 755 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 755 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E005 OF 2023  
SC CHIRCHIR, J  
JANUARY 30, 2025**

**BETWEEN**

**SAIDI WESONGA SHITUBI ..... APPELLANT**

**AND**

**PROSECUTION ..... RESPONDENT**

*(Being an Appeal against the judgment of Hon. GP Omondi in the Senior Principal Magistrate's court at Mumias in sexual offences case no. E038 of 2021 delivered on 12/1/2023)*

**JUDGMENT**

1. The Appellant was charged in the lower court , with the offence of defiling a 16-year-old girl contrary to section 8(1) and 8(4) of the [sexual offences Act](#).
2. The particulars being that on diverse dates in the year 2020 and 6<sup>th</sup> November 2021 at xxxx village xxxxxx sub-location xxxxxx location in xxxxxx sub-county within Kakamega County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E.N.W a child aged 16 years.
3. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006
4. The Appellant was convicted of the main charge and sentenced to 15 years imprisonment.

**Petition of appeal**

5. The Appellant was aggrieved by the outcome and filed this petition of Appeal. He has set out the following grounds:
  - a). That the learned magistrate erred in law and fact by recording a conviction and imposing a sentence in a trial which did not meet the constitutional threshold of a fair trial under Article 50 (2)(j) and Article 49 (f) of [the constitution](#).



- b). That the trial court erroneously convicted him in a case where medical evidence was doubtful and could not conclusively prove partial or full penetration.
  - c). That the trial court erroneously convicted and sentenced him where a crucial witness the whistle blower who was a boda boda man by the name Daudi who informed the victim's father that he escorted the victim to school on the material day was not called to testify.
  - d). That the trial court failed in its finding by not observing and considering that this was a systematic planned and implicated strategy to implicate him with the crime because of the existing grudge between him and the victim's father
  - e). That he was convicted and sentenced as a result of failure by the trial magistrate to attempt to deal with the contradictions and doubtful evidence which was not water tight enough to base a safe conviction.
  - f). That the hon. Trial magistrate erred in both law and facts by failing to exercise his judicial discretion in sentencing him to a minimum mandatory sentence.
  - g). That the learned trial magistrate grossly erred in law and facts by rejecting his plausible defence without proper evaluation.
6. The appeal was canvassed by way of written submissions.

#### **Appellant's submissions**

- 7. It is the Appellant's first submission that he was not brought to court within the constitutionally prescribed period of 24 hours ,and to that extent, his right was violated. He further states that the date of his arrest was irregularly changed.
- 8. It is further submitted that there were material contradictions on the identity of the complainant and there was no amendment done to amend the names to show that one person was being referred to .
- 9. The Appellant also submits that crucial witnesses which included the alleged informer, who was a bodaboda operator, one Shadrack and Cleopas referred to by the prosecution witnesses ,were not called to testify.
- 10. It is the Appellant's further submission that he trial court failed to consider his defence to the effect that the charges were fabricated by the complainant's father due to a land dispute between the two ,or his defence of alibi.

#### **Respondent's submissions.**

- 11. On whether the appellant was accorded fair trial in terms of Article 50 (2) (j) of *the constitution*, the respondent contends that the charges were duly read to the Appellant in the language which he understood and consequently the said Article of *the constitution* was duly complied with.
- 12. On whether there was penetration , the respondent submits that the evidence of the complainant was corroborated by the evidence of the clinical officer , which evidence proved that there was corroboration.
- 13. The respondent refutes the allegation of fabrication of the case and submits that the circumstances under which the crime was reported and that of the Appellant's arrest , negates fabrication.



14. On the prosecution's failure to call particular witnesses, it is submitted that the Appellant has not demonstrated how the alleged failure prejudiced the Appellant's case; that the calling of witnesses is the prerogative of the prosecution in any event.
15. On whether the evidence supported the conviction, the respondent argues that the trial magistrate relied on the evidence of the complainant, plus the corroboration as aforesaid, and gave reasons as to why she believed the complainant; that the rest of the witnesses were not eye-witnesses.
16. On the evidence meted out the respondent's submissions was that the sentence was within the law and the crime was aggravated by the fact that the Appellant was the uncle of the complainant.

### **Summary of the evidence**

17. Pw1, the complainant told the court that sometimes in 2020, she was with the accused's wife when she requested her to take a bag to the Accused who was harvesting vegetables in his farm. On reaching the farm, the accused asked her to his girlfriend but she refused. She further stated that at night on the same day she met with the accused and they had sex. He gave her Kshs. 50/= and instructed her not to tell anyone. She testified that thereafter they had sexual intercourse on several occasions. The accused would give her money and gifts.
18. She further told the court that the sexual intercourse used to take place on a road, in the evening, as she went to her grandmother's house to sleep. They would meet between 8-9pm, she stated. Her mother later came to know about it and she informed the village elder. The Accused was warned.
19. She further testified that despite the warning, they continued having sex until at one time when a boda boda Rider known as Daudi saw the accused following her. The Rider reported to her father. The father confronted her, and upon confessing the incidents to her father, he took her to Koyonzo police station. She was later taken to Matungu health centre. She produced the P3 form, treatment notes, PRC form and her birth certificate. The accused was a neighbour and a cousin to her father.
20. On cross examination, she stated that she could not report to anyone, as the accused had threatened her.
21. PW2 was the complainant's mother. She told the court that in 2021, she discovered that PW1, had with her ksh. 100 and when she confronted her, she stated that the accused had given her. She reported the incident to the village elder.
22. PW3 was the complainant's father. He recalled that in November 2021 he met with a boda boda operator who asked him if his daughter was still having a relationship with the accused. He confronted the complainant and the complainant informed him that the accused had forced her to have sex with him.
23. On cross-examination, he denied that the issues had anything to do with the land dispute and that the dispute had been resolved earlier and amicably.
24. PW4 was the clinical officer from Matungu sub-county hospital. He testified that on 9/11/2021, he examined the complainant who reported that she had had sex on 16/11/2021. He found that the complainant's hymen was missing. He did a high vaginal swab which turned out negative. There was no evidence of a recent sexual contact. He filled the PRC form and the treatment book, which were produced in evidence.
25. PW5 was the investigating officer. He told the court that on 8/11/2021 while at Koyonzo police station, the accused was escorted by members of the public on reports that the accused was caught by a boda boda while attempting to have sex with a minor, and had tried to run away. He interrogated



the complainant and she confirmed that they have had sexual relationship with the accused in the past on several occasions.

26. On cross examination he stated that the boda boda Rider did not record his statement
27. The accused was put on his defence, at the conclusion of the prosecution's case and he gave a sworn statement. He denied the charges and stated that he was framed because there is an existing feud between his family and that of the complainant over a land dispute; that the dispute started on 10/12/20 when PW2 destroyed the boundary between them. That PW2 then cut him on the head. He filed a complaint and PW2 was arrested. That though the dispute was settled by the family, PW2 later vowed to revenge.

### **Analysis and determination**

28. This is a first appeal and the mandate of this court is to review the evidence, evaluate it and arrive at its own findings. I have considered the evidence, the parties submissions and the grounds of Appeal. The issue that lends itself for determination is whether the prosecution proved the offence of defilement beyond reasonable doubt.
29. Section 8 (1) (4) of the *Sexual Offences Act*. The section provides:
  - “(1) any person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (4) A person who commits the offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
30. The offence of defilement is founded on three main ingredients: that is, the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. The age of the complainant was not an issue during trial or in this Appeal. It suffices to state however that the complainant produced her birth certificate showing that she was born on 31<sup>st</sup> March, 2005. The alleged offence occurred between 2020 and 6<sup>th</sup> November 2021. She was therefore 16 years at the time of the offence.
31. The identification of the accused was also not contested. It transpired that the two were neighbours, and relatives. The complainant told the court that the accused was a cousin to his father a fact that was not contested. Further identification has not been made an issue on this Appeal.
32. What is in issue is the element of penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
33. Penetration is proved through the evidence of the victim and may be corroborated by medical evidence. In the present case, the victim testified that the appellant had sexual relationship with her on several occasions and she gave a detailed description of how the accused used to have sex with her, while she was on her way to sleep at her grandmother's house. The accused would then give her money. She testified that he warned her about disclosing their affair to anyone.
34. Although, the medical officer testified that the complainant's hymen was absent, there was no evidence of recent sexual activity. Thus the medical evidence in this case did not corroborate the evidence of the complainant.



35. However the court in the case of *Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)* cited in the case of *Evans Wanjala Wanyonyi v Republic (Criminal Appeal 312 of 2018)* [2019] KECA 679 (KLR) had this to say about the place of medical evidence in rape cases: "... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence." Thus corroboration by medical evidence is not mandatory.
36. Therefore the next question is whether the evidence of the complainant sufficiently proved the offence of rape. According to the complainant the defilement had gone on for a while and apparently the two had not been discovered until a boda boda Rider found them one morning. They were not having sex then but was about to, according to the Investigation officer. The complainant, in her testimony confirmed that they were indeed found by a Motorbike Rider.
37. The Appellant has questioned why this Rider was not called as a witness. I too pose the same question. In the absence of any medical evidence, this discovery would have strengthened the complainant's testimony to the effect that they had been meeting on the road. The Rider was an important witness particularly when considered against the fact that it is this Rider's report that triggered the reporting of the incident to the police.
38. I have also considered the evidence of PW2, the complainant's mother. PW1 told the court that her mother came to know about the incident, the accused was warned. She further stated that the accused went to her mother, knelt down and promised not to continue with the affair (3<sup>rd</sup> paragraph of page 5 of the proceedings). Then at cross-examination she stated: "you and I were warned by my mother".
39. However despite what the complainant told the court as stated above, when it came to her mother's testimony (PW2), one could detect some evasiveness or aloofness concerning the incident. For instance at the second-last paragraph on her evidence-in-chief found at page 8 of the proceedings, she stated: "I don't exactly know what happened. It is my husband who knows more about the incident". I consider her testimony to have fallen short, from someone who had confronted the accused to the extent of the accused coming to kneel down before her in search of forgiveness.
40. I have carefully read through the prosecution witnesses' accounts in this case and I am not convinced that it is met the standard of proof in criminal cases, which is proof beyond reasonable doubt. Failure to call, an otherwise critical witness in the circumstances, has left some gaps in the evidence. Further PW2's failure to even mention to the court that he had gone to the extent of confronting the Accused, if indeed the complainant was being candid casts doubts on the credibility of both PW1 and PW3's testimonies.
41. I have further considered the Appellant's defence. He told the court that the charges emanate from a past feud between PW3 and himself. PW3 is the complainant's father and the dispute was about a land boundary. He stated that the dispute started in 2020 and at some point PW3, cut him on the head with a knife. Instructively this part of his testimony was not challenged at cross-examination.
42. Further on cross-examination PW3 who is the complainant's mother and wife of PW3, first stated that the land issue had no bearing to the charges but immediately thereafter went on to state that she had a grudge against the Appellant because "we are not in good relation in the family". PW2's subsequent admission to some family differences seems to lend credence to the Appellant's testimony linking the charges to a pre-existing feud between the Accused and the complainant's family.
43. In the case of *Elizabeth Waitibigeni Gatimu v Republic (Criminal Appeal 50 of 2012)* [2015] KEHC Justice Mativo while citing the Supreme Court of Canada in *R vs Lifchus (1997) 3 SCR 320* stated: "A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or



prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.(Emphasis added)

44. In the same Waithegeni case ( supra) the judge went on to state: “Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.” ( Emphasis added)
45. Based on the testimonies of PW1,PW2,PW3 and the Appellants, and the gaps I have pointed out , am not satisfied that the prosecution proved its case beyond reasonable doubt. .
46. Accordingly it is my finding that the conviction of the Appellant was not safe. The conviction is hereby quashed and sentence set aside.
47. He shall be set free forthwith, unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**S. CHIRCHIR.**

**JUDGE.**

**In the presence of :**

Godwin Luyundi – Court Assistant.

Ms. Kagai for the respondent

The Appellant in person- present.

