



**Adami "Alias" Baba Shiku v Republic (Criminal Appeal 4 & 1 of 2024
(Consolidated)) [2025] KEHC 12268 (KLR) (27 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 4 & 1 OF 2024 (CONSOLIDATED)**

RC RUTTO, J

AUGUST 27, 2025

BETWEEN

ELIJAH NGUNIRI ADAMI "ALIAS" BABA SHIKU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, was charged with the offence of defilement contrary to section 8[1] as read with section 8[3] of the *Sexual Offences Act*. The particulars of the offence were that on 12th June 2016 at [particulars withheld] Estate, Thika District, Kiambu County, he intentionally caused his penis to penetrate the vagina of ENK, a child aged 15 years old. He also faced an alternative count of committing an indecent act with a child contrary to section 11 [1] of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, he intentionally touched the vagina of ENK, a child aged 15 years old with his penis.
2. The appellant pleaded not guilty and after a full trial, the learned trial magistrate found him guilty of the offence of defilement. He was convicted on the main charge and sentenced to serve 20 years imprisonment.
3. Aggrieved by that finding, he appealed to this Court via, his petitions of appeal dated 3rd November 2017 and 7th July 2021. The appellant similarly filed grounds of appeal and amended grounds of appeal.
4. The appellant challenged the trial court's findings on the following grounds, that: the prosecution failed to discharge its burden of proof to the required standard as to conclude that the appellant committed the offence; the trial court relied on insufficient evidence since crucial witnesses were not called to testify; the appellant was not furnished with the prosecution's evidence in advance; the appellant's right to a fair hearing as enshrined in Articles 25 [c] and 50 of *the Constitution* were not protected; and his defence was not considered. On these grounds, he prayed that the appeal be allowed



by quashing his conviction and setting aside the sentence meted out. He urged this court to set him at liberty.

5. The appeal was canvassed by way of written submissions. In his undated written submissions, the Appellant submitted that the ingredient of penetration was not proved to the required standard. Furthermore, that the witness who gave the medical evidence did not satisfy the court that his credentials were verifiable taking into account that he did not author the reports.
6. He lamented that he, on several occasions, sought for the witness statements but to no avail. As a result, he argued that the conduct of the proceedings was done in ambush. He thus argued that his rights under Article 50 [2] [j] of *the Constitution* were violated. Still on constitutional breaches, he submitted that he was neither informed nor furnished with legal representation against his protected rights under Article 50 [2] [h] and [q] Constitution.
7. He submitted that his defence was wrongly ignored yet it cast doubt on the prosecution's evidence. Finally, he submitted that since crucial witnesses were never called to testify, the evidence before the trial court fell below the standard threshold. He thus urged this Court to allow his appeal.
8. In its written submissions dated 25th November 2024, the Respondent submitted that all the ingredients to a charge of defilement had been sufficiently proved beyond any shadow of a doubt. That the medical evidence of PW3 was admissible by dint of sections 33 and 77 [1] of the *Evidence Act*.
9. Regarding the allegation that the Appellant was not furnished with the witness statements, learned counsel for the Respondent referred this court to page 3 of the proceedings and observed that the Appellant did not raise that issue before the trial court. That he in fact, cross-examined the witnesses substantively. As such, no prejudice was occasioned by him.
10. Lastly, on the allegation of failure by the prosecution to call crucial witnesses, it was submitted that all the witnesses called to testify sufficiently elaborated that the Appellant was the perpetrator of the offence. He therefore urged this Court to uphold the conviction and affirm the sentence.

Analysis and Determination

11. It is trite law that a first appellate court has the duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however always bear in mind that unlike the trial court it did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence. See the cases of *Pandya v R* [1957] EA 336; *Ruwalla v R* [1957] EA 570 and *Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic* [2010] eKLR.
12. The prosecution called four witnesses. PW1 testified that she was 14 years old and that she knew the Appellant as she has seen him for about one month. That they lived in the same plot and the Appellant was referred to as Baba Shiku. She stated that on 12th June 2016, at 2.00pm she was from church when she decided to go and greet her friend Gloria. She passed the appellants door and he was standing on the door. That the Appellant's house was adjacent to the home of Gloria. That the Appellant saw her and subsequently grabbed her and pulled her into his house. That there was a person who saw the Appellant pulling her into his house. The Appellant then closed her mouth, removed her clothes and his and sexually assaulted her. She felt pain during the ordeal. The appellant covered her mouth during the act. That after committing the offence, the Appellant warned her against telling anyone. She stated that she bled. She then went home.
13. PW1 stated that she was seen leaving the Appellant's house. That though she did not inform her mother what happened, someone else did. That she however, later informed her mother and was taken to Witeithie Hospital. She denied that the appellant was charged with the offence to settle an old score.



14. PW2's account of events was that on the material day, she returned home at 5:00 p.m. having gone to church with PW1 in the morning hours. However, on returning home, she did not find PW1. One hour later, PW1 appeared at PW2's shop. According to PW2, PW1 lied to her that she was at home. Her evidence was that later on, her in-law, one Damaris called her husband requesting PW2 to urgently speak to her. She visited the said Damaris who informed her, together with Mama Gloria, that PW1 was seen in the Appellant's home. According to PW2, the two ladies saw PW1 entering the Appellant's house at 2:00 p.m. and leaving at 5:00 p.m. On returning back home, PW2 inquired from PW1 what had transpired but she did not say anything.
15. PW2 later took the Complainant to a private clinic at Witheithie in the company of PW1's father and later Thika Level 5 Hospital. The Complainant was treated. She confirmed that the minor was 14 years old by relying on the birth certificate. It was at the Hospital that the Complainant informed PW2 about the offence. PW2 similarly denied that she was framing the Appellant for the offence. She also denied that she had a relationship with the Appellant.
16. PW3, Dr. Gichane Hermes, a medical doctor at Thika Level 5 Hospital produced the P3 form dated 14th June 2016 filled by a clinician called Maingi. PW3 testified that the Complainant was seen on 12th June 2016 at the Hospital. She was later observed by Maingi on 22nd June 2016, when the P3 form was filled. The observations made were that the Complainant was 15 years of age. She suffered soft tissue injuries on the right side of her vagina. She had pus cells, red blood cells and epithelial cells. In addition, her hymen was broken and there was presence of blood. The conclusion was that there was penetration.
17. PW4 CPL Esther Koome, the investigating officer at Thika Police Station testified that on 12th June 2016, she received the report of the offence. She collected the evidence and recorded witness statements. She then preferred the charges against the Appellant who was arrested on 14th June 2017. Her age assessment was that she was 13 years old. She also denied that the Appellant had been framed.
18. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the Appellant. He was placed on his defence. His unsworn testimony was that PW2 was his mistress and had rented a house for her. He acknowledged that PW2 was the Complainant's mother. His defence was that the PW2 was unhappy with the Appellant who decided to marry another woman that she found in his house. PW2 threatened vengeance. On the material day, the Appellant's evidence was that he was at work the entire day. The following day, he was arrested in the presence of PW2. He denied that he committed the offence maintaining his innocence.
19. In order to sustain a conviction on a defilement charge, the prosecution must establish all of the following three crucial ingredients: the age of the Complainant, the aspect of penetration and, the identity of the perpetrator. See the case of George Opondo Olunga v Republic [2016] eKLR. On the age of the Complainant, Pw1's birth certificate was adduced in evidence. According to it, the Complainant was born on 11th October 2001. As at the time of purported commission of the offence on 12th June 2016, the minor was 14 years old. I therefore find that this ingredient was proved to the required standard.
20. On penetration, the P3 form dated 14th June 2016 confirmed that she had suffered soft tissue injuries on the right side of her vagina. She also had pus cells, red blood cells, and epithelial cells. According to the PRC report dated 12th June 2016, PW1 suffered soft tissue injuries on her vagina. Her hymen was open. These two medical reports confirmed that the victim was penetrated. I find that this medical evidence confirmed the act of penetration that had been first proved on the basis of the testimony of PW1, the complainant. In her testimony, she clearly narrated how the Appellant removed her clothes and his and sexually assaulted her. He covered her mouth and warned her not to tell anyone. That



evidence was not rebutted at cross-examination. The trial court, that had the benefit of seeing PW1, testify, never adjudged her a not trustworthy witness. Consequently, her evidence was sufficient proof of penetration under section 124 of the *Evidence Act*, which was further corroborated by the medical expert evidence of PW3.

21. I note that the Appellant challenged the production of the P3 form by PW3 stating that he was not the author. Having perused the record, I find that PW3 laid a basis for the production of the document by stating that Maingi was a colleague that he had worked with for four years and he affirmed that he was conversant with his handwriting. I therefore find that the said evidence was well admitted under sections 33 and 77 of the *Evidence Act* as urged by the Respondent. The upshot is that I find that penetration as an ingredient was proved to the required standard.
22. Another critical element that must be established by the prosecution is the positive identification of the assailant. In this case it is common ground that the Appellant was a person known to the complainant. He was a neighbour whom they referred to as “Baba Shiku”. Notably, in his unsworn defence testimony, the Appellant confirmed that the complainant was PW2’s daughter and that “he was having an affair “ with PW2. Hence the Appellant was a person well known to the complainant. His identification was thus, by way of recognition rather than identification of a stranger. The evidence also shows that the act happened during the day, hence minimal or no chances of mistaken identity. PW1 narrated how the Appellant further spoke to her and threatened her. I find the Appellant’s identification positive.
23. The upshot is that contrary to the Appellant’s allegation, the prosecution proved all the three ingredients of the offence of defilement to the required standard. Hence ground one is dismissed. Ground two is also dismissed as I have found that the P3 form was well produced in evidence.
24. Turning to the other grounds of Appeal, I have perused the record and note that the court made an order for the appellant to be issued with the witness statement. The Appellant never raised the issue of lack of statements before the trial court. He always stated that he was ready for hearing and fully participated and ably cross-examined all the prosecution witnesses. Equally, there is no evidence on record that the Appellant sought time to get legal representation and he was denied. Be that as it may, lack of legal representation is not a panacea for voiding a conviction. In *HMM v Republic* [2020] eKLR, it was held thus:

“29. On legal representation it is not absolute and there are instances where the same can be limited. This was succinctly dealt with in this case of *S V Halgryn* 2002, [2] SACR 211 [SCA] Paragraph 11, Herms JA stated that: -

“Although the right to choose a legal representative is fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations.”

30. It therefore appears from the above provisions of law that legal representation at the expense of the state is only available where there is likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. It is therefore incumbent upon the accused person to prove that unless he or she is assigned an advocate by the state, substantial injustice would occur.



31. The Court of Appeal in the case of *Macharia v R.* after reviewing the past and current law stated that as follows: -

“ Art 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

25. According, I find the allegations of breach of constitutional right to fair hearing due to lack of witness statements and lack of legal representation to be without merit.
26. Regarding the allegations of failure to call crucial witnesses, I equally dismiss this ground. While it is trite law that the prosecution has a duty to call all crucial witnesses, even if their testimony will prejudice its case, it is not a required that a superfluous of witnesses have to be called to prove a case. While it is mentioned that D saw the complainant leave the Appellant’s house and that Damaris told PW2 and Mama G of the incident, I find that failure to call the two did not prejudice the Appellant as, first they were not eye witnesses to the defilement incident. Further it has not been demonstrated what prejudice the failure to call them occasioned the Appellant.
27. Lastly, the Appellant gave his unsworn testimony denying the offence. He maintained that he was being framed by PW2 whom he had broken-up with having been her mistress. I find that this evidence was correctly considered and dismissed. First, during cross-examination, it was never put to PW2 that she was her mistress. Secondly, from the evidence on record, PW2 was informed of the incident and inquired from PW1. Had she framed the Appellant, she would not have waited to be “tipped off” by third parties. Lastly, PW3 produced medical evidence which confirmed that PW1 was defiled. I find that an alleged frame-up does not address the fact that indeed PW1 was defiled and she unrebuttably identified the Appellant as the assailant.
28. In conclusion, I find the Appellant’s appeal on conviction to be without merit. Having been duly convicted, I find no reason to interfere with the sentence meted out.
29. The upshot is that this appeal has no merit and it is dismissed in its entirety.
30. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF AUGUST, 2025.

RHODA RUTTO

JUDGE

In the presence of;

Appellant present from Kamiti Maximum prison

Ms Torosi Respondent

Selina Court Assistant

