



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shaban v Republic (Criminal Appeal E017 of 2022)  
[2024] KEHC 642 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 642 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E017 OF 2022**

**KW KIARIE, J**

**JANUARY 25, 2024**

**BETWEEN**

**JUMA SHABAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O case NO. E009 of 2021 of the Chief Magistrate’s Court at Mombasa by Hon. R.M. Amwayi– Senior Resident Magistrate)*

**JUDGMENT**

1. Juma Shaban, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 Of 2006.
2. The particulars of the offence are that on diverse dates between the 26<sup>th</sup> day of November 2020 and the 9<sup>th</sup> day of January 2021, in Jomvu sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of M.R., a child aged 16 years.
3. The appellant was sentenced to twenty years’ imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
  - a. That the learned magistrate erred in law and facts for not appreciating that the prosecution case was not proved beyond reasonable doubt.
  - b. That the learned magistrate erred in law and facts by failing to consider that the prosecution party failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt.
  - c. That the learned magistrate erred in law and facts for not noticing that the medical evidence was not established to corroborate the complainant’s evidence.



- d. That the learned magistrate erred in law and fact for not considering that a crucial witness was not summoned in court.
  - e. That the learned magistrate erred in law and fact for dismissing my defence without any legal basis.
4. The state opposed the appeal through Mr Alex Gituma learned counsel. He contended that the prosecution proved all the ingredients of the offence to the required standards.
  5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions, considering that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
  6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
    - a. Whether there was penetration;
    - b. Evidence must show that the accused is the perpetrator; and
    - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they are proven.

7. The complainant, M.R. (PW1), testified that she worked in a hotel in Bomani. When she got some money, she decided to go and look for her aunt, who was staying in Mikindani. She travelled on the 26<sup>th</sup> day of November 2020. When she arrived in Mikindani, she did not find her aunt. She went and sat at a mosque. This is where the appellant found her. She volunteered to take her to her aunt. When they failed to see her, he asked her to accompany him to his home. They found his mother and sister cooking. After eating, the appellant told his mother that she (the complainant) was going to sleep with him. This was after she enquired about whether she was staying for the night.
8. F.O.T. (PW2) is the complainant's mother. Her evidence was that the complainant wanted to attend a wedding on the 21st day of November 2020. When she fell asleep, she disappeared until the 9<sup>th</sup> day of January 2021, when she was called at Mikindani police station. She further testified that her daughter was never employed. This evidence contradicted that of the complainant in some material aspects. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1976-80] I KLR 1442 said:

The witness is a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
9. In the instant case, I find it unsafe to rely on the complainant's evidence that the appellant defiled her. I, therefore, quash the conviction and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.



**DELIVERED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**KIARIE WAWERU KIARIE**

**JUDGE**

