



REPUBLIC OF KENYA



**Nyaranga alias Ogal v Republic (Criminal Appeal E058 of 2023)
[2024] KEHC 13135 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E058 OF 2023
KW KIARIE, J
OCTOBER 30, 2024**

BETWEEN

CHARLES ONYANGO NYARANGA ALIAS OGAL APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.23 of 2022 of the Senior Principal Magistrate's Court at Oyugis (Kendu Bay) by Hon. Celesa A. Okore-Principal Magistrate)

JUDGMENT

1. Charles Onyango Nyaranga alias Ogal, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 Of 2006.
2. The particulars of the offence are that on the 17th day of March 2020 within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of SBO, a child aged five years.
3. The appellant was sentenced to forty years' imprisonment. He was aggrieved and filed this appeal against the sentence. He was represented by Lawrence Obonyo, Advocate. He raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law by failing to evaluate the evidence before her and reach her conclusion.
 - b. The learned trial magistrate erred in fact and law by failing to consider that the appellant could not recall what transpired during the trial process because he was of unsound mind.
 - c. The learned trial magistrate erred in fact and law in failing by finding that the prosecution discharged its burden of proof.
 - d. The learned trial magistrate erred in law by misapprehending the identification evidence.



- e. The learned trial magistrate erred in law in presuming that any medical evidence of sexual injury relating to the victim is that of the accused just because it is an offence under the [Sexual Offences Act](#).
 - f. The learned trial magistrate erred in fact and law in failing by failing to consider the mental illness of the appellant.
 - g. The learned trial magistrate erred in law in misapprehending the extent to which section 36 of the [Sexual Offences Act](#) and section 124 of the [Evidence Act](#) relate to each other and whether the two sections are exclusive of each other.
4. The state contested the appeal, arguing it had no merit.
 5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.
 6. It is very crucial to ensure that an accused who exhibits mental illness at any stage of a trial is examined to ascertain their capacity to participate in the proceedings fully. I have perused the record in the trial court, and nowhere did the trial magistrate indicate that she had noted some behaviour that may suggest that the appellant required to be examined to ascertain whether he had any mental challenges. The appellant was represented throughout the trial by an advocate, Lawrence Obonyo. He never raised any issue concerning the appellant's mental challenge. This ground cannot be raised on appeal.
 7. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator and
 - c. The victim must be below eighteen years old.
 1. This position was echoed in the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR.
Therefore, I will endeavour to establish whether the prosecution met the required standards.
 9. When the complainant testified in court, she said she was seven. This was on the 21st day of March 2023. A copy of the Certificate of Birth that was produced as prosecution exhibit 1 indicates that she was born on the 25th day of August 2015. As of the 17th day of March 2020, she was four years and seven months old. Section 8(2) of the [Sexual Offences Act](#) The complainant's age was proved for section 8 (2) of the [Sexual Offences Act](#). The section provides:
A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 10. SBO (PW1), the complainant, informed the trial court that she had been sent to the shops. When it started to rain, she sought shelter at Peri's home. The appellant joined them in the house. After the rains, the appellant asked her to accompany him so that he could take her to her mother. CO (PW3) and BP (PW4) confirmed these facts. I, therefore, find that the appellant left Peri's home with the complainant.



11. The complainant testified that the appellant took her to a bushy area near her home and defiled her. This was after he had removed her panty and asked her to lie down, which she did.
12. Meanwhile, CO (PW3) and BP(PW4) who had become suspicious followed them from behind. The evidence of CO (PW3) was that she saw the appellant taking the complainant to a thicket near her (complainant's) home. She said she saw the appellant lying on the complainant, and together with BP (PW4), they screamed. The appellant stood up and put on his pair of trousers. He assisted the complainant in dressing up and ran away. This is what BP(PW4) testified to.
13. EAO (PW2), the complainant's mother, testified that after she had just returned to her house, she was attracted by screams. She ran to where the screams were coming from. This was a bushy area near her gate. She met with the complainant, who was crying and was bleeding from her genitalia. When enquired about the matter, she pointed at the appellant, who was running away. She gave chase but did not catch up with him. She took her daughter to the hospital.
14. David Ouma Osunga (PW5), the complainant's neighbour, was attracted by some commotion and followed a crowd of people going to the complainant's home. He found her bleeding from her genitalia and assisted her to go for treatment.
15. At Kendu Bay sub-county hospital, the complainant was examined by Fred Oyaa, who was on study leave at the time of the proceedings. The P3 form was produced on his behalf by a colleague, Ernest Omollo (PW7). At the time of the examination, the complainant had active bleeding from the perineum and the vagina. The perineum had a tear and was massively stained with blood. The hymen was freshly torn. There was a fresh bruise on the left labia minora. The minor was four years and six months at the time.
16. From the evidence on record, I find that the prosecution proved penetration into the complainant's genitalia. The identity of the perpetrator was equally proved; it was the appellant.
17. It was argued that the learned trial magistrate erred in law in misapprehending the extent to which section 36 of the *Sexual Offences Act* and section 124 of the *Evidence Act* relate to each other and whether the two sections are exclusive of each other.
18. Section 124 of the *Evidence Act* states:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
19. On the other hand, section 36 of the *Sexual Offences Act* states:
 - (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing,



including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

- (2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.
 - (3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.
 - (4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.
 - (5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.
 - (6) An appropriate sample or samples taken in terms of subsection (5)—
 - (a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and
 - (b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.
 - (7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—
 - (a) the State;
 - (b) any Minister; or
 - (c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.
 - (8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.
20. With respect to the appellant's advocate, these two sections do not address the same issue. Whereas section 36 of the *Sexual Offences Act* addresses the mode of obtaining medical, forensic and scientific evidence, section 124 of the *Evidence Act* is on corroboration required in criminal cases. The proviso thereof specifically addresses sexual offences. The contention that the learned trial magistrate misapprehended these sections is not factual.
21. The analysis of the evidence on record shows that the appellant's conviction was based on watertight evidence. The appeal lacks merit and is hereby dismissed.



DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE

