



**Onyango v Republic (Criminal Appeal E015 of 2024)
[2024] KEHC 15047 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E015 OF 2024
KW KIARIE, J
NOVEMBER 28, 2024**

BETWEEN

SILAS ODHIAMBO ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E008 of 2024 of the Chief Magistrate's Court at Homa Bay by Hon. J.A. Orwa—Senior Principal Magistrate)

JUDGMENT

1. Silas Odhiambo Onyango, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* no 3 of 2006.
2. The particulars of the offence were that between the 21st and the 23rd day of January 2024, at [Particulars Withheld] within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of EVO a child aged twelve years.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence. He was in person and raised grounds of appeal as follows:
 - a. That the trial magistrate erred in law and fact in convicting the appellant when the evidence on record was malicious, fabricated, far-fetched, and meant to implicate him with the offence.
 - b. That the trial court convicted the appellant on the strength of a defective charge sheet.
 - c. The trial court gave the appellant a very harsh sentence.
 - d. That the trial court rejected the alibi defence, which was compelling enough to exonerate the appellant from wrongdoing.



- e. That the evidence on record was not corroborated.
 - f. The trial court erred both in law and fact in convicting the appellant without considering that he was not medically tested to confirm that he committed the act.
 - g. The evidence of the medical officer who examined the complainant exonerated from any wrongdoing alleged by the appellant.
 - h. The trial magistrate convicted the appellant on the strength of a single-eye witness.
4. The state opposed the appeal on the grounds that the conviction and the sentence were proper.
 5. This is the 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 v Republic* [1972] EA 32.
 6. To establish an offence of defilement against an accused person, the prosecution has to prove 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.

This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues the court needs to determine...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.

Therefore, I will endeavour to establish whether the prosecution met the required standards.

7. The complainant, EVO (PW1), testified that she was thirteen years old. A copy of the Certificate of Birth produced as prosecution exhibit 1 indicates that she was born on the 24th day of December 2012. Therefore, she was twelve years old at the time of the alleged offence. Her age, for Section 8(3) of the *Sexual Offences Act*, was therefore proved.
8. Section 8(3) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
9. The complainant's evidence was that at about 8 p.m., they left home to go to the shop in the company of a friend. On the way, they met with a crying child. After that, they met with Rawlings, , who ordered her to accompany him. He took her to the lake, where he proposed to have her as his girlfriend. When she declined, he left her, and she started going home. It was at this juncture that she met the appellant.
10. EVO. (PW1) narrated further that when she met the appellant, he asked her to accompany him. She was hesitant but reluctantly complied. He took her to a one-roomed house and told her it belonged to his wife, Eugen . This is where he defiled her with lights on and in the presence of Eugen .



11. This evidence raises a fascinating issue. How did the appellant defile her in the presence of his wife without her protesting? Ordinarily, unless it is an orgy, no woman will allow her husband to indulge in what the complainant said happened to her.
12. Her narration of the incident does not add up. This is a minor with an adult, but she never indicated that she felt any pain during the incident.
13. The prosecution left out a material witness, Scovia. This is the person the complainant said was in her company that evening when she encountered Rawlings, and, later, the appellant. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

14. The medical evidence of Moses Otieno Osuma (PW4) was that when he examined the complainant on the 23rd day of January 2024, her genitalia were normal, with no fresh injury to the hymen except for a remnant of a torn scar. A high vaginal swab did not reveal any existence of spermatozoa. He was emphatic that the complainant's genitalia had been penetrated earlier than the 21st day of January 2024. This evidence should have raised a red flag on the complainant's credibility. The proviso to section 124 of the *Evidence Act* states:

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.

I find that the evidence of the complainant was not believable.

15. Sections 179 and 180 of the *Criminal Procedure Code* provided for convictions for offences other than those charged. Reading through the sections, it is clear that these offences must be minor compared to the one charged and the one the accused tried for. At the time of conviction, the court cannot enhance the charge, as in this case. This was prejudicial to the appellant. In any case, the certificate of birth did not support the learned trial magistrate's conviction under section 8 (2) of the *Sexual Offences Act*.
16. The upshot of the preceding analysis of the evidence is that the conviction was unsafe. I quash the conviction, set aside the sentence, and set the appellant at liberty unless lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

