



**Onditi v Republic (Criminal Appeal E010 of 2024)
[2024] KEHC 15936 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E010 OF 2024
DR KAVEDZA, J
DECEMBER 19, 2024**

BETWEEN

JOSEPHAT OMATO ONDITI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. M. Maroro on 21st December 2023 at Kibera Chief Magistrate's Court
Sexual Offences Case No. E061 of 2020 Republic vs Josephat Omato Onditi)*

JUDGMENT

1. The appellant Josephat Omato Onditi was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash the conviction and set aside the sentence imposed.
3. The appeal was canvassed by way of written submission with both parties filing their respective submissions. The same have been considered and there is no need to rehash them.
4. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



5. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
6. Further, section 8(1) and (3) of the [Sexual Offences Act](#), No. 3 of 2006 provides thus: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (3) 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.
7. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
8. PW2, the complainant in this case, gave evidence after a voir dire examination. She testified that in April 2021, she met the appellant, Josephat, and they agreed to start a boyfriend-girlfriend relationship. She stated that on one occasion, she did not attend school because she was meeting the appellant. She met him at his residence, where he was staying with a friend. She went onto his bed, and the appellant undressed her. He then made her to lie on her back and inserted his penis into her vagina. She went home later in the day.
9. At home, PW2 met her aunt, who questioned her about her whereabouts. She did not provide any information. PW1 also questioned her, but she remained silent. It was only after PW1 physically disciplined her that she disclosed everything. The following day, she led PW1 to the appellant's house, where the appellant was arrested.
10. PW2's testimony did not require corroboration under the proviso to Section 124 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya), provided there were reasons to believe the child was telling the truth. In this case, the trial magistrate noted that PW2 was consistent and steadfast in her testimony. Furthermore, her evidence, which was subjected to cross-examination, remained consistent throughout.
11. The appellant was well-known to PW2, who recognized him and had a relationship with him. This was not their first meeting. Therefore, I find that the appellant was properly identified.
12. To corroborate the complainant's evidence, PW1 testified that he was living with the complainant while she attended [Particulars Withheld] Primary School. He recalled that on 17/05/2021, the minor left home for school, but in the evening, he was informed that she had not attended. After questioning her, she admitted that she had been with the appellant.
13. The following day, she led PW1 to the appellant's house, where a fracas ensued. They then proceeded to the chief's office and were advised to take the complainant to Nairobi Women's Hospital. He produced the minor's birth certificate. Upon cross-examination, the reason for the fracas was said to be that he asked the appellant why he was having sex with the minor.



14. PW3, John Njuguna from Nairobi Women's Hospital gave evidence that he was producing a report on behalf of Ann Mutheu. He averred that the complainant was examined on 18th June 2021 having been allegedly defiled the previous day. Upon examination, there were no physical injuries visible and no injuries on her genitalia. Her hymen was broken with a healed tear. In addition, there were no injuries on her genitalia though her hymen was broken with a healed tear. He produced the PRC and P3 forms as prosecution exhibits. It was his conclusion that there was penetration. This court has reached the same conclusion. The ingredient of penetration was therefore proved beyond reasonable doubt.
15. PW4, the Investigating Officer said that on the material date, after the case had been minuted to her for investigation, she recorded the statements. She produced the birth certificate of PW2. Upon re-examination, she noted that Exhibit 1 was the minor's proof of age.
16. On the age of PW1, the trial court considered the birth certificate produced which confirmed that the complainant was 13 years old at the time of the offence. She was therefore a child and the ingredient proved beyond reasonable doubt.
17. In his sworn defence, the appellant testified that he is a student who deferred studies due to fees. He met the complainant while helping a friend, Clinton, vacate, learning her name and that she had completed Class 8. They would often meet outside the gate, and the complainant used to visit Clinton's house.
18. He recalled that on 17/05/2021, while at Clinton's house with Clinton and his brother's son, the complainant knocked early in the morning. She said she was helping her aunt who had given birth. She took tea, held the baby, and left after lunchtime, saying she was going to Uthiru. During cross-examination, DW1 stated that PW2 often visited Clinton's house. He mentioned that Clinton was unavailable to testify. Upon re-examination, he added that the complainant never mentioned Clinton leaving the house or leaving them alone.
19. The court considered his defence and found it to be incredible. In view of the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.
20. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.
21. On sentence, the appellant was sentenced to serve twenty years imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. The [Sexual Offences Act](#) provides for a mandatory minimum sentence of twenty (20) years imprisonment for the offence the appellant is convicted of. The court sentenced the appellant to the minimum sentence provided under the law.
22. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 Republic vs Joshua Gichuki Mwangi. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
23. Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE



In the presence of:

Omao for the Appellant

Mburugu for the Respondent

Achode Court Assistant

