



**Dalmas Oburu Omollo v Republic (Criminal Appeal 30 of 2023)  
[2025] KEHC 200 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 200 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL 30 OF 2023  
DK KEMEL, J  
JANUARY 17, 2025**

**BETWEEN**

**DALMAS OBURU OMOLLO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the Honorable Leister Simiyu (PM)  
delivered on 26<sup>th</sup> February 2022 in Siaya CMCC (S.O) NO. 23 of 2020)*

**JUDGMENT**

1. The Appellant herein Dalmas Oburu Omollo was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on diverse dates between 28/03/2020 and 01/04/2020 at [Particulars Withheld] in Siaya sub county within Siaya County, unlawfully and intentionally caused his penis to penetrate the vagina of DAO a child aged 13 years.
2. He was likewise charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars were that on diverse dates between 28/03/2020 and 01/04/2020 at [Particulars Withheld] in Siaya sub county within Siaya County, unlawfully and intentionally touched the vagina of DAO a child aged 13 years with his penis.
3. The Appellant denied the charge and upon a full trial he was convicted and sentenced to 20 years' imprisonment.
4. Dissatisfied by the conviction and sentence, the Appellant has now filed this appeal raising the following grounds:
  - i. That the trial magistrate erred in both law and fact in failing to establish that the prosecution did not prove its case beyond reasonable doubt.



- ii. That the trial magistrate erred in law and in fact by relying on shoddy and flimsy evidence presented by the prosecution.
  - iii. That the trial magistrate failed in law and in fact in failing to consider the nature of the mandatory sentence imposed due to the fact that he is a first offender.
  - iv. That the trial magistrate failed in law and in fact by failing to consider the Appellant's mitigation.
5. On the basis of the grounds above the Appellant prayed that the sentence be set aside and he be set at liberty.
  6. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions (See *Okeno v Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v Republic* [2004] KLR 81.
  7. The Respondent called a total of five witnesses in support of its case.
  8. PW1 DA testified that she was aged 13 years and had birth certificate (PMFI- 1), showing the date of birth as 24/6/2006. She stated that on a Saturday of 28/03/2020, she was passing by outside the Appellant's house when the Appellant called her to his house. That the appellant removed her dress and her underwear and then made her lie on his bed, slept over her and inserted his penis into her vagina and had sex with her. That after the said act, the appellant gave her ksh 20/- to buy chapati. That when she left the appellant's house she met her mother at the appellant's gate and that she informed her mother on what had happened. That together with her mother they went to the appellant's house and that her mother scolded the appellant who left on his bicycle and went away. That she and her mother reported to the police at Tingwangi then Siaya Hospital and later on went back to Tingwagi police station. They were issued with a P3 form (PMFI- 2), and PRC form (PMFI- 3).

On cross- examination, she stated that the first time she met the appellant was a Saturday when the appellant just greeted her and she went on her way. That the following Saturday she passed by again and that the appellant called her to his house when he had sex with her. That she had never had sex with any other person before.

9. PW2 MA, testified that she resides at [Particulars Withheld]. She recalled in October 2019 that she sent her daughter to grind maize. That she had heard rumours from the complainant's siblings that her daughter had been visiting the Appellants house. The appellant was a neighbor who lived alone. That she went and warned Oburu the appellant to leave her daughter alone. That on another occasion the complainant's siblings M1 and M2 informed her that D was in Oburu's house. That she rushed to the house of Oburu and found the two locked up in the house of the Appellant. That when they came out, the complainant informed her mother that they usually have sex with the Appellant. That she reported the matter to the village elder then to Tingwangi hospital then later to the police who issued them with a P3 form and referred to Siaya County Hospital. That she took the document back to the police.

On cross -examination, she stated that on several occasions her daughter would delay to return when sent on errands. That on the 1<sup>st</sup> occasion she found her on the road, 2<sup>nd</sup> occasion she found her on the Dalmas Oburu Omollorstep of Oburu, 3<sup>rd</sup> occasion found her on the road walking home and on the 4<sup>th</sup> occasion she was inside Oburu's house where there was commotion but not a struggle. That is when she reported to the village elder and police then took her to hospital. That her daughter had informed her that she usually sleeps with the Appellant in his house.



10. PW3 Lucy Aoko Ochieng testified that she is the village elder of [Particulars Withheld]. That one evening MA (PW2) and her husband and PW1 went to her place. That Pw2 stated that she acted on suspicion and followed PW1 to the house of the Appellant. That pw2 found pw1 locked up in the Appellant's house and that pw2 screamed and that the Appellant fled. That she called the assistant chief and who referred them to Tingwangi hospital. That they came to Siaya then returned to Tingwangi Hospital.

On cross-examination, she stated that M informed her that she screamed and Oburu (appellant) fled on his bicycle. That M came to her on 1<sup>st</sup> April 2020. That M had been hearing rumours since October 2019. That when M caught them in Oburu's house, it was on 28<sup>th</sup> March 2020 and went to report to her.

On re-examination, she stated that she had initially heard about the complaint on the school board, M had reported to the school head teacher that Oburu (appellant) had an illicit affair with Dalmas (complainant) and that the teacher called the appellant to warn him.

11. PW4 Isaac Imbwaga testified that he is a clinical officer at Siaya County Hospital, registration number 18/36 of teaching practice council. That he had with him a P3 and PRC forms in favour of DAO aged 13 years. That the P3 form was dated 1/4/2020. That the complainant was accompanied by the mother and that they came one day after date of offence. That the complainant was given PEP for HIV and emergency contraceptives. That on examination of the genitalia, normal externally, bruised vaginal wall, absent hymen and whitish vaginal discharge. The laboratory examination revealed that HIV was negative, pregnancy test negative VDRL negative, urinalysis-pus cells seen, Epithelial cells seen, no spermatozoa, and high vaginal sores- pus cells seen. He concluded that features suggested vaginal penetration.

PRC form indicated that survivor reported several defilements by the same perpetrator who gave her gifts, dates and times of defilements were not given.

The witness also had a P3 form in favour of the Appellant herein Dalmas Oburu Omollo aged 65 years. On examination of the genitalia, it was normal uncircumcised penis shaft with reddening of purpura surface of the preface with whitish like crystal around the gland's penis. Laboratory examination showed that HIV and VDRC were negative and that in urinalysis there were no abnormalities. He concluded that the Appellant reported to have defiled the minor but on examination there were no signs of penetration.

On cross –examination, he stated that he examined the minor on 2/4/2020 and that the medical history showed that the last incident was on 1/4/2020 at 4.00 pm. That P exhibit 2-(p3 form) of the minor referred to history given which was incorrectly indicated as 2/4/2020. That according to P exhibit 4 (laboratory report), the sample collection date was 2/4/2020 at 4.00 pm. That he saw the victim 24 hours from the last alleged incidence. That no spermatozoa was found on the victim. That the whitish discharge on the vagina could indicate penetration but in this case the discharge was due to vaginal candidiasis. That upon examination of the Appellant, he also had whitish like crystal but he was not able to know its cause. P exhibit 5 was the P3 form of the Appellant and P exhibit 2 was the P3 form of the complainant.

12. PW5 No. 62444 Corporal Eluid Shitanda testified that he is stationed at Tingwangi police post. That on 2/4/2020 at 7.00 pm MAO went to them with her daughter DAO aged 13 years and reported that the previous day on 1/4/2020 at 5.00pm she had found the child leaving the house of Dalmas Oburu. That Dalmas had no wife then. That they had already gone to Siaya County Hospital then examined and treated. That a report was booked, statements recorded and P3 form was issued. That he and colleague visited the scene but didn't find the suspect. But later traced him and arrested him and



took him to Siaya hospital where he was examined. That PW2 gave him a copy of the minor's birth certificate showing date of birth as 24/6/2006 which was produced as P exhibit 1.

On cross –examination, he stated that he is the Investigating officer with 29 years in police service and has handled many sexual offence cases. That he never instructed the doctor to do DNA on the minor and the Appellant.

13. That marked the close of the prosecution's case.
14. The court then ruled that the prosecution had established a *prima facie* case and that the accused was thus placed on his defense. The Appellant elected to remain silent and that the defense case was closed.
15. Parties duly filed and exchanged written submissions. The Appellant submitted that PW2 the complainant's mother produced the birth certificate of the minor yet she was not the maker. He submitted further that the record bears witness that it was PW1 who used to go to the house of the appellant and thus pw1 herself was sexually oriented. Relying on the case of *James Kariuki Waganga v Republic* (2018) eKLR Prof. Ngugi (J) the Appellant submitted that the court has power to impose any sentence other than mandatory sentence considering the circumstances of the case. In this regard, he requested the court to set aside the mandatory sentence of 20 years as harsh in the circumstances.

It was the appellant's submissions that his mitigation was not considered in issuing the sentence. He thus prayed that the appeal be allowed.

16. The Respondent, on the other hand, submitted that all the requisite elements for the offence of defilement that is age of the minor, penetration and identity of the perpetrator had been sufficiently proved. On the element of age, the Respondent submitted that the minor testified that she was 13 years old (at page 8 line 5 of the record of Appeal). That she marked her birth certificate as PMFI- 1. That PW5 produced the minors birth certificate as P Exhibit- 1 showing that she was born on 24/6/2006. (at page 22 line 13-14 of the Record of Appeal). Further, the Respondent relied on the case of *Omuroni vs. Uganda* Criminal Appeal No. 2 of 2000 and stated that the court had the opportunity to observe the victim and was satisfied that she was a minor based on observation and common sense.

On the element of penetration, the Respondent relied on the case of *Daniel Wambugu Maina versus Republic (Supra)* and submitted that penetration need not be complete and there need not be a release of spermatozoa into the genitalia. It submitted that the minor testified that he (Appellant) inserted his penis into her vagina. He caused penetration into her vagina." (page 8 line 16-17 of the Record of Appeal). It also submitted that PW4 testified that on examination of the minor's genitalia, it had bruised vaginal wall, absent hymen whitish vaginal discharge and epithelial cells seen. He formed an opinion that there was penetration.

To this extent, the Respondent submitted that penetration was proved beyond reasonable doubt.

On the aspect of identity, the respondent submitted that in the minor's testimony she stated: "the person who inserted his penis into my vagina is in court. I had seen him in another occasion in his home. (appellant pointed out." (page 9 line 10-11 of the record of appeal). It relied on the case of *Roria vs Republic* (1967) EA 583(Unreported) and submitted that the circumstances were tenable to enable the victim identify and recognize the appellant. On this background, the Respondent prayed that the appeal be dismissed.

17. I have considered and evaluated the lower court record plus the rival submissions and authorities. I find that the issue for determination is whether the prosecution proved its case against the Appellant beyond reasonable doubt.



18. In defilement matters, it is trite that the elements that the prosecution must prove to secure a conviction are : Age of the victim, penetration and the identity of the perpetrator.
19. On the first issue of age, PW1 testified that she was 13 years at the time of the defilement. On this aspect, i agree with the submissions of the Respondent as captured above. The appellant contended that the birth certificate was produced by PW2 yet she is not the maker. I have perused the record and confirmed that it is PW5, the investigation officer who produced the birth certificate rightfully so. I do not find any evidence on record of the Appellant disputing the authenticity of the said birth certificate. In any event, the Appellant did not object to the production of the said birth certificate by the investigating officer. That argument by the appellant does not hold water. I am thus satisfied that the element of age was sufficiently proved.
20. As regards the element of penetration, from the record PW1 minor testified that “he (Appellant) inserted his penis into my vagina. He caused penetration into my vagina.” (page 8 line 16-17 of the Record of Appeal). In what can be construed as a confession, the appellant submitted on appeal that the record bears witness that it was PW1 who used to go to the house of the appellant, thus pw1 herself was sexually oriented.
21. It is trite that medical evidence is not the only proof of penetration in defilement cases. The element of penetration can be proved by the testimony of the complainant. This court has severally held that what is most important to prove the allegation of rape or defilement is not medical evidence but the oral evidence tendered by the victim. In the present case, the evidence of the clinical officer (PW4) did confirm that there was penetration of the complainant’s genitalia. In the case of *Kassim Ali v Republic* [2006] eKLR the Court of Appeal observed as follows:

“ So, the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.”

I am thus satisfied that the element of penetration was sufficiently proved.
22. Lastly, as regards the identity of the perpetrator, the Respondent submitted that that in the minor’s testimony she stated: “the person who inserted his penis into my vagina is in court. I had seen him in another occasion in his home. (Appellant pointed out.” (page 9 line 10-11 of the record of appeal). The Appellant also submitted that it was Pw1 who used to go to his house. Thus, I am satisfied that the Appellant and the minor were familiar to each other and that made it tenable for the minor to identify him. (See *Roria vs Republic (Supra)* ). There is there no doubt that the Appellant was the perpetrator. Indeed, the mother of the complainant (PW2) stated that she had earlier warned the Appellant to keep off her daughter and had in fact briefed her daughter’s head teacher who subsequently warned the Appellant. The evidence is overwhelming against the Appellant and that he was placed at the scene of crime. The complainant confirmed that she used to have sex with him in the past and thus had no difficulty in identifying him as her assailant. I find that the Appellant was squarely placed at the scene of crime. Iam satisfied that the prosecution proved all the three essential ingredients of the offence beyond any reasonable doubt. Hence, the finding on conviction by the trial court was sound and I see no reason to interfere with it.
23. On the issue of sentence, it is noted that the Appellant was ordered to serve 20 years imprisonment. Indeed, under section 8(3) of the Sexual Offences Act, a person found guilty of defiling a child aged between 12- 15 years old is liable to be sentenced to a sentence of not less than twenty years. The Appellant has raised the issue of mandatory sentence of 20 years as a ground of appeal. In the landmark case by the Supreme Court of Kenya in *Republic vs. Mwangi Gichuki & Others* Petition No. E018 of



2023 [2023] eKLR (12 July 2024) the Supreme Court stated that all minimum mandatory sentences under the *Sexual Offences Act* No. 3 of 2006 are lawful unless otherwise amended.

The sentence imposed is the minimum possible in law. It is noted that the Appellant then aged about 65 years old went about seducing the complainant who was a minor thereby ruining her life and education. The Appellant turned into a pedophile and a predator of young and vulnerable children. The conduct of the Appellant was detestable and that the pre-sentence report filed by the probation officer indicated that the members of the community were aghast about the incident. I am satisfied that the sentence imposed is neither harsh nor excessive and that he requires custodial rehabilitation before being released back to the society.

24. Ultimately, this court is satisfied that the trial court addressed itself correctly on the law and facts. Hence, there are no grounds for interfering with the findings of fact by the said court. I am satisfied that the appellant was properly convicted of the offence of defilement contrary to section 8(3) of the *Sexual Offences Act*. The resultant sentence was within the limits permitted by law and I see no reason to interfere with the exercise of that discretion by the trial court.

25. In the result, it is my finding that the appeal has no merit. The same is hereby dismissed.

**DATED AND DELIVERED AT SIAYA THIS 17<sup>TH</sup> DAY OF JANUARY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

Dalmas Oburu Omollo.....Appellant

M/s Kerubo.....for Respondent

Mboya.....Court Assistant

