



**Adongo v Republic (Criminal Case E008 of 2024)  
[2025] KEHC 1588 (KLR) (17 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1588 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL CASE E008 OF 2024  
SM GITHINJI, J  
FEBRUARY 17, 2025**

**BETWEEN**

**STEPHEN OWANO ADONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Stephen Owano Adongowas charged in the lower court with the offence of attempted defilement, contrary to Section 9 Sub-section (I) of the sexual offence [Act No. 3 of 2006](#).
2. The particulars of this offence are that on the 6<sup>th</sup> day of October, 2019 at [Particulars withheld] in Malindi Sub-County within Kilifi County, the appellant unlawfully caused his penis to penetrate into the vagina of A.M.N a girl aged 5 years.
3. In the alternative he was charged with the offence of committing an indecent act contrary to Section 4 (d) of the sexual offence [Act No. 3 of 2006](#).
4. The particulars hereof are that on the 6<sup>th</sup> day of October 2019 at [Particulars withheld] in Malindi Sub-County within Kilifi County, the appellant unlawfully committed an indecent act by unlawfully attempting to touch the vagina of A.M.N a girl aged 5 years using his penis.
5. The prosecution case is that the victim in this case who offered evidence as Pw-1 was on 6<sup>th</sup> October, 2019 aged between 2 to 3 years. She was in Nursery School. She said while her mother was away, she and her brother namely Adongo visited the appellant whom she described as “baba Adongo”. They were only the three of them at the place. She alleged that the appellant defiled her by putting his “dudu” (penis) in her vagina (of which location she pointed to the court). She felt a lot of pain and screamed. However, nobody heard her. Adongo was outside and she was on the bed. She had been stripped naked at the time. After he finished he dressed her up. He warned her not to tell anyone or lest he repeats it again. She went home and kept quiet. Her genitalia was itching and paining. She was



- walking with difficulty. Her uncle noted of it and questioned her. Her mother and the said uncle took her to Malindi Sub-County Hospital.
6. The evidence of Pw-2 shows she was examined at the said Hospital on 11/10/2019. The P-3 form was filed on 11/10/2019. It was suspected that she had been defiled by a person known to her. She was crying and urinating. On examination she had abdominal whitish discharge. Vaginal swab was examined and the results are that; there was no spermatozoa, urine was okay and HIV was negative. Based on treatment notes and history, it was concluded there was attempted defilement. Age assessment revealed she was about 5 years old. The P-3 form was filled to the said effect and was produced as an exhibit.
  7. The investigating officer who gave evidence as Pw-3 stated that the matter was reported to her on 12/10/2019 by the mother of the victim who was in company of the said victim. They made a complaint of attempted defilement. The suspect was in their company and was immediately arrested. The complainant alleged the appellant attempted to defile her by rubbing his penis on her vagina. She felt pain and the appellant threatened to kill her if she told anyone about it. She issued a P-3 form and after it was filled charged the appellant.
  8. What I gather from defense case is that the appellant was married to one Caroline Wairimu and they had children. They had however disagreed and parted. The mother was not taking good care of the children and the appellant threatened to report her. She was also interested in having the motorcycle which the appellant had been given by his sister, KEMH-254Y. For the reasons she fixed the appellant. She had before claimed he had defiled their boy child and later the victim in this case. The victim was beaten up to lie against him. He did not commit the alleged offence.
  9. The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve 6.5 years imprisonment.
  10. Dissatisfied with the said conviction and sentence the appellant preferred an appeal to this court on the grounds that: -
    1. There was no enough evidence to convict the appellant.
    2. The defense was misconstrued and not properly weighed
    3. The medical evidence relied on was flawed, questionable and inadmissible.
    4. The appellant's submissions was ignored.
    5. Charge is duplex
    6. The charge particulars were unilaterally amended by the magistrate while writing judgment.
    7. The evidence is contradictory and unreliable.
  11. The appeal was canvassed by way of written submissions and the respondent in their submissions conceded the appeal.
  12. I have as the first appellate court re-evaluated the charges, evidence adduced, judgment of the lower court and sentence meted; considered the grounds of the appeal and submissions by both sides.
  13. What is of great interest and consideration in this appeal is the charges. The particulars of the offence in both the main and the alternative counts does not disclose an offence as carried in each statement of the offence.



14. The first count is of attempted defilement contrary to section 9 sub-section (1) of the sexual offence Act. However, the particulars of the offence discloses an offence of defilement. The wording is that the accused unlawfully caused his penis to penetrate into the vagina of A.M.N, a girl aged years.
15. For the alternative count, the offence is of committing an indecent act. However, the particulars of the charge were amended to read that the accused unlawfully attempted to touch the vagina of A.M.N a girl aged 5 years, using his penis.
16. Under section 2 of the Sexual Offence Act “indecent act” means an unlawful intentional which causes: -
  - a. Any contact between any part of the body of a person with the genital organs, breast or buttocks of another, but does not include an act that causes penetration.
  - b. Exposure or display of any pornographic material to any person against his or her will.
17. As alleged by the appellant the charges are defective as they are “duplicitous” and it was not clear to the accused of the offence he was defending. Section 134 of the criminal procedure code is to the effect that every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It’s therefore obvious that a conviction based on a defective charge undermines the right to fair trial. In *Yongo -V- Republic (1983) eKLR*, the court emphasized that a charge must disclose an offence known to law. Further in *Sigilai -V- Republic (2004) eKLR*, the court stressed that a charge must be clear and specific. On this point or ground, the conclusion is that the charge is incurably defective.
18. The evidence of Pw-1 does not also support the charges preferred against the appellant. Her evidence is to the effect that she was penetrated and therefore defiled. However, the evidence of Pw-2 and Pw-3 contradicts that evidence as they disclosed the offence of attempted defilement. The said errors and contradictions were not resolved by the time of closure of prosecution case.
19. Crucial witnesses who were disclosed were not called as witnesses. A brother to the victim namely Adongo, uncle to the victim and the mother were all not called as witnesses. No reasonable explanation was offered by the prosecution for the failure. This left the weak evidence of Pw-1 uncorroborated and given the contradictions between it and the rest of the evidence, unreliable.
20. Appellant’s defense is that he was fixed by his estranged wife so as to have the use of his motorcycle. She had done it before and he produced evidence in support. Given the gaps, errors and contradictions in the prosecution case, It’s vivid that its one which should not have led to a conviction. The charges and the evidence were not properly analyzed by the trial court and so arrived at a wrong decision, of conviction. As such this court finds the appeal merited. The conviction and sentence are therefore, hereby quashed and the appellant is set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2025**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of: -

1. Mr. Nyongesa for the accused person
2. Mr. Mwangi for the State.



3. Appellant virtually

