



REPUBLIC OF KENYA



**Isoe v Republic (Criminal Appeal E013 of 2024)
[2025] KEHC 6767 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E013 OF 2024
A. ONG'INJO, J
FEBRUARY 20, 2025**

BETWEEN

DOUGLAS OGENDI ISOE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the conviction and sentence by
Hon. C. A. Ogweni Senior Resident Magistrate in Kisii Principal
Magistrate's Sexual Offence Case No. E 048 of 2020 delivered on 22.2.23)*

JUDGMENT

1. The Appellant Douglas Ogendi Isoe was charged with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offence [Act No. 3 of 2006](#) on 2 Counts.
 2. Particulars are that on the 18th June 2020 at Kerera Location in Kisii Central Sub County within Kisii County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of C. S. O. a child aged fourteen (14) years old.
 3. In the alternative the Appellant was also charged with the offence of committing indecent act with a child contrary to Section 11 (1) of the Sexual Offence [Act No. 3 of 2006](#)
 4. Based on the evidence of five (5) Prosecutions witnesses and the Appellant's sworn testimony the trial Magistrate convicted the Appellant and sentenced him to serve 20 years imprisonment.
 5. The Appellant was aggrieved by the conviction and sentence and he lodged his Petition of Appeal filed on 5.2.24 on the following grounds ;-
1. The learned trial Magistrate erred in law and fact by convicting the Appellant to serve 20years imprisonment without observing that the offence of defilement was not proved beyond reasonable doubt as required by law.



2. The learned trial Magistrate erred in law and fact by convicting the Appellant 20 years imprisonment without considering that the investigation conducted in this case was scanty and shady which could not be used to secure conviction.
 3. That for sure the medical report tendered before the trial court was malice which was only generated in order to fix this young and peasant man into this heinous act.
 4. That the trial learned magistrate erred in law and facts by convicting the Appellant to serve a huge and punitive sentence of 20 years without considering the general circumstances of the offence thus asking this Hon. Court to kindly review the findings of the lower court for the interest of justice.
 5. The learned trial Magistrate erred in law and fact by convicting the Appellant to 20 years imprisonment despite the glaring contradictions
 6. That the Appellant prays to be served with the trial court records to enable him erect more grounds of Appeal
 7. That more grounds shall be adduced during the hearing and determination of this appeal.
6. The Prosecution's case was that the Appellant defiled PW2 on 18/6/20 at around 2:00 p.m when she was left at home alone. She said that the Appellant went to look for his panga and the complainant gave him the panga. That while the complainant was sweeping their compound the Appellant returned and grabbed her from behind and she thought it was her sister. The Appellant pulled her to a nearby maize plantation removed her panty and he also removed his trouser and inner pants and forcefully had sex with her by inserting his penis into her vagina. That when the Complainant felt pain and screamed the Appellant covered her mouth.
 7. The Complainant further stated that two of her sisters Barongo and Kwamboka heard her screams and they went and found the Appellant having sex with her. The Appellant warned them to stop making noise and threatened them and that the Appellant was still naked.
 8. The Complainant's mother also heard the screams and she went where they were and found them there. That the mother called the Area Chief to go and solve the issue amicably. That the Nyumba Kumi members and the police came and arrested the Appellant from the same place. The Complainant went to police station and later was escorted to Keumbu Sub County Hospital where she was treated and issued with a PRC form Exhibit P1, P3 form – Exhibit 2 and treatment notes Exhibit 3.
 9. PW1 Erick Apisi Clinical Officer at Keumbu Sub County Hospital produced P3 form which he filled and PRC form which was filled by Bethseba Ongwere who was a Clinical Officer at the facility and was later transferred to Ibeno Hospital.
 10. PW3 BKO aged 15 years testified and said that she was sister to the Complainant herein and LB. She said that she knew the Appellant as Ogendi. She also said that she knew the Appellant's home and it was about 1 – 2 Kms from their home. PW3 further said that on 18/6/2020 B, her mother and herself went to fetch firewood and left the Complainant at home and they came back within one hour. That on their way back they heard screams and went where the screams came from and found the Appellant (Ogendi) had removed his trousers and he was lying on top of the Complainant. The trousers were on his knees. That they screamed and their mother rushed to the scene. PW3 stated that there was blood on the Appellant's shirt and he was defiling the Complainant. That the police and the village members came and arrested the Appellant.



11. PW4 GK the complainant's mother confirmed that the Complainant was born on 16/1/2006 and she produced her Birth Certificate as Exhibit 4. She also confirmed that they had gone to fetch firewood with her two daughters and the Complainant was left at home to sweep the compound. That the two sisters went ahead of her and on her way back home she heard screams. That she further confirmed that the children were screaming for help and she rushed to the scene. On reaching the scene she found the Appellant was half naked lying on top of the Complainant inside a maize plantation. PW4 also stated that the Appellant took her phone and called the Area Chief but she managed to snatch the phone from him. PW4 also said that Douglas was his relative and they stayed 1 – 2 Kms apart and confirmed that there has not been any dispute between them. PW4 further said that her family blamed her for reporting the matter. That the complainant was taken to Keumbu Hospital and the Community Policing members and the police arrested the Appellant.
12. PW5 PC Damaris Amwayi the Investigating Officer from Keumbu Police Station testified that a report was made that the Complainant (PW2) was defiled by the Appellant. PW5 said that the Appellant was arrested from his homestead and the both the Appellant and Complainant were taken to Keumbu Sub County Hospital for examination and later they recorded statements.
13. When the Appellant was placed on defence, he gave sworn statement and said that he went to collect his debt from the Complainant's mother who asked him to go back on 18/6/2020. That when he went on that day the mother alleged that he had defiled the Complainant. That the Appellant further stated that he had loaned the Complainants mother Kshs. 10,000/=. He also stated that PW4 called the police who arrested him and charged him for the offence of defilement. On cross examination the Appellant stated that he went to claim fir his debt on 17/6/2020 and PW4 asked him to go back on 18/6/2020.
14. This Appeal was canvassed by way of written submissions.
15. The Appellant's undated submissions he questioned whether evidence adduced by family members meet the required standards to sustain a conviction. He said that the alarm raised by the Complainant and her sisters ought to have made even neighbours to respond but that was not the case. The Appellant also submitted that the evidence by the medical officer was framed up as the clothes the Complainant was wearing were not produced to support the allegations that she was defiled.
16. The Appellant also submitted that he was taken together with the Complainant to the hospital but he was never examined to verify that he was involved in the offence and that this creates doubt in the mind of the court.
17. The Appellant contended that the evidence of the Investigating officer and the Complainants mother was contradictory as to who called the Assistant Chief to the scene. He also said that investigations were not properly carried out as no neighbor recorded statements and even the Chief who arrested him did not testify.
18. The Respondent's submissions are dated 24/9/2024. The Respondent submitted that the ingredients of the offence of defilement were proved beyond reasonable doubt and the Appeal should be dismissed.

Analysis and Determination

19. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose v R* [2013] eKLR thus;
“.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always



bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

20. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:-

- i. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
- ii. Whether there were contradictions in the prosecution case.

Section 8 (1) and (3) of the sexual offence [Act No 3 of 2006](#) provides that;

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2. A person who commits an offence of defilement with a child aged between age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

21. The offence of defilement is anchored on three main ingredients being the age of the victim, penetration and the proper identification of the perpetrator.

22. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

23. From the complainant’s testimony she was born on 16/1/2006 as per Exhibit 4 and that at the time she was defiled on 18.6.20 she was 14 years. There is no dispute as to the age of the complainant.

24. The second element is the second ingredient is penetration which is defined under Section 2 of the [Sexual Offences Act](#) as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

25. The same section defines “genital organs” to include;

“the whole or part of male or female genital organs and for purposes of this Act includes the anus.”

26. The Complainant testified how the Appellant found her alone at home on 18/6/20 grabbed her and pulled to a nearby maize plantation and defiled her. That when she screamed the Appellant covered her mouth. Her two sister PW3 Brigit Kwamboka and Barongo rushed to the scene and found the Appellant in the act. PW4 the mother of the complainant who had been left behind by PW3 also heard screams at her home where the children were calling for help and when she arrived she found the Appellant half naked lying on top of the Complainant inside the maize plantation. The Complainant was taken to Keumbu Hospital and on examination it was found that her hymen was freshly torn and the labia majora and minor were bruised. That the outer genitalia had bruises and there was blood in the vagina. P3 Form Exhibit 2 and PRC Form were filled indicating the results of the examination and



treatment. From the evidence tendered by the witnesses it is clear that the ingredient of penetration was proved beyond reasonable doubt.

27. Whether the Appellant was identified as the perpetrator, it was not in dispute that the Appellant is a cousin to the to the Complainant and they therefore knew each other very well. The offence was committed in broad day light at 2:00p.m and the Appellant was found in the act by PW3 and PW4 and the Appellant was arrested at the scene by the Assistant Chief and the police.
28. PW5 PC Damaris Amwayi testified that at the time the Appellant was arrested his pants were still down.
29. The Appellant claimed that the Complainant's mother owed him Kshs. 10,000/= which he had gone to take but he didn't raise the issue with the Complainant's mother PW4. PW4 said that the Appellant had not wronged her before and the Complainant said she had no dispute with the Appellant and she was not lying against him.
30. It is therefore clear that the Appellant was positively identified as the perpetrator of the offence of defilement against his cousin.
31. The appeal herein lacks merit and the same is dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF FEBRUARY, 2025.

A. ONGINJO

JUDGE

Judgment delivered in the presence of:

