



**Koi v Republic (Criminal Appeal E053 of 2023)
[2025] KEHC 2141 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E053 OF 2023
DK KEMEL, J
FEBRUARY 14, 2025**

BETWEEN

ERICK ONYANGO KOI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon Limo (PM) dated 15th November 2023 in Siaya Chief Magistrate's court Sexual Offence Case No. E041 of 2021)

JUDGMENT

1. The appeal herein arises from the conviction and sentence of Hon. Limo (PM) in Siaya Chief Magistrates Court Sexual Offence Case No. E041 of 2021 dated 15/11/2023 wherein he was sentenced to serve twenty (20) years' imprisonment for an offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 13th August 2021 within Siaya County intentionally caused his penis to penetrate the vagina of CAO a child aged 11 years. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 with particulars being that on 13th August 2021 within Siaya County, intentionally touched the vagina of CAO a girl aged 11 years.
2. Being aggrieved by the aforesaid conviction and sentence, the Appellant filed grounds of appeal on 21/11/2023 as follows:
 - i. That the learned trial magistrate erred in law and fact in failing to find that the prosecution did not prove its case.
 - ii. That the learned trial magistrate failed to note that both the complainant and appellant were arrested at the same time but it is only the complainant who was taken to hospital for examination.



- iii. That the trial magistrate failed to consider the Appellant's defence which was cogent, credible and unshaken.
 - iv. That the learned trial magistrate erred in law and fact by failing to observe the provisions of Section 333 (2) of the Criminal Procedure Code while passing the sentence.
 - v. That the learned trial magistrate erred in failing to consider the Appellant's mitigation when imposing the sentence which is harsh.
 - vi. That the learned trial magistrate erred in law and fact by failing to observe that the appellant was a minor at the time of the offence and hence the sentence imposed is unconstitutional.
3. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and reach its own independent conclusion as to whether or not to uphold the decision of the trial court. This court has to consider that the trial court had the advantage of seeing and observing the demeanour of the witnesses and therefore must make due allowance for that. See *Okeno Vs. R (1972) EA 32*.
4. PW1 CAO testified after a *voire dire* examination that she is aged 13 years old and a pupil in class seven at a school (name withheld). She stated that on 12/8/2021 at about 6.00 pm, she was from school and heading to her grandmother's house when she met the Appellant herein who requested her to go their home as she would sleep with his sister. That since her grandmother's home is far she agreed to accompany the Appellant to his home and that on arrival he opened the door as there was nobody at his home and when she enquired about the sister he fetched a panga and ordered her to sleep in his house. That the Appellant defiled her by inserting his penis into her vagina. That the ordeal went on throughout the night and that in the morning the Appellant escorted her out of his house and left her at the roadside. That she went to a nearby petrol station and informed the security guard about what had happened. That the guard took her to the police station and that she later led the police to the house of the Appellant and that he was arrested after she pointed him out to the police as the person who had defiled her at night. That she was later taken to hospital for checkup.
- On cross examination, she stated that she was carried by a *boda boda* operator. That she saw the Appellant's grandmother. That she met the Appellant at the road.
5. PW2 Christine Yiembe testified that she is a teacher at a certain school name (withheld) and that on 12/8/2021 the complainant was involved in a fight with a pupil and both were punished at school. That PW1 did not return home and that she looked for her in vain. That on 13/8/2021 the complainant and police officers arrived at her house and briefed her about the defilement. She joined the police and complainant plus the clan elder and went to the home of the Appellant where he was arrested. That she took the complainant to hospital for medical examination.
- On cross examination, she stated that she could not report to the police on 12/8/2021 as there was a curfew in place.
6. PW3 GAO testified that on 13/8/2021 she was informed of the defilement incident and that she accompanied the complainant and police to the scene where they arrested the Appellant and escorted him to the police.
- On cross examination, she stated *inter alia*; that the minor showed them the Appellant's house; that the minor had sought refuge in the Appellant's house while she was on her way to her grandmother's home; that complainant had differed with her mother; that no item was recovered.
- On reexamination, she stated that the minor positively identified the Appellant.



7. PW4 Eunice Otieno testified that she is a security guard at Ngiya Top Oil Petrol Station. That on 13/8/2021 she met a minor who had a bag and who informed her that she was heading to school and that she had differed with her mother at school and that her mother was a teacher at that school. That the minor informed her that the minor was heading to her grandmother's house when she met the appellant on the way and who took her to his house and later defiled her. That she escorted the minor to the assistant chief and later accompanied police to the home of the Appellant where he was arrested after the minor identified him.

On cross examination, she stated that she was informed that the minor had been defiled.

8. PW5 Brian Chege testified that he works at Siaya sub County Hospital and was testifying on behalf of his colleague Isaac Imbwaga who had filled a P3 form. That the complainant's under pant had stains but had no tears. That she had pain while walking. That there were bruises on labia minora with redness, a freshly broken hymen scar which was bleeding. That specimens were collected for testes. That there was evidence of vaginal penetration. He produced the P3 form and post rape care form as exhibits 1 and 2 respectively while the lab report was produced as exhibit 3.

9. PW6 No. 23795 PC James Maina was the investigating officer. He stated that on 13/8/2021 he was on patrol when a security guard at a petrol station alerted him of the incident and briefed him that she had spotted a girl walking with difficulty and upon interrogating her, she established that she had been defiled. That the complainant led the police and villagers to the house of the Appellant where they arrested him after the minor identified him. He organized to have the minor taken to hospital. That the girl was aged 11 years as per the birth certificate which he produced as exhibit 3.

On cross examination, he stated that the petrol station is near the police station and that the watchman had noticed the girl walking with difficulty.

10. At the close of the prosecution's case, the trial court found that a prima facie case had been made by the prosecution against the Appellant who was put on his defence. He opted to give a sworn evidence.

11. DW1 Erick Onyango Koi testified that he is a mechanic. That he was at home when police arrived and woke him up and took him to the police where he was charged. He denied defiling the minor.

On cross examination, he stated inter alia; that he used to live with his grandmother; that he only met the minor in court for the first time; that he did not give the minor money.

12. The appeal was canvassed by way of written submissions. Both parties duly complied.

13. I have considered the evidence tendered at the lower court as well as the rival submissions. I find the issues for determination are firstly, whether the Respondent proved its case against the Appellant beyond any reasonable doubt and secondly, whether the sentence imposed was appropriate in the circumstances.

14. As regards the first issue, it is noted that the Appellant was charged with an offence of defilement under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It is proper to reproduce the relevant provisions of the *Sexual Offences Act* so as to establish whether the same were proved by the Respondent or the Appellant in some of them:

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- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.



- (2) A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.
 - (3) A person who commits an offence of defilement with a child aged between twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
 - (4) A person who commits an act of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
 - (5) It is a defence to a charge under this section if:
 - a) It is proved that such child deceived the accused in believing that he or she was aged over the age of eighteen years at the time of the alleged commission of the offence and:
 - b) The accused reasonably believed that the child was over the age of eighteen years.
 - (6) The belief referred to in Sub Section 5(b) is to be determined having regard to all the circumstances, including any steps the accused person to ascertain the age of the complainant.
 - (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction sentence the accused person in accordance with the provisions of the [Borstal Institutions Act](#) and the [Children Act](#).
 - (8) The provisions of sub section (5) shall not apply if the accused person is related to such child within the prohibited degree of blood or affinity.
15. The Respondent was under obligation to prove the essential ingredients of the offence herein namely age, penetration and positive identification of the Appellant as the perpetrator.
16. As regards to the issue of age, the birth certificate was produced by the investigating officer (PW6) and which showed the age of the complainant at the time of the incident as eleven years one month and fourteen days. Her age therefore fell within the bracket of eleven to twelve years old and actually one month and fourteen days. I find that the minor was below the age of eighteen years old pursuant to the description provided by Section 2 of the [Sexual Offences Act](#). I find the Respondent proved this ingredient beyond any reasonable doubt.
17. Ad regards the element of penetration, the evidence of PW1 was that the Appellant took her to his house and defiled her the whole night and that she felt pain in her private parts. The petrol station guard (PW4) stated that she saw the complainant walking with a lot of difficulty. The evidence of the clinical officer (PW5) was that upon examination of the complainant's genitalia, the same showed features consistent with vaginal penetration namely, bruises on labia minora, lacerations with redness, fresh broken hymen, scar which was still bleeding, presence of pus cells, epithelial cells. The said clinical officer formed the opinion that there was evidence of vaginal penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as the partial or complete insertion of the genital organ of a person into the genital organ of another person. The clinical officer produced the P3 form and post rape care form as exhibits. I find this ingredient was proved beyond any reasonable doubt by the Respondent.



18. As regards the identity of the Appellant as the perpetrator, the complainant gave a vivid account of how she had met him on the road as she walked from school to her grandmother's house. She walked from school to her grandmother's house. She stated that he convinced her to go to his home where she would spend the night with his sister but on arrival the Appellant locked her in his house and defiled her. The complainant stated that the Appellant escorted her the following morning and left her at the roadside. The complainant later briefed a petrol station guard (PW4) who alerted the assistant chief and police officers. The complainant led the police to the Appellant's house where he was promptly arrested. The complainant had no difficulty in pointing out the Appellant as the person who had defiled her. I find the complainant had known the Appellant right from the time they met all the way to his house where they slept until the following morning when the Appellant escorted her to the road side. This was evidence of identification by recognition. Even though there was no eye witness, the trial magistrate believed the testimony of the complainant after conducting a *voire dire* examination. In the Court of Appeal Case of *J.W.A Vs R*, [2014] eKLR, it was held:

“We note that the Appellant was charged with a Sexual Offence and the proviso to Section 124 of the *Evidence Act* clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being certified that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”

Further in the case of *Mohammed Vs R* [2006] 1KLR 138, the court held:

“It is now settled that the courts shall not be armstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is telling the truth.”

Flowing from the foregoing, I find the Appellant's defence did not shake the evidence of the prosecution which clearly placed him at the scene of crime as the perpetrator. I find the Respondent proved this ingredient beyond reasonable doubt.

19. The totality of the evidence presented left no doubt that the Appellant was involved in the crime. The several grounds of appeal on conviction have no merit as the conviction arrived at by the learned trial magistrate was quite sound and should not be interfered with.
20. As regards sentence, it is noted that the Appellant was sentenced to 20 years' imprisonment. The charge sheet indicates the age of the complainant as 11 years old and hence under Section 8 (2) of the *Sexual Offences Act*, the Appellant ought to be sentenced to life imprisonment. However, the birth certificate indicates that the complainant was born on 27th September, 2009 and therefore at the time of the incident she was aged 11 years, ten months and 16 days thereby implying that she was one month and 14 days shy of 12 years. The complainant was therefore aged over 11 years and fairly within the age bracket of between 11 and 12 years. This defect in the charge sheet is curable under Section 382 of the *Criminal Procedure Code* and that no prejudice was suffered by the Appellant by the failure of the prosecution to amend the charge sheet as he has benefited in that the trial court did sentence him to twenty (20) years' imprisonment. I find the same was proper since the age of the complainant was on the border line between eleven and twelve years and thus the sentence should be in line with Section 8(3) of the *Sexual Offences Act*. It is noted that the learned trial magistrate did not factor the period spent in custody pursuant to Section 333 (2) of the *Criminal Procedure Code*. The Appellant was in custody through out the trial right from the date of arrest on 13/8/2021 upto the time of conviction and sentence. This period ought to have been factored during the sentencing. To this extent, the appeal on sentence partially succeeds.



21. In view of the foregoing observations, it is my finding that the Appellant's appeal on conviction lacks merit and is dismissed. The appeal on sentence partially succeeds to the extent that the sentence of 20 years' imprisonment shall commence from the date of arrest namely 13/8/2021.

DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

Erick Onyango Koi.....Appellant

M/s Kerubo.....for Respondent

Ogendo.....Court Assistant

