



**Lokichogio v Republic (Criminal Appeal E063 of 2023)  
[2025] KEHC 3049 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL E063 OF 2023  
PJO OTIENO, J  
MARCH 18, 2025**

**BETWEEN**

**IMAI LOKICHOGIO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from judgment of Hon. Mayamba  
in Kakuma law court Cr. SO. No. E024 of 2023)*

**JUDGMENT**

**Introduction**

1. The appellant herein was charged with the offence of defilement contrary to section 8(1), as read with section 8(3), of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on the 22<sup>nd</sup> September 2023 in Turkana West Subcounty, he intentionally caused his penis to penetrate the vagina of a minor aged 14 years.
2. In the alternative, the Appellant was charged with offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The charge sheet gave the particulars of the offence to be that on the 22/9/2023, in Turkana west sub-county, the accused intentionally touched the vagina of KL a child aged 14 years.
3. At the trial, the prosecution called a total of four (4) witnesses to testify while the Appellant was the only person to give evidence in his defence. After taking and analysing the evidence led by both sides, the trial court found the Appellant guilty and was convicted of the offence of defilement. He was thus sentenced to serve a 15 years' imprisonment.



## The Appeal

4. Feeling aggrieved by the trial court's decision, the Appellant lodged an appeal against the entire conviction and sentence by the trial court. The appeal was filed in person hence instead of filing a Memorandum of Appeal, the appellant filed 'Notice of Motion' which sets out seven (7) grounds of appeal. The summary of those seven grounds is that the prosecution neither called crucial witnesses to the case nor tendered sufficient evidence to prove its case to the requisite standards. He also offered mitigation and asserts to be a 1<sup>st</sup> offender.
5. The Court is urged to allow the appeal by quashing the conviction, setting aside the sentence and forthwith setting the Appellant at liberty. The Appeal was canvassed by way of written submissions with the parties getting a chance to highlight the written submissions.

## Summary of the Prosecution Case

6. PW1, the clinician stated that the complainant was brought to her at the hospital with a history of defilement. He asserted having done age assessment on the complainant by use of growth parameters like the dental formula and established her age to be 14 years old. While being treated, she stated that the complainant was noted to have blood-stained clothes and she told the witness that she had been defiled by a person known to her. The complainant was confirmed to have sustained soft tissue injuries on the face, bruises at the left upper limb and on the labia majora which also had bruises. The injuries were approximately 2 days old. It was thus his opinion that that the nature of the offence was defilement and produced the age assessment report as PEX1 and P3 form as PEX2.
7. PW2 and the father to the complainant confirmed the complainant's age to be 14 years old and further that the accused had been staying with his family having employed him to ride his motorcycle. It was his case that on 22/9/2023 while he came back from herding, he was informed that the accused had brought food and had returned to go bring the complainant from where she was living with her mother. He indicated that the accused defiled the complainant along the road and that the same had been reported by the minor to her stepmother.
8. The complainant had similarly explained to the NPR officers that along the way, the appellant had stopped the motorcycle before directing her into the bush. In the bush, the appellant pretended to drop the motorcycle and sought the assistance of the complainant in lifting it up. It was in that process that the appellant grabbed and defiled her.
9. Together with the NPR officers, the witness proceeded to the scene and while there, they saw trails of motorcycle as well as soil disturbance. He further stated that he took the complainant to Kakuma Mission Hospital and was issued with a P3 form which was filled.
10. On being cross-examined, the witness confirmed that the motor cycle belonged to the witness.
11. The victim gave evidence at PW3. She evidence was that on 22/9/2023, at around 8 am, she left with the appellant from Nakitongo heading to Nalapatui where her father stayed with the animals. The appellant was riding while she was a pillion passenger. She stated that when they got to a place called Dam, the appellant asked her to alight for them to collect some boxes nearby. She testified that the appellant then dropped the motorcycle down and asked her to help lift it. She stated that as she held the motorcycle at the rear side, the accused asked her to move to the front for help. It was then that the Appellant pounced on her, removed his short trousers as well as her dress and a lesso she had tied around her waist, and had carnal knowledge of her.



12. She indicated that the appellant slept on her and inserted his manhood in her genitals and spilt sperms onto her clothes. She stated that the appellant beat her while defiling her then warned her not to inform anyone of the incident. It was her testimony that when the police officers came, she informed them what the accused had done to her and later proceeded with the police to the scene of the incident.
13. Before the trial court, she positively identified the appellant as the person who was riding her father's motorcycle and who had defiled her.
14. PW4, PC Farida Abong Ewoi was a police officer stationed at Kakuma police station, who was assigned to investigate the matter. She testified that on 23/9/2023 at around 10 am, she was at the report office when a report of defilement was made. Four people, the complainant, her father, an NPR officer and the accused, walked into the station and made the report. The complainant then explained to her, away from the others, what had transpired and she recorded the witness statement. which was a reiteration of her above evidence to the effect that the appellant had grabbed and defiled her. It was her testimony that she booked the report and took the complainant to the hospital where it was established by the medical officer that the complainant had been defiled. She also took the complainant for age assessment and it was established that the latter was below the age of 18 years. She positively identified the accused before the court as the person they had arrested on the incident day.
15. Upon cross examination, the witness said that the fact of defilement had been confirmed by the doctor and that it is not true that doctors can lie.

#### **Defence Case**

16. With the prosecutions case closed, the accused was adjudged to have a case to answer and was put on his defence. The records show that the accused elected to give sworn testimony. It was his testimony that on 22/9/2023, he was ferrying 2 sacks of green grams, ½ sack of beans and the complainant. He went to a place called Loreng and refueled his motorcycle at Kshs.1500 before proceeding to Nalapatui village where he was to drop the load and the passenger. Having done so, the following morning, he went to ask for his money for ferrying the load from PW2. PW2 however refused to pay him and there ensued a quarrel between him and PW2. He averred that the quarrel attracted NPR officers who arrested him and put him on a motorcycle. He was then brought to the police station before being put in the cell and later being brought to court.
17. He then mitigated his case for having been the one who was taking care of his blind mother and sought courts favour.

#### **Analysis and Determination**

18. The court has considered both parties submissions to the appeal herein, the grounds of the appeal, the trial proceedings and the impugned judgement by the trial court. From that duty the court finds the only issue for determination to be whether the offence upon which the appellant was convicted was proved beyond reasonable doubt.
19. What amounts to a proof of beyond reasonable doubt has remained settled since *Miller v Minister of Pensions* [1947] 2 ALL ER 372 when the English Court stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow a doubt. The Law would fail to produce the connectivity if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course, it is possible, but



not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

20. The ingredients of the offence of defilement<sup>1</sup> remain to be; the age of the victim, penetration and proper identification of the perpetrator. For this court to be satisfied that the conviction faulted here was safe and merit upholding, the court must be satisfied that the three ingredients were all proved to the established standards.
21. Being the first appellate court in the matter, the court is duty bound to revisit the evidence tendered before the trial court afresh, re-evaluate and reanalyze it in full with a view to reaching its own independent conclusion. The court however bears in mind that the trial court had the advantage of hearing and seeing the witnesses testify and thus observing their demeanor. That benefit the appellate court does not enjoy. The court this must rely on the evidence as recorded, with particular emphasis being given to any comments made on the demeanor or conduct of the witnesses with a particular deference to the trial court as the master of the facts.

### **Age of the complainant**

22. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim hence proof of age of a defilement victim cannot be gainsaid. The court of appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR on the issue of age held that:

“... the question of proof of age has finally been settled by recent decisions of 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. The appellant in this case was charged with defiling a girl aged 14 years. The complainant at the trial testified to have been 14 years old at the time of the incident. This was confirmed by the evidence of PW2, the father, who indicated that the complainant’s age at the time was 14 years old. The age assessment conducted on the complainant by the PW1 also revealed her age to be 14 years old at the time of the incident. To this extent, the court finds the age of the Appellant to have been sufficiently proved by the prosecution to the required standards. The court holds that the complainant was at the time of the incident aged 14 years.

### **Penetration on the complainant**

24. On proof of penetration, the court point the decision in *Sammy Charo Kirao v Republic* [2020] eKLR where in reiterating the position of the Ugandan Supreme court in *Bassita v Uganda* S.C. Criminal Appeal No. 35 of 1995, the court stated that:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence

<sup>1</sup> see George Opondo Olunga . Republic [2016] eKLR.



the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”<sup>2</sup>

25. In the circumstances all the prosecution witnesses testified as to penetration of the complainant by the Appellant. The evidence of complainant was to the effect that on 22/9/2023 at around 8 am, together with the Appellant they left Nakitongo for Nalapatui where her father stayed with the animals. She stated that when they got to a place called Dam, the appellant asked her to alight for them to some collect boxes nearby home where the animals had been staying.
26. The appellant then dropped the motorcycle down and asked her to help lift it. She stated that she held the motorcycle at the rear side when the accused asked her to move to the front. Just then that the Appellant started assaulting her by slapping her on the face before removing his clothes as well as those for the complainant. She indicated that the appellant then slept on her, inserted her manhood in her vagina and spilt sperms onto her clothes. The Appellant had warned her not to inform anyone of the incident.
27. Evidence by the complainant was corroborated by that of his father (PW2) and the investigation officer who all reiterated the position by the minor. The medical evidence of PW1 indicated that the complainant was noted to have blood-stained clothes. She had also sustained soft tissue injuries on the face as well as bruises at the left upper limb and labia majora and which injuries were of approximately 2 days old. She reached a conclusion that indeed the complainant had been defiled. To this extent it is not in doubt that the element of penetration was adequately proven by the prosecution at the trial court.

#### **Identity of the Appellant as the perpetrator**

28. On the identification of the Appellant as the perpetrator of the act, the Appellant was a person well known to the complainant. PW2 stated the Appellant had been staying by his family members having employed him to ride his motorcycle and that the appellant occasionally carried his ferried the members. PW3 at all times maintained that it is the Appellant who had defiled her. There could not have been a mistake on who was with the complainant other than the appellant. In fact, the appellant denies not having been with the complainant but asserts having delivered her safely to the desired destination. His account however fails to address how he was arrested away from the destination.
29. The court notes that the intervening period between the occurrence and the report by the complainant to a lady at Nator village was very short. That the complainant spoke to a person other than her father diminishes and make the narrative that this was a case of frame up incredible. That complainant first revealed the incident to the women she had met at Nator village before talking to the father, in the view of the court, rules out the accusation of frame up. More importantly, when the appellant had a chance to cross examine both PW2 and 3, he never alluded to any debt or bad blood to just his defence. The court finds that the evidence by PW3 was cogent and irresistibly pointed towards the Appellant as the perpetrator of the offence as he was the last person to be with the complainant before she raised the complaint.
30. It is also the holding by the court that the complainant had no reason to lie against the appellant as the person who defiled her. It is evident that the two, appellant and the complainant knew each other well. This was therefore a case of identification by recognition. Recognition of an attacker is more satisfactory, more assuring and more reliable than identification of a stranger as it depends on personal knowledge of the Assailant by the complainant.<sup>3</sup>

<sup>2</sup> Abdulsalim v Republic (Criminal Appeal E005 of 2023) [2023] KEHC 25863 (KLR) (30 November 2023)

<sup>3</sup> see Ajononi & others v Republic [1980] KLR 54.



### **Appeal against the Sentence meted by the Trial Court**

31. The sentence prescribed for the offence under Section 8(3) of the *Sexual Offences Act* is an imprisonment of not less than 20 years. Despite the statutory minimum sentence provision in place, the trial court in its exercise of discretion and upon considering the circumstances of the case as well as the Appellant's mitigation, imposed sentence of only 15 years imprisonment. The court finds the sentence of 15 years imprisonment meted by the trial court to have been a legal sentence. No basis is laid for this court to interfere with the sentence and the same stands.
32. The power to sentence upon conviction is a matter at the discretion of the trial court and it takes a very strong case for an appellate court to intervene by way of interference. The court finds good guidance from the decision in *S v Malgas* 2001 (1) SACR 469 (SCA) on the principles that guide interference with sentencing by the appellate court. In the decision, the court said: -
- “A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court ... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate.’”
33. The court finds no material to justify any interference with the judgment and sentence imposed. It is satisfied that the case was proved beyond reasonable doubt hence the conviction was safe and sound. The sentence is itself appropriate and commensurate with the offence charged. The appeal has no merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT LODWAR, THIS 18TH DAY OF MARCH, 2025**

**PATRICK J O OTIENO**

**JUDGE**

