



REPUBLIC OF KENYA



KENYA LAW
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**Odongo v Republic (Criminal Appeal 103 of 2023)
[2025] KEHC 3677 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 103 OF 2023
DR KAVEDZA, J
MARCH 24, 2025**

BETWEEN

ROBINSON OBURA ODONGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
on 24th September 2021 at Kibera Chief Magistrate's Court Sexual
offence case No. 029 of 2020 Republic vs Robinson Obura Odongo)*

JUDGMENT

1. The Appellant was charged with the offence of sexual assault but after full trial convicted by the Subordinate Court of the offence of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence as per the charge sheet were that on 24th March 2020 within Nairobi County unlawfully used his fingers to penetrate the vagina of V.W.M. a child of 4 years. The appellant was sentenced to serve ten (10) years imprisonment.
2. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. With the above, I now proceed to determine the substance of the appeal. In his Petition of Appeal, the appellant contended that the learned trial magistrate erred by considering the evidence adduced by the prosecution which he maintained was marred with discrepancies, that the learned magistrate unduly



- disregarded his defence, and that the time he spent in custody was not taken into consideration at the time of sentencing.
5. The prosecution presented four witnesses. PW3, the complainant herein, gave unsworn testimony after a voir dire examination. She said that on the day of the incident, she was playing with her friend Monica when the appellant called her into his house. Her friend and their brothers had already left. Inside, he locked the door, threw her onto his bed, removed her tights, and inserted his finger into her vagina. Afterwards, he told her to dress and keep quiet. She reported the incident to her father, who confronted the appellant that day. The appellant later called her mother, EWM (PW1). The girl identified the appellant in court.
 6. PW1, the mother, said that on 24th March 2020, she went with her daughter and a neighbour, Kijuzi, to Satellite Police Station. They were referred to Nairobi Women's Hospital, where her daughter, born on 23rd April 2015, was examined and given a PRC form. During cross-examination, PW1 noted no visible injuries on her daughter's genitalia.
 7. PW2, John Njuguna, produced the PRC and P3 forms completed on 24 March 2020 by a colleague. The report showed no tears, bruising, or penetration, with the hymen intact.
 8. PW4, Sgt Gentrix Naliaka, testified that on 25th March 2020, she was assigned the case from the OB records. The appellant was already in custody, brought in by the public. She contacted the girl's mother, who took her daughter to Nairobi Women's Hospital for the forms to be completed. She then questioned and charged the appellant.
 9. In his defence, the appellant said that on 23 March 2020, he was leaving his house when two men and a child approached him. The child identified him as her attacker, and he was told to wait for the police. He was later accused of the assault but pointed out that the medical report showed no injuries. He denied the offence and any connection to the girl or her family.
 10. Section 2 of the Act defines the term "indecent act" as an unlawful intentional act which causes—
 - (a) any contact between any part of the body of a person with the genital organs, breasts, 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;
 11. Upon thorough scrutiny of the evidence adduced by the prosecution, this Court observes significant inconsistencies that undermine the credibility of the complainant's testimony. Initially, the complainant stated that the appellant invited her into his house while she was playing outside with a friend. However, during cross-examination, her account materially shifted—she asserted that she had been alone when the appellant called her inside. She further stated that her friend had already left for home and that both her brother and her friend's brother were present at her friend's residence.
 12. This inconsistency is not minor but rather fundamental, as it affects the sequence of events leading to the alleged offence. It was therefore incumbent upon the prosecution to call the complainant's friend, her brother, or even her friend's brother to corroborate this version of events. The prosecution's failure to do so raises serious doubts about the reliability of the complainant's account and the strength of the case against the appellant.
 13. Moreover, the medical evidence tendered was inconclusive. The clinician from Nairobi Women's Hospital, who examined the complainant, failed to establish any medical findings supporting the occurrence of an indecent act. Additionally, PW1, the complainant's mother, upon personally



observing her daughter, noted no visible injuries or signs of trauma. The absence of medical evidence further weakens the prosecution's case.

14. The legal burden of proof in criminal cases rests solely on the prosecution, which must establish the accused's guilt beyond reasonable doubt. In this instance, the prosecution failed to discharge this duty.
15. The complainant's father, to whom she allegedly reported the incident, was not called as a witness. Similarly, her friend Monica, who had purportedly been playing with her before the alleged incident, was also not presented to testify. Given that the complainant was a minor of tender years and gave unsworn evidence, it was imperative to provide corroborating evidence to substantiate her claims. The prosecution's failure to do so is a fatal omission that renders the case unproven to the requisite legal standard. The evidence adduced against the appellant was insufficient and did not meet the legal threshold required for a conviction.
16. For the foregoing reasons, I find the appeal merited. I hereby quash the conviction and set aside the sentence of ten (10) years imprisonment imposed by the trial court. The appellant is thus set free unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant absent

Mutuma for the Respondent

Tonny Court Assistant

