



REPUBLIC OF KENYA



**Onyiego v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 3588 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E020 OF 2024
DR KAVEDZA, J
MARCH 24, 2025**

BETWEEN

DAVID ONDIEK ONYIEGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. Murage (PM) on 8th April 2024 at Kibera Chief Magistrate's Court
Sexual Offences Case no. E119 of 2020 Republic v David Ondiek Onyiego)*

JUDGMENT

1. The appellant was charged and after a full trial convicted by the Subordinate Court for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve thirty (30) years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the learned magistrate erred by disregarding vital aspects of the case. He urged the court to quash his conviction and set aside the sentence imposed.
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 which was before the trial court and 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. PW3, the complainant testified that she was born 13th August 2006. She recounted that from 2017 to 2020, whilst living with her brother EN, the appellant would visit her, and lure her with food, lock her in his house, and drug her with a cloth on her face until she loses consciousness. She would wake up and find her underwear wet, and he admitted to sexual acts, despite her protests. This happened



between 2017 and 2020. The appellant sometimes sent transport to fetch her, isolating other children. PW1 discovered her confined on one occasion. The complainant reported vaginal pain and, on cross-examination, confirmed the appellant drugged and defiled her prior to PW1's intervention.

5. PW1, Senior Sergeant Simon Wanyonyi Masinde, the appellant's uncle, testified that on 21st November 2020, he learned that the complainant and her brother were at the barracks' cell, a prohibited area for children. Seeking food, he went to the appellant's residence, the camp cook. After the appellant's initially refused entry, security forced access. The complainant was found asleep on a bed, with two other children, aged 6-7, on the floor. The complainant disclosed that the appellant used a cloth to render her unconscious. She was later taken to Nairobi Women's Hospital. On cross-examination, PW1 clarified that the complainant lived with her brother, not at the camp.
6. PW2, John Njuguna, a clinician, testified that the complainant upon examination had a broken hymen which was healed.
7. PW4, Corporal Peris Makio, testified that on 25th November 2020, following a tip, she interrogated the complainant, who reiterated the appellant's actions. An age assessment confirmed the complainant was 13 years old. The appellant fled but was later arrested. On cross-examination,
8. In his defence, the appellant a cook at the barracks admitted the complainant visited his home but denied defilement, claiming PW1 locked her in his house. On cross-examination, he conceded the children's prior visits.
9. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means,

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

10. Further, section 8(1) and (3) of the Sexual Offences Act, No. 3 of 2006 provides thus: -

“ 8. Defilement

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

11. In this case, the element of penetration was Penetration was substantiated, firstly, by the sworn testimony of the complainant, who recounted the appellant's act of inserting his penis into her vagina on various occasions between 2017 and 2020. This was corroborated by medical records adduced by PW2, John Njuguna, a clinician at Nairobi Women's Hospital, who detailed the examination of the complainant. Though no fresh injuries were observed, the presence of an old hymeneal tear corroborated her account, and she received requisite treatment further evidenced by a PRC form. The complainant was also found in the appellant's bed by PW1 fortifying her account of events.
12. The complainant's age was incontrovertibly established by the age assessment report which was produced by the investigating officer. The report confirmed that the complainant was 13 years old at the time of the offence. The trial court thus rightly concluded that PW3 was a child within the meaning of the law.



13. Identification of the appellant posed no uncertainty. PW3 testified that she frequently visited his residence at the Barracks on several occasions for over 3 years. She was also discovered in his premises by PW1. Such recognition, stemming from a prior acquaintance, precluded any prospect of mistaken identity.
14. The foregoing analysis demonstrates that the prosecution discharged its burden, proving the case beyond reasonable doubt. The elements of penetration, the complainant's minority, and the appellant's identity were each established with requisite particularity. Accordingly, the conviction stands affirmed.
15. On sentence, the appellant was sentenced to serve thirty years imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion.
16. Although sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.
17. For the above reason, I hereby set aside the sentence of thirty (30) years imposed by the trial court and substitute it with a sentence of twenty (20) years imprisonment. The sentence shall take effect from 8th April 2024 the date of the appellant's conviction.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:-

Nyaboke h/b for Nyabega for the Appellant

Mutuma for the Respondent

Tonny Court Assistant.

