



**Ondieki v Republic (Criminal Appeal 47 of 2024)
[2025] KEHC 3714 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3714 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 47 OF 2024
DR KAVEDZA, J
MARCH 24, 2025**

BETWEEN

PETER MANGARIA ONDIEKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 3rd October 2024 by Hon. I.M Kabuya (SPM) at Kibera Chief Magistrate's Court Sexual Offences Case No. E127 of 2022 Republic vs Peter Mangaria Ondieki)

JUDGMENT

1. The appellant Peter Mangaria Ondieki was charged and after a full trial convicted 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 fifteen (15) years imprisonment. The particulars of the offence as per the charge sheet were that on 11th November 2022 at Bombolulu in Kibra Sub-County, within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of HK a female child aged 13 years old.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant raised 6 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court erred in convicting him on the evidence of the minor without conducting a voir dire examination. He challenged the charge sheet as defective. The trial court failed to consider his defence. 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. The prosecution called four witnesses in support of their case. HK the complainant herein gave sworn testimony. She recounted that on 11th November 2023 at around 3 pm she was going to the wash room when she encountered the appellant. At the time, the appellant was the caretaker in the premises they had rented. They exchanged greetings and the appellant inquired whether someone was in their house to which she agreed despite being alone. She told the court that the appellant then grabbed her and took her to a vacant room underneath the staircase, unlocked the room and they got in.
5. There the appellant undressed her and then inserted his penis into her vagina. The complainant told the court that the incident took place while they stood. After he was done, the appellant stepped out and the complainant followed him behind.
6. It was at this time that the complainant's father bumped into them and confronted the appellant. A fight ensued when the appellant tried to run away. When a crowd gathered, the appellant was let free. The complainant's father reported the incident at Jamhuri Police Station. The complainant was later taken to Nairobi Women's Hospital for examination and treatment. The complainant confirmed that the appellant was his acquaintance and they watched funny movies together on his phone.
7. On cross-examination, the complainant averred that she did not scream because there was no one who could come to his rescue. In addition, she went to the hospital with the same clothes but they were not surrendered. In addition, the incident happened while she was standing. In addition, despite her father having a grudge against the appellant she was not fabricating the case. Furthermore, she was born on 22nd September 2009 despite the birth certificate indicating that she was born in 2010. She confirmed that the birth certificate was obtained after the incident.
8. The complainant's father PW2 testified that on the material day, she was out to buy groceries and returned home around 3 pm. When he went up the stairs he saw the appellant with his daughter as they were standing outside his house. When he confronted them, the complainant narrated her ordeal on how the appellant had defiled her. When he confronted the appellant, the appellant fought him and tore his shirt. The commotion attracted neighbours who separated them. He reported the incident to the police. The complainant was also taken to Nairobi Women's Hospital for examination and treatment. He told the court that the complainant was born on 2nd August 2010 as indicated in the birth certificate. He told the court that the complainant informed her that it was her first sexual encounter with the appellant.
9. On cross-examination, PW2 denied that he had a sour relationship with the appellant. He denied beating up the complainant to admit that she was defiled.
10. At Nairobi Women's Hospital, the complainant was examined and the evidence was presented by John Njuguna (PW1) on behalf of his colleague who had since left the facility. On examination, there was bruising on the labia, the hymen had torn and healed and the anal region had no injuries. No discharge was observed. The findings were that there was previous penetration.
11. PC Omollo (PW3) the investigating officer testified that the alleged incident was reported on 11th November 2022. She escorted the minor to Nairobi Women's Hospital where a P3 form and PRC were issued. He then recorded witness statements and arrested the appellant. He reiterated that the complainant was seen leaving the appellant's house and a confrontation ensued. That PW2 punished the complainant leading to a confession of what had transpired. He produced the complainant's birth certificate.



12. In his defence, the appellant gave sworn testimony and stated that he was a caretaker of a Kibera building and lived alongside HK and her father, PW2. One day, returning home at 1 p.m., he met HK running downstairs. She asked why he was early; he asked why she wasn't at school. Citing unpaid fees, she ducked into a vacant house as PW2 approached. PW2 passed Peter, went home, and then accused him of misconduct with HK Peter denied it, blaming PW2's grudge on his kindness, PW2's children often begged him for food. A fight erupted, but neighbours intervened, favouring the appellant. PW2, a rent defaulter, resented the appellant's duties. A month later, after HK and her brother fled to their grandmother's in Nakuru, the appellant was arrested PW2 falsely linked him to their escape.
13. In court, the appellant admitted tension with PW2 made him nervous but denied lying. He believed HK lied from fear of PW2, though he had no proof beyond their rocky bond. Living in a bedsitter with PW2, HK's broken hymen, he argued, pointed elsewhere. He noted PW2's harshness once made her hide.
14. Charles Arori (DW2) the landlord and Peter's employer, said PW2 stopped paying rent when Peter took over collection, straining ties. He saw PW2's neglect—his kids sought food from the appellant and thought PW2's insecurity fuelled a fabricated case, once warning Charles to keep the appellant away from HK He testified that eviction wasn't pursued due to Kibera's rules.
15. Millicent Shisia (DW3) a neighbour, called PW2 a violent alcoholic who starved and beat his kids, pushing them to the appellant for help. HK used Millicent's phone to get money from her mother, escaping to Nakuru before Peter's arrest. Millicent stayed silent, fearing PW2.
16. Anthony Kimeri (DW4), a health officer, broke up a noon row between Peter and PW2, a frequent clash over rent or noise. He later heard of the defilement claim but doubted it since no health reports surfaced. A vacant room existed, but he saw no crime.
17. The preliminary issue raised was that the charge sheet was defective. The appellant argued that the charge sheet was fatally defective as the main charge and the alternative charge and the particulars had been altered by hand. In particular, the alterations were on the sections of the law the appellant was charged with and the date the offence is alleged to have occurred.
18. While the appellant argues that the defect on the charges was fatal, it is important to consider substantively the import and effect of the same and whether prejudice was occasioned.
19. The Appellant contends that the charge sheet relied on by the trial court to convict him was defective. In determining whether a charge sheet is defective or not, the Court of Appeal in *Sigilani –vs- Republic* (2004) 2 KLR, 480 held as follows: -

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

20. On the other hand, Section 134 of the *Criminal Procedure Code* provides for what the components/ ingredients of the charge sheet constitute as follows: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.



21. Looking at the record and entire evidence one cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross-examination questions to the prosecution witnesses that he understood he was accused of having alleged inappropriate sexual contact with HK
22. Furthermore, the handwriting alteration of the charge sheet was never raised or contested in trial, and from the record and evidence the prosecution sought to prove the charges of defilement with the particulars of the charge. In the premises, no prejudice was occasioned. The ground of appeal fails.
23. The Appellant submitted that a voir dire examination was not conducted on the complainant as required by the law. Voir dire examination was explained by the Court of Appeal in the case of *Macharia vs. Republic* (1976) KLR 209, as: -

“It [voir dire] must be a preliminary examination of a witness by the magistrate in which the witness is required “to speak the truth” with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth).....”

24. In the present case, PW4 gave sworn testimony and was later cross examined by the Appellant’s advocate. There was no indication by the trial court that PW4 did not understand the meaning and the consequences of an oath. I have also noted that PW4 was not a child of tender years. I take guidance from recent case law which determined that the use of voir dire in relation to the age of the victim may vary from case to case and will depend on the facts of a particular case. In *Maripett Loonkomok vs. Republic* (2016) eKLR, the Court of Appeal held that: -

“We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, Criminal Appeal No.10 of 2014. Section 19 of the [Oaths and Statutory Declarations Act](#) is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth.....”

25. It is clear to us from the record that the trial Magistrate did not conduct voir dire examination for he believed, erroneously, that the complainant was not a child of tender years. In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge the court may still be able to uphold the conviction.
26. Guided by the authorities above and the circumstances of the present case, it is my finding that the complainant (PW4)’s evidence was properly taken by the trial court.



27. On whether the offence was proved beyond reasonable doubt, the ingredients of the offence of defilement are proof of penetration, the age of the victim, and the identity of the perpetrator.

“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.”

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

Defilement

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

29. Turning to the ingredient of the complainant’s age, this court considers it a matter of fact that must be firmly established by the evidence presented before it. The complainant testified that she was born on 22nd September 2009, while her father, PW2, gave a different date, asserting she was born on 2nd August 2010, creating an immediate inconsistency in the timeline of her birth.

30. Further complicating matters, the birth certificate, which was tendered as evidence, was only issued on 14th December 2022, notably after the appellant had entered his plea, raising questions about its timing and relevance to the proceedings. Even more troubling, this document was certified on 2nd October 2020, a full two years before its supposed issuance, suggesting strongly that it may have been doctored or fabricated specifically to bolster the prosecution’s case, thereby rendering it wholly unreliable as a legal document in these proceedings.

31. Despite this glaring issue with the documentary evidence, the trial magistrate, who had the opportunity to observe the complainant directly when she gave her testimony, concluded that she appeared to be under 18 years of age based solely on her physical appearance and demeanour. Despite the lack of an age assessment report, the trial magistrate nonetheless proceeded to affirm her status as a minor, a finding that carries weight but rests on subjective impression rather than objective proof.

32. Moving to the allegations of penetration, the complainant narrated a specific sequence of events, claiming that the appellant grabbed her, forcibly took her into a vacant house located on the ground floor. There, while both were standing, the appellant allegedly inserted his penis into her vagina, completing the act of defilement. She further stated that once the appellant had finished, he left the scene, and she followed behind him. At the hospital and at the police station, the complainant reported defilement had occurred on the floor of that vacant house. She further reported that the appellant had defiled her repeatedly. At the hospital, she presented clothes that were dirty and soiled at the back, which she had not changed since the alleged incident. This detail raises a significant question, whether the act took place while she was standing, as she consistently maintained, how could her clothes have become soiled at the back in a manner consistent with lying or sitting on a dirty surface?

33. The narrative becomes even murkier when considering how the complainant and appellant were allegedly discovered, as conflicting accounts emerge from the witnesses. The complainant testified that her father, PW2, found her outside the vacant premises, and engaged in conversation with the appellant, implying they were still in close proximity after the supposed assault. In contrast, PW2 told the court he saw his daughter and the appellant emerging together from the appellant’s own premises, not the vacant house, presenting a different location entirely. Adding to the confusion, the investigating officer, PW3, testified that PW2 had informed her the complainant was seen leaving the appellant’s house, not the vacant house. The critical question was therefore whether the alleged defilement took place and if it did where did it take place.



34. A third layer of contradiction arises in the complainant's account of the incident's dynamics, as she described the appellant grabbing her forcibly and dragging her into a vacant room where he defiled her against her will, yet astonishingly, she was later seen standing outside with him, calmly conversing as though nothing traumatic had occurred. This is particularly striking given her additional testimony that she considered the appellant an acquaintance with whom she had previously spent time, including watching funny movies together in the company of her friends, which paints a picture of familiarity and ease that sits uneasily with the claim of a violent assault followed by casual interaction.
35. A fourth and equally troubling inconsistency emerges around the circumstances of the complainant's disclosure, as PW2 adamantly denied beating her to extract a confession about the defilement, insisting her testimony was voluntary, while the complainant herself conceded that PW2 had indeed beaten her, though she maintained this was unrelated to her decision to testify in court. However, the investigating officer, PW3, directly contradicted PW2, stating that he had admitted to her that he beat the complainant to elicit the confession about the incident, suggesting coercion may have played a role in shaping her story. Furthermore, while PW2 denied harbouring any grudge against the appellant, the complainant openly acknowledged that tension existed between the two men, stemming from tenancy disputes, which introduces the possibility of a personal motive behind the accusation that PW2 was unwilling to admit.
36. Taken together, these contradictions weave a tapestry of doubt over the prosecution's case, the unreliable and potentially falsified birth certificate undermines the complainant's age, the implausible explanation of soiled clothes clashes with her description of a standing assault, the shifting locations of the alleged defilement and discovery blur the narrative's coherence, the complainant's relaxed post-incident interaction with her supposed attacker defies logic, and the conflicting accounts of coercion and underlying grudges hint at ulterior motives, all of which collectively establish substantial reasonable doubt in favour of the appellant, casting serious uncertainty over whether the offence occurred as alleged.
37. The test as to whether the contradictions are minor or substantial was laid out in the case of *Sigei v Republic* [2023] KECA 154 (KLR):
- “In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, they must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.”
38. From the above authority, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.
39. Having analysed and re-evaluated the evidence on record, it is my finding that the Complainant and her father PW2 were untruthful witnesses as evidenced by the contradictions and inconsistencies in their evidence. The said contradictions are so substantial as they relate to material facts.
40. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of fifteen (15) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH 2024



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D. KAVEDZA

JUDGE

In the presence of

