



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyango v Republic (Criminal Appeal E019 of 2024)  
[2025] KEHC 3416 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3416 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E019 OF 2024**

**DK KEMEL, J  
MARCH 21, 2025**

**BETWEEN**

**SIMON OMONDI ONYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. S. W. Mathenge  
(SRM) dated 17.8.2023 in Bondo PMCR S.O E013 of 2023)*

**JUDGMENT**

1. The Appellant herein Simon Omondi Onyango was charged at the lower court with the offense of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 6<sup>th</sup> day of March 2023 at [Particulars Withheld], Usire Sub-Location in Bondo Sub-County within Siaya County willfully and intentionally caused his penis to penetrate the vagina of M.A.O a child aged 14 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offense Act No. 3 of 2006*. The particulars were that on 6<sup>th</sup> March 2023 at [Particulars Withheld], Usire sub location, Bondo Sub-County within Siaya County willfully and intentionally touched the vagina of M.A.O a child of 14 years with his penis.
3. After a full trial, the Appellant was convicted and sentenced to 18 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant filed his Petition of Appeal dated 6<sup>th</sup> May 2024 wherein he raised the following grounds of appeal:
  - i. That the trial magistrate erred in law and in fact by convicting the appellant on uncorroborated evidence.



- ii. That the trial magistrate erred in law and in fact in not finding out that the ingredients of defilement were not proved beyond reason doubt.
- iii. The trial magistrate erred in law and fact by convicting the appellant for the offense of defilement yet the doctor's evidence indicated that the minor was not defiled.
- iv. The trial magistrate erred in law and fact in failing to consider that the investigation tendered was shoddy, marred with inconsistencies and contradictions.
- v. That the trial magistrate erred in law and fact convicting the appellant yet the minor admitted that she did not know him.

The Appellant therefore prayed that the appeal be allowed and that he be set at liberty.

5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its independent findings and conclusion. (See *Okeno vs. Republic* [1974] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
6. The prosecution called a total of six witnesses in support of its case.
7. PW1 MA, a minor from [Particulars Withheld] and a 14-year-old pupil at [Particulars Withheld] primary school gave a sworn statement. That on the 6/3/2023, she borrowed the Appellant water to drink. That the Appellant gave her the water and then pulled her into M [Particulars Withheld]'s house. That he removed her clothes and put them on the window, removed his clothes too and then put his penis inside her vagina and did bad manners to her. That when he was done, she arose to pick her clothes from the window but the Appellant pulled her back and again inserted his penis in her vagina again. She felt pain in her stomach area. That the Appellant was smelling alcohol. She then wore her clothes and went and informed M. That M took her to school and briefed her teacher about it. She was then taken to Bondo police station and that she reported to the OCS. She was then taken to Bondo hospital for examination which confirmed that indeed she had been defiled. The birth certificate was marked as PMFI -1, P3 form was marked as PMFI -2, PRC form was marked as PMFI-3, outpatient note was marked as PMFI4, and lab request was marked as PMFI5.

On cross examination, she reiterated what she had stated in chief adding that she knew where the Appellant lived and that M entered the house where she was defiled and locked the door before calling the OCS. She maintained that the Appellant had sexual intercourse with her. That nobody had couched her on what to say.

On reexamination, she averred that no one else was inside the house. That she saw Simon naked and that he took his penis and put it in her vagina, it is called "ngono". That her parents are deceased and that she lived with her grandmother. That she had had sexual intercourse before with one Spency.

8. PW2 GA stated that she is PW1's grandmother and guardian. That regarding the case, M and her sister B went and had lunch in her house that day and went back to school. At 3.30pm she received a phone call from M who requested her to go to where she was, at her house. At M's house, she found a crowd, the assistant chief had also arrived. That M had shouted to everyone that a girl had been defiled and that she had locked the defiler inside. That M gave the assistant chief the key who opened the door and that she saw the appellant. That she knows the Appellant as fundi and who fixes everything from bikes to TVs to aerals. That the Appellant's grandmother also arrived. That M informed them that the Appellant had defiled M.



That the board chair of the school called them to go to school. That they went to the school and found M in the office. They then went to Maranda police and found the assistant chief already there. The OCS informed them to take M to hospital where she was examined. That upon interrogating PW1, she learnt that the Appellant had pulled her into the house and defiled her.

On cross examination she stated that she saw the Appellant lying on a mattress. That M's dress had blood.

9. PW3 Maurice Otieno stated that he is the head teacher [Particulars Withheld] primary school and that M is in his school in grade six. That on 6/3/2023 at about 4.30 pm a parent called N went to the school with M and informed him that she had been defiled in her house by one Simon. The child was left in his custody. That he called the assistant chief immediately who came and they reported to Maranda police station. That PW1 is a small timid girl, upon interrogating her she said nothing but later claimed that Simon had defiled her. She was in her school uniform.

10. PW4 Stephen Okumu Okwiri testified as a clinical officer from Bondo sub county hospital. He examined the minor M Atieno on 7/3/2023 upon reporting a case of sexual assault –defilement by a person well known to her. She was a psychiatric patient on follow up at the hospital. On examination, she was in a fair general condition. On examination of the genitalia, she had bruises on the labia minora and majora. She had guarding pain meaning she wouldn't allow someone to press hard around the genitalia. He did laboratory examinations too. The hymen was intact, there was mild bleeding. HIV, VDRL and pregnancy tests were all negative. He drew a conclusion that indeed the minor had been defiled. He produced the P3 form as exhibit 2, PRC form as exhibit 3, treatment notes as exhibit 4 and lab results from Bondo hospital as exhibit 5.

On cross examination, he stated that defilement is sexual abuse of a child who is younger than 18 years. That on physical examination, there was mild bleeding. That before you get to the hymen you first penetrate the labia.

On reexamination, he stated that the order of the genital organs is that you first have the labia majora, labia minora, cervix then the hymen. Thus its possible for penetration to occur without touching the hymen. That half penetration is still penetration.

11. PW5 M [Particulars Withheld] stated that on 6/3/2023, she had left in the morning and on returning, she saw M at her homestead talking to C. She enquired on what had happened and that the girl claimed that the Appellant (Simon) had raped her. She was in her school uniform and so she held her hand and took her back to school. At the school, she explained to Mr. Maurice Otieno Ombewa and Madam Gladys on what the minor had told her and left the minor in their custody.

She knew the Appellant as her brother in law, son to the 3<sup>rd</sup> wife of her father in- law. She told them that the Appellant was locked in her house and that he was drunk.

12. PW6 No. 88142 Sergeant Kwamboka from Maranda police post under Bondo police station. She stated that on 6/3/2023 the complainant went to the police post accompanied by her grandmother and the assistant chief of Usire. That they reported defilement by a person known to the complainant. She issued a P3 form. She learnt that the Appellant was locked up inside a house. She arrested him. That his name was Simon alias Solomon. That she relied on the medical evidence and the evidence of the victim and charged him with the instant offence. She produced the minor's birth certificate as exhibit 1, showing her date of birth as 01/01/2009.

13. That marked the close of the prosecution's case. The court later ruled that the appellant had a case to answer and put him on his defence. He opted to tender an unsworn statement.



14. DW1 Simon Omondi Onyango stated that police were looking for him. That he could not have defiled the minor as the doctor's evidence showed that there was no spermatozoa and that the hymen was intact. Further, he did not understand the fact that Mr. Maurice Ombewa could not examine her because he was a male teacher.

He closed his case.

15. I have considered the evidence tendered before the lower court. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond reasonable doubt.

16. It is noted that the Appellant was charged under section 8(1 as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 which stipulates as follows:

(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.

17. The elements that must be proved in a defilement case are, age of the complainant/victim, penetration and the identity of the perpetrator.

18. On the element of age, the investigating officer (PW6) produced the birth certificate of the minor as exhibit one. The same indicated that the minor was born on 01/01/2009 thus, she was about 14 years old at the time of the offence. In the case of Omuroni versus Uganda Criminal Appeal No. 2 of 2000, the court held that a birth certificate was a prima facie proof of age; and it was sufficient as proof of age. (See also Mwalango Chichoro vs. Republic MSA C. Appeal No. 24 of 2015).

The certificate of birth produced herein showed that the complainant was aged 14 years old at the time of the incident and thus she was below the age of 18 years and a minor at that and who had no capacity to consent to the sexual intercourse. I find this ingredient was proved by the prosecution beyond reasonable doubt.

19. On the element of penetration, PW1 stated that 'he removed her clothes put them on the window, removed his clothes too then put his penis inside her vagina and did bad manners to her. When he was done, she arose to pick her clothes from the window but Simon pulled her back and again put his penis in her vagina again.'

The clinical officer (PW4) stated that 'On examination of the genitalia, she had bruises on the labia minora and majora. She had guarding pain meaning she wouldn't allow someone to press hard around the genitalia... on the re-examination of PW4, he stated that 'that the order of the genitalia organs is that you first have the labia majora, labia minora, cervix then the hymen. Thus its possible for penetration to occur without touching the hymen. Half penetration is still penetration'

I am satisfied that the element of penetration was articulately explained by PW4 whose evidence corroborated that of the complainant (PW1). I find that the ingredient of penetration was proved by the prosecution beyond reasonable doubt.

20. On the element of identification, The complainant recognized the Appellant as Simon and a neighbour and a person well known to her before. In fact it was the evidence of the complainant that she had gone to ask for water to drink before he dragged her into his house and defiled her. PW2 also identified the Appellant as the fundi who repairs everything, from bikes to TVs and aerials. PW5 also recognized the Appellant as her brother in law as he is her father in-law's child from his 3<sup>rd</sup> wife. It was PW5 who locked the Appellant inside the house upon learning that he had defiled the complainant and



then raised alarm leading to his apprehension. I find that this was a case of recognition because he was a person well known to them. I am therefore satisfied that the perpetrator was properly identified by the witnesses. The Appellant was placed at the scene of crime and apprehended soon after the defilement. The Appellant's defence evidence did not cast doubt upon that of the prosecution which was overwhelming against him. I find this ingredient was proved beyond reasonable.

21. An analysis of the evidence as a whole leaves no doubt that the finding on conviction by the learned trial magistrate was quite sound and that the same is hereby upheld.
22. As regards the sentence, it is noted that the Appellant in his petition of appeal has not challenged the aspect of the sentence since all the grounds appear geared towards the conviction only. However, I am inclined to consider the issue of sentence. It is noted that the Appellant was ordered to serve a sentence of 18 years' imprisonment. Indeed, under section 8(3) of the *Sexual Offences Act*, a person convicted thereby warrants a sentence of not less than twenty years' imprisonment. The trial court received the Appellant's mitigation as well as a pre-sentence report. The report indicated that the community was aghast at what he did especially to the complainant who suffers from epilepsy. The action of the Appellant has psychologically scarred the complainant who is a total orphan as her parents are all dead and that her life has been turned upside down. The Appellant was expected to protect young and vulnerable children but not to prey on them. The sentence imposed, in my view was neither harsh nor excessive as it is the minimum possible in law. I am guided by the Supreme Court's decision in Petition No. 18 of 2023 *R Vs Stephen Gichuki and Others* [2023] eKLR which held that minimum sentences under the *Sexual Offences Act* No.3 of 2006 are lawful until the same is amended or declared unconstitutional. It is noted that the Respondent has not sought for enhancement of sentence and did not file a notice to that effect. Hence, I will not proceed to enhance the sentence to twenty years imprisonment. It is also noted that the Appellant remained in custody throughout the trial and the said period prior to conviction must be considered in line with the provisions of section 333(2) of the *Criminal Procedure Code*. The charge sheet indicates that the Appellant was arrested on 6/3/2023. Hence, the sentence should commence from that date.
23. In the result, and save only that the sentence of 18 years imprisonment shall commence from the date of arrest namely 6/3/2023, the Appellant's appeal lacks merit. The same is dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of

Simon Omondi Onyango.....Appellant

Soita.....for Respondent

Mboya.....Court Assistant

