



**Oduor v Republic (Criminal Appeal E022 of 2021)
[2025] KEHC 2590 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E022 OF 2021
WM MUSYOKA, J
MARCH 14, 2025**

BETWEEN

JOSEPH OMONDI ODUOR APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. Phoebe Y. Kulecho, Senior Resident Magistrate, SRM, in Busia CMCSOC No. 22 of 2019, of 31st August 2021)

JUDGMENT

1. This is a case where I have been forced to determine the matter without input from the appellant. The petition of appeal was drawn and filed when the appellant was an in-mate at Busia Main Prison. He was moved to another prison after that. He has never been produced in court, for the purposes of either mention or hearing of his appeal, despite production orders being issued. I was informed, on 13th February 2024, that he was being held at the GK Prison at Narok. I issued production orders for him to appear virtually, to no avail. In the end, I was informed that it was unclear where he was being held.
2. It is unfortunate that the prisons authorities facilitate the filing of these appeals, then they transfer the appellants away from the stations where the appeals are to be heard, instead of retaining them in prisons nearby, to facilitate an easier handling of the appeals, and perhaps consider transfer after the appeals are unsuccessful. It is disappointing, in this case, that the prison authorities do not appear to even know where the appellant is being held. One would wonder why the prison authorities should facilitate the filing of the appeal, only to frustrate its hearing, by transferring the appellant away from the jurisdiction of the court where the appeal is pending, and subsequently fail to avail him in court, or to disclose his whereabouts for the purpose of getting him to attend court for the hearing of his appeal.
3. The appellant, Joseph Omondi Oduor, had been charged before the primary court, of the offence of sexual assault, contrary to section 5(1)(a)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. The



particulars of the charge were that between 15th and 31st January 2019, at Burumba area, within Busia Township, of Busia County, he wilfully and unlawfully used his fingers to penetrate the anus of ATA, a child aged 3 years. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.

4. PW1, ATA, was the minor complainant. He testified that the appellant had inserted his finger into his anus, causing him intense pain. PW2, PAA, was the mother of PW1, to whom PW1 reported about the assault, whereupon he took the child for medical care, and reported to the police. PW3, KP, was the clinical officer who examined PW1. He noted that PW1 had old scars in the anal region, and he formed the opinion that he had been sexually assaulted. PW4, No. 85684, Police Corporal JO, was the arresting and investigating officer.
5. The appellant was put on his defence, vide a ruling that was delivered on 30th June 2021. He made a sworn statement, on 3rd August 2021, and called 1 witness. He denied the charges, dismissing them as a frame-up, being the consequence of a breakdown of a relationship between the appellant and PW2. DW2, JOO, testified that there was indeed a relationship between the appellant and PW2.
6. In its judgment, delivered on 31st August 2021, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to 10 years imprisonment, on even date.
7. The appellant was aggrieved, and brought the instant appeal, revolving around the evidence being meagre and shoddy; the trial court relying on hearsay evidence; the investigating officer not testifying; the whole case being a lie; the effect of the break-up between him and PW2 not being considered; the scene of the offence not being visited by PW1, PW2 and PW4; inconsistencies in the evidence; and there being no independent evidence.
8. Directions were given on 2nd November 2023, for canvassing of the appeal by way of written submissions. The appellant did not file written submissions, and he could not possibly file the same as his whereabouts within the prisons system is unknown.
9. There are 3 elements of sexual offences that the prosecution is required to establish: the fact of penetration, the fact that the penetration was by the accused person, and the fact that it happened without consent of the victim. So, the issue before me is whether the 3 elements were established by the respondent.
10. On penetration, the alleged victim himself, PW1, testified. He narrated how a finger was inserted into his anal area, causing him intense pain. He was unshaken on cross-examination, for he repeated the same narrative. That testimony was corroborated by PW2, who stated that PW1 had difficulty passing stool, and would cry while at it, and while his behind was being wiped. PW1 had also changed his style of walking. He subsequently informed PW2 that the appellant had inserted his finger into his anus several times. There was further corroboration from the clinician, PW3, that he noted scars in the anal area of PW1, which suggested violation several times. I am persuaded that there was adequate proof of penetration.
11. On whether the appellant had anything to do with the penetration, PW1 testified that it was him who inserted fingers into his anus. He is recorded as saying:

“ ... I know the person in the dock. He is Jose. He inserted his finger in my anal area. We were at Obura’s house. He did it. He inserted his finger here ... I felt intense pain. The accused used his index finger. He inserted it into my body ... I know Jose. I keep seeing him at Obura’s house. Obura is Jose’s neighbour. I first saw Jose at Obura’s place. Jose inserted his finger in my behind ... I felt intense pain. I bled. I got a swelling.”



12. Those were the words of the victim. It happened to him. He described it, in clear terms, and identified the person who did it to him. In the face of such testimony, there could have been no doubt, in the mind of the trial court, as to the identity of the perpetrator. There was corroboration. PW1 informed PW2 about it, after she saw that his walking style had changed, and that he was experiencing pain while passing stool. That information was passed to PW4, the arresting and investigating officer, who interviewed PW1, who narrated that the assault was by a male adult well-known to him.
13. On whether the penetration was with the consent of the victim, it will be noted that PW1 was a minor. The charge put the age of PW1 at 3 years. He testified on 3rd September 2019, and, upon voir dire examination being conducted, the trial court pronounced him to be a child of tender years, whose testimony was then taken unsworn. His mother, PW2, testified, but she did not talk about his age. PW3 was the clinician, who handled his case. He too did not talk about the age of PW1, but he produced records where the age was put at 3½ years. PW4 was the investigating officer, he produced a birth certificate, which indicated that PW1 had been born on 20th September 2015. From the material placed on record, the age of PW1 could be assessed as between 3 and 4 years old at the time of the offence, which made him a minor of tender years. He was incapable of consenting to the act the subject of the prosecution.
14. The evidence presented by the respondent, in my assessment, based on the 3 elements that I have discussed above, clearly point to the offence charged being proved adequately against the appellant.
15. However, let me consider the issues raised in his petition of appeal, to evaluate whether there could be some other reason for interfering with the findings of the trial court.
16. One of the issues raised is about the evidence. It is described as meagre and shoddy. It is also said to be hearsay and not independent. The trial court did not rely on circumstantial evidence, but direct evidence, from the mouth of the victim himself. So, that evidence cannot, by whatever stretch, be described as hearsay. The only thing to look out for would be corroboration. Even that is not fatal, for the court can still convict on the uncorroborated testimony of a babe, so long as the said court finds it credible, truthful and believable. In this case there was corroboration. See *Kassim Ali vs. Republic* [2006] eKLR [2006] KECA 156 (KLR) (Omolo, Bosire & Githinji, J), *AML vs. Republic* [2012] eKLR [2012] KEHC 2554 (KLR) (Odero, J), *Fappyton Mutuku Ngui vs. Republic* [2014] eKLR [2014] KECA 570 (KLR) (K. Kariuki, Maraga & Mohammed, JJA), *Robert Mutungi Muumbi vs. Republic* (2015) eKLR [2015] KECA 584 (KLR) (Makhandia, Ouko & M’Inoti, JJA), *George Muchika Lumbasi vs. Republic* [2016] eKLR [2016] KEHC 2942 (KLR) (Mwita, J) and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR [2016] KECA 147 (KLR) (Makhandia, Ouko & M’Inoti, JJA), among others.
17. The second issue is that that evidence was meagre and shoddy. I understand that the appellant is submitting that the witnesses called were not adequate to establish the charges, for just 4 were presented. It is trite that no number of witnesses is required to prove a certain fact. There is no obligation to call every person who knows anything or something about the case as a witness. See *Bukenya and Others vs. Uganda* 1972 EA 549 (Spry Ag P, Lutta Ag VP & Mustafa JA), *AHM vs. Republic* [2022] KEHC 12773 (KLR) (Mativo, J) and *Andrea Kahawa vs. The DPP Arusha HCCRA No. 81 of 2022* (Komba, J). All what is necessary is for the prosecution to call such number of witnesses as it deems sufficient to prove its case. Were the 4 adequate? I believe they were. PW1 and PW2 testified on penetration and the perpetrator. The testimony of PW1 was enough. It had happened to him. He experienced it. He went through it. He knew who did it. PW2 was availed to provide corroboration, and so were PW3 and PW4. The testimonies were sufficiently detailed and flowing to establish that which the respondent was seeking to prove.



18. On whether it was independent, I may not be very clear of what the appellant had in mind, but I suppose it has something to do with the fact that the principal witnesses, apart from the technical witnesses, were blood relatives, being the victim and his mother. The other 2 witnesses were the clinician and the investigating officer. The appellant appears to have issue with the fact that the primary evidence came from 2 family members, and no one testified outside that circle. That alone should not be fatal to the case. What would matter should be whether the witnesses were privy to what happened. It happened to PW1, and he reported to PW2, and PW2 escalated that to PW4. There was consistency, and the fact that the first 2 witnesses were son and mother, would be neither here nor there.
19. One of the grounds of appeal suggest inconsistencies or contradictions in the evidence, particularly the statement by PW1, that he was not taken to hospital. It is true, that at cross-examination, PW1 stated that he was not taken to hospital, yet the rest of the witnesses said that he was. It is trite that contradictions and inconsistencies in the evidence could be fatal to a prosecution. However, for them to have that effect they must go to the heart or core of the matter, for not every fleeting inconsistency or contradiction counts. See *John Cancio De SA vs. VN Amin* [1934] 1 EACA 13 (Abrahams CJ & Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ), *Joseph Maina Mwangi vs. Republic* [2000] eKLR (Tunoi, Lakha & Bosire, JJA), *Twehangane Alfred vs. Uganda* [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), *Dickson Elia Nsamba Shapwata & Another vs. The Republic*, Cr. App. No. 92 of 2007(unreported), and *Philip Nzaka Watu vs. Republic* [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA).
20. There was overwhelming evidence that PW1 was taken to hospital. There was also overwhelming evidence that something had happened to his anus, which, according to him, had something to do with insertion of fingers into it by the appellant. The contradiction or inconsistency arising from his statement, regarding his not being taken to hospital, was not fatal.
21. The other issue raised was that the investigating officer did not testify. There can be no foundation for this ground, for PW4 was the investigating officer, and she testified as such. Secondly, in the 8th ground of the petition of appeal, the appellant avers that “neither the investigation officer or pw2 ... visited the scene ...” That ground means that he recognises that an investigating officer testified. The appellant is taking 2 mutually irreconcilable or exclusive positions. In one ground of appeal, he argues that the investigating officer was not called to the witness stand. On the other, he says that the investigating officer who testified, that is to say PW4, did not visit the scene of the crime. In any case, the failure or omission to call an investigating officer is not necessarily fatal to the prosecution. See *Alfred Bumbo and Others vs Uganda Criminal Appeal No 28 of 1994* (Manyindo, DCJ, Oder & Tsekooko, JJSC), *SC vs. Republic* [2018] eKLR (W. Korir, J) and *Isaiah Sawala Alias Shady vs. Republic* [2021] eKLR (HA Omondi, J).
22. On PW1, PW2 and PW4 not visiting the scene, I do not appreciate what that would serve. In cases, such as this, there would be no reason for the investigating officer to go to the scene of the crime. Whether that should happen is often at the discretion of the individual investigating officer, based on the nature of the case they are handling. For sexual offences, such a visit would usually serve no purpose. Whether or not there was penetration would not be established from the scene, but from the body of the victim, and the statements recorded from the witnesses. .
23. On the case being a lie, or frame-up, based on the break-up of the liaison between the appellant and PW2, the overwhelming evidence pointed to the assault on PW1 having happened. It was up to the defence to raise a doubt to the narrative by the prosecution. The defence did not raise any doubts in the case presented by the prosecution. That issue was considered and analysed by the trial court, but, in the end, nothing came of it.



24. For avoidance of doubt, the trial court stated:

“It may well be that indeed the accused and PW2 were lovers and it is on the basis of that relationship that PW2 trusted the accused with her child, PW1, without knowing that the accused had an ulterior motive. If that be the case then even if PW2 got angry at the accused when he ended the relationship, her reporting to the authorities that the accused had committed sexual assault against PW1 had nothing to do with the fact that the accused ended the relationship, if indeed the accused committed the offence then the complainants mother had every right to seek justice for her son once she found out. One had no connection with the other. In any case the child had no motive to want to falsely accuse the suspect yet he is the one who implicated him.”

25. Overall, I am not persuaded that there is any merit in the appeal herein, and I hereby dismiss it, affirm the conviction and confirm the sentence.

26. I will go back to what I have stated in paragraphs 1 and 2 of this judgement. As the appellant did not participate in arguing his appeal, I shall direct that the Deputy Registrar shall furnish the Commissioner of the Kenya Prison Service, with 2 sets of certified copies of the typed proceedings in this appeal and of this judgment, so that the same can be availed to the appellant, wherever he could be, and so that the Commissioner of Prisons is informed of the difficulty the courts often have in accessing convicts in prison custody, for the purpose of disposing of their appeals, and how that is impacting on the work of the courts, and how it is compromising on the rights of convicts to have appeals heard and disposed of speedily and effectively, and in their presence. As this appeal emanated from the Busia Main Prison, let a similar set of copies of the proceedings and judgement be furnished on the officer in charge of that facility.

27. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 14TH DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

