



**Ogutu v Republic (Criminal Appeal E34 of 2024)  
[2025] KEHC 3015 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3015 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E34 OF 2024**

**DK KEMEL, J  
MARCH 14, 2025**

**BETWEEN**

**STEVEN OTIENO OGUTU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. C. Maiyo (R.M) in  
Siaya CMCCR. SO.No. E012 of 2023 delivered on 26th March 2024)*

**JUDGMENT**

1. The Appellant herein Steven Otieno Ogutu was charged before the magistrate's court with the offense of defilement contrary to section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offense were that on diverse dates between December 2020 and December 2021 in Siaya sub-county within Siaya County, intentionally caused his penis to penetrate the vagina of EAO, a child aged 11 years.
2. He was likewise charged with 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 diverse dates between December 2020 and December 2021 in Siaya sub-county within Siaya County, intentionally touched the vagina of EAO, a child aged 11 years with his penis.
3. After a full hearing, the Appellant was convicted of the main and after his mitigation, he was sentenced to 20 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant has since appealed against the same on the following grounds:
  - i. That the trial magistrate erred in law and in fact in not considering the contradictions, inconsistencies, and discrepancies that were consequential to conviction.



- 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 in relying on inconclusive evidence of identification to convict the appellant.
  - iv. The trial magistrate erred in law and fact in failing to consider that the investigation tendered was shoddy.
  - v. That the trial magistrate erred in law and fact in failing to prove that there were no independent witnesses and or whether there was an eyewitness to the alleged crime.
  - vi. That the trial magistrate erred in law and fact by failing to establish that the elements forming the offense in question were not proved by the prosecution.
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 finding 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 4 witnesses while the defense called 1 witness.
  7. PW1 EMN stated that she is a clinical officer from Siaya County hospital for the last five years and that she had brought with her a P3 form for E.A.O. She stated further that the documents had been prepared by one BCO with whom she had worked for five years and was well conversant with his handwriting. That her said colleague was away on official duties. She stated that on the medical history of the victim, she stated that the victim (EAO) had been having penetrative sex in her father's house with someone well known to her on several occasions during daytime and once during night on diverse dates since she was in class three. On injuries, no injuries or age of injuries was stated. Nature of offense is defilement and that the estimated age of the victim who was examined was 11 years. On examination of the genitalia, there were no bruises, no lacerations, hymen was torn and old. Pregnancy, VDRL and HIV tests were all negative. That there was evidence of vaginal penetration. That the report was prepared by BCO on 29/3/2023 and bore the hospital stamp. She added that the results on the PRC are the same on the P3 form. That the documents were produced as follows: P3 form produced as Exhibit 1, Patient attendant card –exhibit 2, laboratory request and report as Exhibit 3, and PRC form as Exhibit 4.

There was no cross examination nor re-examination.

8. PW2 EA stated on oath after a voire dire examination. That she is 12 years old and in grade 6 at [particulars withheld] Primary school. That she knows the Appellant who is called Steven Otieno Ogotu and who was raping/defiling her in that he “took his ‘makangari’ called penis and inserted it in my vagina.” She stated that the Appellant did this act at her parents' home as he used to take her to school and that they lived together at her home as a relative. That the defilement started in 2020 while she was in class three until 2021. That she feared telling her mother about it and that she was not feeling pain. That as she was moping the floor, her mother noticed that there was a sound coming from her vagina. That she was taken to hospital by her mother and that she confirmed that the Appellant used to commit the act. That she was taken to Siaya County Hospital. That she identified the birth certificate which was marked as PMFI 5.

On cross-examination, she confirmed that the Appellant did the act on her.



On re-examination, she confirmed yet again that the Appellant did the act on her.

9. PW3 RAO stated that on 20/03/2023 she discovered that there was a sound coming from her daughter's (EA) private parts. She took her to hospital and she was informed that she had been defiled severally. That her daughter Eunice had also informed her that she had been defiled by 'Free'. That 'Free' had taken his private part and inserted in her vagina then given her money to keep quiet. That she knew "Free" as his father and her mother in law were siblings. She stated further that her daughter was 12 years having been born on 18/8/2011 as per the birth certificate which was produced as exhibit 5.
- That her daughter also disclosed that 'Free' had sex with her severally, on bed and in the dining room where he had ordered her to remove her pant and had sex. She identified 'Free' as the Appellant in court also known as Steven Ogutu.

On cross examination, she stated that the Appellant was staying at her place in the year 2020, and that she is the one who took her daughter to hospital and carried no clothes.

10. PW 4 No. 247971 PC Kevin Kipchumba Kiplagat stated that he was the Investigations officer currently at Karemo police post under Kogelo Police station. That on 28/03/2023 a report was made via OB-7 same day by complainant/victim escorted by her mother RAO complaining that her child had been defiled. That he recorded the report then sent the minor and her mother to Siaya county hospital with a P3 form which was filled and confirmed that indeed the minor had been defiled. That upon examining her, the minor disclosed that the Appellant who is a relative that had been living with them had been defiling her on several occasions. That she did not report as the Appellant had threatened her. That the mother got to know about it on 26/3/2023. That after she made the report, the Appellant was arrested on 02/04/2023 via OB-2 Siaya police station and charged accordingly. That he visited the scene and was shown by the complainant and her mother.

On cross examination, he stated that he did not find the Appellant with the minor; he found him in Karapul. That when the minor and her mother made the report, he sent them to hospital with a P3 form which was later filled and showed that the minor had been defiled.

11. That marked the close of the Respondent's case.
12. The trial court later ruled that a prima facie case had been established and put the Appellant on his defence. He opted to give a sworn testimony.
13. DW 1 Steven Otieno Ogutu stated that on the said date of the incident, he was not in Siaya in 2020 and that he came back to Siaya in January 2022. That he was summoned by his brother to go take care of his house and who gave him a house where he was sleeping in. That he did not know why he was in court. That he does not know why he was accused of the offence.

On cross-examination, he said that from 2020 to 2021 he was not in Siaya as he was in Kakamega. He brought nothing to court to show that he was in Kakamega and his employer Pamela was also not in court. That Eunice is his niece, a daughter to his brother. That he didn't call Pamela to court when asked to bring a witness and that he didn't have money to go to Kakamega. That he was not denied an opportunity to call witnesses or seek more time to be able to look for witnesses.

The Appellant then penned off his evidence by stating that he had nothing else to add. He closed his defense case.

14. The appeal was canvassed by way of written submissions. Both parties duly complied.
15. The appellant submitted that the prosecution was coaching and also reminding the complainant of her evidence. He submitted that that was an untenable practice. PW2 then stated "...the incident came



to her knowledge as there was sound coming from my reproductive organ system as I was mopping the floor.” Page 11 line 18-19 of the Record of Appeal. That she was then taken to hospital. He submitted that the same was the evidence of PW3 who was the mother of the complainant.

The Appellant further submitted that PW1, the clinician, stated in her evidence that there were no clothes brought to hospital for examination. He submitted that there was nothing besides the story and narration of the complainant/minor and her mother. That there were no lacerations, no bruises and hymen torn and soiled. That there was no vaginal discharge and no abnormalities detected.

16. The Appellant relies on a myriad of authorities including OKK VS. Rep (2021) eKLR, Okeno vs, Rep. (supra), Queen vs. Manuel Vincent Quintanilla 1999 ABQB 769 to name but a few.

Based on the foregoing, he submitted that the appeal be allowed, the conviction quashed and sentence set aside and the Appellant set at liberty.

17. The Respondent submitted that the elements of the offence of defilement are proof of age, penetration and identity of the perpetrator.

18. On the element of age, it submitted that Exhibit 1, the birth certificate proved that the minor was born on 18/8/2011 thus she was 11years at the time of the offense.

19. On the element of penetration, it was submitted that section 2 of the *Sexual Offences Act* defines penetration as ‘the partial or complete insertion of the genital organs of a person into the genital organs of another person.’ It was submitted further that PW1 stated that the act had been recurring, which statement was enough to prove penetration.

20. On the aspect of identification, the Respondent submitted that the Appellant was well known to both PW2 and PW3, thus this was a case of recognition and not identification. It relied on the case of Reuben Taabu Anjononi & 2 others vs. Republic where the Court of Appeal in Nairobi held that “...recognition not identification of the assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant...”

It was submitted that all the Appellant’s grounds of appeal lack merit as the prosecution’s evidence is overwhelming.

21. On sentencing, the Respondent submitted that the sentence meted is commensurate with the charges and ought not to be altered.

22. I have considered the record of the trial court and the rival submissions as well as the authorities relied upon. I find that the issue for determination is whether the Respondent proved its case beyond reasonable doubt against the Appellant.

23. Section 8(1) (2) stipulates as follows:

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

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

25. On the element of age, Pw3 produced the birth certificate of the minor as exhibit 5. The same showed that the minor was born on 18/8/2011 thus, she was about 11 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)

I find that the Respondent proved this ingredient beyond any reasonable doubt.

26. As regards the element of penetration, the minor/complainant testified in her examination in chief that he “took his ‘makangari’ called a penis and inserted it in my vagina.” On cross examination and reexamination, the witness reiterated and confirmed that the Appellant did the act. In the case of *Kassim Ali vs Republic* [2006] eKLR the Court of Appeal observed as follows:

“So the absence of medical examination to support the fact of rape or defilement is not decisive as the fact of rape or defilement can be proved by oral evidence of a victim of rape or circumstantial evidence.”

27. Further, Section 124 of the *Evidence Act* provides thus:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

28. The effect of the proviso to Section 124 was considered by the Court of Appeal in the case of *Robert Kabwere Kiti v Republic* [2012] eKLR, where the Court observed as follows:

“Turning to corroboration as a requirement for the minor’s evidence as complained by the appellant, in the *Mohamed versus Republic* case (2005 2 KLR 138) this Court made the following observations:

‘By legal notice No.5 of 2005 which introduced the proviso to Section 124 of the *Evidence Act*, Parliament drastically qualified Section 124 of the *Evidence Act* to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful’.”

29. The Appellant had contested that the only evidence of defilement was the testimony of the complainant and her mother. Based on the above legal proviso and the authorities captured in line with proving defilement cases, I am satisfied that the offence of defilement was proved as the minor was believable. Further, the evidence of the clinical officer (PW1) who produced the documents namely, PRC, P3 form left no doubt that there was penetration of the complainant’s genitalia.
30. Lastly, the minor and her mother testified that the Appellant was a relative well known to them and having lived with them for some time. This was also confirmed by the Appellant whom on the cross examination on his defence testimony stated that the minor was his niece being a daughter to his brother. Hence, the issue of recognition and identity of the Appellant was not in doubt. Even though



the Appellant claimed in his defence that he did not know why he had been arrested, I find that the same did not shake the evidence of the Respondent. It is highly unlikely that the complainant's parents could use their young and vulnerable daughter to act as a victim of defilement and make the Appellant as the fall guy so as to settle scores yet there was no evidence at all the were any differences. It is instructive that the complainant's father had requested the Appellant to come and live with his family and thus there was no reason that he could turn against him for no apparent reason. I am satisfied that the Appellant was the perpetrator of the crime. I find that the Respondent proved this ingredient beyond reasonable doubt.

31. I am therefore satisfied that the offence of defilement was well and satisfactorily proved beyond reasonable doubt. Consequently, the finding on conviction by the trial court was quite sound and must be upheld.
32. On the sentence, the trial court imposed a sentence of 20 years' imprisonment. As the victim was a child aged 11 years old, the sentence ought to have been life imprisonment. However, it is noted that the Respondent did not seek to enhance the same by filing the requisite notice. I am inclined not to interfere with the sentence which in my view is quite lenient to say the least. It is instructive that the Appellant molested his niece instead of protecting her and has thus ruined her life as she has now been psychologically scarred for the rest of her life. The Appellant took advantage of the hapless complainant despite the fact that he was a close relative. It is also noted that the Appellant was released on bond a few days after being arraigned in court and thus remained out on bond until his conviction on 26/3/2024.
33. In the result and save only that the sentence shall commence from the date of conviction namely 26/3/2024, the Appellant's appeal is devoid of merit. The same is hereby dismissed. The conviction and sentence by the trial court is hereby upheld.

Orders accordingly.

**DATED, AND DELIVERED AT SIAYA THIS 14<sup>TH</sup> DAY OF MARCH, 2025**

**D. KEMEI**

**JUDGE.**

In the presence of:

Stephen Otieno Ogutu.....Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant

