



**Ochola v Republic (Criminal Appeal E073 of 2024)
[2025] KEHC 2861 (KLR) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E073 OF 2024
DR KAVEDZA, J
MARCH 11, 2025**

BETWEEN

CALVINCE AGAO OCHOLA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
20th May 2024 by Hon. A. Mwangi (CM) at Kibera Chief Magistrate's
Court Sexual Offences Case No. 28 of 2020 Republic v Calvince Agao Ochola)*

JUDGMENT

1. The appellant was charged and after a full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 16th March 2020 and 22nd March 2020 at [particulars withheld] Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of VAA a child aged 8 years. He was sentenced to serve thirty 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 witness statements which were the basis of his conviction were contradictory. He urged the court to quash his conviction and set aside the sentence.
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. 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.”
5. Further, section 8(1) and (2) 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.
 - (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.
6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
7. The prosecution case was as follows: V.A.A. (PW1), born on XXth May 2012, provided unsworn testimony following a voir dire examination. She recounted that on the material day, she and her friend T (name withheld) were invited to the appellant's residence. The appellant, their neighbour, ordered them to undress, touched PW1's private parts with his finger, and subsequently penetrated her with his private part. PW1 screamed in pain, but the appellant silenced her, threatening to slit their throats. He then sexually assaulted T similarly. Afterwards, he instructed them to dress and play outside. She confided in H (name withheld) , who informed her parents, leading to a hospital visit and a police report.
8. As discussed in the *Kenya Judiciary Criminal Procedure Bench Book* 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).
 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'birithia v R* High Court at Meru Criminal Appeal No. 111 of 2011).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), *CoK*)



9. In this case, given that the complainant gave unsworn evidence and she was a minor of tender years, additional corroborating evidence was required.
10. To corroborate her evidence, HAH (PW2) testified that on 22nd March 2020, at approximately 4:30 pm, while visiting her sister at [Particulars Withheld], the complainant disclosed the sexual assault. PW2 recorded PW1's account, informed the complainant's mother, and accompanied her parents to Milimani Police Station. She noted a video clip of the disclosure was deleted due to phone issues during cross-examination.
11. JSO (PW3), the complainant's mother, testified that on the material day, her husband alerted her to their daughter's alleged defilement. She rushed home, took the complainant to Nairobi Women's Hospital for examination resulting in a Post-Rape Care (PRC) form, and reported the matter at [Particulars Withheld] Police Station. The appellant was arrested. PW3 confirmed the complainant's birth certificate and identified the appellant in court. In cross-examination, she revealed the complainant's alleged multiple prior assaults by the appellant, silenced by death threats.
12. PC Caroline Olunga (PW4), highlighted the prosecution's case and how the appellant was arrested and detained at [Particulars Withheld] Police Post and then transferred to Kilimani Police Station. PW4 identified him in court.
13. John Njuguna (PW5), a clinician at Nairobi Women's Hospital, testified on behalf of Lilian Mutisya, who examined the complainant on 23rd March 2020 at 2:00 pm. Findings included genital blunt injury, an inflamed vulva with bruises, an inflamed urethra, and fresh hymenal tears, indicating recent sexual assault. The complainant appeared anxious. PW5 produced the PRC and P3 forms.
14. PW6, PC Doreen Wakhungu, the investigating officer recalled that on 24th March 2020 she called both the complainant and her mother to Kilimani Police Station, where she issued the complainant with a P3 form. Afterwards, she recorded the minor's statement. She produced the complainant's birth certificate in court, which indicated that she was born on 19th May 2012, indicating that the complainant was eight years old at the time of the incident. PW6 identified the appellant in court.
15. The evidence by the prosecution leaves no doubt that the ingredient of penetration was proved beyond reasonable doubt.
16. On the age of the complainant, the trial court considered the birth certificate produced by both the complainant's mother and the investigating officer. The birth certificate indicated that she was born on 12th May 2012. She was therefore 8 years old at the time of the offence. There is therefore no doubt that the complainant was a child.
17. In his defence, the appellant testified that in November 2019, he lived with his brother and befriended a neighbour who visited with her child, the complainant, V.A.A. The child played outside during these visits. One Saturday, he took his sick cousin to hospital, returning the next day. That evening, while preparing supper, the complainant and other children arrived. The following day, after showering, he found people, including an investigating officer and the complainant, at the house. She identified him, leading to his arrest and transfer to Kilimani Police Station. He denied the offence.
18. VO (DW2), the appellant's brother, recounted returning home with githeri one Monday to find children, including the complainant, playing outside. He asked the appellant to serve them food. The next day, PC Oyola arrived with the complainant, her mother, and another. Initially, the complainant couldn't identify her assailant, but after her mother showed a video of her account to PW2 (H)(name withheld), she pointed to the appellant.



19. Kennedy Oyola (DW3) testified that on 20th March 2020, the complainant's father, a friend of his daughter, informed him of the incident. Concerned, he asked his daughter, Y.J., if she'd been defiled; she denied it. He took her to Melchizedek Hospital, where she was examined and found unharmed.
20. Y.J. (DW4), a minor, gave unsworn testimony after voir dire. She recalled playing with the complainant when the appellant invited them for githeri. She stated nothing sinister occurred, and her father, DW3, later had her medically examined, confirming her well-being.
21. On the identification of the assailant, the complainant, her mother, the arresting officer, and the investigating officer all identified the appellant in court. The complainant was able to point him out among several other men who were present at the time of the arrest. Thus, the element of identification is sufficiently proven.
22. The court considered the appellant's defence and found it to be incredible. Given the foregoing, I find that his defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.
23. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
24. On sentence, the appellant was sentenced to thirty (30) years imprisonment. During sentencing, the court considered the pre-sentence report, and the aggravating circumstances surrounding this case and exercised discretion. Based on this premise, I see no reason to interfere with the sentence.
25. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:-

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

