Omondi v Republic (Criminal Appeal E085 of 2024) [2025] KEHC 8533 (KLR) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8533 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E085 OF 2024

A MABEYA, J

JUNE 13, 2025

BETWEEN

GLEN WASHINGTON OMONDI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. F. M. Rashid PM delivered on the 24/8/2023 in Winam SO Case No. E012 of 2023, Republic v Glen Washington Omondi)

JUDGMENT

1. This appeal emanates from the judgment and conviction made on the 24/8/2023 and sentence passed by the Hon. F.M. Rashid PM, on the 8/9/2023 in Winam Sexual Offences Case No. E012 of 2023.
2. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
3. The particulars of the charge were that on diverse dates of August 2022 and 12/5/2023 at [Particulars Withheld] in Kisumu East sub county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of J.A.O a child aged 16 years old.
4. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
5. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of four (4) witnesses. The defence constituted the appellant's sworn testimony. After the trial, the appellant was found guilty of defilement and sentenced to 15 years imprisonment.
6. Dissatisfied by the trial court's conviction and sentence, the appellant filed his petition of appeal dated 4/10/2024 setting out 9 grounds of appeal as follows: -

a. The learned trial magistrate erred both in law and fact in lowering the burden of proof in a criminal case to the prejudice of the Appellant.

b. The learned trial magistrate erred both in law and fact in shifting the burden of proof to the Appellant against the cardinal tenets and principles in a criminal trial where the prosecution shoulders the burden throughout the trial.

c. The learned trial magistrate erred both in law and in fact in relying on unreliable medical evidence to convict the appellant.

d. The learned trial magistrate erred both in law and in fact in finding that all the ingredients of the offence of defilement had been established by the prosecution against the Appellant which was not the case.

e. The learned trial magistrate erred both in law and in fact in failing to take into account the answers given by the prosecution witnesses during cross-examination and hence disregarding the evidence that was favourable to the appellant.

f. The learned trial magistrate erred both in law and in fact in treating and considering the prosecution case in isolation.

g. The learned magistrate erred both in law and in fact in disregarding the defence case and the evidence tendered by the Appellant.

h. The findings, conclusions and decisions by the learned trial magistrate are against the weight of evidence.

i. The sentence handed or meted out is manifestly harsh and excessive in the circumstances of the case.

7. In support of his appeal, the appellant filed written submissions in which he stated that the documentary evidence presented by the prosecution and the oral testimonies of its witnesses were unreliable as they were contradictory. That a DNA test ought to have been conducted to prove that the appellant was the father to the victim's child failure to which there were doubts about his culpability.

8. He further submitted that the prosecution failed to prove its case beyond reasonable doubt and on this basis his conviction ought to be quashed and sentence set aside.

9. For the state, it was submitted that all ingredients of the offence of defilement were proved beyond any reasonable doubt. That the age of the complainant was proved through the provision of a birth certificate produced as PExh2 which showed that the complainant was 16 years old.

10. That penetration was proved by medical evidence which was corroborated by the testimony of PW1, the complainant and PW3 who examined the complainant. It was submitted that the complainant testified that she knew the appellant, a fact the appellant acknowledged in his defence.

11. On contradictions and inconsistencies, it was submitted that there wasn't any and that if there were any, the same were minor and did not affect the main substance of the prosecution's case and that the appellant's defence was an afterthought as he did not dispute that he was caught cohabiting with the complainant.

12. As regards the sentence, it was submitted that the same was commensurate with the offence committed and thus ought not to be interfered with.

13. This being the first appellate Court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach its own independent conclusions and findings but at all times bearing in mind that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

14. The prosecution case was that, on the material date, the complainant ("Pw1"), after leaving school, met the appellant on a motorbike. He took her to Pw1's house and defiled her. She later found that she was pregnant. Pw2, FA, Pw1's mother identified Pw1's birth certificate showing that Pw1 was born on 11/11/2006.

15. She testified that she was called to Pw1's school after the latter had fallen sick. She found her in the Ward where a nurse informed her that Pw1 was pregnant. She reported the incident to Kasagam Police Station. When Pw1 came home during half term, she disappeared from home. The mother of the appellant called and told her that Pw1 was in the appellant's house. In the company of police officers, Pw2 traced Pw1 in the house of the appellant where the appellant was arrested.

16. PW3, Austin Ouma, the Clinical Officer produced a P3 and PRC form filled after Pw1 was examined at their facilities at the JOOTRH Gender Based Violence Centre in February, 2023. It was his testimony that on examination, the complainant had a broken hymen and yellowish vaginal discharge and that she had distended abdomen which was a sign of pregnancy.

17. PW4, Corporal Regina Chepkemoi, the Investigating Officer testified that she was assigned the case and following her investigations and arrest of the appellant, she charged him with the offence. She testified that despite Pw1 telling her that she was defiled by two people, she did not look for the other person who allegedly defiled her.

18. When placed on his defence, the appellant denied committing the offence but admitted to that Pw1 was found in his house at the time of his arrest and that he knew that she was a student. He further admitted that he was her neighbor.

19. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him to 15 years imprisonment.

20. The Court has considered the record. The first ground of appeal is that the appellant was convicted and sentenced on insufficient evidence that was full of contradictions and inconsistencies.

21. He submitted that that a DNA test ought to have been conducted to prove that he was the father to Pw1's child failure to which there were doubts about his culpability. On its part, the state submitted that all ingredients of the offence were proven; that the contradictions and inconsistencies, if any, did not affect the main substance of the prosecution's case.

22. The appellant was convicted as charged in the main count. The charge sheet against the appellant provided the charge against the appellant as that of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.

23. Section 8(4) is the penal provision and prescribes the sentence for the offence thereunder as follows:

> " 8. Defilement
>
> (1) ...
>
> (2) ...
>
> (3) ...

> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

24. The offence of defilement is rooted on three main ingredients being the age of the complainant (must be a minor), penetration and the proper identification of the perpetrator.

25. The first element is age. In Edwin Nyambogo Onsongo v Republic (2016) Eklr, the Court of Appeal stated: -

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the complainant's age, it has to be credible and reliable." (emphasis added)

26. In the present appeal, the age of Pw1 is not disputed. From the evidence on record, the age was proved by Pw1's testimony and corroborated by her mother (Pw2) through the Birth Certificate (PExh1). The birth certificate showed that Pw1 was born on 11/11/2006. In this regard, as at the date of the commission of the offence, Pw1's age was 16 years. The first element was therefore proved to the required standard.

27. The second element to be proved is the second ingredient of the offence which is penetration. Penetration is defined under section 2 of the *Sexual Offences Act* as: -

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

28. Pw1 testified how the appellant met her after school, took her to a house where they had sex. Pw3 who produced the results of the medical examination of Pw1 told the court that Pw1's hymen was broken and the vagina had a yellowish discharge. He produced the P3 form and medical notes in which he concluded that there had been penetration.

29. From the foregoing evidence, it is clear that there had been penetration of Pw1's genital organ.

30. The third and last element is identification. That it is the suspect who caused and/or committed the penetration.

31. In this case, the trial court relied on the testimony of Pw1. It found that the appellant was well known to Pw1 and that they were neighbours. That the two had a relationship and cohabited after Pw1 became pregnant. That at the time of the arrest, the Pw1 was found in the house of the appellant.

32. There is no doubt that Pw1 and the appellant knew each other. It is also not in dispute that they were neighbours. What is in dispute is whether it is the appellant who penetrated Pw1. Pw1 told the court how sometimes in August, 2022 the appellant picked her on her way from school and took her to her home. That he then defiled her there. She did not tell anyone of this fact until February, 2023 when she was found to be pregnant.

33. The trial court believed the testimony of Pw1 and held that the same was corroborated by the medical records produced by Pw3. These were the P3 and the PCR Forms.

34. Firstly, I find that the medical reports could not be said to have corroborated the testimony of Pw1. This is so because, while the act of penetration is said to have occurred in August-September, 2025, the medical examination took place in February, 2023 over six months later. The fact that the hymen was found broken with an examination done 6 months later, it cannot directly point at the appellant.

35. Secondly, while there may have been no reason to disbelief Pw1, certain aspects of her evidence required circumspection. She never reported to anyone about the incident in September, 2022. When she first had the fist opportunity to tell her story in February, 2023, she told both Pw2, the Police and the medical personnel that examined her that she was defiled by 2 people.

36. When confronted with that issue at the trial, she admitted that she had lied to them. The question that arises is what might have motivated her to lie to the said people about the circumstances surrounding her defilement.

37. I am aware that the testimony of a victim, when believed need not be corroborated. The proviso to Section 124 of the *Evidence Act* is clear that: -

> " 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".

38. In Ndungu Kimanyi vs. Republic [1976-80] 1 KLR 1442, the Court of Appeal stated that: -

> " The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".

39. The appellant faulted the evidence on penetration on the basis that it was not linked to him as there was no DNA examination undertaken to link him to the complainant's baby considering that in her statement presented to the police, Pw1 had stated that she was defiled by two people.

40. On this issue, it has been held in several occasions that a fact of rape or defilement can be proved by oral evidence and circumstantial evidence without necessary calling for medical evidence. This is in line with section 124 of the *Evidence Act* which states that corroboration is not necessary in sexual offences.

41. Kassim Ali v Republic Cr. App. No. 84 of 2005 (2006) eKLR, it was stated that: -

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a complainant of rape or by circumstantial evidence."

42. Further, on DNA testing, section 36 (1) of the *Sexual Offences Act*, provides that: -

> " Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing,

including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

43. Notably, section 36(1) is couched in discretionary terms. The above provision was a subject of discussion by the Court of Appeal in the case of Robert Mutingi Mumbi vs. Republic, Criminal Appeal No. 52 of 2014 (Malindi) where this Court stated: -

> "Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms ... DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved."

44. In Paul Mirito Aming'a vs. Republic (Criminal Appeal E009 of 2023) [2024] KECA 480 (KLR) (9 May 2024), the Court of Appeal held: -

> "We think, with respect, that both courts below fell into error when they determined that a DNA test was not necessary in the matter. While it is trite that DNA testing is not mandatory to prove a sexual offence, we are of considered view that in such a case as the instant one where a child was born out of the alleged defilement, and there was no other medical evidence, DNA ought to have been done to establish beyond reasonable doubt that the appellant was the biological father of the child hence connected to the defilement".

45. In the present case, the Court has found that Pw1's evidence was not very reliable. It has found that there was no medical evidence to prove the offence and connect the same with the appellant. Since a criminal case is to be proved beyond any reasonable doubt, the defilement having been alleged to have resulted in the birth of a child, this was the best case in which a DNA test should have been undertaken.

46. Further, considering that Pw1 had told the Mother, the Police and the Medical attendants that she had been defiled by two people, a DNA test on the appellant, the child and Pw1 would have proved the case beyond reasonable doubt. The doubt that was left lingering should have been resolved in favour of the appellant.

47. Accordingly, the Court finds that the offence of defilement was not proved beyond any reasonable doubt and that the appellant's conviction by the trial court was not safe.

48. In view thereof, the Court finds that the appeal is meritorious and allows the same. The conviction of the appellant is quashed, the sentence set aside and the appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE