



**Oketch v Republic (Criminal Appeal E022 of 2024)
[2025] KEHC 10480 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E022 OF 2024**

**DK KEMEL, J
JULY 18, 2025**

BETWEEN

FREDRICK OTIENO OKETCH ALIAS LIJONDO APPELLANT

AND

REPUBLIC RESPONDENT

(Arising from the judgment of Hon. S.W. Mathenge (S.R.M) delivered on 28th July 2023 in Bondo Chief Magistrate's Court in Sexual Offence Case No.E046 of 2022)

JUDGMENT

1. The Appellant herein Fredrick Otieno Oketch alias Lijondo in association with others not before court were charged with the offence of Gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 30th September 2022 at around 0245hrs at Nyaguda sub location, South Sakwa location, Bondo Sub County within Siaya County, in association with others not before court caused his penis to penetrate the vagina of BAO a child aged 17 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 Offences Act*. The particulars were that on 30th September 2022 at around 0245hrs at Nyaguda sub location, South Sakwa location, Bondo Sub County within Siaya County, in association with others not before court, intentionally touched the vagina of BAO, a child aged 17 years, with his penis.
3. The appellant denied the charges and that the matter proceeded to full trial. The trial court later convicted the Appellant and sentenced him to 14 years.
4. Aggrieved by the said conviction and sentence, the Appellant has lodged his Petition of Appeal wherein he raised the following grounds of appeal:



- i. That the trial magistrate erred in law and fact in not finding that the elements of defilement were not proved beyond reasonable doubt.
- ii. That the trial magistrate erred in law and fact in relying on the inconclusive evidence of identification to convict the Appellant.
- iii. That the trial magistrate erred in law and fact in not considering the contradictions, inconsistencies and discrepancies that were consequential to conviction
- iv. That the trial magistrate erred in law and fact in not appreciating the Appellant's defense that was overwhelming against the prosecution's case.

The Appellant thus prays that the conviction be quashed, sentence set aside and that he be set free.

5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court to arrive at its independent findings and conclusion. [See *Okeno v Republic* [1972] 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. In determining this appeal, I have to bear in mind that under Section 107 of the *Evidence Act* [Cap 80], the burden is always on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in *Woolmington v Dpp* [1935] AC 462 as well as in *Sawe v Republic* [2003] eKLR.
7. The prosecution called five witnesses in support of its case whose evidence is as follows. On 30/9/2022 at around 0245 hours, the Complainant, BAO. [PW1] escorted her sister to the Wichlum centre where there was a disco where one of the artists Prince Inda was performing live. The sister got inside the disco arena while the complainant stayed outside. The complainant called her boyfriend to take her home. The boyfriend arrived and after exchanging pleasantries, he asked her to wait for him as he went to get his motorcycle from the nearby parking.

However, no sooner had he left her that three men attacked her and dragged her to a nearby room and pushed her inside. They were armed with machetes and knives. The owner of that room was inside asleep and so they threatened him and moved her to a neighboring room where they defiled her in turns and that two of the assailants left while one remained. A little while later, another man entered with a torch and lit it on the face of the one in the room. The third man then left while the fourth one who had just entered with a torch remained. The complainant thought that the man had come to rescue her but unfortunately the man informed her that she would be his wife for that night. He too, like the other three that had left defiled her. The complainant managed to raise alarm which attracted members of public who rescued her. She was able to identify two of her assailants who were arrested and charged. That one of the said assailants herein was convicted and sentenced at plea taking stage after he pleaded guilty to the charges.

8. The complainant's testimony was corroborated by that of Walter Odero Aluda [PW2], who testified that he was a resident of Wichlum centre and that on 30/9/2022 at around 2.00Am he was asleep when three men kicked his door and entered his house. Two of the men were armed with pangas and knives while the third man held a girl and that they had torches. They ordered him to leave his house, but he refused, so they left. It seemed to him that the girl was not with them voluntarily. He was able to identify two of the men as Oyugi and Paul Kasadi. Moments later his neighbor by the name Lijondo came to wake him up to see what was happening in his house but that he informed him to deal with it and continued sleeping. At about 5.00Am a huge crowd gathered at Lijondo's house. He could not



confirm whether Lijondo was part of the three men who had earlier stormed his house because he did not see the third man.

9. BOO [PW3] testified that on 30/9/2022 he was with his girlfriend BAO [the Complainant] at Wichlum centre at a disco concert. At about 0245 hours he wanted to go to sleep and so he informed her to wait for him to get his motorcycle from the parking lot. Upon returning, he did not find her. He called her phone but it was off and so he decided to go to his house to sleep.

At around 4.50 am, he was woken by a workmate who informed him that BAO had been attacked and raped and that she was at BMU offices Wichlum. He rushed there and found Olulo Meta who informed him that he had raped BAO in association with Paul, Sam and Lijondo. That he, together with others, went to Paul's home but Paul threatened them with a panga and so they retreated. That he took the complaint to Amoyo police station and later took her home, where her father took her to the hospital where she was treated. That he recognized Lijondo as a person he used to see at Wichlum.

10. Edwin Ochieng [PW4] testified that on that fateful night at about 0245 hours he was at a disco concert at Wichlum when a young man called Sam informed him that Lijondo had taken his girl. They both went to Lijondo's house. He stated that Lijondo's real name is Fred. That they found him seated outside and that he had a girl in his house, but Lijondo denied having a girl in his house. A crowd then gathered and the girl came out of Lijondo's house. They asked the Complainant whether she could identify her perpetrators and she identified Oyugi with a torch. They arrested Oyugi and took him to Wichlum BMU offices. That he did not know how Lijondo was arrested.
11. No. 98xxx Pc Ogik Edwin of Bondo Police Station under Amoyo police post stated that he was the investigating officer in that case. He testified that the Complainant reported a case of gang rape that had occurred on 30/9/2022 at around 0245 hours. He advised her to get treated and issued her with a P3 form which was duly filled at Bondo Sub county Hospital confirming that she had been defiled. She presented her birth certificate showing her date of birth as 1/8/2005 placing her at the age of 17 years at the time of the incident. He produced the Birth certificate as exhibit 1. He proceeded to Wichlum centre where one Meta had already been arrested by members of the public and re-arrested him. Then later at noon he was able to arrest the Appellant. He recorded witness statements. That Metta pleaded guilty and was convicted and that he identified the Appellant as Fredrick alias Lijondo.
12. The court later established that the prosecution had established a prima facie case against the Appellant and thus placed him on his defence. The Appellant opted to tender a sworn statement wherein he stated that he knew nothing about the case. That on 29/9/2022 being a fisherman he went fishing at night until 30/9/2022 at 4.00 am and that he went to his house to sleep until 8.00Am when he heard a knock at his door. It was the beach chairman and two police officers in uniform. That they arrested him and after about five days later he was arraigned in court. That marked the close of the defense case.
13. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.
14. I have considered the record of appeal and the submissions filed and find the issue for determination is whether the Respondent proved the charge of gang defilement beyond reasonable doubt against the Appellant herein.
15. Section 10 of the *Sexual Offences Act* No. 3 of 2006 provides as follows:

‘Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence



termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.’

16. The burden of proof lies on the prosecution in all criminal cases and never shifts to the person who has been charged. Under Section 107 of the *Evidence Act* [Cap 80], the burden of proof was on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in *Woolmington v Dpp* [1935] AC 462 and *Sawe v Republic* [2003] eKLR. The prosecution must prove its case against an accused person [appellant herein] beyond a reasonable doubt, and if there is a doubt it must be resolved in favor of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of *Woolmington v Director of Public Prosecutions* [supra] where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant’s guilt beyond any reasonable doubt. That position has been accepted and applied by our Courts for many years. For instance, in the case of *Moses Nato Raphael v Republic* [2015] eKLR, the Court of Appeal referred to the speech by their Lordships in the said case and stated:

“The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This principle is well captured in the time honored English case of *Woolmington v DPP* [1935] AC 462 where the Court stated:

“Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt, subject to the qualification involving the defense of insanity and to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

17. In a case of defilement, the prosecution must prove three ingredients being the age of the complainant who must be a minor, penetration and the identity of the perpetrator.
18. In *Onesmus Karithi Kaberi & 2 others v Republic* [2021] eKLR the court held that:

“In a charge of gang defilement, therefore, the prosecution is required to prove that the offence of defilement was committed in association with another or others. It is instructive that where a person did not do the actual act of penetration within the meaning of defilement but was in the company of others who did the actual act of penetration, he too will be liable for the offence. The definitive parts of the section are found in the terms ‘in association with another or others, or any person who, with common intention, is in the company of another who commits the offence. In addition to establishing the ingredients for the offence of defilement, the Court is thus required to establish whether the accused persons were in association of one another or had a common intention to commit the offence.”

19. As regards the aspect of age of the complainant, the investigating officer [PW5] produced a birth certificate of the complainant as Exhibit 1, which indicated that she was born on 1/8/2005. This placed her at the age of 17 years old at the time of the offence, thus it was confirmed that the complainant



was a minor. The ingredient of age is a critical component in these kind of offences as the subsequent sentences to be imposed upon conviction will heavily rely on it. The Court of Appeal in *Kaingu Elias Kasomo v Republic Malindi Criminal Appeal No. 504 of 2010 [UR]* held as follows:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

As the complainant’s age fell within the age bracket of 16-18 years old, I find that the Respondent proved the ingredient beyond any reasonable doubt.

20. As regards the aspect of penetration, section 2 of the *Sexual Offences Act* defines the same as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In the case of *Mark Oiruri Mose v Republic Criminal Appeal No. 295 of 2012 [2018] eKLR*, the Court of Appeal held that the law does not require the proof of spermatozoa in the genital organ of the victim and that as long as there is penetration whether on the surface, the ingredient of the offence is demonstrated and that the penetration need not be deep inside the girl’s organ. The complainant stated as follows:

“...They then started undressing me, they pushed me onto a bed . They then started raping me.... Afterwards, 2 out of the 3 left. ...The owner of the house then arrived...it was sudden, his entrance. He also had a knife with him. I was screaming and he slapped me with the knife. I was already dressed at that time. He threatened me with the knife, telling me to undress. I asked if he was my helper or a rapist. He told me I would be his wife for the night. He also raped me.” [page 6 lines 2-10]

Medical evidence is not the only proof of penetration in defilement cases. The element of penetration can be proved by the testimony of the complainant. This court has severally held that what is most important to prove the allegation of rape or defilement is not medical evidence but the oral evidence tendered by the victim. In the case of *Kassim Ali v Republic [2006] eKLR* the Court of Appeal observed as follows:

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

It is noted that the Respondent did not call the clinical officer who examined the complainant after the incident. However, such failure did not vitiate its case as the evidence of the complainant was sufficient to prove the ingredient on the aspect of penetration. It is clear that the complainant gave credible evidence which placed the Appellant at the scene and who was arrested from his house on the material date. I find the evidence of the complainant was sufficient as she pointed the Appellant out as the owner of the house where the gang defilement took place and who also defiled her after his colleagues were through with their turns. Further and as guided by the foregoing authority, I am satisfied that the Respondent proved the ingredient of penetration beyond any reasonable doubt.

21. The Respondent was also under obligation to prove that the act of gang defilement was committed by the Appellant while being in company or association with others. From the complainant’s testimony on cross-examination, she stated as follows:

“...Yes, 3 people raped me...” page 7 line 12-13]. The evidence of PW1 and PW2 placed the appellant at the scene of the crime. In the testimony of PW3, a co-accused of the appellant



by the name Meta who pleaded guilty to the offence, mentioned the Appellant and two others as his accomplices. To my mind, that showed a common intention by the perpetrators including the Appellant to commit the offence of gang rape. It is instructive that the incident took place in his house and that as soon as his associates arrived in with the complainant, he excused himself and left them to work on the girl and later came in for his turn. It is also instructive that the Appellant was later arrested from his said house. It is clear therefore that the Appellant was acting in association with other accomplices one of whom has since been convicted and sentenced upon pleading guilty to the charge. I find the appellant's alibi defense was a mere sham and denial that did not rebut the overwhelming evidence of the prosecution's case as he was squarely placed at the scene of crime. The complainant maintained that she had seen the Appellant who was the owner of the house and who defiled her last before she was rescued. Hence, I find that the Respondent proved the ingredient on the identity of the Appellant as one of the assailants beyond any reasonable doubt."

22. In light of the foregoing analysis of the entire evidence, I am satisfied that the Respondent's evidence was quite overwhelming against the Appellant herein and that the Appellant's alibi defence did not shake that of the Respondent. I find that the ingredients of gang defilement contrary to section 10 of the *Sexual Offences Act* were proved against the Appellant beyond any reasonable doubt. I find that the trial court properly addressed its mind to the facts in issue in this case and appropriately applied the law thereto. The finding on conviction was therefore sound and must be upheld.
23. As regards sentence, the Court of Appeal in the case of *Benard Kimani Gacheru v Republic Criminal Appeal No. 188 of 2000*, the Court stated:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

24. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owuor v Regina [1954] 21 270* as follows: -

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James V R.*, [1950] 18 E.A.C.A 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. V Sher Shewky*, [1912] C.C.A. 28 T.L.R. 364."



Ogola s/o Owuor’s case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to date.”

25. Under section 10 of the *Sexual Offences Act*, a person found guilty of an offence of gang rape or gang defilement shall be liable upon conviction to serve a sentence of not less than fifteen [15] years’ imprisonment but which may be enhanced to life imprisonment. In the instant case, the trial court considered the time the Appellant spent in custody during trial and imposed a jail term of 14 years’ imprisonment. I find that the said sentence is the possible minimum in law and that the trial court took into account the fact that the Appellant was a first offender. It is also noted that the Appellant and his associates took advantage of the complainant who was the waiting for her boyfriend to go home and waylaid her and raped her in turns. The complainant was definitely physically and psychologically wounded. This called for a deterrent sentence. I see no reason to interfere with the said sentence.
26. Consequently, it is my finding that the Appellant’s appeal is devoid of merit and that the same is hereby dismissed.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 18TH DAY OF JULY 2025.

D. KEMEI

JUDGE

In the presence of:

Fredrick Oteino Oketch alias Lijondo...Appellant

M/s Kerubo.....for Respondent

Okumu.....Court Assistant

