



**Onyango v Republic (Criminal Appeal E016 of 2024)  
[2025] KEHC 10113 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10113 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E016 OF 2024**

**DK KEMEL, J  
JULY 11, 2025**

**BETWEEN**

**JOHN OTIENO ONYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of Hon. T. K. Nambisia (RM) in Ukwala Principal Magistrate’s Court Sexual Offence Case No. E012 of 2022 delivered on 25/3/2024)*

**JUDGMENT**

1. The Appellant herein John Otieno Onyango has lodged the present appeal following the order of Hon. T. K. Nambisia (RM) in Ukwala Principal Magistrate’s Court Sexual Offences Case No. E012 of 2022 wherein she sentenced the Appellant to serve life imprisonment for an offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#).
2. Aggrieved by the said conviction and sentence, the Appellant filed a petition of appeal on 5/4/2024 wherein he raised the following grounds of appeal.
  - i. That the trial court failed to summon crucial witnesses.
  - ii. That the trial court erred in failing to consider his defence.
  - iii. That the Appellant therefore prays that the appeal be allowed and he be set at liberty.
3. This being a first appellate court, the role of this court is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own independent conclusions as to whether or not to uphold the decision of the lower court. This court should take into consideration the fact that it did not see or hear the witnesses testifying and must therefore give due allowance for that. See *Okeno Vs. R* [1972] EA 32.



4. The record shows that the Appellant faced a main charge of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on the 6<sup>th</sup> day of June 2022 at around 1000 hours in [Particulars withheld] village, North Uholo Location in Ugunja Sub County within Siaya County intentionally caused his penis to penetrate the vagina of one Juvenile namely CA aged 10 years. The Appellant also faced 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 the 6<sup>th</sup> day of June 2022 at around 1000 hours in [Particulars withheld] village Uholo Location in Ugunja Sub County, within Siaya County intentionally caused his penis to penetrate the vagina of one Juvenile namely CA aged 10 years. The Appellant also faced an alternative charge of committing and indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). The particulars were that on the 6<sup>th</sup> day of June 2022 at around 1000 hours in [Particulars withheld] village, North Uholo Location, in Ugunja Sub County within Siaya County willfully and intentionally touched the vagina of a girl child aged 10 years namely CA with his penis.
5. CA (PW1) was the Complainant. She testified that on the material date she was alone at home when the Appellant arrived and persuaded her to accompany him to a sugar plantation and that she complied. That on reaching the sugarcane plantation, the Appellant directed her to remove her under pant and lie down and that the Appellant also removed his trouser. That the Appellant used his “chuchu” to insert it in her organ which she uses to urinate. That she later informed her mother who took her to hospital and that she informed her that it was the Appellant who had hurt her and that the Appellant was their neighbor.  
  
On cross examination, she stated that the Appellant defiled her during the day and that the Appellant found her alone at home and asked her to escort him to a sugarcane plantation. That the Appellant informed her that they go to the plantation to look for her mother. That nobody saw them going to the plantation.
6. RA (PW2) was the step mother of the Complainant. She stated that the minor is aged 10 years as per the age assessment report dated 17/6/2022. That she had left the minor in the morning at home and when she came back at around 10.00 am she did not find hr. that the minor later returned while having faeces on her body and face and on confronting her, she informed her that she had difficulties as she had pains on her buttocks. That upon checking her, she noticed blood stains on the minor’s under pants. That she established from the minor that the Appellant had defiled her. That she took her to Yuaya Police post and then to Sigomere Hospital.
7. Oshorn Odhiambo (PW3) a clinical officer at Sigomere hospital testified on behalf of his colleague Bonface Outa. That the complainant then aged 8 years old was examined on 12/6/2022 and that the vulva was soiled with fecal matter and whitish discharge and that the hymen was traumatized. He produced the P3 form, treatment notes and PRC form as exhibits. That the Appellant was also treated for injuries sustained from mob justice as well as syphilis and that he produced the P3 form and lab results as exhibits. That the partially traumatized hymen indicated penetration of the victim’s vagina.
8. No. 69883 CPL James Kemboi (PW4) was the investigating officer. He stated that he was at the police post when the Complainant was presented to them and that he escorted her to Tingare dispensary and then to Sigomere Sub County hospital.  
  
That he issued a P3 form which was duly filled and that the child was conformed to have been defiled. That he visited the scene on 6/6/2022 at 6.00 pm. That he took the child for an age assessment and that he later produced the same as an exhibit.



9. The trial court later established that the Respondent had established a prima facie case and thus placed the Appellant on his own defence. He opted to give a sworn testimony.

10. John Otieno Onyango (DW1) testified that he was at home on the material date ploughing his land. That the Complainant's guardian RO (PW2) was interested in his land and which had persisted as from 2020 when his mother died. that the said RO hatched the plan to frame him over the case because he had refused to give her land. He denied the defilement allegations.

On cross examination, he stated inter alia; that he knows the Complainant but maintains that he did not defile her; that there are people who were aware of the land dispute; that he has never had any altercation with the Complainant and that he does not have any reason why she would frame him up.

11. The appeal was canvassed by way of written submissions. Both parties duly complied.

12. It is noted that the Appellant was convicted and sentenced on the main charge of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. the same provides as follows:

8(1) A person who commits an act of which causes penetration with a child is guilty of an offence termed as defilement.

8(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.

13. The Respondent was under obligation to prove the guilt of the Appellant beyond any reasonable doubt. It is trite that in all criminal trials, the burden of proof lies squarely upon the prosecution to prove the guilt of an accused and that the threshold is one of beyond reasonable doubt. See *Woolmington Vs. DPP [1935] AC 462*. As regards the charge of defilement, the Respondent was under obligation to prove three essential ingredients namely; age of the victim, penetration and the identity of the perpetrator.

14. As regards the aspect of age, the Complainant stated that she was in class two and that she was aged nine years. An age assessment report was produced by the investigating officer (PW4) which estimated the age of the Complainant at 10 years. The Court of Appeal in the Case of *Edwin Nyambogo Onsongo Vs Republic [2016] eKLR* held as follows:

“The question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documentary 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 proof of the victim's age, it has to be credible and reliable.”

From the foregoing authority and the evidence of the minor and guardian and backed by the age assessment report, it is quite clear that the Complainant's age was around 10 years old and that for all intents and purposes, she was a child under the age of 18 years and had no capacity at all to consent to the sexual intercourse. Further, the aspect of age is crucial for purposes of sentencing since the *Sexual Offences Act* has put forth the specific ages of victims of defilement which will determine the appropriate sentences to be imposed. In the case of *Kaingu Elias Kasomo Vs Republic Criminal Appeal No. 504 of 2010* the Court 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 the case 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.”

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

15. As regards the aspect of penetration, Section 2 of the [Sexual Offences Act](#) defines it as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The Section further defines genital organ to include the whole or part of male or female genital organs and includes the anus.

It was the evidence of the Complainant that the Appellant put his “chuchu” in her buttocks and that he hurt her on the place which she uses to urinate. The clinical officer (PW3) stated that the hymen was partially broken and that her vulva was soiled with fecal matter and that there was evidence of penetration of the vagina and that the minor’s clothes were stained with blood and fecal matter. The clinical officer produced the P3 form, post rape care form, treatment notes as exhibits. I am satisfied that this ingredient was proved by the Respondent beyond any reasonable doubt.

16. As regards the aspect of identification of the Appellant as the perpetrator, it was the evidence of the Complainant that the Appellant found her alone at home around 1000 hours and requested her to follow him to a nearby sugar cane plantation where he defiled her. She also stated that she knew the Appellant as a neighbor and that as soon as she returned home, she informed her mother that it was the Appellant herein who she referred to as Otieno who has hurt her. The incident took place during the day and in broad daylight and in which no difficulty in recognizing the Appellant whom she had known. Indeed, the Appellant in his defence had known both the Complainant and her mother. The Appellant confirmed that he had no differences with the Complainant and that he has no reason as to why she could raise a complaint against him. I find the Appellant’s claim that the Complainant’s mother had framed him over his refusal to lease land to her to be preposterous and unbelievable. It is highly unlikely that the mother of the Complainant could use her vulnerable child as a victim of defilement so as to settle scores with the Appellant. I am satisfied that the Appellant was properly identified and that the evidence adduced placed him squarely at the scene of crime and as the perpetrator. I find this ingredient was proved beyond any reasonable doubt.

17. From the foregoing analysis, it is clear that the Respondent proved its case against the Appellant beyond any reasonable doubt. The defence evidence did not shake that of the Respondent which was quite overwhelming against him. Hence, the finding on conviction by the trial court was quite sound and must be upheld.

18. As regards sentence, Section 8(2) of the [Sexual Offences Act](#) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment of life. It is noted that the trial court imposed a sentence of life imprisonment. Learned counsel for the Respondent has urged this court not to interfere with the said sentence. It is trite that an appellate court should be slow to interfere with the discretion of a subordinate court unless it is shown that the said court has taken into account some irrelevant factors or has misinterpreted the law or that the sentence is manifestly harsh and excessive or that the same is illegal. Indeed, sentencing is at the discretion of the trial court. The trial court called for a presentence report and which is dated 20/4/2024. The same indicated that the Appellant defiled a mentally challenged girl who suffers from epilepsy and whose mother is deceased. It further indicated that the Appellant was quite notorious in the village as he abused alcohol and drugs and often raped, intoxicated women and sometimes children and that he also did not spare his own elderly mother. It further indicated that the community has had relative peace and harmony after he was arrested and charged and that they do not want him back. I find that the action of the Appellant in molesting a mentally challenged girl was quite abhorrent and



must be frowned upon. The Appellant was expected to protect the vulnerable members of the society but not to prey on them. I find that he requires custodial rehabilitation so as to enable him undergo comprehensive rehabilitation. The Supreme Court in Petition No. 18 of 2023 Republic Vs. Joshua Gichuki Mwangi & Others, [2023] eKLR, held that all sentences under the *Sexual Offences Act* are lawful as long as Section 8 of the Act remains valid. That being the position, I find that the sentence imposed by the trial court is lawful and proper and must be upheld.

19. In view of the foregoing observation, it is my finding that the Appellant's appeal lacks merit. the same is dismissed. The conviction and sentence are upheld.

**DATED AND DELIVERED AT SIAYA THIS 11<sup>TH</sup> DAY OF JULY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

John Otieno Onyango.....Appellant.

M/s Kerubo.....for Respondent.

Okumu.....Court Assistant.

