



**Odhiambo v Republic (Criminal Appeal 154 of 2023)
[2024] KEHC 1491 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 154 OF 2023
DR KAVEDZA, J
FEBRUARY 20, 2024**

BETWEEN

JOSPEH OCHIENG' ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the original conviction and sentence delivered by Hon. E. Boke (S.P.M) on 10th February 2022 at Kibera Chief Magistrate's Court Sexual Offences Case no. 12 of 2018 Republic vs Joseph Ochieng' Odhiambo)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8 (1) and (3) of the Sexual Offences Act. He was sentenced to serve life imprisonment.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. The grounds of appeal are: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that essential prosecution witnesses were not called to testify. That his defence was not taken into consideration. Finally, that his sentence was harsh and excessive.
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 analyze and re-evaluate the evidence that was before the trial court to 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. With the above, I now proceed to determine the substance of the appeal.
4. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. To succeed in a prosecution for defilement, the prosecution must prove 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.” The other ingredients are proof of the age of the victim and the positive identification of the assailant. The appellant and the respondent filed written submissions which have been duly considered.
5. The prosecution case was as follows. PW 2 SAA, the complainant testified after *voir dire* examination that she is 10 years old and in class 4. On a day that she could not recall, she went to the appellant’s shop in the company of her younger brother. There they met the appellant who was known to them being their neighbour. The appellant bought her younger brother ‘mandazi’ and sent him away.
 6. She testified that the appellant tried to kiss her but she refused. He then forcefully removed her dress and underwear, forcing her to bend over. She narrated that the appellant inserted her penis into her vagina and her anus. She tried to scream but the appellant had covered her mouth.
 7. In her testimony, PW 2 gave a clear and graphic testimony of her ordeal at the hands of the appellant on several occasions. She knew the appellant, who was their neighbour. I therefore hold that the appellant is the one who committed the act of penetration.
 8. The complainant’s testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. The trial magistrate noted that the complainant had no grudge against the appellant and had been troubled by the ordeal. In addition, her demeanour during the trial was well documented, and the trial court found that there was no reason why she would lie. The trial court was therefore satisfied that the victim was telling the truth.
 9. On the other corroborating evidence, the complainant’s father PW 4 told the court that in March 2018, he noticed the complainant being withdrawn. He was later informed by her teacher that she had problems with her walking. The teacher informed him that the complainant had been sexually assaulted and had been taken to Nairobi Women’s Hospital for treatment. He reported the incident at Muthangari Police Station.
 10. GOO (PW 3) a minor, and the complainant’s brother told the court that he knows the appellant who is their neighbour. He also told the court that the appellant runs a shop.
 11. Nicholas Nguya (PW 4) a teacher at the complainant’s school confirmed that the complainant who was in class 4, was feeling unwell and taken to hospital. She disclosed to him that she had been sexually assaulted by a neighbour.
 12. Dr. Peter Wanyama (PW 1) of Nairobi Women’s Hospital testified on behalf of Dr. Christine Muriithi who had examined the complainant but had since resigned from the hospital. He told the court that the complainant was examined on 1st March 2018 after an alleged case of sexual assault by a person known to her. He produced the Post Rape Care (PRC) Form. He told the court that the outer and inner genitalia were normal but her hymen was broken. She also had some discharge in her urine. He opined that PW 2 had been subjected to forceful penetration. PW 7. Dr. Kizzie Shako produced the P3 form. It was her evidence that the complainant had old tears in her hymen. I hold that the opinion of the two medical experts is consistent with the evidence of penetration and corroborated PW 2’s testimony that the appellant penetrated her.
 13. The investigating officer summarised the prosecution’s evidence. In addition, an age assessment report was produced dated 7th August 2019.
 14. On the age of the complainant, the trial court considered the age assessment report which indicated the complainant to be between the ages of 10 and 11 years. The complainant’s father also told the court



that the complainant was 11 years old at the time of his testimony which was one year after the offence was committed. There is therefore no doubt that PW 2 was a child aged 10 years.

15. The Appellant complained that essential witnesses were not called. The said witnesses are the landlord of the premises where the complainant was residing and a friend at school to whom she narrated her ordeal. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness. (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).
16. It is my finding that given the totality of the evidence, the evidence of the landlord and the complainant's friend would added nothing to the well corroborated evidence. It was therefore not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with the provision of section 124 of the *Evidence Act*.
17. The Appellant further argued that his defence was not taken into account. In his testimony, he denied the charges terming them a fabrication. He recalled that the complainant's father had borrowed money from him which he refused to give. This was the reason he believed that the complainant's father had decided to fabricate the charges against him. In addition, he denied knowing the complainant. He however admitted to residing within the same premises with the complainant and her family. The appellant's evidence, when weighed against the prosecution evidence, particularly the testimony of PW 1, amounted to a mere denial of the offence and was rightly dismissed.
18. From the totality of the evidence, the prosecution proved all the elements of the offence of defilement beyond reasonable doubt. I therefore affirm the conviction of the trial court.
19. On appeal against the sentence, the Appellant was sentenced to life imprisonment. The trial court noted that although the appellant was charged under section 8 (3) of the *Sexual Offences Act*, the appellant was sentenced under section 8 (2) bearing in mind that the age of the complainant was proved to be below 11 years. This is in line with the provisions of section 179 of the *Criminal Procedure Code*, which provides that an accused person can be convicted of an offence which he or she was not originally charged with.
20. That notwithstanding, sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.
21. For the above reason, I hereby set aside the sentence of life imprisonment imposed by the trial court and substitute it with a sentence of twenty (20) years imprisonment. The sentence shall take effect from the date of the appellant's conviction being 10th February 2022.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2024

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D. KAVEDZA

JUDGE



In the presence of:

Ms. Ntabo for the State

Appellant present on the Platform

Nelson Court Assistant

