



**Onyango v Republic (Criminal Appeal 1 of 2019)
[2024] KEHC 4999 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL 1 OF 2019
RE ABURILI, J
MAY 13, 2024**

BETWEEN

SAMUEL ODHIAMBO ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence by the Hon. P. Olengo delivered on the 24th December 2018 in the Principal Magistrate's Court in Nyando in Criminal Case No. 41 of 2016)

JUDGMENT

1. This is a fairly old appeal and the reason for the delay is that the lower court record was never availed to the High Court despite several requests and reminders.
2. The Appellant Samuel Odhiambo Onyango was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.
3. He was sentenced to serve twenty (20) years imprisonment on 24th December 2018 which is now 5 years and 4 months.
4. Aggrieved by that conviction and sentence, he filed the appeal on 4th January 2019 with another Petition filed by his advocate on 7th January 2019.
5. The advocate however fizzled out and the Appellant on his first appearance before me on 16th March 2024 sought leave to withdraw his appeal challenging conviction and sought only sentence reduction.
6. He informed the court that the minor was aged 12 years, a family member but not his child. He submitted that he was reformed, was schooling in Form two, is 36 years old. His wife left after he was arrested, he has studied Mind set and Biblical studies. He now knows that it is wrong to defile a child a fact he did not know.



7. The prosecution counsel opposed sentence reduction submitting in contention that the sentence imposed was lenient as the appellant was given minimum sentence, the minor having been aged 12 years. That there was no evidence of reformation.
8. The Appellant sought time to avail his testimonial but as at the time that I am writing this judgment, no document was filed. The lower court file was also not availed. It follows that only a retrial can guarantee justice to the appellant who has been in prison from 2016, yet there is no guarantee that the minor will get justice, as there is no guarantee that the lower court file will ever be traced or that the police file will be available with documentary evidence which was produced before the lower court.
9. That being the case, and as it is not clear why the lower court file has never been traced despite summons issued to the Court Administrator, I give the Appellant who has been in custody since 2016 nearly 8 years and order that having served nearly 8 years in prison, that is sufficient punishment for the offence committed against the minor.
10. He shall, unless otherwise lawfully held, be released from custody forthwith on condition that he does not commit any offence in the next two years from date of release and in default, he shall be arrested and sent back to prison to continue serving the remainder of the prison term.
11. Signal to issue.
12. This file is closed.
13. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE

