



**Omondi v Republic (Criminal Appeal E024 of 2023)  
[2024] KEHC 7564 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7564 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E024 OF 2023  
DO OGEMBO, J  
JUNE 20, 2024**

**BETWEEN**

**TOBIAS OMONDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Conviction and sentence of the Hon. S. W. Mathenge, SRM, in Bondo, PM's Court, Sexual Offence No. E065 of 2022, judgment delivered on 19/5/2023 and sentence on 30/5/2023)*

**JUDGMENT**

1. The Appellant, Tobias Omondi, was charged before the lower court with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. That on 25/11/2022 at around 17.30 hrs at South Sakwa location, Nyangoma Division, Bondo sub-county, Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of E.A.O, a child aged 13 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual offences Act*, No. 3 of 2006. That on 25/11/2022, at around 17.30 hrs at South Sakwa location, Nyangoma Division, Bondo sub-county, Siaya County, he intentionally and unlawfully touched the vagina of E. A. O a child aged 13 years with his penis.
3. The Appellant was tried and convicted of the main charge. On 30/5/2023, he was sentenced to serve 20 years imprisonment. He has moved to this court on appeal and raised the following grounds of appeal:-
  1. That the prosecution failed to prove its case beyond any reasonable doubt and the conviction went against the evidence adduced.
  2. That the trial court failed to observe that the prosecution did not prove penetration ingredient.



3. That the trial court erred in law and facts by basing appellant conviction on a contradictory evidence of prosecution witnesses.
  4. That the trial court failed to observe that the prosecution never proved its case beyond any reasonable doubt and conviction went against the weight of evidence.
  5. That the trial magistrate failed to comply with the provision of Section 36 (1) of the Sexual Offences Act, No. 3 of 2006.
  6. He pleads that this appeal be allowed entirely. This appeal is opposed by the Respondent.
4. In the case of *Okenov R* [1972] EA 32, the Court of Appeal spelt out the jurisdiction of a first appellate court. That it is to re-assess, re-evaluate and re-analyse the evidence tendered to come to its conclusions. This court must therefore consider the whole evidence before the trial court.
  5. From the record of the proceedings, PW1 was Eunice E.A.O, 14, and in grade 4, whose evidence was that on 25/11/2022 at about 5.30 pm, she was headed to her father at Wich Lum market when the appellant confronted her. That later, appellant went to where she was playing with her siblings. He gave her 5/= which she used in buying biscuits. He later returned and gave her 100/=. He then led her to a house wherein he closed her eyes and nose and mouth with a cloth. He made her kneel, removed her clothes and panty. He then lay on her by force and put his male part in her female part. That another man came and found them in the bathroom where they were but accused said he was urinating. Other neighbours gathered as the chief was called. That people wanted to lynch the appellant. They were taken to Amoyo Police Station and she was taken to Hospital.
  6. G.O.O was PW2. He is father of PW1. His evidence was that PW1 was born on 16/8/2009 as per the certificate of birth (PEXH1). He recalled that on 25/11/2022, at about 8.00 pm, he was informed that PW1 had been raped at a neighbour's house. He found a crowd baying to assault the perpetrator. He identified the man as Tobias Omondi, a fisherman at Wich Lum. That the appellant admitted and told him it was the devil which got him. They took him to the police station as the child was taken to hospital.
  7. The Assistant chief, Edwin Juma Owuor was PW3. His evidence was that he had received a distress call and on reaching the scene, found a crowd gathered with a suspect who admitted defiling the child. He assisted in taking the man to the police station. And PW4 Stephen Okwiri, a clinical officer at Bondo sub-county hospital gave evidence that he examined the child on 26/11/2022 and filled both the P3 form and the PCR forms. He noted that on examination, the inner parts of PW1 had blood stains and whitish discharge. She had pain on lower abdomen and lower limbs. Her hymen was freshly broken and she was bleeding from the genital area. He formed the opinion that there was evidence of defilement. He produced the relevant exhibits including the P3 form, the PRC form, treatment sheet and the lab test form.
  8. The last prosecution witness was PC EO PW5. He is the one who received the appellant from the members of public. He also took the witness statements.
  9. When the appellant was put to his own defence, he gave a defence on oath and testified that he is a fisherman. That on the material date, as he waited for his boat, a motor cycle appeared and he was stopped. He was then locked up by people who wanted to kill him. He was later moved to the police station and charged in court. He denied knowing the complainant, nor defiling her. He called no witness.
  10. The parties herein have canvassed this appeal by way of written submissions. The appellant has submitted that there was no independent eye witness who testified in court. relying on Abanga Alias



Onyangov R, Criminal Appeal No. 32/1990, the appellant submitted that the circumstantial evidence do not point at him. Also that court did not take into account his mitigation and proceeded to sentence him to a mandatory minimum sentence which was unjustifiable, discriminative and unfair *Julius Kitsao Manyeso v R*, Malindi,CR. App.NO. 12 of 2021. He pleaded in the alternative, for a sentence that would be for rehabilitation purposes.

11. The prosecution, on the other hand, submitted that the prosecution witnesses proved the three elements of the offence *Daniel Wambugu Mainav R*, [2018] eKLR ie age of the complainant, penetration and identification of the assailant. And that this appeal be dismissed.
12. I have considered this case, the proceedings and the submissions that the parties have made. Section 8 (1) of the *Sexual Offences Act*, provides:-

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

13. The above definition gives the essential elements of the offence of defilement which the prosecution is under a duty to prove to sustain a conviction for the offence of defilement. The case of *Daniel Wambugu Maina v R*, [2018] eKLR, relied on by the prosecution confirms that the three elements are:-
  - i. Age of the complainant
  - ii. Proof of penetration
  - iii. Identity of the perpetrator
14. From the record of the proceedings it was the evidence of PW1, PW2 and PW3 that the complainant was born on 16/8/2009 and was therefore 13 years, old at the time of the commission of the offence and 14 years as at the time of giving evidence. The certificate of birth of the complainant (PEXH1) was produced as an exhibit in this matter. With this evidence, this court is convinced that the prosecution duly proved the age of the complainant and that she was a child at the time of the commission of the offence.
15. On the second element of proof of the fact of penetration, again the prosecution provided the evidence of PW1 that on the material date and the time, the appellant followed her into room, removed her clothes and under pant, before inserting his male organ into her female organ. There was also the evidence of PW4 that he examined the complainant on the same date and found that her hymen was freshly broken, she had blood stains in her inner parts which also had whitish discharge. She had pain on lower abdomen and lower limbs and she was bleeding from her genital area. This witness formed the opinion that there was evidence of defilement. He produced as exhibits the P3 form, PRC form and the treatment sheet which he filled upon the examination.
16. The evidence of those two witnesses leave no doubt that the prosecution laid sufficient evidence to prove the fact of penetration. I so find.
17. The last element subject of proof is the one of identification of the perpetrator. Again, several witnesses gave evidence that relate to this. According to PW1, the appellant had approached her earlier in the day and given her Kshs5/= which she used to buy biscuits which she took together with her siblings. That the appellant again approached her and gave her Ksh100/= before leading her to the room where he defiled her. This incident took place during the day at about 5.30 pm and clearly, PW1 had the opportunity to see the appellant well. And this witness was forthright enough to confirm that she was able to identify the appellant well even though she had not known him before this date.



18. And then there is the evidence of PW3, the Area Assistant Chief, that on being called and informed of the incident, he rushed to the scene where he found both the appellant and the complainant as the appellant was under arrest by members of the public who wanted to lynch the appellant and that he is in fact the one who saved the appellant. And farther, that the appellant admitted the act only saying he had been misled by the devil. The same evidence was given by PW2, the father of the complainant who also found the appellant still under arrest with the gathered crowd baying for his life. It is these two witnesses, who apparently saved the appellant from the crowd and took him to the police station.
19. I have considered the evidence of these three witnesses and I am convinced that they corroborate each other on the fact that the appellant was actually caught in the act, detained by the gathered crowd and later escorted to the police station. It is true that the man who allegedly caught the appellant in the act did not give evidence as a prosecution witness. The failure of this witness to give evidence is however, not fatal to the case of the prosecution, particularly with the evidence of PW1 that it was the appellant and no-one else who defiled her.
20. In the submissions of the appellant, he has referred this court to the cases of Abanga–VS- R, and Sawev R (both supra), that circumstantial evidence should be such that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused.
21. Taking into account the above circumstances of this case, this court is convinced that the same point to no one but the appellant as the person who defiled the complainant. I am therefore convinced that the prosecution duly proved the identity of the appellant as one who defiled the complainant.
22. I have otherwise considered the defence of the appellant. The appellant did not challenge the evidence of PW1 at all on how he lured her with ksh5/= and also with 100/= before defiling her. He also did not challenge the evidence of PW2 and PW3 on how he was arrested and taken to the police station. His defence that he was innocently arrested by members of the public and taken to the police station, without any reason, is unbelievable. Unbelievable in view of the evidence of the prosecution witnesses that he was in fact caught in the act. The appellant also called no witness, leaving his defence devoid of any corroboration. I sincerely do not find any merit in the defence of the appellant. I dismiss it.
23. Section 8 (3) of the Act, states;

“ A person who commits an offence of defilement with a child between the age of 16 and 18 years is liable upon conviction to imprisonment for a term of not less than 15 years.”
24. The record of the proceedings of the lower court clearly show that prior to being sentenced, the appellant was accorded the opportunity to mitigate and he accordingly stated;
25. It is my first offence. I appreciate the court on how it has proceeded. I will not repeat the offence. I pray for forgiveness. I have 9 children. They are all mine. One is in form 4. All in school and I am afraid of what will happen to them. Three of them are orphans. My wife is unwell. I pray court’s sentence be lenient for the sake of my children.
26. The court then proceeded to obtain a probation officers, pre-sentence report. And in passing the sentence, the court noted,
27. I have considered the offence, mitigation, presentence report and time spent by accused in custody, I sentence accused to serve twenty years. Right of Appeal 14 days.



28. The above clearly show that the sentence passed by the trial court was proper and legal and took into account the circumstances of the case and the mitigation of the appellant. In effect, the court clearly followed the guidelines of the Supreme Court in the Muruatetu case. The sentence therefore was not meted out as a mandatory minimum sentence. The appeal of the appellant on sentence therefore fails.
29. In the circumstance, I am convinced that the prosecution duly discharged its burden of proof and proved the case against the appellant beyond any reasonable doubt as required by the law *Woolmington v DPP* [1935] AC).
30. The appeal of the appellant filed herein on 5/6/2023 totally lacks any merit. I dismiss the same wholly. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE, 2024.**

**D. O. OGEMBO**

**JUDGE**

20/6/2024

Court

Judgment read in open court in presence of appellant (Kisumu) and Ms. Kerubo for State.

**D.O. OGEMBO**

**JUDGE**

20/6/2024

