



**Opiyo v Republic (Criminal Appeal 174 of 2023)  
[2024] KEHC 8404 (KLR) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8404 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 174 OF 2023**

**DR KAVEDZA, J**

**JULY 15, 2024**

**BETWEEN**

**EVANS OKOTH OPIYO ALIAS OMONDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal against the original conviction and sentence delivered by Hon. Mutunga (P.M) on 17th April 2023 at Makadara Chief Magistrate's Court Sexual Offences Case no. 277 of 2019 Republic vs Evans Okoth Opiyo alias Omondi))*

**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) as read with 8(2) of the *Sexual Offences Act*. The particulars were that on 26<sup>th</sup> October 2019 at around 12 00 pm, at Starehe Sub County within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of N.M. a child aged 10 years. He was sentenced to serve ten (10) years' imprisonment.
2. Being dissatisfied, the appellant filed an appeal against the conviction and sentence in line with his petition of appeal. He submitted written submissions, which I have considered, and there is no need to rehash them here.
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 analyse and re-evaluate the evidence which was before the trial court and 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.
4. With the above, I now proceed to determine the substance of the appeal. In his grounds and submissions, the appellant has raised eight grounds of appeal which have been coalized as follows. He challenged the totality of the prosecution's evidence against which he was convicted. He argued that



- the prosecution's evidence was marred with contradictions and that the prosecution failed to prove its case beyond reasonable doubt. He urged the court to quash his conviction and set aside his sentence.
5. To succeed in a prosecution for defilement, it must be proven 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."
  6. The prosecution case was as follows: The complainant (PW1) provided a sworn testimony after voir dire examination stating that she was 10 years old and in class 5. She told the court she lived with her parents and sibling. On 26<sup>th</sup> October 2019, she had gone to the salon when she met the appellant who sold 'mandazi' in the area. The appellant told her he would take her somewhere, and she agreed. As they walked, she noticed they were getting far from her house. She tried to run away, but the appellant held on to her.
  7. They reached a mabati shelter which had no occupants. The appellant forced her inside and pushed her on the wooden bed. He then undressed her and also undressed himself. She narrated that the appellant inserted his penis into her vagina. He threatened her against screaming. She told the court that she was in a lot of pain and was bleeding from the vagina.
  8. After the ordeal, someone came to the door and asked the appellant for wheat flour. He opened the door, locked the complainant inside, and left. The complainant peeped through an opening in the door. She saw a lady and started screaming for help. The lady came and opened the door, but the complainant did not tell her what had happened. She immediately left and made her way back home. At home, she found the woman who washed their clothes and told her about the ordeal. Later, her parents came home, and she also told them what had happened. The matter was reported to the police, and she was taken to the hospital for examination and treatment.
  9. In her testimony, PW1 gave clear and graphic testimony of how the appellant, who sold 'mandazi' in the area lured her to a mabati house and defiled her. Despite being subjected to rigorous cross-examination, PW1 remained steadfast that it was the appellant, the 'mandazi' vendor who committed this act against her. The appellant was well-known to PW1 with whom she recognised. She could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.
  10. PW1'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 there were recorded reasons why she believed the child was telling the truth. In her judgement, the trial magistrate recorded that his observation of the demeanour of the minor as she testified was satisfactory and that she was truthful and credible. In addition, she had no reason to point an accusing finger at the appellant if indeed he did not defile her. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, and her evidence was unshaken on cross-examination by the appellant.
  11. Regarding additional corroborating evidence, the prosecution called RW (PW2), the complainant's mother. She told the court that on the day in question, she arrived home in the evening and found CN (PW3), who cleaned their house, still present, which was unusual. PW3 then told her what the complainant had said. PW2 questioned the complainant about the events of that day, and the complainant consistently stated that she had been defiled by the 'mandazi' vendor. PW3 also testified that when the complainant arrived that day, she was walking with her legs apart. Together with her husband, PW2 and PW3 reported the incident at the police station, and the complainant was referred to MSF for examination and treatment.



12. Celine Onyango (PW4) a clinical officer gave evidence on behalf of Millie Wambui who examined the complainant on 26<sup>th</sup> October 2019 but was not available to testify. Upon examination, there were no physical injuries, her vagina had fresh bruising at the posterior focucette with no abdominal discharge. The hymen was oestrogenised. She concluded that the cause of the injuries was penile penetration. This medical evidence corroborates the complainant's testimony regarding penetration and produced the PRC and P3 reports.
13. On the age of the complainant, it was her testimony that she was 10 years old. The investigating officer produced her birth certificate which indicated that she was born on 27<sup>th</sup> December 2009. She was therefore 10 years old and a child within the meaning of the law.
14. In his defence, the appellant admitted to selling 'mandazi' in the area. He testified that the complainant's father wanted to take over his stall and fabricated the entire story to have him arrested. He maintained his innocence.
15. The trial court considered this defence and found it to be baseless. I have already found above that her testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. I therefore find that penetration was proved to the required legal standard.
16. Having analysed the totality of the prosecution's case, I find that the prosecution proved their case beyond reasonable doubt. The conviction on the charge of defilement is thus affirmed.
17. On the sentence, section 8(2) provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to life imprisonment. The prosecution proved that the child was 10 years old; hence, the trial court, upon exercising discretion, imposed the sentence of 10 years' imprisonment. In my view, the trial court exercised its discretion in imposing the sentence. I therefore see no reason to interfere.
18. The upshot of the above analysis is that the appellant's appeal is dismissed in its entirety for lack of merit.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15<sup>TH</sup> DAY OF JULY 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr. Achilla present for the Appellant

Omurokha present for the Respondent

Nelson/Naomi Court Assistants

