# Talani alias Odiala v Republic (Criminal Appeal 45 of 2021) [2024] KEHC 9159 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9159 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VIHIGA**

**CRIMINAL APPEAL 45 OF 2021**

**JN KAMAU, J**

**JULY 24, 2024**

**BETWEEN**

**PETER TALANI ALIAS ODIALA ........................................................ APPELLANT**

**AND**

**REPUBLIC ................................................................................... RESPONDENT**

***(Being an Appeal from the Judgment of Hon S. O. Ongeri (PM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No 13 of 2018 on 6th September 2019)***

## JUDGMENT

### Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. He was convicted by the Learned Trial Magistrate, Hon S. O. Ongeri (SPM), on the charge of defilement and sentenced to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgement, on 22nd January 2021, he lodged the Appeal herein. His Petition of Appeal was dated 2nd December 2019. He set out four (4) grounds of appeal.
4. In his Written Submissions dated 9th October 2023 and filed on 22nd January 2024, he incorporated three (3) Supplementary Grounds of Appeal. The Respondent's Written Submissions were dated 26th February 2024 and filed on 28th February 2024. The Judgment herein was based on the said Written Submissions which both parties relied upon in their entirety.

**Legal Analysis**

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having considered the parties' Written Submissions, it did appear to this court that the issues that had been placed before it were:_

   a. Whether the Trial Court breached the Appellant's right to fair trial;

   b. If the answer to (a) hereinabove was in the negative, whether the Prosecution proved its case beyond reasonable doubt;

   c. Whether the sentence that was meted out against the Appellant herein was manifestly excessively to have warranted interference by this court.

8. This court therefore dealt with the said issues under distinct and separate heads.

**I. Right to fair trial**

9. This court noted that in Supplementary Ground of Appeal No (2), the Appellant submitted that the Trial Court breached his right as envisaged in Article 50(2)(o) of *the Constitution* of Kenya, 2010. He pointed out that he was tried for the same offence in Vihiga Criminal Case No 31 of 2017 and Criminal Case No 13 of 2018 where the accused and complainant were the same. He asserted that he was acquitted in the first case and hence, he ought to have been acquitted in the second case which was the subject of this Appeal. It was his case that he suffered double jeopardy and invoked the principle of autrefois acquit. The Respondent did not submit on this issue.

10. This was a preliminary point of law that ought to be determined as its determination would inform whether or not the court would delve into the merits or otherwise of the appeal herein.

11. Notably, there could be no doubt that an accused person ought not to be tried a second time for the same offence that he had previously been acquitted or convicted. The legal maxim "nemo debet bis vexari pro una et eadem causa" was a latin phrase which literally meant that "No one shall be tried or punished twice in regards to the same event". This was the legal protection against double jeopardy which gave right to the defence of "autrefois convict" or "autrefois acquit."

12. Notably, Article 50(2)(o) of *the Constitution* of Kenya provides that:-

> " Every accused person has the right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted (emphasis court)."

13. The reasoning behind this principle was that there had to be a finality in legal processes. The accused person had to be protected from the prejudice he would suffer by going through a second trial after the State had seen his entire defence. It was also to protect citizens from undue oppression by the State.

14. That being said, it was, however, quite feasible that multiple criminal offences could arise out of the same transaction. In such situations generally two (2) tests were applied, that is, same evidence test and same transaction test.

15. The same evidence test barred the mounting of a second prosecution requiring the very same evidence which would have been required to convict at the first prosecution. In any situation where the same evidence would have been required to sustain a conviction in any subsequent litigation, then that subsequent litigation was prohibited by the double jeopardy rule.

16. In the case of Conneley vs DPP 1964 2 All ER 401 it was held that:-

> "… (iv) that one test whether the rule applies is whether the facts which constitute the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a conviction on the first indictment either as to the offence charged or as to an offence which on the indictment the accused could have been found guilty.
>
> (v) That this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge;
>
> (vi) That on a plea of autrefois acquit convict or autrefois convict a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;
>
> (vii) That what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged in a former indictment and it is immaterial that facts under examination or the witnesses being called in the later proceedings are the same as those earlier proceedings;
>
> (viii) That apart from circumstances under which there may be a plea of autrefois acquit, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of res judicata applies"

17. From the above decision, it was apparent that for a plea of autrefois acquit to be applicable, the offence charged had to be the same as the offence for which one had been previously acquitted. The mere fact that the two (2) trials emanated from the same episode, had the same witnesses or similar evidence or that two (2) separate crimes were committed in the same incident was not the true test.

18. In this regard, in the case of Regina vs Z [2005] 3 ALL ER 95, the court therein held that:-

> "It is obvious that this principle is infringed if the accused is on trial again for the offence of which he has been acquitted. It is also infringed if any other steps are taken by the prosecutor which may result in the punishment of the accused on some other ground for the same offence. But it is not infringed if what the prosecutor seeks to do is to lead evidence which was led at the previous trial, not for the purpose of punishing the accused in any way for the

offence of which he has been acquitted, but in order to prove that the defendant is guilty of a subsequent offence which was not before the court in the previous trial (emphasis court).

19. It was therefore clear that the fact that the evidence in a previous case corresponded overwhelmingly with the evidence in a latter case was not in itself sufficient grounds to apply the principle of autrefois acquit. Therefore, in applying the "same evidence rule", a court would look not at the facts but at the ingredients of the offences. The question was whether the ingredients required to prove one offence were the same as those required to prove the second offence.

20. On the other hand, the same transaction test limited piecemeal prosecution by compelling the State to prosecute at one trial all offences which had been committed with a common motivating intent and which had a single ultimate goal.

21. In the interest of justice and to save court's time and resources, this court perused Vihiga Sexual Offence Case No 31 of 2017 on its own motion to establish whether indeed the Appellant suffered double jeopardy when he was charged and convicted in Vihiga Sexual Offence Case No 13 of 2018 as he had submitted.

22. A perusal of Vihiga Sexual Offence Case No 31 of 2017 indicated that the Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act* No 3 of 2006. He was acquitted of the said offence. Thereafter, he was charged in Vihiga Sexual Offence Case No 13 of 2018 where he was convicted.

23. Although the Complainant was the same in both Vihiga Sexual Offence Case No 31 of 2017 and Vihiga Sexual Offence Case No 13 of 2018, the subject lower court case in Appeal, the offences occurred on different dates.

24. In Vihiga Sexual Offence Case No 31 of 2017, the particulars of the charge were as follows:-

> "Peter Taliani alias Odiaba, on the 1st July 2017 at Emutsa Area within Vihiga County intentionally and unlawfully committed an act which caused penetration with his penis to the vagina of PO, a child 8 years."

25. The alternative charge was that:-

> "Peter Taliani alias Odiaba, on the 1st July 2017 at Emutsa Area within Vihiga County intentionally and unlawfully committed an indecent act PO, a child 8 years by touching her private parts namely, vagina."

26. In Vihiga Sexual Offence Case No 13 of 2018, the particulars of the charge were as follows:-

> "Peter Taliani alias Odiaba, on the 28th February 2018 at Emutsa Area within Vihiga County intentionally and unlawfully committed an act which caused penetration with his penis to the vagina of PO, a child 8 years."

27. The alternative charge was that:-

> "Peter Taliani alias Odiaba, on the 28th February 2018 at Emutsa Area within Vihiga County intentionally and unlawfully committed an indecent act PO, a child 8 years by touching her private parts namely, vagina."

28. It is important to point out that it could not be that just because the offences were the same, the same were charged under the same provisions of the law and that they required proof of similar ingredients

for one to plead autrefois acquit. The charges must have emanated from the same facts. In other words, the same offence must have been prosecuted twice on the same facts. This was not only to protect a person from double jeopardy but it was also to avoid embarrassing two (2) different courts determining a case against an accused person which could arrive at different conclusions.

29. It was clear that the particulars of the two (2) cases, to wit Vihiga Sexual Offence Case No 31 of 2017 and Vihiga Sexual Offence Case No 13 of 2018 were different as the offences were committed at different times. Notably, in Vihiga Sexual Offence Case No 13 of 2018, PW 1 told the Trial Court that it was not the first time that the Appellant had defiled her. The fact that he had committed similar offences and had been acquitted in one case was not sufficient ground to invoke the principle of autrefois acquit.

30. If this were so, serial offenders would have a field day by committing the same offence with the same person at different times and once acquitted rely on the principle of autrefois acquit in subsequent offences to avoid convictions.

31. However, if the person had been acquitted on the charge of defilement and there had been an alternative charge, he could not then be charged with the alternative charge at a later stage on the same facts and the same evidence against the same complainant.

32. In the premises foregoing, this court found and held that the Appellant's Supplementary Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

**II. Proof of the prosecution's case**

33. Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) were dealt with under this head as they were all related.

34. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

35. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR.

36. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

**A. AGE**

37. The Appellant did not submit on this issue. On its part, the Respondent submitted that a Dental Technologist, Charles Makokha (hereinafter referred to as "PW 7") produced an Age Assessment Report which indicated that the Complainant (hereinafter referred to as "PW 1") was aged seven (7) years at the material time.

38. In the aforementioned Age Assessment Report dated 26th July 2018, PW 7 concluded that PW 1 was aged seven (7) years as at that time as her 2nd permanent molars were missing with mixed dentition.

39. The Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about seven (7) years old as at the time of the examination and was therefore a child at the material time of the incident that occurred on 28th February 2018.

**B. Identification**

40. Both the Appellant and the Respondent did not submit on this issue. This court therefore fell back on the evidence that was adduced during trial to establish whether or not the Appellant was identified as the person who defiled PW 1.

41. According to PW 1, on the material date, she was at the garden fetching firewood when he saw the Appellant herein. She ran away but he ran after her. He caught up with her and took her to his house where he gave her mandazi. He then defiled her by inserting his penis into her vagina and led her out of his house after telling her not to disclose the incident to anyone.

42. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

43. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

44. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

45. When she was cross-examined, PW 1 explained that the incident occurred during daytime and that his house was three (3) bed-roomed. The detailed description of his house showed that the lighting conditions were adequate for a positive identification. As had been mentioned hereinabove, PW 1 had told the Trial Court that it was not the first time that he had defiled her. She said that she used to see him in the village. She identified him in court by pointing at him in court. There could not therefore have been any possibility of a mistaken identity because both she and he were known to each other and were therefore not strangers.

46. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

**C. Penetration**

47. The Appellant questioned why PW 1 kept the defilement a secret yet she had already testified in another case where she told both her family and the Trial Court the truth. He also questioned how many times PW 1's hymen had been torn and whether it tore during the first or second incident.

48. He also questioned why the Clinical Officers, Paul Muturi (hereinafter referred to as "PW 4") and Evan Karega (hereinafter referred to as "PW 6") did not record their findings of the Sexually Transmitted Infection (STI) in the Post Rape Care (PRC) Form and P3 Form so that the same could read the same as that of Clinical Officer, Michael Ochieng (hereinafter referred to as "PW 3") who testified that the STI was negative.

49. He further queried why he was not examined to ascertain if he also had the STI. He asserted that PW 4 and PW 5 relied on afterthoughts to nail him for the offence.

50. He sought to know what was meant by the assertion that PW 1 was penetrated by a human part and whether PW 1's labia minora and labia majora were lacerated or loose and if so why that was so.

51. According to PW 1's teacher, Melisa Ombaya (hereinafter referred to as "PW 2"), on 1st March 2018, she was in class when PW 1 asked to go to the toilet. She had difficulties walking. When she came back, she asked her what had happened and she informed her that the Appellant had defiled her.

52. From the evidence of PW 3, PW 1 was not walking properly and was unable to sit upright when he examined her on 8th January 2018. He observed that there were no lacerations on the labia and minora. However, her hymen was torn. He could not, however, tell how long the same had been torn.

53. PW 4 stated that PW 1 had lacerations on the vaginal wall and discharge when she was examined on 1st March 2018. She still walked with a lot of pain. PW 6 completed the P3 Form and noted that she had lacerations on her vaginal wall and was still walking with difficulty. He examined her two (2) days after the incident. He concluded that there had been penetration by a human part. He classified the injuries as harm.

54. The Respondent did not submit on this issue but set out the evidence that was adduced by the Prosecution witnesses.

55. Notably, PW 1's evidence was well corroborated by the oral evidence of PW 2 and the Investigating Officer, No 58648 Corporal Lucy Chanzu (hereinafter referred to as "PW 6") and by the scientific evidence that was tendered by PW 3, PW 4, PW 5 which confirmed recent penetration.

56. Whether PW 1's labia majora or labia minora were lacerated or loose was immaterial. The fact that the Appellant was not examined to confirm if he also had a STI did not weaken the Prosecution's case as it was evident that PW 1 had been defiled and he had been positively identified as having been the person who defiled her. His arguments of what constituted a human body were irrelevant and fell by the wayside. It was evident from PW 1's evidence that he defiled her by inserting his penis into her vagina.

57. There were no inconsistencies in her evidence and hence the case of Pamkrishnan Denkerrai Pandya vs Republic (1957) EACA 102 could not assist his case. His unsworn evidence had little or no probative value and did not therefore outweigh the evidence that was adduced by the Prosecution. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 1 and that the Prosecution had proved its case against him beyond reasonable doubt.

58. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) were not merited and the same be and are hereby dismissed.

**III. Sentencing**

59. Supplementary Ground of Appeal No (3) was dealt with under this head.

60. It did appear to this court that the Appellant was not appealing against his sentence. He argued that the time he spent in custody while the trial was ongoing be taken into account in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). He pointed out that he was arrested on 7th March 2018 and sentenced on 6th September 2018 and consequently, his sentence ought to have started running from 6th September 2018. He placed reliance on the case of 88 Prisoners vs DPP & Others (Case number and eKLR citation not given) where Odunga J (as he then was) held that a person's liberty was lost once he was arrested.

61. Section 333(2) of the Criminal Procedure Code provides that:-

> " Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

62. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

63. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide that:-

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

64. The Charge Sheet indicated that the Appellant herein was arrested on 7th March 2018. He was sentenced on 6th September 2019. A perusal of the proceedings of the lower court showed that although he was granted bail/bond, he did not post the same and hence remained in custody during the entire trial. The Trial Court did not also take into account the period he had remained in custody while his trial was ongoing.

**Disposition**

65. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 2nd December 2019 and lodged on 22nd January 2021 and the Appellant's Supplementary Grounds of Appeal dated 9th October 2023 and filed on 22nd January 2024 were partly merited purely on Supplementary Ground of Appeal No (3). His conviction and sentence be and are hereby upheld as they were both unsafe.

66. However, it is hereby directed that the period between 7th March 2018 and 5th September 2019 when the Appellant remained in custody while his trial was going on to be considered while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

67. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JULY 2024**

**J. KAMAU**

**JUDGE**