



**Omukobole v Republic (Criminal Appeal 111 & 109 of 2018  
(Consolidated)) [2023] KEHC 2457 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2457 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 111 & 109 OF 2018 (CONSOLIDATED)**

**PJO OTIENO, J**

**MARCH 24, 2023**

**BETWEEN**

**WASHINGTON JALANGA OMUKOBOLE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentencing of Hon M I  
Shimenga (RM) in Butere SRM's Court Criminal Case No 814 of 2016)*

**JUDGMENT**

1. The Appellant was charged before the trial Court with the offence of defilement contrary to Section 8 (2) with an alternative charge of committing an indecent act with a child contrary to section 11 (1) *Sexual Offences Act*. The facts of the main charge and alternative one were that on September 25, 2016 at [Particulars withheld] Village in [Particulars withheld] Sub-County the Appellant did use his penis to penetrate the vagina of the complainant a child aged 11 years with the alternative that he intentionally touched the vagina of the child.
2. When the charge was read out to the Appellant, he pleaded not guilty and a full trial thereafter ensued during which the prosecution listed and led evidence from five witnesses. After the Court determined that a prima facie had been established, the Appellant gave his sworn statement then called, his father PW2, and his wife PW3 as witnesses.
3. The evidence by the prosecution was that on September 25, 2025, the Complainant, PW11, a child aged 11 years, was at her grandmother's home washing utensils when the Appellants asked her to go to his house and pick money for buying airtime. When the Complainant went to the Appellant's door, the Appellant held her by the hand, pulled her into the house and penetrated her using his penis and thereafter released her with a warning never to tell anybody what had happened. She complied with



- the threat and did not tell anybody till November 2016 when the grandmother noticed changes in her body and asked her questions.
4. On being cross-examined by the Appellant, PW1 told the Court that on the date she was defiled Appellant was at home alone because his children had gone to school while his wife was serving a jail term in prison.
  5. The grandmother to the Complainant gave evidence as PW2 and said that on September 25, 2016 she had gone for a visit in [Particulars withheld] and was not home. That on November 6, 2016 she witnessed changes on the Complainant who had not done her homework and had a swollen waistline. When she interrogated the Complainant she told her what Appellant had done to her in September of the same year. The witnesses reported the incident to the father to Appellant and then to the Chief hence the next morning the Appellant and the father approached her for reconciliation but she declined. The matter was later reported to the police after the Complainant had been medically examined and established not to be pregnant.
  6. After the arrest, arraignment and being released on bond, the Appellant made a second attempt at reconciliation and offered to give to the Complainant his motorcycle so that the witness fails to attend Court and the case is dismissed but even that offer was declined by the witness. The witness identified the Appellant as a neighbour well known to her. On cross-examination she told the Court that she did not know when the child was defiled but the Complainant told her that the Appellant was responsible. She repeated that the Appellant went to her house with his father to negotiate a settlement but she refused.
  7. Patrick Shikanda Wangula, a village elder gave evidence that the Complainant and PW2 made a report to him about defilement of the Complainant by the Appellant. He received the report and released the two to go back home promising to inform the Chief who when notified did a letter. To that witness the Accused chose to ask no questions.
  8. PW4, the Clinician based at Butere Sub County Hospital gave the evidence that he received a complaint on November 7, 2016 at about 11.05 and registered same as OP 26717/2016. The complainant was accompanied by the grandmother and reported that she had been defiled by a person known to her. The witness examined the Complainant and confirmed that her hymen was missing but was not freshly broken and the vagina had no fluids but he confirmed penetration. All other medical examinations were negative. He completed a P3 form on November 14, 2016 and approximated age to be over 13 years. He produced treatment notes as P Exh 2 and P3 form P Exh 3
  9. Upon cross-examination, the witness told the Court that the Complainant was accompanied by the mother, he was the first medical officer to attend to her and that the child was afraid to talk hence he referred her to the Police Station and for counselling.
  10. The last witness was the investigating officer, No 101772 PCW Miriam Chelagat attached to Butere Police Station and who received the complaint about defilement on November 7, 2016, recorded statement from the Complainant and the grandmother after noting the report in the OB and completed P3 form. He later received a report that the Appellant who had disappeared had resurfaced hence he went and effect the arrest.
  11. On being cross-examined by the accused he told the Court that at the time of the incident, the wife to the accused was in prison a fact told to her by the said wife. That when the police party reached his home, the Appellant took off and was chased and arrested in a maize planation. He confirmed that the home of the Appellant is about 15 meters from that of the Complainant and that both were immediate neighbours.



12. When put on his defence the Appellant chose to give sworn statement and called his father and his wife in support of his position that he did not commit the act alleged.
13. In his sworn statement, the Appellant told the Court that on the material day he had gone to tether the animals only to come back and find the police waiting for him in the company of his father. The Appellant and the father were then taken to Butere Police Station where the father was released as the Appellant was confined and later brought to Court. He denied committing the offence because the mother to the Complainant is his sister with whom he has a lot of respect. He alleged a small dispute which he said made him be framed by way of revenge. He said he had children older than the complainant.
14. When cross-examined by the prosecutor, the Appellant told the Court that the complainant is well known to him, they are immediate neighbours and that he is a married man who lived in Kisumu with child in Form 1 at Shikonga Secondary School. He said he had been to Kakamega to release the arrested wife and only to be arrested a week later. He said that during the month of September 2016 he was juggling between Kisumu and home even upto the end of September and that during that period he did not enjoy good relationship with the family of PW2. He denied ever going to the home of the complainant seeking an out of Court settlement.
15. DW2, was WA, father to the Appellant who said that on September 25, 2016 he was coming back from herding when he found the police officers at his home while looking for his son. At that time the son and wife were in the shamba and that the son was arrested and charged with defilement. He said that the Complainant was reported to be pregnant but no child had come as at the time he was giving evidence. On cross-examination he said the accused would be between Kisumu and home to look for odd jobs and accepted having approached the complainant with a view to having matter settled outside Court but did not offer to give a bicycle as a consideration.
16. DW3, Ada Matendere was the last witness for the defence who said that she was indeed arrested and convicted for a different offence but was released on September 16, 2016 only for the Appellant to be arrested two weeks later on allegations of having defiled the Complainant. She asserted that the date having been on Sunday, she was at home with her child and did not see the Appellant defile the Complainant.
17. On cross-examination she said that the Appellant was home on September 25, 2016 and not at Kisumu. She admitted knowing the Complainant very well and that she lives with the grandmother who was a good neighbour. She was unaware of attempt of reconciliation.
18. In his reserved Judgment, the trial Court having identified the three ingredients to be proved, returned a verdict that all had been proved beyond reasonable doubt and convicted the Appellant before sentencing him to serve life imprisonment.
19. That conviction and sentence has aggrieved the Appellant, who then filed the two Appeals essentially asserting that; there was no proof of defilement of the Complainant; that the evidence led was contradictory; that the Appellant's rights under article 50 (2) a, b & j were violated at the trial; that the charge was fatally defective and that the trial Court shifted the burden of proof onto the Appellant.
20. Even though the two Appeal files were placed together, when the matter came up for mention on October 24, 2023 the Appellant elected to pursue only No 109/2018 and to abandon No 111/2018.
21. Whatever the grounds of appeal the Appellant prefers, this Court in executing its mandate as a first appellate Court, to re-evaluate and re-examine the entire evidence at trial afresh with a view to coming to own conclusions is not constricted to the grounds of appeal.



22. It is now trite that when faced with a charge of defilement, the prosecution has the unwavering duty and unshifting burden to prove beyond reasonable doubt the fact that the Complainant was a minor, that there occurred a sexual penetration, by the accused. She was just about two months stay of turning eleven (11) years old. It is therefore the finding of the Court that the Complainant was beyond reasonable doubt proved to have been a minor.
23. On penetration, the Complainant was adamant and consistent that the Appellant locked her into a house, put her on his bed, undressed himself before tearing the Complainant's underwear and inserting his penis into her vagina. That evidence even when not corroborated is by dint of Section 124, *Evidence Act* sufficient to sustain a conviction provided the Court is satisfied that the same is cogent and credible.
24. Upon review of the evidence led, the trial Court was convinced that there had been actual penetration. The Court has itself reviewed the record of evidence tendered at trial and is satisfied that the evidence of minor was cogent and was never shaken even upon cross-examination. Moreover if there had not been a wrong committed, why would the Appellant and his father DW2 seek to reconcile with the Complainant's family? The Court upon re-appraisal of the evidence finds no error with the analysis by the trial Court but concurs with that Court that indeed the Complainant was penetrated by the Appellant.
25. On the last issue of identification the totality of the evidence was that the two families were immediate neighbours and knew each other quite well. There was no suggestion that the Complainant could have been mistaken. That there was a small difference between the Appellant and the Complainant's mother, details of which have never been revealed, may not be the reason enough to infer bad blood. In any event, to the Appellant, by evidence on oath, the mother to the Complainant is a sister to him.
26. It is the finding by the Court that being acquaintances, the evidence by the Complainant was that of recognition rather than identification and that the same was sufficiently done. No reasonable doubt has been created in the mind of the Court that the Appellant could have been mistakenly identified or framed.
27. In sum, the Court finds that the three ingredients of the offence of defilement were proved beyond reasonable doubt and that the evidence offered by the Appellant in his defence which was adequately considered by the Court, did not controvert the prosecution's case.
28. Accordingly, this appeal fails and the same is dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24<sup>TH</sup> DAY OF MARCH 2023.**

**PATRICK J O OTIENO**

**JUDGE**

**In the presence of:**

Appellant in person

Ms Chala for the Respondent

**Court Assistant: Polycap Mukabwa**

