



**Otieno v Republic (Criminal Appeal E134 of 2022)
[2023] KEHC 2342 (KLR) (Crim) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E134 OF 2022
JM BWONWONG'A, J
MARCH 22, 2023**

BETWEEN

SAMWEL OWINO OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence delivered by Hon.
M. Maroro, P.M, on 14th July 2022 in Kibera Chief Magistrate's
Sexual Offences Case No. 92 of 2019 Republic v Samuel Owino Otieno)*

JUDGMENT

1. The appellant has appealed against his conviction and sentence of fifteen years imprisonment in respect of the offence of defilement contrary to section 8 (1) (2) of the [Sexual Offences Act](#) No. 3 of 2006 count 1.
2. He also appealed against his conviction and sentence of 15 years imprisonment in respect of the offence of committing and indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) in count II.
3. Being dissatisfied with the judgement the appellant filed the present appeal in which he raised 8 grounds in his petition.
The main grounds raised are as follows.
4. In grounds 1 to 6 the appellant challenged the totality of the prosecution evidence used to convict him, for being insufficient. In ground 7 the appellant complained that the trial court failed to consider his defence. In ground 8 the appellant argued that he was denied the right to a fair trial as set under article 50 of the [Constitution](#) of Kenya.



5. In response the respondent filed grounds of opposition. The grounds raised are that the appeal is misconceived and unsubstantiated. The appeal is an abuse of the court process, since the appellant was properly convicted.

The appeal lacks merit and the same should be dismissed.

6. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs. Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs. R* [2013] e-KLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
7. JO (name withheld) (Pw 1) after voir dire examination, gave sworn testimony and testified that she is 11 years old. She told the court that she knew the appellant who was her father's driver. She told the court that on November 8, 2019 she was helping him pack his clothes in his room upon his request. He told her to stand against the wall next to the door. He then put his hands on her vagina. He proceeded to undress her and sucked her breasts and put his penis into her vagina. He then told her not to tell anyone. She then called her mother as her pants were blood-stained. She tried to call her mother, but she did not respond. When her mother came home she elaborated on what had happened. Her mother then called the appellant and he apologized. She was taken to Nairobi Hospital in Galleria for treatment. She was admitted for 2 days and discharged after treatment.
8. In cross-examination, she told the court that she did not scream, because she was scared. Further, the appellant had been touching her breasts severally.
9. RAO (name withheld) Pw 2 told the court that she is the complainant's mother. On November 8, 2019, at around 10.50 am, she received a call from her daughter. She told her to come home as there was a private matter needing her attention. When he went home to inquire what was the issue, she noticed that her pantie was blood stained. She told her what had happened. She called the appellant who apologized. She took her for treatment at Nairobi Hospital at Galleria for treatment. She also reported the matter to the police resulting in the appellant's arrest and being charged. She told the court that the appellant had worked for them for 5 years and had become a member of their family.
10. Beverly Wasike (Pw 3), a doctor at Nairobi Hospital examined the complainant. She had presented on a case of alleged defilement. Her genitalia was bruised with blood from her vagina with whitish fluid. The hymen was absent. She took sample swab for testing. She filled the P3 form and PRC forms, which were produced as exhibits. She told the court that the appellant was also examined. He had no physical injuries.
11. Emily Okwaro (Pw 4) the government analyst did laboratory tests on vaginal swabs obtained from the complainant and the appellant. The report produced indicated that there was no semen or blood stains on the vaginal swab and the clothes worn by the complainant on the material day. In cross-examination, she confirmed that there was no semen from the appellant. She produced the report in court.
12. No. xxxxx PC Emmy Mutai (Pw 5) the investigating officer attached to Hardy Police Station told the court that she arrested the appellant. This was after a report was made by Pw 2 on a case of alleged defilement. She took statements and in the company of PC Brenda arrested the appellant. She also produced the complainant's birth certificate, indicating she was born on May 25, 2008.
13. The trial court found that the accused had a case to answer and put him on his defence.



14. He opted to give sworn testimony. He testified that on November 8, 2019, he was working in the compound of Fred Outa, Pw 2's husband and lived in the servant quarters. That at around 5 00 pm he received a call from Pw 2, who hurled insults at him. He claimed his innocence. He told the court that he was taken to the hospital the next day and the results turned out negative. He accused Pw 2 of setting him up. In addition, he had found the complainant with a boy in the house and that the aunt knew about it.

Analysis and determination

15. In grounds 1 to 6 the appellant challenged the totality of the prosecution evidence used to convict him, for being insufficient. He argued that the trial court failed to appreciate the law as it relates to burden and standard of proof. He complained that the court shifted the burden of proof to him contrary to the provisions of the law. In addition, the prosecution failed to prove that he committed the offence, he was charged with beyond reasonable doubt. He also maintained that there were glaring inconsistencies in the prosecution evidence.

16. The appellant submitted that there were inconsistencies in the evidence of Pw 3 and Pw 4. The results of the laboratory tests produced by Pw 4 did not show evidence of any semen and blood, yet the P3 report produced indicated that the victim was bleeding. He submitted that the absence of the hymen was not attributable to him. He maintained that there was a grudge between himself and Pw 2. That this showed that there was reasonable doubt, which the court should have considered before convicting him.

17. The respondent submitted that with regard to the ingredients of the offence charged, the prosecution proved the element of penetration. That the testimony of the victim was cogent and clear. The court was also satisfied of the victim's truthfulness. The medical report affirmed that indeed there was penetration due to the absence of the hymen. The appellant was also positively identified as the perpetrator. The victim's birth certificate was also produced in court to prove her age. She was therefore a child within the definition of the law.

18. This being a case for defilement, what was to be proved are the ingredients of the offence of defilement and in the case of *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are identification or recognition of the offender, penetration and the age of the victim.

19. In this case, the issue of identification has not been challenged in this appeal. The complainant's evidence is that of recognition and has not been disputed. Therefore, the two critical elements that must be proven to sustain a conviction for the offence of defilement under these provisions of the law are the act of penetration and the age of the victim.

20. Regarding the age of the complainant herein, the same is not in dispute, as a birth certificate produced in court which he indicated that the victim was born on May 25, 2008. She was therefore a minor aged 11 years old at the time of the commission of the offence.

21. The next element that has to be proved was penetration. "Penetration" is a term defined under Section 2 of the *Act* to mean:

"the partial or complete insertion of the genital organs of a person into the genital organs of another person."

22. In this case, the complainant gave sworn evidence. She was very clear in her narration of the events that took place on November 28, 2019, when she was defiled. She told the court how the appellant



sucked her breasts, undressed her and defiled her. She also testified that he told her not to report the incident to anyone. It was her evidence that she stained her panties due to the bleeding that resulted. The P3 report produced confirmed that on examination she had bruises on her labia minora. She also had bleeding in her vagina and experienced pain on touch. Her hymen was also absent. The conclusion was that she had experienced penal penetration. The findings were similar to those in the PRC report that produced in court.

The element of penetration was therefore proved.

23. The grounds of appeal challenging the prosecution evidence in that regard therefore fail and are hereby dismissed for lacking in merit.
24. In ground 7 the appellant complained that the trial court failed to consider his defence. The appellant argued that the trial court shifted the burden of proof to him and failed to consider his defence. From the record, the trial court considered his defence and found it to be unbelievable and an afterthought. The learned magistrate noted that during cross-examination, the appellant did not raise it, that is that Pw 2 had a grudge against him. I find that this was an afterthought. I find this that this ground of appeal fails and is hereby dismissed for lacking in merit.
25. In ground 8 the appellant argued that he was denied the right to a fair hearing as set out under article 50 of the *Constitution of Kenya*. The appellant failed to make any submissions in respect of this ground. I have considered the record and I find that the appellant was accorded a fair trial as enshrined under article 50 of the *Constitution of Kenya*. The ground therefore fails and is hereby dismissed.
26. In this circumstance, I find that the appeal in respect of his conviction on the offence of defilement lacks merit and is hereby dismissed.
27. The prosecution ought not to have charged count II which is relation to committing an indecent act with a child contrary to section 11 (1) for the *Sexual Offences Act*. This offence is bad for splitting of charges. I therefore quash the conviction and sentence in that regard.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS MARCH 22, 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Jumba for the appellant

The appellant in person

Ms Joy Adhiambo for the respondent

