



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Otinga v Republic (Criminal Appeal E019 of 2022)
[2023] KEHC 20386 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E019 OF 2022
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

JOHN ALUCHIO OTINGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence by Hon. G Ollimo, Resident
Magistrate, RM, in Butere RMCSO No. 24 of 2021, of 23rd March 2022)*

JUDGMENT

1. The appellant, John Aluchio Otinga, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(4) of the [Sexual Offences Act](#), No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the charge were that on diverse dates between 10th and 20th October 2019 in Butere Sub-County, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of AS, a child aged 15 years. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.
2. PW1, AS, was the complainant. She described how the appellant told her that his wife wanted her at her house, and he gave her some money. When she got to the house, the appellant's wife was asked to take a wedding gown somewhere. She left the next day, leaving the appellant alone, with her and his children. At night, while she was sleeping in the same room with a daughter of the appellant, he stepped in, and carried her into another room, and inserted his penis into her vagina. He threatened her with a knife. She was found to be pregnant thereafter. The matter was reported to the police. PW2, JOW, was the grandfather of PW1. He stated that the appellant, a fellow pastor, had visited his church, when he informed PW1 that his wife needed to see her. PW2 released her to go there. PW1 returned home after 4 days, looking rather sickly. He asked some women to examine her, who informed him that PW1 was pregnant. When he interrogated her, PW1 informed him that the appellant had defiled her, after



he had sent his wife away to Kisumu. He thereafter reported the matter to the police. PW3, Catherine Masits, was the clinician who attended to PW1, 1 year and 4 months after the alleged defilement. PW4, No. 237971 Inspector of Police Beatrice Rono, was the investigating officer. She stated that the matter was allocated to her after PW1 delivered. She said that the complaint was that the appellant was not paying maintenance. PW5, Eunice Adhiambo, was the clinician who attended to PW1.

3. The appellant was put on his defence, vide a ruling that was delivered on 22nd June 2021. He made an unsworn statement. He denied the charges.
4. In its judgment, the trial court found the appellant guilty.
5. The appellant was aggrieved, and brought the instant appeal, revolving around the charges being defective; the trial being unfair; the evidence being insufficient and uncorroborated, inadequate, contradictory and inconsistent; burden of proof being shifted; failing to hold that the medical evidence did not prove defilement; alibi defence not considered; failing to consider that the DNA report had exonerated the appellant of defilement; and the sentence being harsh, excessive and punitive.
6. Directions were given on 25th April 2022 and 26th July 2022, for canvassing of the appeal by way of written submissions. The appellant submitted on the case being fabricated; the trial court insisting on conducting the matter to conclusion, despite the DNA results being negative; and the age of the complainant. I shall only consider the issues that the appellant submitted on, and presume that the grounds not submitted on were abandoned.
7. On the case against the appellant being fabricated, the appellant has laid no basis, other than arguing that the prosecution had hinged its case on the hope that the DNA test results would turn out positive.
8. On the DNA results being negative, that of itself is not proof that the appellant had not defiled the minor, unless it is considered alongside other evidence. One piece of such other evidence, is the statement by PW1, that she had not had any sexual intercourse with any other man, prior to her alleged defilement by the appellant. She said, during cross-examination: "I revered him as my pastor prior to the incident, I had not had sexual intercourse with anyone else." In view of this statement, the only conclusion to draw was that the resulting pregnancy must have been by the appellant. The fact that the DNA test turned out negative against the appellant, meant he was not responsible, and he should have been exonerated. The fact that he was not responsible for the pregnancy meant that PW1 did not tell the truth, that the pregnancy had something to do with the alleged defilement by the appellant.
9. Should the appellant have been acquitted on this piece of evidence? I believe he should have, from the analysis above. The trial court rejected the DNA results, suggesting that they could have been fabricated. Was there basis for that rejection? I do not think so. The trial court did not have any material upon which it could conclude that the results were fabricated. There was equally no other evidence that it could clutch on to convict, after PW1 had categorically stated on oath, that she was having sexual intercourse at that time for the first time.
10. On the age of the complainant, the charge placed her at age 15. PW1 stated that her age, as at 28th July 2021, when she testified, was 18 years, although she did not know the exact date of her birth, for her mother died when she was young, but she presented a certificate of birth, which indicated the date of birth as 11th March 2003. She stated that the certificate of birth was obtained in 2019, for the purpose of the national Standard 8 examinations, a fact confirmed by PW2, her grandfather. Going by the certificate of birth, it would mean that by 10th/20th October 2019, PW1 was aged 15 years and 6 months as at 10th/20th October 2019. PW2 was the guardian for PW1, and, as he was her own grandfather, it would be expected that he would have knowledge of when his own grandchild was born. Further, a certificate of birth was produced, and there is no material on record, which contradicts its contents.



The fact that it was obtained after commission of the alleged offence does not suggest that it is a false document.

11. I am satisfied, from the trial record, that the material before the trial court was not sufficient to sustain a conviction of the appellant, of the offence charged. He should have been acquitted. I, accordingly, allow the appeal, quash the conviction, and set aside the sentence imposed on him. The surety is hereby discharged, and whatever he deposited shall be returned to him. The file herein to be closed. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
21ST DAY OF JULY 2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Mainga, instructed by Samuel N. Mainga & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

