



**Ochieng alias Odseng v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 15580 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E035 OF 2023
DK KEMEL, J
DECEMBER 6, 2024**

BETWEEN

FREDRICK OCHIENG ALIAS ODSENG APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence in S.O No. E036
of 2022 by Hon. J.P. NANDI (P.M) Bondo dated 25/07/2023)*

JUDGMENT

1. The Appellant herein Fredrick Ochieng alia Odseng was charged with an offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 2nd August 2022 at around 1400hrs in Rarieda Sub-County within Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of MA a child aged 6 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 2nd August 2022 at around 1400hrs in Rarieda Sub-County within Siaya County, he intentionally and unlawfully used his penis to touch the vagina of MA, a child aged 6 years.
4. The Appellant denied the charges and a trial commenced and thereafter, he was convicted and sentenced to forty (40) years' imprisonment.
5. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged a petition of appeal filed on 9/8/2023 wherein he raised the following grounds of appeal:
 - i). The learned trial magistrate erred in law and in fact in convicting the Appellant against the weight of the evidence on record.



- ii). That the learned trial magistrate erred in law and in fact in convicting the Appellant when the prosecution failed to prove penetration.
 - iii). That the learned trial magistrate erred in law and in fact in convicting the Appellant while relying on the contradictory evidence of the witnesses to arrive at the verdict.
 - iv). That the learned trial magistrate erred in law and in fact in shifting the burden of proof to the Appellant.
 - v). That the learned trial magistrate failed to observe that the sentence of 40 years imposed was against the evidence adduced.
 - vi). The learned trial magistrate failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.
6. The Appellant prayed that the appeal be allowed, conviction be quashed and sentence set aside.
7. This being the first appellate court, its jurisdiction is well settled. In the widely quoted case of OKENO –VS. R (1972) EA 32 it was held that the duty of the first Appellate Court is to re-assess, re-evaluate and re-analyze the evidence tendered and to itself come to its own conclusions of course bearing in mind that the court did not have the benefit of seeing or observing the witnesses as they testified. It is therefore imperative that this court fairly considers the evidence on record and to reach own determination.
8. The Respondent called a total of five witnesses in support of its case.
9. PW1 was a minor aged six years called MA After a voire dire examination, she tendered a sworn testimony. She testified that on 2nd August 2022 at 1400hrs, she had gone to buy mandazi but found that there were no mandazi at the shop. She was with A. That the shop was Amin Chunga’s. That they went to the home of Loka but there were no mandazis there. That they went to Madam, but still there were no mandazis. Then Odiseng (points at the accused/Appellant) called them. That the Appellant gave A Kshs10/= to go buy mandazi. That the Appellant asked her to stay behind. That he asked her to go into the posho mill. That the Appellant removed her panty and then removed the thing he uses to urinate and put it inside her part where she uses to urinate (my chuchu). That A returned and the Appellant very quickly put back her panty then gave her Kshs 20/ and asked them to go home. That she informed A what happened to her in the posho mill. That it was A who informed her mother who examined her and saw blood. That she and her mother went to Nyamalo and then went to the home of Odiseng. That Odiseng’s mother quarreled him. That they then went to the hospital but found it closed and so they went home.
- PW1 further stated that the following day, she and her mother went to the hospital where she was examined. PW1 testified that she saw the Appellant in court. That she knew him before as she used to see him at the posho mill.
- On cross examination, she reiterated what she had testified in chief and affirmed to the court that she was not lying.
11. PW2 was JO alias A. After a voire dire examination, he testified that he went to [Particulars Withheld] primary school in standard three. That he knows MA, who is his sister. He stated further that on 2.08.2022 MA borrowed their mother five shillings to buy mandazi. That he and MA went to Mama Chunga but she had no mandazi. That they went to Loka and later to Madam but there were no mandazi. That on their way home, Odiseng (points at the accused/Appellant) called them at the posho mill, that he gave him Kshs 10 and asked him to go buy mandazi. That the Appellant instructed MA to remain behind. That on returning back, he looked at MA and saw tears running down her cheeks.



That on inquiring from her as to what had happened, she informed him that Odiseng had done bad manners on her. That A is his name that they use at home.

On cross examination, he testified that it is the Appellant who called them and that he is the one who asked MA to go with him but the Appellant refused and asked MA to stay at the posho mill. That he knows the Appellant as one working at the posh mill and who also fixes shoes. PW2 went further to testify that it was him, their mother and MA who went to the Appellants home. That MA informed the Appellant's mother what had happened and showed her panty to her.

12. PW3 was CA the mother to PW1. Her testimony was that on 2/8/2022 at 2.00 PM, she gave her daughter PW1 Kshs 5 to go buy mandazi. That PW1 asked her brother A (PW2) to accompany her to the shop and that she was cooking. She went on to state that the children took unusually long to return. That when they returned, they informed her that Odiseng had called them and sent them to buy mandazi at Kakere which is far. She testified further that later that night the complainant informed her that Odiseng had touched her. That she removed her panty and it had blood stains.

That she went to the village elder and together they went to Odiseng's home. That later she took the girl to hospital but it was closed. They went home. That the following day they went to hospital then to the police. They were asked to go to Ongiello Hospital. That the girl (PW1) was examined then went back to the police. That MA is her daughter. That in 2022 at the time of her deferment she was about six years old. She identified birth certificate of MA as PMFI 1, P3 form as PMFI 2, Treatment notes of Abidha as PMFI 3. She later identified the pink panty that belonged to her daughter with dried blood stains as PMFI 4. She then identified the perpetrator as the Appellant before the court. That she knew him as the man who used to stitch her children's shoes. The complainant could not scream as it was then raining; that her daughter was not walking properly and that they went to Appellant's home together with the clan elder and showed the complainant's panty.

13. PW4 was Gilbert Ambila, a clinical officer at Ongiello hospital. He produced the P3 form dated 3.08.2022. He testified that there were dry blood stains on the complainant's pink underpants. That she reported defilement by a person well known to her on 2.08.2022. That on genital examination she had injuries on both left and right labia minora and a perforated hymen. The conclusion upon examination was defilement. He produced the P3 form marked as PEX. 2, treatment notes as p ex. 3.

On cross examination, he testified that the Appellant did not go to him for examination, and that he only saw the blood-stained panty of the minor complainant not the rest of the clothes that she had on the day of the incident.

14. PW5 was No. 245450 PC Gesare Martha of Aram police station. She testified that she was the investigating officer in the case. That on 3.08.2022 a report was made by the mother of the complainant that a six year old MA had been defiled by Fredrick Ochieng alias Odiseng. She received the minor's birth certificate which showed that she was born on 22.9.2015 which meant she was six years old at the time of the defilement.

That she issued her with p3 form. She had already been seen at Abidha hospital. The P3 was filled at Ongiello hospital. From the medical report and her investigations, she established that there was defilement. She relied on the statement of the complainant and the birth certificate plus medical report and concluded the offence took place. That she charged the Appellant with the offence upon ODPPs approval. That she went ahead and arrested him at the posho mill where he worked.

On cross examination, she testified that she was with male police officers who nabbed the Appellant during arrest.



15. At the close of the prosecution, the court ruled that the prosecution had established a prima facie case against the Appellant and subsequently placed him on his defense. He opted to tender an unsworn statement but did not call a witness.
16. The Appellant testified that he was Fredrick Ochieng Ojowa Odiseng. That he stayed at Asembo. He stated that he was in court to defend his case. That on Tuesday during lunch time, he met three people who blocked him on his way to a shop. They took him to the police station where they took his finger prints and later spent the night at the police station. That the following day he was taken to court. He knew he was in a court room because there was a picture of a lion on the wall but knew not why he was there. The Appellant closed his case.
17. The appeal was canvassed by way of written submissions. In his submissions, the Appellant submitted that the medical report ie P3 Form had some inconsistencies and that the same should be struck out. He pointed out the different stamps bearing different dates.

I have looked at the p3 form myself and found out that the medical report is a certified copy of the original. The stamp dated 02.08.2022 is for the date captured by the medic on the initial visit of the complainant and the other date 11.01.2023 has a signature and caption ‘certified copy of the original’ meaning that it is the date the copy was certified and that the same is thus admissible as evidence.
18. The Appellant likewise submitted that there were inconsistencies on the evidence of the prosecution witnesses was inconsistent. He again relied on the different stamps which I believe I have explained above. The other contradiction he pointed out was that PW1 stated that it was PW2 who informed the mother and yet PW3 stated that it was PW1 who informed her of the ordeal. On this argument, i believe it cannot on its own quash a case of defilement which relies mainly on the medical evidence, and further the inconsistencies have not been shown to prejudice the Appellant.
19. It was the Appellant’s submission that the mandatory nature of the sentence under section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006 is “unconstitutional” On this, he relied on the guidelines in HCCR.Petition no. E017 of 2021 at Machakos by G.V. Odunga J.

On this argument, I am guided by Petition No. 18 of 2023 where the court held that the minimum sentences in sexual offences are lawful until the Act is amended.
20. I have considered the lower court proceedings, evidence, and submissions and find that the only issue for determination is whether the Respondent proved their case beyond reasonable doubt.
23. Before delving into the merits of the appeal, as guided by foregoing decisions, this Court will first deal with the offence of defilement, the requisite ingredients and how Courts have appreciated its prosecution.
24. In Daniel Wambugu Maina v. Republic (2018)eKLR, the court stated that the elements to be proved for the offence of defilement are the age of the minor, penetration by the assailant and identity of the accused as the perpetrator.
25. In the Court of Appeal case of JOHN MUTUA MUNYOKI V REPUBLIC [2017] EKLR (Makhandia, Ouko & Murgor JJA) stated that under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:
 - i. The victim must be a minor.
 - ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.



iii. Identity of the perpetrator.

26. On the issue of age, PW3 produced a birth certificate which showed the minor was born on 22.9.2015 which placed her age as six years old at the time of defilement and was thus a minor. I find that the Respondent proved this ingredient beyond any reasonable doubt.

27. On the aspect of penetration, there must be evidence adduced to the effect that the complainant's genitalia was penetrated either partially or complete. Section 2 of the Sexual Offences Act defines penetration as the partial or complete insertion of the genital organ of a person into the genital organ of another person. PW1 testified that: "the Appellant took his thing that he uses to urinate and put it in my thing that I use to urinate." Her brother (PW2) corroborated PW1's testimony.

PW4 examined the victim and observed that: "she had a normal external genitalia with injuries on both left and right labia minora and perforated hymen. He concluded that there was defilement. Her difficulty in walking was because of the injuries sustained in her genitalia. He produced the p3 form as PEX. 2 and treatment notes as PEX.3 respectively" (see page 13 lines 8-17 of the record of appeal).

From the evidence on record, it is clear that penetration was adequately proved by the Respondent beyond any reasonable doubt.

28. On the aspect of identity of the Appellant as the perpetrator, the Respondent submitted that the victim's examination in chief indicated that:

"I see Odiseng in court (points at the accused). I knew him before the day we were buying mandazi. I used to see him at the posho mill which belongs to ALOKA. I had also seen him much earlier. He works at the posho mill and also fixes shoes" (see pg. 5 line 15 -18 of the record of appeal).

PW2 also identified the Appellant and stated that on their way home, Odiseng (points at the accused/ Appellant) called them at the posho mill. Pw2 went on to explain how the Appellant gave him money and directed him to go buy mandazi while he instructed the complainant to remain behind at the Posho mill. He was later briefed by the complainant as to what had happened to her and that he alerted his mother about the incident.

PW3 likewise identified the perpetrator as the Appellant before the court. That she knew him as the man who used to stitch her children's shoes. That she escorted the complainant to the Appellant's home and showed his mother the complainant's blood stained underpants whereupon the Appellant's mother quarreled him about what he had done.

29. It was contended by the Appellant in his submissions that the medical report ie P3 Form had some inconsistencies and that the same should be struck out. He pointed out the different stamps bearing different dates.

I have looked at the p3 form and found out that the medical report is a certified copy of the original. The stamp dated 02.08.2022 is for the date captured by the medic on the initial visit of the complainant while the other date 11.01.2023 has a signature and caption 'certified copy of the original' meaning it is the date the copy was certified and that the same is thus admissible as evidence.

30. It was likewise contended by the Appellant in his submissions that there were inconsistencies on the evidence of the prosecution witnesses and that he relies on the different stamps which I believe I have explained above. The other contradiction he pointed out was that PW1 stated it was PW2 who informed the mother and yet PW3 stated that it was PW1 who informed her of the ordeal. On this argument, it is obvious that the Appellant has got it all wrong in that it was the complainant who



briefed her brother (PW2) on their way home after the incident and that it was PW2 who informed their mother and that the mother (PW3) later in the night grilled the complainant who then briefed her on what had transpired between her and the Appellant. I find that there was no contradiction whatsoever. It is instructive that the incident took place in broad daylight and that the complainant knew the Appellant quite well as a neighbour and who used to repair their shoes in the area. It is highly unlikely that the parents of the complainant could use their young and vulnerable daughter as a victim of defilement so as to settle scores with the Appellant. I am satisfied that the Appellant was positively identified as the perpetrator. I find that this ingredient was proved by the Respondent beyond any reasonable doubt.

31. I have addressed my mind to evidence tendered at the trial court, grounds of appeal submissions on appeal, all the authorities relied on by both parties.
32. In light of the foregoing, I am convinced that the Respondent proved all aspects of the offence of defilement beyond reasonable doubt against the appellant. The finding on conviction by the learned trial magistrate was therefore quite sound and I see no reason to interfere with it.
33. On the issue of sentence, it is noted that the Appellant was sentenced to 40 years' imprisonment. It is trite that sentence imposed must be commensurate with the moral blameworthiness of the offender and that the court must look at the facts and circumstances of the case in their entirety. (See the case of *Ambani Vs R* [1990] eKLR). Indeed, under section 8(2) of the *Sexual Offences Act*, a person convicted of the offence is liable to imprisonment for life. It is noted that the Appellant defiled a young and vulnerable child of tender years whose life is now psychologically scarred for the rest of her life. The Appellant was expected to be a protector but instead took advantage of the minor and stole her innocence. Under the provisions of the said Act, the Appellant ought to serve a sentence of life imprisonment. However, following the decision of the Supreme Court in *Francis Karioko Muruatetu and Another Vs R* [2017] eKLR, the trial courts were held not to be hamstrung when imposing minimum sentences upon offenders and that the court were obligated to receive mitigating circumstances before imposing an appropriate sentence thereafter. This window however appears to be limited in that the same Supreme Court vide *Petition No. 18 of 2023 R Vs Joshua Gichuki Mwangi* [2024] eKLR held that minimum sentences are legal and lawful as long as section 8 of the *Sexual Offences Act* remains valid and has not been declared as unconstitutional. This decision was made on 12/7/2024 and which is now binding on all subordinate courts including this court. That being the position, this court's hands are tied and that it cannot tinker with the Appellant's sentence aforesaid. Consequently, the sentence by the trial court must be upheld.
33. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The conviction and sentence is upheld.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of: -

Fredrick Ochieng Alias Odseng.....Appellant

Mochafor Respondent

Ogendo.....Court Assistant

