Odhiambo v Republic (Criminal Appeal E089 of 2024) [2025] KEHC 13296 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13296 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E089 OF 2024

WM KAGENDO., J

SEPTEMBER 25, 2025

BETWEEN

CLINTONE ODINO ODHIAMBO .... APPLICANT

AND

THE REPUBLIC .... RESPONDENT

(Being an Appeal against conviction and sentence in Mombasa Magistrates Courts S.O No. E098 of 2021 delivered on 15/1/2025 by Hon. G.A. Olimo (SRM))

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 and faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 6 of 2006.
2. The particulars of the offence on the main charge are that on 7th September, 2020 at [particulars withheld] area in Likoni Sub County within Mombasa County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of KM a child aged 14 years. And, in the alternative count, on the same date within the said locality, the appellant unlawfully and intentionally touched the vagina of KM a child aged 14 years with his penis.
3. The appellant was after full trial found guilty under the main count and was thereby sentenced to fifteen (15) years imprisonment. Being, aggrieved by the conviction and sentence, and he preferred the present appeal.
4. He based it on grounds that the learned trial magistrate erred in matters of both law and fact by finding that his guilt was established on a defective charge sheet as the timelines of the offence did not tally with prosecution witness testimonies. Further, that the evidence did not meet the threshold in Sec 36 of the *Sexual Offences Act* as the same was doubtful and non- incriminating. The appellant further faulted

the learned magistrate for failing to take cognizance of the defense of alibi raised by both prosecution witnesses and the appellant.

5. Despite the directions by this court that the appeal be canvassed by way of written submissions neither of the parties had filed the same, as at the time of making this determination.

Determination

6. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic* (1957) EA 336).

A. Whether the Charge Was Defective as Particularized?

7. The appellant's contentions in so far as the charge sheet is concerned is that the particulars of the charge, specifically the dates of the alleged commission of the offence were nor congruent with the testimonies of the prosecution witnesses.

8. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence, to enable him appreciate the nature of the charge(s) against him and to enable him to prepare an appropriate defence. It follows, therefore, that a charge sheet that was deficient in substance would prejudice an accused person's right to a fair trial as provided for in Article 50(2)(b) of *the Constitution*. This was the rationale behind Section 134 of the *Criminal Procedure Code*. The Section provides that:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

8. The Court of Appeal in *Sigilani v Republic* [2004] 2 KLR, 480 stated that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence."

9. In the instant, the particulars of the impugned charge sheet detail that the appellant was charged with; "defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006". Therefore, the charge sheet indicated the statement of the offence that the appellant was charged with, which offence is known in law. The charge sheet also contained the particulars of the offence. That the appellant was alleged to have inserted his penis into the vagina of the complainant, a child aged 14 years. The issue in contention is the timelines of the commission of the said offence. The appellant contends that the charge sheet states that the offence occurred on the 7th day of September, 2020, which considerably differs from the testimonies of the prosecution witnesses.

10. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR that:

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [198] eKLR that:

'In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

1. When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charged offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

2. When for such reason it does not accord with the evidence given at the trial."

11. The appellant's argument is that neither of the witnesses referenced with specificity the said commission of the offence as 7th September, 2020. In my view, in as much as the appellant may rely on the inconsistencies in the evidence as a defence, this does not render the charge sheet defective. I needlessly reiterate that the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.

12. From my perusal of the record, I hold the considered view that the appellant cannot be said to have misunderstood the nature of the charges against him. It is evident that the appellant understood that he was being accused of having committed the offence of defilement, against the complainant.

B. Whether the prosecution established its case against the appellant beyond reasonable doubt?

13. Section 8(1) of the *Sexual Offences Act* provides as follows:

" 8.

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

...

(3). A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

14. From the foregoingthe offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients must each be proven for a conviction to issue. (See *George Opondo Olunga vs. Republic* [2016] eKLR.)

15. As to the age of the complainant, PW1 produced her birth certificate (Pexh-1) which indicated that she was born on 6th June, 2006, thus as at the time of the offence she was 14 years. Needless to add, the appellant in his appeal did not contest the age of the minor.

16. The second issue is whether the prosecution established proof of penetration of the complainant, beyond reasonable doubt. Penetration is proved through the evidence of the victim corroborated by medical evidence. Nevertheless, what this court requires is proof of facts that the offence was committed, the medical evidence, notwithstanding. The provisions of Section 124 of the *Evidence Act* are instructive to the end that a conviction can rest squarely on the sole testimony of the victim.

17. The appellant argued that there exists undeniable contradictions and inconsistencies in the complainant's testimony, in that she could not reliably outline the specific days that the alleged incidences occurred.

18. With regards to discrepancies and contradictions, in *John Mutua Munyoki v Republic* [2017] KECA 376 (KLR) the Court of Appeal noted as follows;

> "How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully."

19. Further, in *Philip Nzaka Watu v. Republic* [2016] eKLR where the Court of Appeal stated as follows:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

20. In considering the testimony PW1; she vividly narrated that sometime in August, 2020 she used to visit a cybercafé operated by the appellant. That, in one of her visits the appellant confessed that he was in love with her and he became her boyfriend thereafter. It was her testimony that they would have walks on the beach and sometime in 2021 they had sex at the beach and went home. Her mother noted that she was not walking properly and the complainant disclosed that she had sex with Clintone (the appellant). The complainant left home and slept at the appellant's male friend. Suddenly her mum, her two (2) uncles and Clintone arrived. They started beating both the complainant and the appellant and were escorted to Likoni Police Station. Enroute to the police station one of her uncles told the complainant to state that the appellant raped her and if she refused, she would be arrested herself and the appellant released.

21. In the complainant's (PW1) cross-examination she remained adamant that she had sex with the complainant in 2021.

22. However, weighing the medical evidence as deposed by PW3, a Clinical Officer and reproductive health specialist after examining the complainant on 8/6/2020 noted that the complainant's hymen was freshly broken with tenderness on her vulva, which age of the injury was within 17 hours before the time of examination.

23. From the foregoing, myriads of questions arise. Is the complainant's testimony credible? The appellant was arrested in August, 2020, and released on bond thereafter after commencement of the trial case, so did they have their impugned sexual encounter while the appellant out on bail? If so, then who defiled the complainant on the 7th of September, 2020?

24. It is trite that the burden of proving facts that justify the drawing of an inference from the facts to the exclusion of any other reasonable hypothesis of the innocence of the suspect is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

25. Save for the complainant's testimony that would directly implicate the appellant to the offence, as particularized in the charge sheet, the other prosecution witnesses, specifically PW2 (*mzee wa mataa*) and PW4 (the complainant's adopted mother) only alluded to a frowned upon romantic relationship between the appellant and the complainant, which does not automatically prove the appellant culpability to the offence.

26. In my view, dates and timelines are critical in criminal cases, and their probative value cannot be ignored, especially where the case is anchored on a sole eye-witness testimony, as it aids the dislodging of alibi defences, if and/or when raised.

27. It is further not lost to me that the complainant never connected the appellant to the crime out of her own volition, as admittedly she was beaten by her adopted mother and threatened by her uncles to implicate the appellant or risk jailtime.

28. Notably, the prosecution impliedly deemed the complainant's testimony as credible despite the glaring inconsistencies in the timelines of when the offence was committed, as they found no need to seek leave to render her as a hostile witness and cross-examine her on the said inconsistencies.

29. Further, having read the trial court's judgment, I find that the trial magistrate did not comment on the said discrepancy and no reasons were listed as to the reasons why the same was ignored.

30. In assessing the complainant's testimony, I find that her recollection of the nexus events of the fateful days is constituted by detailed and vivid accounts, to wit this court is unable to doubt her truthfulness. This court finds that the circumstances corroborate the complainant's evidence to the end that the appellant on several occasions had sexual intercourse with her and threatened her to silence.

31. Clearly the trial court failed to evaluate the veracity of all these contradictions and discrepancies. To my mind these contradictions and inconsistencies are not minor. They were critical and go to the root of the prosecution case and whether the complainant was a credible and truthful witness. I find the discrepancies are significant and ousts the testimony of the complainant and casts doubt to its veracity.

32. Having ousted the complainant's testimony, the balance of the prosecution's evidence does not link the appellant irresistibly with the commission of the offence without leaving or suggesting any other conclusions without which, thus its probative value.

33. From the foregoing, this court is of the view that it has said enough to show that this appeal is for allowing. Accordingly, the appeal is allowed, the conviction quashed and the sentence imposed set aside. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 25TH DAY OF SEPTEMBER. 2025.

W. K. MICHENI

JUDGE

In the presence of;

For the Appellant and his Advocate Mr Egunza

For the Respondent - Mr Sirima

Court Assistant - Ms Bebora