



**Dede v Republic (Criminal Appeal E084 of 2023)
[2025] KEHC 15687 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E084 OF 2023
ACA ONG'INJO, J
OCTOBER 30, 2025**

BETWEEN

PAUL ODHIAMBO DEDE APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence by Hon. C. N. C. ORUO P. M.
RONGO PMC S. O. C. NO 14 OF 2020 delivered on 29th November 2023)*

JUDGMENT

1. The Appellant Paul Odhiambo Dede was charged with the offence defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006.
2. The particulars were that the Accused person on diverse dates between 3rd to 6th January 2020, at [Particulars Withheld] in Rongo Sub-County within Migori County intentionally and unlawfully caused his penis to penetrate the vagina of R. A. O. a child aged 12 years.
3. In the alternative to Count 1 the Accused was charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 2 of the Sexual Offences Act No.3 of 2006.
4. In the 2nd Count the Accused was charged with the offence of Child Pornography contrary to Section 16(1) (a) as read with Section 16(1)(g) of the Sexual Offence Act No. 2 of the Sexual Offences Act No.3 of 2006.
5. The particulars were that the accused on 23rd Day of May 2020, at Kamagambo Police Station in Rongo Sub-County within Migori County was knowingly and unlawfully found in possession of visual indecent photos depicting the image in a mobile phone Tecno pop 2 f of RAO a child aged 12 years.



6. Upon consideration of the evidence of 7 prosecution witnesses and the Appellant's sworn statement the trial magistrate found the Appellant guilty and convicted him for the principal offences in the 2 counts and he was sentenced to serve 20 and 6 years respectively in the 1st and 2nd Count to run consecutively.
7. The Appellant was aggrieved by the conviction and sentence and he preferred the Appeal herein vide Petition dated 13th December 2023 on the following grounds: -
 1. That the Honourable Trial Magistrate erred both in law and facts in misdirecting himself as per the dictates of law in sentencing the Accused as per the minimum sentences provided in law yet the same sentence is now set at the discretion of the court as the current Court of Appeal ruling as such the said sentence was excessive in the circumstances.
 2. That the Honourable Trial Magistrate erred both in law and facts when he sentenced the Appellant for defilement that happened 5 months ago and examination done in May 2020.
 3. That the Honourable Trial Magistrate erred both in law and facts by arriving at a sentence that was unconstitutional and illegal in nature and excessive in the circumstances based on a medical examination report that were conducted on the said minor five months after the said alleged defilement incidence.
 4. That the Honourable Trial Magistrate erred both in law and facts by arriving at a judgment and sentence that was not an equivocal on the evidence presented as to the confirmation of the ownership of the mobile phone make Tecno Pop 2... S/No 892540210994 I Count 2 as no ownership documents were presented before court to authenticate ownership records tying the Appellant to the said phone and count.
 5. That the said judgment was full of judicial errors and flawed in the circumstances and was a miscarriage of justice.
 6. That the Honourable Trial Magistrate erred both in law and facts by putting himself in the arena of events and relying on the totality of evidence presented before him without cautioning himself as to the veracity of the duration of time of the alleged offence.
 7. That the ruling of the Honourable Trial Magistrate goes against the rules of natural justice and the rule of law and the said judgment and sentence was prejudicial to the Accused and excessive in the circumstances.
 8. That crucial witnesses were not called to buttress the prosecution case.
8. Reasons Wherefore the Appellant prays that the sentence and judgement be set aside and the Appellant be acquitted
The appeal herein was heard by way of written submission.
9. The Appellants submissions dated 6th day of march, 2025 were to the effect that there were various flaws and teething contradictions which arose during the said trial including in the statement by the complainant in which she stated that the incidence occurred the first time on the 3rd day of January 2020 at a sugarcane plantation and later the Appellant took the complainant to his house where she met the wife and 4 children and that she slept the said house until the 6th day of January 2020 when the accused took her from his house and again defiled her in a bush before take photos of her nude frame using his phone. That later the Appellant took the Complainant and abandoned her near her



grandfather's home at kanga kasongo but when she met with her uncle she did not tell him what had transpired and neither did she tell her mother and father later on what had transpired previously.

10. The Appellant's Counsel questioned why the Complainant did not tell her parents of the said incidence even though she knew that she had been away for that long
11. Regarding PW2 Rose Awino Ouma – The clinical officer's testimony the Appellant's counsel submitted that she was not the author of the P3 and Filter forms as well as the Treatment Notes. That the Reports showed that the Complainant did not have fresh broken hymen and the Appellant was also examined and the report was negative.
12. It was submitted that PW3 Jones Owich Nyaonge testified having met the accused with the minor seeking directions to the complaints uncle home but he did not witness the Appellant committing the offence.
13. The submissions in respect to the testimony of PW4- PC. Mavoko Cythamo was that on arrest of the Appellant he recovered the subject phone but he did not know when the photos were taken and he did not know if the phone belonged to the accused person. That PW4 did not know how he knew the PIN that enabled him access the phone that was allegedly recovered from the Appellant.
14. The Appellant's counsel also submitted that PW5- CI- KIP produced forms dated 26th May 2020 and yet he said he conducted the parade on 25th June 2020 and the name of the Appellant was not appearing on the ID form.
15. For the evidence tendered by PW6- IP- Sammy Ndungu It was submitted that he did not specify the make of the phone he examined.
16. As for PW7- IP- Rosalia Jephchirchir it was submitted that her evidence contradicted that of PW4 as to who opened the Appellant's phone upon recovery. The Appellant counsel cited the holding In Crim. App. No 139 of 2001, [2003] UGCA, 6. Where it was stated that:-

“With regard to contradictions in the prosecution's case (from the evidence of the minor , the clinical officer the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”like in this case the witnesses were either said to be there and denying at the same time, while some saying the witnessed the crime, while others came after the occurrence , whilst some only heard..... “

17. The Appellant's counsel further submitted that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. He urged the court to address the issue whether PW1's, PW2, PW3, PW4 PW5 and PW6 testimonies are all contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. The Appellant's counsel also cited the holding of the definition by the Court of Appeal of Nigeria in David Ojeabuo v Federal Republic of Nigeria 6 {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA where it was stated:

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two



pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

18. It was further contended that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.
19. The court was invited to be guided with the holding in the case of *Osetola vs State* {2012} 17 NWLR (Pt.1329) 251. And also See *Theophilus vs State* {1996} 1 nwlr (Pt.423) 139 and urged to find that there are more inconsistencies in the evidence of the prosecution in the trial court to warrant the accused to be found not guilty of the said offence.
20. Based on the Appellant's submission above it was argued that medical evidence exonerated the Appellant from the serious charges which seemed fabricated against him. It was also contended that the identification parade did not have the Appellant's name as the perpetrator and he did not have been identified.
21. It was also contended that the medical examination done more than 5 months later did not produce tangible evidence that link the accused with the said offence and nothing was presented before the court through Safaricom data or registration to show that the line in question that was found in the said phone was actually registered in the accused name as the owner of the said phone and there were no photos produced that placed the accused at the scene where the photos were taken. Further that the motorbike alleged to have been in photos and used to ferry the complainant minor was never produced to link the accused to the crime.
22. The Appellant's counsel also submitted that in this case the evidence of the complainant was wanting and not in accordance with Section 124 of the *Evidence Act* and Section 19 of the *Oaths and Statutory Declarations Act* and that is why it took her over 5 months to even mention the accused person, take the police to his home or record a similar statement implicating him.
23. It was further the position of the Appellant that the evidence of the arresting officer and the investigating officer were at variance as to who had actually opened the accused phone.
24. It was submitted that suspicion however strong cannot lead to a conviction. The Appellant counsel cited the holding of the Court of Appeal in *Sawe v Republic* [2003] KLR 364 where it was stated thus:-

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."
25. The Appellant's counsel similarly submitted that the ingredients of defilement must be proved conjunctively and not disjunctively and when one of the elements cannot be adequately established based on the absence of some fact or otherwise, thereby creating any form of doubt, that doubt must go to the benefit of the Accused. That in this case the court had not talked of the indecent act and neither had the medical evidence link the accused to the offence.
26. The Appellant's counsel claimed that the judgement omitted count two and never addressed itself over the same and as such the same is wanting for all aspects and relied on the case of *Peter Ngure Mwangi vs Republic* 2014 eKLR and *Yongo Vs Republic* in page 198 eKLR in which principles applicable on defective charge was enumerated



27. The Appellant’s counsel acknowledged as held in the case of *J.W.A. v/s Republic* (2014) eKLR that pursuant to the proviso of Sections 124 of the *Evidence Act* corroboration in sexual offences is not necessary especially if the said victim is a child and seen to be telling the truth, but that in this case scenario there were some gaps and evidence was missing and as such the evidence is somehow shaky and fails the required standards to afford a conviction in the circumstances as was also held in the case of *John Gatheru Wanyoike v Republic* [2019] eKLR where the court held that:

“It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler.”

28. The Appellant’s counsel submitted that in determining this Appeal, the court has to determine whether the ingredients of the offence of defilement were proved by the prosecution namely:

- a. Whether the age of the complainant was proved.
- b. Whether there was an act to cause penetration, which was not successful.
- c. Whether the appellant was positively identified by the minor as her assailant.

29. For the 1st ingredient it was submitted that it was not in dispute. However for the second issue it was submitted that the conflicting dates and medical documents tendered could not establish the same.

30. It was also argued that the court did not delve into the second count of committing an indecent act with a child, which apparently was fatal in the judgement.... In considering the alternative charge the offended section of the law is section 11(1) of the *Sexual Offences Act*.

31. On the 3rd count it was submitted that in this scenario nothing was presented before the court to show that the line in question belonged to the accused person and was registered in his name and neither was the personnel or data from the phone provider tender evidence to support ownership of the said phone.

32. Regarding the sentence it was submitted that The Supreme Court in the *Francis Karioko Murwatetu* case (supra) set out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows:

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender;
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;



h. any other factor that the Court considers relevant.

33. It was however submitted that that Supreme Court guidelines in no way replace judicial discretion. That they are advisory and not mandatory and are geared to promoting consistency and transparency in sentencing hearings and also aimed at promoting public understanding of the sentencing process. The Appellant sought to rely on paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:
34. The Appellant's counsel concluded that due to the inconsistencies and anomalies presented by the prosecution, its case falls short of the threshold to sustain a re-opening of the same and thus the same is lacking in substance and form and the court should interfere with the lower courts judgement and set aside the entire sentence and or use its discretion in meting out the sentence.
35. The Respondent did not file submissions and therefore this court will proceed and determine the appeal based on the grounds of appeal and the Appellant's submissions.

Analysis And Determination

36. Having considered the re-evaluate the evidence and judgment of the trial court and having considered the grounds of appeal, the submissions and authorities cited this court is to determine whether the appeal has merit
37. In *Mark Oururi Mose vs. Republic* (2013) eKLR the mandate of the 1st appellate court was restated thus:-
- “.....the court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analysed 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 demeanor of the witnesses and hearing them give evidence and give allowance for that.”
38. Upon re-evaluating the record and submissions, the following issues arise:
1. Whether the offence of defilement was proved beyond reasonable doubt.
 2. Whether the offence of child pornography was established.
 3. Whether contradictions in the prosecution case were material.
 4. Whether the sentence was lawful and proportionate.
39. On whether the offence of defilement was proved beyond reasonable doubt.
40. The elements of defilement are:
- (iii) identification of the perpetrator.
 - (ii) proof of a sexual act; and
 - (i) proof of the age of the complainant;
- The complainant's age was established at 12 years and is not in dispute.
41. As to the alleged sexual offence medical examination conducted by PW2 was undertaken 5 months after the alleged event and it was established that the complainant's hymen was broken though not fresh. The complainant explained that the Appellant carried her on his motorbike but did not take her to her destination as he promised. That instead he took her round from 11.00am to 6.00pm when



he offered to go with her to his home to spend the night and then take her home the following day. But before taking her to his home he took her inside mature sugarcane plantation where he defiled her while threatening to cause her harm using a nail like object that was sharpened if she raised alarm. That after defiling her he took her to his home where she met his wife and 4 children. The Complainant told the Appellant to take her home on 2 consecutive days and it is on the 3rd day that he accepted to take her home and they left at 7am using the Appellant's motorbike but he took her to the bush with tall trees and sugarcane and away from the road and defiled her again. That after defiling her he instructed her to pull up her T- shirt so that he could take photographs of her naked and she complied. She said the Appellant used his phone to take the photographs. She said the motorbike was parked in the scene. She identified the photographs as well as the phone that the Appellant used in court as prosecution exhibits.

42. Although the Complainant did not tell her uncle or her mother what had transpired, when the Appellant was arrested for violating Covid-19 regulations his phone was found to have nude pictures of a minor. Investigations led to tracing of the said minor who identified the Appellant on parade as the rider who took her round and round until it was late and later took her to sugarcane plantation and defiled her on the 1st day of their encounter and on the day that he was taking her home at her insistence. The delay in reporting the offence committed by the Appellant cannot be faulted on the minor as it is obviously out of fear that she would be harmed by the adult who threatened to kill her if she reported to anyone. The Complainant was in the Appellant's home for 3 days and she could not have failed to identify him being he went round with her the entire day on the 1st day and stayed in his home for 3 days before he took her early in the morning and again defiled her before abandoning her near her grandfather's home. The Appellant's wife was also interrogated and she identified the Complainant as one of the 2 girls that had stayed in her home after being brought by the Appellant.
43. PW3 also saw the Appellant with the Complainant and they talked when he was asking for directions to the Complainant's grandfather's home. Later PW3 even gave him money when he claimed the girl had disappeared without paying fare.
44. Although the Appellant complained that the trial court did not record reasons for believing the complainant's evidence as required by Section 124 of the *Evidence Act* this court upon perusal of the judgment of the Trial Magistrate at pages 13 and 14 confirmed that the Trial Magistrate gave reasons why he believed the Complainant whose testimony was consistent in so far as how the incident took place including taking nude photographs of her with his phone even though the offence was committed 5 months prior to the Appellant's arrest.
45. The arrest of the Appellant and recovery of the phone which had nude photographs of the minor taken together with the finding that the minor's hymen was broken and her testimony that the Appellant abducted her and defiled her on 2 occasions when she was in his custody makes this court find that the prosecution proved the occurrence of the alleged sexual act and the Appellant's participation beyond reasonable doubt.
46. To prove the offence in count 2, the prosecution had to show that the Appellant knowingly possessed indecent visual material involving a child. The alleged device, a Tecno Pop 2F mobile phone, was recovered from the Appellant. Upon recovery of the phone by PW4 he said the same was not switched off and when the Appellant refused to hand it over he took it by force and found it had nude photos of a minor whom they feared might have been killed. The Appellant was interrogated and he led the police to where he left the girl and also told the police that one Nyaonge knew the girl. When the said Nyaonge saw the photographs in the Appellant's phone he identified the complainant as his cousin and he led police to his uncle's place and in turn his uncle took them to the girl's home. The complainant was traced and the clothes she was wearing on the material day and the bag she was carrying were recovered.



The exhibits recovered from the girl were seen in the photograph recovered from the Appellant's phone.

47. There was clear proof of ownership and possession of the phone used to take nude photographs of the minor and this court finds that the essential elements of the offence in count 2 were met.
48. On alleged inconsistencies and contradictions on the prosecution evidence this court finds that PW4 on the Appellant recovered the phone and saw the nude photographs of the child and that is when he forwarded the same to DCI Headquarters for forensic examination. There is therefore no contradiction between their evidence as they handled the phone at different times for different purposes. This court does not find any material contradiction and/ or inconsistency that would strike at the heart of the prosecution case and thereby make it unreliable.
49. On whether the sentence was harsh and excessive the trial court imposed the statutory minimum sentences of 20 years and 6 years imprisonment respectively, to run consecutively. The offences in the 2 counts arose from the same transaction, and ordinarily the sentences ought to have been ordered to run concurrently. However, the offence the Appellant committed is so barbaric that a stiffer sentence would be appropriate as he subjected a vulnerable child the age of his own children to a heinous crime during the COVID-19 period exposing her not only to infection of the virus but also exposing her to danger of being harmed by himself or other likeminded criminals who were roaming wantonly with malicious motives during the period in question. This court finds the conviction and sentence are safe and the same is upheld. This appeal has no merit and is dismissed.

Right of appeal 14 days explained.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 30TH DAY OF OCTOBER, 2025.

ANNE ADWERA ONGINJO

JUDGE

In presence of; -

Mr. Oimbo for the Respondent / State

Mr. Ongoso Advocate for the Appellant

Appellant- present in person

Maureen- Court Assistant

