



**Onyango v Republic (Criminal Appeal E034 of 2023)  
[2025] KEHC 15315 (KLR) (Crim) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15315 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E034 OF 2023  
AM MUTETI, J  
OCTOBER 29, 2025**

**BETWEEN**

**JOSEPH OBANDO ONYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence in a case of indecent acts with 2 children (i.e., two counts) contrary to section 11(1) of the Sexual Offences Act No.3 of 2006 at Makadara law Courts, judgment by Hon. E. Kanyiri (PM) on 23/09/2022)*

**JUDGMENT**

1. The appellant in this matter was tried in Chief Magistrate's Court in Makadara in a Sexual offence case No. 141 of 2020, he was convicted and sentenced to serve 15 years imprisonment in Count 1 and Count 2 by Hon. E. Kanyeri Principal Magistrate on 9<sup>th</sup> December 2022.
2. The appellant has appealed on both conviction and sentence in respect of both counts and set out the following amended grounds of appeal filed on 27<sup>th</sup> July 2023:-
  - i. That the Hon. Trial Magistrate erred in matters of fact and law as the prosecution did not establish a prima facie case contrary to Articles 25(c), 27(1), 47(1), 50(1), 157(11), and 159(2) (e) of *the constitution*, s. 362 CPC, and s.107 of the *Evidence Act*.
  - ii. That the magistrate erred in fact and law by awarding a sentence without due regard to the Judiciary sentencing policy guidelines.
  - iii. That the magistrate failed to factor in character evidence, which is a crucial component of the trial process.



- iv. That the magistrate erred in fact and law by awarding a disproportionate sentence as the appellant is an aged person
3. The appellant filed submissions whereas the respondent filed grounds of opposition dated 31<sup>st</sup> May 2023. The grounds of opposition are as follows:
  - i. That the Appeal is misconceived and unsubstantiated.
  - ii. That the Appeal is an abuse of the court process since the Appellant was properly convicted before the trial Court and the prosecution did discharge its burden of proof beyond reasonable doubt.
  - iii. That the Appeal lacks merit and the same should be dismissed in its entirety.
4. The appellant in this case though challenging the conviction and sentence has missed some very pertinent issues that the court has suo moto noted. The prosecution counsel does not appear to have closely scrutinized the record either when she prepared the grounds of opposition. The court will determine the appeal on the basis of those matters of law as it is clear that they go to the root of the matter.
5. The appeal is one that is for allowing outrightly purely on matters of law based obvious errors committed by the trial magistrate for which the accused and the state cannot be blamed.
6. In order to demonstrate the errors on the face of the record, it is important to reproduce the following are excerpts of the judgment and sentencing ruling:-

#### Judgment

“From my summary of the evidence and analysis of the same and I am satisfied that:

- (a) That there was no penetration of the genitalia of the complainants, namely the vagina by the accused's genitalia, namely the penis.
- (b) That the prosecution has proved that it is the accused that was responsible for committing an indecent act with one IAO. and not EMI, therefore, find that there was sufficient evidence to prove that there was contact between the accused penis and the complainant IA. vagina. (emphasis mine)
- (c) That the prosecution has proved that it is the accused that was responsible for this offence as enumerated under b above having been positively identified by the complainants.

In the circumstances, I am satisfied that the prosecution has failed to prove count I and its alternative charge and II. I find that prosecution has proven all the three ingredients of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 as against IAO beyond all reasonable doubt. I, therefore, find the accused, guilty of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 against IAO and I convict him of the said offence accordingly and as per provisions of sections 215 of the Criminal Procedure Code.”

7. The conviction by the learned Hon Magistrate was for the Offence of Committing an indecent act with a child and that was in respect of Count II only. The magistrate having found that the prosecution



had not proved Count I and its alternative Count ought to have immediately acquitted that appellant of that count. However, as is clear from the excerpt above, there was no order made acquitting the appellant in respect of that Count.

8. The omission was fatal rendering the judgment incompetent in that respect as it did not comply with the provisions of Section 169 of the Criminal Procedure Code. The section provides that:-
- (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
  - (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code (Cap. 63) or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
  - (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty (emphasis mine).

The court having failed to order the acquittal of the appellant in respect of count I and its alternative violated the above provision of the law thus the judgment is for setting aside to that extent.

9. The error by the court in the judgment must have then led to the error in sentencing.

### **Sentencing**

“The accused person was charged with two under counts of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 29th of May 2020, at Kariobangi north estate within Nairobi County, unlawfully and intentionally caused his penis to penetrate the genital organ of I. AO a child of 10 years. Under count II the accused 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. The particulars of the offence are that on the 29th of May 2020, at Kariobangi north estate within Nairobi County, unlawfully and intentionally caused his penis to penetrate the genital organ of EMN a child of 9 years. The accused was convicted for the two counts of defilement vide this court's judgement dated the 23rd of September 2022. (emphasis mine)

The matter now comes up for sentencing. Having considered all the factors as enumerated above the accused is sentenced as follows:

- A) Under count I the accused is sentence to serve 15 years imprisonment.
- B) Under count II the accused is sentenced to serve 15 years imprisonment.

Right of appeal 14 days duly explained.

Dated, Signed & Delivered This 9th Day Of December 2024.

E. Kanyiri

Certified true Copy of the Original



10. The learned Honorable magistrate grossly erred by sentencing the appellant for an offence that she had found had not been proved. The sentence in respect of Count I cannot therefore be allowed to stand. The same is quashed and set aside.
11. Further, the conviction that was entered in the judgment in respect of Count II was for committing an indecent act with a child but not defilement.
12. The learned Hon. Magistrate fell into error by pronouncing in her Sentencing ruling that the appellant had been convicted for the offence of defilement yet no such conviction had been entered.
13. The upshot of the above analysis is that this court is duty bound under Section 354 of the Criminal Procedure Code and remedy the situation. The Section provides;-
  - (1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.
  - (2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.
  - (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
    - (a) in an appeal from a conviction—
      - (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or (emphasis mine)
      - (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
      - (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
    - (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;
      - (bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;
    - (c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re- hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;



- (d) in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.
- (4) Subject to subsection (5), an appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, at the hearing of the appeal:
- Provided that where the appeal is on some ground involving a question of law alone, he shall not be entitled to be present except with the leave of the High Court.
- (5) The right of an appellant who is in custody to be present at the hearing of the appeal shall be subject to his paying all expenses incidental to his transfer to and from the place where the court sits for the determination of the appeal:
- Provided that the court may direct that the appellant be brought before the court in a case where in the opinion of the court his presence is advisable for the due determination of the appeal, in which case the expenses shall be defrayed out of moneys provided by Parliament.
- (6) Nothing in subsection (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case.
14. The appeal therefore succeeds and the Conviction and sentence is set aside. However, this court has considered whether in the circumstances the appellant should be set free or an order for retrial must result.
15. The view of this court is that an order for a retrial is merited. It is clear in the mind of the court that by ordering a retrial, the court will not in any way be aiding the prosecution to fill gaps in the evidence. The offence was committed barely five years ago and considering the nature of the case, the witnesses should not be hard to get.
16. The court is guided by the case of *Fatehali Manji vs. The Republic*[1966] E.A. on retrial where the court had this to say:-
- “In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”(emphasis mine)
17. In this case, the view of the court is that the interests of justice require that a retrial be ordered. The age of the victim and the traumatizing nature of the offense and its long-term effect on the victim are matters that this court has taken into consideration. The original trial was undoubtedly defective and the victim should not suffer an injustice courtesy of mistakes by the court.
18. In the end the appeal succeeds and a retrial is ordered.
19. The file shall be placed before the Chief Magistrate Makadara for allocation to a magistrate for trial other than the one who handled it.
20. To avoid exposing the appellant to the risk of inertia in prosecution, this court directs that the matter should be heard on a priority basis and concluded within 1 year of this judgment.



21. The matter shall be mentioned before the CM's Court Makadara on the 6<sup>th</sup> November 2025 for retrial.

22. It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 29<sup>TH</sup> day of OCTOBER 2025.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Habiba

Ms Ogega for the State

Appellant present in Kamiti Prison

