



**Onyiego v Republic (Criminal Appeal E119 of 2024)  
[2025] KEHC 15125 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15125 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E119 OF 2024  
JK NG'ARNG'AR, J  
OCTOBER 28, 2025**

**BETWEEN**

**INNOCENT ONYIEGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisii (W. Kugwa, RM) delivered on 20th November 2024 in Criminal Case (SO) No. E004B of 2022)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 4<sup>th</sup> February 2022 at Nyaura location Kisii central district within Kisii County, the appellant intentionally caused his penis to penetrate the vagina of S.M.M, a child aged 3 years old. He also faced an alternative count of committing an indecent act with a child contrary to section to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and place, the appellant intentionally touched the vagina of S.M.M. with his penis.
2. The appellant was arraigned before the trial court. He entered a 'no guilty' plea to both counts. After a full trial, the appellant was convicted on the main charge. He was commuted to a 10-year custodial sentence.
3. The appellant is dissatisfied with those findings. He filed his undated petition of appeal. He raised seven grounds disputing the findings of the learned magistrate. He argued that the prosecution failed to discharge its burden of proof to the required standard. He pointed out that the evidence of the prosecution was marred with contradictions and inconsistencies. He lamented that he was sentence against the dictates of Article 50 (2) (j) & (h) of *the Constitution*. Finally, he expressed dissatisfaction



with sentence stating that it was harsh and excessive. In view of the foregoing, the appellant prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside.

4. The appeal was heard on 10<sup>th</sup> September 2025. Parties elected to rely on their written submissions to persuade this court to find in their favor. However, when I retired to write this judgement, I was only in receipt of the respondent's submissions. It opposed the appeal. It filed written submissions dated 22<sup>nd</sup> August 2025 through Prosecution Counsel Cletus Akelo. It complained that the trial court ought to have found that the appellant committed the offence of defilement because partial penetration qualified the ingredient of penetration in line with section 2 of the *Sexual Offences Act*. Be that as it may, the offence of committing an indecent act with a child was proved beyond reasonable doubt. It prayed that the appeal be dismissed.
5. I have considered the submissions, examined the record of appeal and analyzed the law. This being a first appeal, the Court must re-evaluate the evidence and make its own findings. See [Bethwel Wilson Kibor v Republic [2009] KECA 143 (KLR)].
6. The evidence on record before the trial court is as follows: PW1 S.M.M.'s witness statement dated 7<sup>th</sup> February 2022 was adopted by the trial court as the minor could not testify. She also stated that on 4<sup>th</sup> February 2022, she was playing with her friend Itesi and the accused whom she referred to as Kaino.
7. PW2 Doris Nyaange Sangara testified that on 4<sup>th</sup> January 2022 at 6:00 p.m., the complainant, who is her daughter came home crying. She was 3 years 8 months old when the offence was committed as per her birth certificate. She was born on 27<sup>th</sup> September 2018. That evidence confirms beyond reasonable doubt that the complainant was a child within the meaning set out in section 2 of the Children's Act.
8. PW2 continued that on 5<sup>th</sup> January 2022, the complainant informed her that she reeled from pain in her genitals. She told her that Kaino, the appellant herein, who was her cousin and neighbour, did something wrong to her on her private parts. PW2 found semen, a greyish/cream fluid and her pants were dirtied by the same fluid. She also observed that her private parts were reddish.
9. PW2 took the complainant to Crista Mariane Hospital. The minor was also taken to Kisii Teaching and Referral Hospital. Thereafter, the matter was reported at Kisii police station. The appellant was later arrested. According to PW2, the appellant admitted the offence when she asked him. She also stated that the appellant and her husband picked a letter from Crista Mariane.
10. PW3 Daniel Nyameino, a clinical officer attached to Kisii Teaching and Referral Hospital, testified that the minor was treated at Kisii Teaching and Referral Hospital and Crista Mariane Hospital. He testified that the complainant's vulva was abnormal. She also had white blood cells and pus cells and was treated. According to PW3, that was indicative of possible friction on the vagina. Her hymen was intact and there were no lacerations on her labia. He produced the complainant's treatment notes, P3 form, PRC form and clinical card.
11. PW4 PC Ryne Juma, attached to Sengera Police Station confirmed that the report was made at Kisii police station on 5<sup>th</sup> February 2022. It was reported by PW2 in the company of PW1. On interrogating the witnesses, PW4 formed the opinion that it was the appellant who committed the offence after luring him into his house.
12. At the close of the evidence of the prosecution, the trial court formed the opinion that the appellant had a case to answer. He was placed on his defence. His sworn evidence was that vigilante members of the community arrested him on the orders of the chief. He was taken to the chief and later escorted to Kisii police station. He was later arraigned to answer to the charges preferred against him. He also



confirmed that his alias was Kaino. Though admitting that he knew the complainant as his neighbour, he maintained his innocence.

13. In order for the prosecution to succeed, it must establish beyond reasonable doubt the age of the complainant, penetration and identity of the perpetrator; the ingredients to the offence of defilement. On the complainant's age, her birth certificate mathematically confirmed that as at the time of the offence, the minor was 11 years, six months old. Her age was corroborated by her mother. I therefore find that the age of the complainant was proved beyond reasonable doubt.
14. On penetration, PW4 testified that the complainant's vulva was abnormal. She also had white blood cells and pus cells. That was indicative of possible friction on the vagina as her hymen was intact and there were no lacerations on her labia. The trial court formed the opinion that based on that evidence, no penetration was established. However, the court was of the view that indecent act, in line with section 2 of the Sexual Offences Act, was proved beyond reasonable doubt.
15. Regarding the identity of the perpetrator, it is apparent that the complainant did not testify. PW2 only gave an account of what she was told which amounts to hearsay evidence. Though the prosecution intended to rely on PW1's recorded statement, the same was not adduced before the trial court. It is not in the record before this court. In the circumstances, it is not clear if the appellant was the perpetrator of the offence. While it is not in doubt that the complainant suffered friction on her private parts, it would be foolhardy for this court to make a conclusion that the evidence rendered the conviction safe.
16. I am not persuaded that the appellant was the perpetrator on account of the absence of the complainant's evidence. That left a serious gap that left the evidence of the prosecution unreliable as it stood. For those reasons, I find that the prosecution failed to prove beyond reasonable doubt that the appellant was the perpetrator. Accordingly, this appeal must succeed. The conviction against the appellant is quashed and the sentence is set aside. I hereby direct the appellant to be immediately released from police custody unless otherwise lawfully held.

It is so ordered.

**JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....

**HON JULIUS K. NG'ARNG'AR**

**JUDGE**

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Appellant present

Koime for the Respondent

