



**Onchengo v Republic (Criminal Appeal E081 of 2024)
[2025] KEHC 14910 (KLR) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E081 OF 2024
JM NANG'EA, J
OCTOBER 14, 2025**

BETWEEN

BRIAN ONCHIRI ONCHENGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Nakuru (Hon. E. S. Soita - SRM) delivered on 26/08/2024 in Sexual Offence case No. E169 of 2021)

JUDGMENT

1. The Appellant is dissatisfied with the Judgment of the above stated lower court before which he was charged with a main offence of defilement contrary to section 8 [1] as read with Section 8 [2] of the *Sexual Offences Act* No. 3 of 2006. In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11[1] of the same Act.
2. The particulars of the main charge are that on 27/11/2021 at Kapkures Estate in Nakuru West Sub County Nakuru County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of M.J., a child aged 2 [two] years. It is alleged in relation to the alternative charge that on the same date and at the same place he intentionally and unlawfully touched the child's buttocks using his penis.
3. The Appellant refuted the charges.
4. After a full hearing, the trial court convicted the Appellant of the main charge of defilement pursuant to Section 215 of the Criminal Procedure Code and sentenced him to life imprisonment. The court's Judgment is silent on the alternative charge.
5. The grounds of appeal as per Petition of Appeal dated 11/10/2024 may be condensed as follows:
 - a. That the learned trial Magistrate erred in law and fact by convicting the Appellant on the basis of inconsistent prosecution evidence.



- b. That the learned trial magistrate generally erred in law and fact by convicting the Appellant against the weight of the evidence.
 - c. That the learned trial magistrate erred in law and fact by rejecting the Appellant's alibi defence, and generally failing to consider his defence.
- and
- d. That the learned trial magistrate erred in law and fact by meting out a life sentence against the Appellant.
6. The Appellant therefore prays that the Appeal be allowed and the sentence imposed against him quashed.
 7. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses [see the case of *Okeno v Republic* [1972] EA 32].
 8. It would appear that the alleged child victim did not testify, apparently owing to his tender age.

The Prosecution Evidence before the lower court.

9. PW1 is M.J.'s mother. She testified that on 27th November 2021 at around 7:00 p.m. she was cleaning her utensils at home as her children played. The Appellant who is their neighbour visited and left with M. J. She was not worried as the child used to visit him in his house. Later, she went for the child as she also looked for food for the family. When she got the Appellant's door, she found it locked and lights were off. She could hear very loud music from the house. Despite knocking the door several times, it was not answered.
10. PW1 husband [PW2] also arrived and demanded of the Appellant to open the door, and he obliged. They saw M.J. standing inside wailing with his trousers down to the knees level. According to PW1, PW2 noticed that the child was bleeding from the anus. With help from their neighbours they arrested the Appellant and handed him to Kapkures Police Station.
11. PW1 further testified that M.J. was taken for medical examination at Nairobi Women Hospital. She identified the child's medical examination report dated 30/11/2021. The witness also tendered M.J.'s Birth Certificate showing his date of birth as 19/09/2019, and so he was slightly over 2 [two] years old at the material time.
12. PW2 confirmed PW1's testimony. He told the court that he had arrived home that evening and sent PW1 to fetch M.J. from the Appellant's house to eat some food he had bought for him. PW1 did go to the Appellant's house where he could hear her knocking the door with no response. He was concerned and decided to join his wife and knocked the Appellant's door hard to force it open. The Appellant opened the door and the child's parents saw him inside the house. When PW2 helped him pull up his trousers which was at the knees, he noticed that he was bleeding from the anal region. They and other neighbours arrested the Appellant and escorted him to Kapkures Police Station. The child was also taken for medical attention as stated by PW1.
13. Dr. Njoroge Ruku of Nairobi Women's Hospital, Nakuru, testified to receiving M.J. at the medical facility on 27th November 2021 at around 10:00 a.m. On examination, his anus was found to be swollen, reddish and tender. There were bruises and blood at the 6 and 12 O'clock position of the organ. It was concluded that M.J. suffered blunt force trauma to the anus. The medical examination



report dated 30/11/2021 showing the observations together with other relevant medical records of the child were tendered and admitted in evidence.

14. PW4 and 5 [police officers] confirmed re-arresting the Appellant from members of the public on 27/11/2021. PW6, the Case Investigating Officer, told the court that she received a short the alleged victim was wearing at the material time from his mother. The short was exhibited in support of the prosecution case. The child could not communicate with the Officer well. PW6 further stated that the child was at the Police Station when the Appellant was handed in and allegedly pointed at him as the culprit.

The Defence Evidence.

15. The Appellant was put on his defence to the charges. Giving sworn evidence, he testified that he had arrived home in the material evening from work feeling very tired. He went to sleep with his radio volume high, without locking his door. About 10 minutes later he heard knocks on the door. Then his neighbour's child entered the house crying. One of the parents of the child was outside and started quarrelling the Appellant and incited his other neighbours to attack him. The parent, the child's father, was claiming that he was seducing his wife.
16. The Appellant pleaded innocence saying that M.J. was a friend of his child and used to go to his home.
17. The Appellant called one Peter Omweri [DW2] as his witness. He told the court he was a resident of Nyahururu but in the period material to the case he was living together with the Appellant at Kaptembwa. In the evening in question, he saw the Appellant being assaulted by area residents and sought to find out why. He learnt that he was being accused of assaulting the subject child whose parents were their neighbours. DW2 then entered their house but did not see blood anywhere. The Appellant's clothes were not also blood stained.
18. The trial court was satisfied that the prosecution evidence proved penetration of M.J.'s anus based on medical evidence and that the Appellant was culpable. The learned trial magistrate accordingly convicted and sentenced him to life imprisonment.

The Parties' Submissions in the Appeal.

19. The Prosecution and Defence Counsel filed written submissions. The Appellant's Advocate submits inter alia that the prosecution evidence was insufficient to convict his client. The prosecution is faulted for failing to call crucial witnesses, for instance neighbours of the parties who were said to be present during the Appellant's arrest. According to the defence, this weakens the prosecution case and the English Case of *Woolmington v DPP* [1935 AC 462] is cited in support of this submission.
20. The Appellant further contends that he put up an alibi defence which the prosecution failed to disprove. He also complains that the trial court did not generally consider his defence. Case Law in *Wang'ombe v Republic* [1980] KLR 149 is relied upon for the proposition that the burden is on the prosecution to disprove in alibi defence and that the court is obligated to consider a defence put forth by the accused and either accept or reject it with reasons.
21. The Prosecution Counsel on his part is convinced that the prosecution evidence proved the charge against the Appellant beyond reasonable doubt and he was therefore rightly convicted and sentenced. The court is told that although M.J. did not himself testify, his mother gave evidence on his behalf as an intermediary which is lawful [See the Judicial determination in *Kipkoech v Republic* [HC 2024] Counsel cites and relies upon in this regard].



22. According to the Prosecution Counsel the injury noted in the subject child's genitalia evidences penetration as observed in *George Hezron Mwakio v Republic* eKLR and *Mark Oiruri v Republic* Criminal Application No. 295 of 2012 [2013] eKLR also referred to by Counsel.
23. The Prosecution Counsel continues to submit inter alia that the fact that M.J. was found injured in the Appellant's house proves, in the absence of an explanation, that he was the culprit.
24. It is accordingly submitted on behalf of the Republic that circumstantial evidence herein proves the Appellant's culpability, reference being made to the often quoted case of *Sawe v Republic*. In answer to the defence claim of inconsistency or contradiction in the prosecution evidence, the prosecution thinks that any such inconsistencies are not so material as to affect credibility of the evidence [see *Republic v Wanja* [2012] eKLR alluded to as supporting this legal position].

Analysis and Determination.

25. I will consider all the grounds of appeal together. It is indisputable based on PW 1's oral evidence and the Birth Certificate tendered that M.J. was 2 [two] years old or thereabouts at the material time. He was therefore a child of a very tender age.
26. In convicting the Appellant, the learned trial magistrate believed M.J.'s parents' testimony as corroborated by the medical evidence that penetration was proven. The lower court was also convinced that the Appellant was the culprit having been found with the child in his house.
27. Section 2 of the *Sexual Offences Act* defines penetration as;

“partial or complete insertion of the genital organs of a person into the genital organs of another person”.

Genital organs include the whole part of male and female genital organs including the anus.
28. Section 143 of the *Evidence Act* further provides;

“No particular number of witnesses are required to prove any given fact”.

Indeed evidence is not counted but rather it is weighed. Even the evidence of one witness may be sufficient to prove a fact if the evidence is credible [see case law in *Benjamin Mbugua Gitau v Republic* [2011] eKLR.
29. It is necessary to appreciate the nature and import of circumstantial evidence which applies herein, there being no eye witness to the defilement.
30. In the case of *Ahamad Abolfathi & Another v Republic* [2018] eKLR, it was elaborated that;

“Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.”
31. In a much older case [*Republic v Taylor, Weaver & Donoram* [1928] Cr. Application R 21], it was observed that;

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that is circumstantial.”



32. In *Sawe v Republic* [2003] KLR 364 relied upon by the Prosecution Counsel, it was stated that circumstantial evidence must satisfy three tests, namely:-

“the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

33. As in the case of *R v Kipkering Arap Koskei* [1949] EACA 135, the prosecution must also show that there existed in-culpatory facts that were incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypothesis other than that of guilt.

Determination.

34. Like the trial court, this court is satisfied that the prosecution evidence not only proves penetration of M.J.'s anus but also shows beyond reasonable doubt that the Appellant was culpable. The Appellant's defence that the charges were actuated by malice because PW2 was alleging that he was seducing his wife appears to be an afterthought given that the claim did not arise during cross-examination of the prosecution witnesses. In fact, the Appellant hardly cross-examined PW2.

35. It is not disputed that the child was at the Appellant's home at the material time, further implicating the Appellant in the criminal act. The alibi defence is irrelevant in the circumstances. The child's parents' evidence not only as intermediaries but as actual witnesses is credible having been corroborated by medical evidence. I see no inconsistencies or material inconsistencies in the prosecution evidence.

36. From the lower court's judgement, the Appellant's defence does not seem to have been considered. Notwithstanding, this didn't occasion prejudice to him as the court still reached the right decision in this court's view. The circumstantial evidence herein unerringly point only to the guilt of Appellant.

37. As regards the complaint as to the sentence imposed, the same is lawful. Section 8[2] of the *Sexual Offences Act* No. 3 of 2006 is in the following terms;

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

38. The sentence meted out by the lower court is thus lawful. All the grounds of appeal fail in the premises, with the result that the appeal is dismissed in its entirety.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF OCTOBER 2025

J. M. NANG'EA,

JUDGE.

In the presence of:

The Prosecution Counsel, Mr Wakasyaka

The Appellant's Advocate, Mr Siah

The Appellant, present in person

The Court Assistant [Jeniffer]

