



REPUBLIC OF KENYA



KENYA LAW
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**GOO v Republic (Criminal Appeal E039 of 2022)
[2025] KECA 1875 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1875 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E039 OF 2022
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
NOVEMBER 7, 2025
CORAM: ASIKE-MAKHANDIA, OMONDI & MUCHELULE, JJ.A.)
CRIMINAL APPEAL NO. E039 OF 2022**

BETWEEN

GOO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment and decree of the High Court of Kenya at Kisumu (J. R. Karanjah, J.) dated 26th June 2018 in HCCRA No. 59 of 2017)

JUDGMENT

1. This is a second appeal, the appellant, Geoffrey Otieno Okoth, having been convicted by Oyugi Magistrate's Court of defilement contrary to section 8(1) as read with 8(2) of the *akn ke act 2006 3 Sexual Offences Act* and sentenced to a life imprisonment, and his appeal having been dismissed by the High Court at Kisumu. The particulars of the offence were that on 13th August 2018 at Kanyagwara Village, Kasewe Location in Rachuonyo East District in Homa Bay County the appellant had intentionally and unlawfully caused his penis to penetrate the vagina of D.A.O. (name withheld), a child aged 2 years.
2. The evidence on which the appellant was convicted was that on 13th August 2016 at about 5.00pm. James Otieno Ouma (PW
2) was called by his brother's daughter A.A.¹ (PW 1) who was aged 12 because the appellant was defiling his (PW2's) two-year- old daughter in the brother's house. He went and found the child emerging from the house with blood and faeces coming from her private parts. He found the appellant in the house. He called for help of the village elder and the appellant was arrested



and taken to police station and child examined at Othoro Level 4 Hospital by Clinical Officer Samwel Omondi (PW 5). The child was found with swelling of her inner vagina, with tear on the anterior of the vagina. Her hymen was broken. The appellant was examined. He had no injury to his genitalia but was HIV positive.

3. PW 1 testified that she was at home with her sister R.A² (PW 3), aged 8 years, and their cousin who was the complainant. The appellant came drunk and lay on the floor of their house. He held PW 3 and begun to strangle her. She managed to escape. He then held the complainant between his thighs while having removed her clothes, and his trousers were lowered. He was sexually penetrating the child with his penis, while she cried and bled and faeces was coming from her parts. PW 3 peeped through the window to see what the appellant was doing. She ran to inform her grandmother.

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4. The appellant denied the charge in sworn defence and stated that he had been forced to drink to the extent that he had slept. He was found her by complainant's brother who beat him with a panga. He did not call any witnesses.
5. The trial court considered the prosecution and defence testimonies and determined that the appellant had defiled the child, convicted and sentenced him. On appeal, the appellant's grounds were that the clan elder had not been called; the clinical officer's evidence did not link him with the offence; the witnesses had contradicted themselves; and that his trial had been unfair because he had not been supplied with proceedings.
6. The High Court dismissed the appeal, finding that the appellant had been caught in the act of defiling the complainant by the prosecution witnesses, PW 1 and PW 3; that his defence had been properly rejected.
7. In the appeal before us, the grounds were that the appellant was intoxicated to the extent that he was not aware of himself; the High Court had not properly re-evaluated the evidence before dismissing the appeal; he was sickly during the trial and not able to properly prepare his defence and his plea to have the case tried de novo had not been allowed; he was aged 17 at the time of the offence; and that the trial court had failed to exercise its discretion in sentencing him to serve life in jail.
8. Our jurisdiction on second appeal has been circumscribed. In *David Njoroge Macharia -vs- Republic* [2011]eKLR, this jurisdiction was set out as follows:-

“A second appeal must be confined to matters of law only. We also state that where possible the Court should not interfere with concurrent findings of fact by the two lower courts unless there are compelling reasons to do so.”

9. When the appeal came for hearing before us, the appellant was not represented but had filed written submissions on which he fully relied. Learned prosecution counsel Ms. Opiyo appeared for the State to oppose the appeal. She equally relied on her written submissions.
10. The appellant submitted that the victims age was not proved; that he was a stranger to the proceedings before the trial court; he was not informed of his right to be represented by counsel; and that the incident had occurred in the midst of a drunken orgy that was hard to unravel.
11. Learned counsel Ms. Opiyo pointed out that the appellant had raised several new grounds on second appeal when this Court was only required to deal with the issues of law, not facts. Nonetheless, she submitted, the child's age had been proved by the production of her baptismal card, that she was



two years old. Secondly the appellant had been caught in the act by PW 1 and PW 3. Regarding the appellant's sickness during trial, it was submitted that the trial had been adjourned to a later date.

On the question of sentence, it was submitted that life imprisonment was the mandatory minimum sentence for the offence.

12. We agree with the State that the appellant cannot be allowed to raise grounds that he did not raise in the High Court and on which there was no determination. Other than the complaint that the High Court did not properly re-evaluate the evidence before dismissing his appeal, the other grounds were new. He did not inform the High Court that he was 17 at the time of the offence, and neither did he seek to be legally represented during trial. He did not complain that he was sick during the trial or that the sentence was improper. Finally, he did not make intoxication a ground of appeal in the High Court.
13. On whether there was sufficient evidence on which the High Court, after reconsidering the case, found that he had been properly convicted, we hasten to agree with the concurrent findings by the two courts that the appellant was caught in the act of defiling the complainant. PW 1 and PW 2 found him holding the child between his thighs. His trousers were lowered. The child's clothes had been removed. The child was crying while bleeding from her private parts, and was passing out faeces. This was a two-year-old child as testified by her father (PW 2) who produced her baptismal card in support. The incident was at 5.00pm. The evidence was overwhelming.
14. The sentence imposed was lawful under section 8(2) of the *akn ke act 2006 3 Sexual Offences Act*.
15. We consequently dismiss the appeal in its entirety because it is not merited.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 2025

ASIKE MAKHANDIA

JUDGE OF appeal

A.O.MUCHELULE

JUDGE OF APPEAL

