Orango v Republic (Criminal Appeal E063 of 2024)
[2025] KEHC 15941 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15941 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E063 OF 2024

DK KEMEI, J

NOVEMBER 7, 2025

BETWEEN

GEORGE OTIENO ORANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

(Arising from the judgment of Hon. E. Tsiminjero (S.R.M) delivered on 29th November 2024 at Ukwala Principal Magistrate's Court in Criminal case S.O No. E002 of 2024)

JUDGMENT

1. The Appellant herein George Otieno Orango was charged before the trial court 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 were that on 13th January 2024 in Simenya village in Ugunja Sub-County within Siaya County intentionally caused his penis to penetrate the vagina of M.A.A a child aged 15 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 13th January 2024 in Simenya village in Ugunja Sub-County within Siaya County intentionally and unlawfully touched the vagina of M.A.A a child aged 15 years with his penis.

3. The matter proceeded to full trial in which the Respondent called six witnesses in support of its case while the Appellant testified for himself and did not call other witnesses. The trial court later convicted the Appellant and sentenced him to 20 years' imprisonment.

4. Aggrieved by the conviction and sentence, the Appellant has since appealed to this court on the following grounds of appeal:

i. That the trial magistrate erred in law and fact by failing to consider that the sentence imposed was very excessive and weighty and that the same should be replaced with a less severe punishment.

ii. That the trial magistrate erred in law and fact by failing to consider that the Appellant is a first offender and thus ought to have been given a less severe punishment.

5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court so as to arrive at its independent findings and conclusion. (See Okeno vs. Republic [1972] EA 32). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to give due allowance in that regard as was held in Ajode v. Republic [2004] KLR 81.

6. In determining this appeal, it must be borne in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden of proof was on the Respondent to prove the charges against the Appellant. This being a criminal case, the standard of proof is one of beyond any reasonable doubt as held in Woolmington Vs Dpp [1935] AC 462 and Sawe versus Republic [2003] Eklr.

7. The prosecution called a total of six witnesses in support of its case.

8. The Complainant, Mary Ann Achieng (PW1) testified that she is 14 years and born in the year 2009. She stated that she left her home on 25/12/2023 and went to where the Appellant worked as he had invited her. That she stayed with him until 13/01/2024 when she returned home. That upon her return, her mother (PW2) took her to the chief's office and interrogated her on where she had been but that she did not disclose. Later that night, she went back to the Appellant's house again until the morning of 17/01/2024 at 5.00Am when the police raided the Appellant's house and arrested both the complainant and the Appellant. She stated further that while staying with the Appellant, they had sexual intercourse severally.

   On cross-examination, she stated inter alia; that she was 14 years and would turn 15 years in April; that the Appellant did not force her to have sex with him and that she visited the Appellant as her lover/ boyfriend.

9. Caroline Aoko Onyango (PW2) testified that the complainant was her daughter and that her daughter went missing on 25/12/2023 and that she informed the chief and his assistant. That the complainant returned home on 13/01/2025 about 11.00Am and after an interrogation at the chief's office of her whereabouts, she disappeared again. It was her testimony that she got a tip off of her daughter's whereabouts from her friend who confided that she had been sighted at the compound of the Appellant. That she then organized with the chief and a police officer and raided the said compound very early on 17/01/2024 and found the Appellant and complainant together and were both arrested. That she had known the Appellant who used to pass by her home. That the complainant was born on 17/3/2009 and that the birth certificate has an error on the year of birth which was to be corrected.

   On cross examination, PW2 stated inter alia; that she did not know that the Appellant was in a relationship with the complainant until they were found together at the Appellant's house.

10. David Makadia (PW3) testified as the clinical officer from Ambira Sub County Hospital and who attended to the complainant who had been found in the house of a man said to be 17 years old. It was his testimony that upon examining PW1 and most of the tests were negative but that she had an infection and thus she was given antibiotics. That there were no bruises on the genitalia and that the hymen was broken but an old case. That weapon used is penis. That there was no discharge and no spermatozoa. That he filled the P3 form. He produced the treatment notes as Exhibit 3, P3 form as P

exhibit 4 and PRC form as Exhibit 5. On cross-examination, he stated inter alia; that the hymen was broken as there was an old scar; that he could not tell what broke the virginity of the victim.

11. Eunice Adhiambo Ong'ow (PW4) testified that she was the assistant chief of Simenya sub location. She stated that she had received a call from a strange number and upon picking it, it was PW2 who informed her that pw1 was suspected to be at a certain home. She made calls to the police and the village elder. They together raided the home where the Appellant worked as a caretaker. They knocked and the Appellant opened the door. The house had two rooms and thus upon going inside the bedroom, they found PW1 under the bed, two used condoms, a black pantie and a green bra. That the same were marked as follows- green bra (PMFI- 6,) black pantie as PMFI-7 and two used condoms as PMFI 8.

    On cross examination she stated inter alia; that Pw1 confirmed that the bra and panties were hers; that they found the Appellant in his house with the complainant and escorted them to the police station and hospital.

    On re-examination, she stated that the bra, the pantie and the used condoms were in the bedroom of the Appellant and that the complainant was found hiding under the Appellant's bed.

12. No. 95883 Pc Kipruto Sambu (PW5) testified that he was attached to Simenya police post performing general duties and that he was the arresting officer. That on 16/01/2024 while at Simenya police post, the area assistant chief (PW 4) went and requested them to accompany her to a place where a minor called Mary Ann Achieng had been spotted. That on their way, the assistant chief called the village elder and together they went to the home of Mr. Olawo and entered the house of George Otieno. That they knocked on the door and that a young man opened and that they entered into the bedroom but no one was on the bed. That upon checking, they found the minor under the bed and asked her to come out. That they also found a green bra, black pantie and two used condoms which they collected as exhibits and took them to the police station.

    On cross examination, he stated that he arrested both the complainant and the Appellant together.

13. No. 53610 PCW Lucy Atieno (PW6) from Ugunja police station was the investigating officer. She testified that on 16/01/2024 while on duty at the station, officers from Simenya police post went with a girl of tender age and reported that she had disappeared on 13/01/2024. After the mother got wind of the girl's whereabouts, she sought the assistance of the area assistant chief and the police, went to the scene where they found the girl and the Appellant. She escorted the two to the hospital for examination. She later recorded witness statements and charged the Appellant with the offence of defilement. That the items found in the house where the Appellant and PW1 were found were a black pantie, green bra and two used condoms. She produced them as follows- green bra (P exhibit 6), black pantie (p exhibit 7) and two used condoms as Exhibit 8. She also produced the clinic card showing that PW1 was born on 17/03/2009 as P exhibit 2. On cross-examination, she stated inter alia; that the exhibits were recovered from the Appellant's house; that the Appellant was found in the house together with the complainant; that they did not carry out further tests on the condoms to confirm the presence of spermatozoa; that the Appellant had claimed that the complainant was his girlfriend.

14. At the close of the prosecution's case, the trial court ruled that the prosecution had made out a prima facie case against the Appellant and thus placed him on his defence. The Appellant tendered a sworn testimony.

15. George Otieno Orango (DW1) testified that on 16/01/2024 at 6.00Am while in the compound of her aunt, two police officers and one civilian walked into the said compound, arrested him and took him to Ugunja police station. At the station, he found a girl and a woman. Upon being asked whether he knew the girl he denied. That when the girl was asked whether she knew him, she nodded affirmatively. That he was taken to the cells and later taken for age assessment where he was confirmed to be 18 years.

He was then informed that he had been charged with the offence of defilement. He denied committing the offence.

On cross examination, he stated inter alia; that he did not know about the charges and that he denied defiling the minor; that he only saw the complainant in court; that he was taken for age assessment which confirmed his age as 18 years; that he had not known the complainant before the incident; that he could not understand why the complainant claimed to have known him.

16. The appeal was canvassed by way of written submissions. Both parties duly complied. The Appellant submitted that the Respondents failed to prove the charges against him beyond reasonable doubt. He prayed that the appeal be allowed as prayed and that the sentence be set aside and that he be set free.

17. On the part of the Respondent, it submitted that it adduced enough evidence in support of the charges against the Appellant. It submitted that the appeal be dismissed.

18. I have considered the trial court proceedings plus the rival submissions on appeal. I find the issue for determination is whether the prosecution proved the charges against the Appellant beyond reasonable doubt and whether the sentences imposed was appropriate.

19. The Appellant faced a charge under section 8(1) and (3) of the *Sexual Offences Act* No. 3 of 2006 which stipulates as follows:

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) 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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the ages of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

20. The burden of proof in the matter lay with the prosecution and that it never shifted to the Appellant herein. Under Section 107 of the *Evidence Act* (Cap 80), the burden of proof lies on the person who wishes to prove the existence of certain facts. It was thus the duty of the Respondent to prove allegations contained in the charges levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in Woolmington Vs Dpp [1935] AC 462 and Sawe versus Republic [2003] eKLR. The prosecution must prove its case against an accused person beyond a reasonable doubt, and if there is a doubt it must be resolved in favor of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of Woolmington v Director of Public Prosecutions (supra) where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond any reasonable doubt.

21. In a charge of defilement, the prosecution must prove three ingredients namely, age of the complainant (must be a minor), penetration (partial or complete) and the identity of the perpetrator.

22. As regards the aspect of the age of the Complainant, the investigating officer (PW6) produced a clinic card of the complainant which indicated that she was born on 17/03/2009. This thus placed her about 14 years 10 months at the time of the offence and therefore the same confirmed that the complainant was a child as she was below the age of 18 years old. The complainant and her mother did confirm the age and thus I find that the Respondent proved this ingredient beyond any reasonable doubt.

23. As regards the aspect of penetration, section 2 of the *Sexual Offences Act* provides that penetration may be partial or complete.

Section 2 of the *Sexual Offences Act*: "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

24. The complainant testified that she had first sexual intercourse with the Appellant on 25/12/2023 when the Appellant invited her for Christmas. She stated that she remained at his house until 13th January 2024 when she returned to her home and that the same day at night, she ran away again and went back to the Appellant's house where they had sexual intercourse severally before being arrested on 16th January 2024. The clinical officer (PW3) who examined the complainant drew the conclusion that there were features suggestive of vaginal penetration. He produced several items namely, treatment notes, P3 form and PRC form as exhibits. I find the ingredient of penetration was thus proved by the prosecution as the testimony of the minor remained consistent all through and was corroborated by that of the clinical officer (PW3).

25. The third aspect to be proved was the identity of the Appellant as the perpetrator. It transpired from the evidence of the complainant that she had known the Appellant as her lover/boyfriend and that he had invited her for Christmas where they both spent together and had sex several times. In Wamunga vs Republic (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

26. Similarly, the Court further cited its own decision in Abdala bin Wendo & Another vs Republic (1953), 20 EACA 166 where it held:

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

27. In the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) eKLR the Court of Appeal in Nairobi held that:

> " .... recognition not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant..."

28. In the instant case, it is the minor's testimony that the Appellant was her boyfriend who had invited her over for Christmas and that she stayed with him until 16/01/2024. That was quite sufficient time to recognize him at any place. Besides, the Appellant being her boyfriend, she could not mistake him for somebody else. Indeed, the complainant and the Appellant were found together in his house when

they were both apprehended. Even though the Appellant maintained in his defence testimony that he did not know the complainant, I find that he was positively identified by the complainant even at the police station and which the Appellant confirmed in his evidence.

29. In Crim App 140 of 00[1], Peter Mwangi Mungai -vs- Republic [2002] eKLR, the Court of Appeal referred to its own decision where it stated thus;

> " .... In Owen Kimotho Kiarie v. R. Criminal Appeal No.93 of 1983, (unreported) this Court held that dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade. The principle was re-echoed in the case of Charles O. Maitanyi v. Republic [1985] 2 KAR 75. In that case it was also held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. The court stated:
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> .... That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade ... If one is to test the evidence with the greatest care this was the way that the Court of Appeal in England in R.v. Turnbull [1976] 3 All ER 549 saw the examination. The Judge ...examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g. by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, did he have any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance..."

30. Guided by the above authorities and specifically R.v. Turnbull (supra), and the Anjononi case(supra), i believe the minor had ample time to observe the Appellant while at his house for all those days over two weeks. I am therefore persuaded that she had enough time to observe the Appellant and which enable her to identify him. Besides, the Appellant being her boyfriend, she had no difficulty in identifying her lover. I find that the Appellant was squarely placed at the scene of crime and was actually apprehended at the scene of crime. Indeed, he was found in flagrant delicto in that the complainant was found without her underpants and bra and which were strewn on the floor as well as two used condoms and further that the complainant was found hiding under the Appellant's bed.

31. In view of the foregoing observations, i am persuaded that the offence of defilement was proved against the Appellant beyond any reasonable doubt and thus the conviction by the learned trial magistrate regarding the main count was quite sound and must be upheld.

32. As regards sentence, it is noted from the Appellant's grounds of appeal that he has contended that the sentence imposed was excessive in the circumstances. It is trite that sentencing is a very crucial issue in the criminal justice system. The same lies in the discretion of the trial court as was held by the Court of Appeal in the case of Benard Kimani Gacheru v. Republic Criminal Appeal No. 188 of 2000 where it was stated as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with

sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

33. The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owuor Vs Regina (1954) 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:
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> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
>
> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher Shewky, (1912) C.C.A. 28 T.L.R. 364."

34. Under section 8(3) of the *Sexual Offences Act*, a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. In Petition No. 18 of 2023 R vs Joshua Gichuki Mwangi and Others [2024] eKLR, the Supreme Court held that all minimum sentences under the *Sexual Offences Act* are not unconstitutional and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences. It is noted that the trial court imposed a sentence of twenty (20 years' imprisonment. It is noted that the actions of the Appellant did cause serious psychological harm to the complainant who was then still a young girl in her formative years. The Appellant who was older was expected to protect her and not to sexually molest her. The Appellant therefore deserved to serve custodial sentence where he would be taken through comprehensive rehabilitation before being released back to the society.

35. Finally, it is noted that the Appellant did not manage to post bail and thus remained in custody throughout the trial and thus the said period must be taken into account in compliance with the provisions of section 333(2) of the Criminal Procedure Code. The sentences imposed must therefore commence from the date of arrest namely 16/01/2024.

36. In the result and save only that the sentence imposed by the trial court shall commence from the date of arrest namely 16/01/2024, the Appellant's appeal lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at Siaya this 7th day of November 2025.

D. KEMEI

JUDGE

In the presence of:

George Otieno Orango .....Appellant.

M/s Kerubo.....for Respondent.

Kimaiyo/Maureen.....Court Assistant.

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