Onyango v Republic (Criminal Appeal E064 of 2024)
[2025] KEHC 16147 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16147 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E064 OF 2024

DK KEMEI, J

NOVEMBER 7, 2025

BETWEEN

FREDRICK OCHIENG ONYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the judgment of Hon. J.P Nandi (S.P.M) delivered on 30th July 2023 in Bondo Chief Magistrates Court in Criminal case (S.O) No. E005 of 2023)

JUDGMENT

1. The Appellant herein Fredrick Ochieng Onyango was charged before Bondo law courts 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 26th December 2022 at around 1800hrs in [Particulars withheld] sub location, Bondo Township location, Bondo sub- County within Siaya County intentionally caused his penis to penetrate the vagina of SAM a child aged 13 years.

2. The Appellant was likewise charged with 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 26th December 2022 at around 1800hrs in [Particulars withheld] sub location, Bondo Township location, Bondo sub- County within Siaya County unlawfully and intentionally touched the vagina of SAM a child aged 13 years.

3. The matter proceeded to full trial in which the Respondent called four 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 15 years' imprisonment to run from the date of arrest.

4. Aggrieved by the conviction and sentence, the Appellant filed his Petition of Appeal dated 29/11/2024 wherein he raised the following grounds of appeal:

i. That the prosecution failed to prove the ingredients of the offence beyond reasonable doubt.

ii. That the trial magistrate erred in law and fact by relying on fanciful and remote possibilities to convict the Appellant.

iii. That the trial magistrate erred in law and fact by not weighing the conflicting evidence of the prosecution's case that was inconsequential to conviction.

iv. That the trial magistrate erred in law and fact by not appreciating the Appellant's cogent defence which overwhelmed the prosecution's case.

The Appellant therefore prayed that the conviction be quashed and the sentence set aside and he be set at liberty.

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 as to whether or not to uphold the decision of the trial court. (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 Respondent called a total of four witnesses in support of its case.

8. The Complainant, MAO (PW1) testified that she is the mother to the complainant who is aged 13 years having been born on 21/08/2009 as evidenced by her birth certificate marked as PMFI- 1. She stated that on 28/12/2022 at around 7.00 P.M, the complainant informed her that she was unwell and went ahead to inform her that Ja Ugenya, Daddy and Ja Seme had been having sexual intercourse with her. That Ja Ugenya would call her and upon her going to where he was grazing cattle, he would have sexual intercourse with her in the bush. That her daughter likewise informed her that she would also go to Ja Ugenya's house and he would have sexual intercourse with her. She further stated that her daughter was mentally unstable and could not recall the dates. She further testified that her daughter also informed that Daddy had sex with her in his house. That she informed her husband Julius Midimo Odinga about it and that they took the child to a private hospital but they were referred to Bondo sub county hospital. That the hospital required Ksh 2000/= which she did not have and so she took her daughter to Siaya County hospital where she was examined and treated. It was established that she had been defiled. She identified the treatment notes which were marked as PMFI- 2. That she reported the matter at Bondo police station who arrested the Appellant herein whose other alias name is Ja Ugenya who works at their home as a herd's boy.

   On cross-examination, she stated that the doctor examined her daughter who mentioned the Appellant as the defiler.

9. SAM (PW2) was the complainant and after a voire dire examination she tendered a sworn testimony and stated that she was in grade 6 at [Particulars withheld] Primary school. That on 26/12/2022 Ja Ugenya called her to his house, gave her ksh 20/= and had sex with her. That he removed her clothes and made her lie on the bed and that he removed his clothes too then inserted his dudu (which he uses to urinate) inside her dudu (which she uses to urinate). That the Appellant later went to graze the animals and that he directed her to follow him. That she followed him and while in the bush he had

sexual intercourse with her again. He then collected firewood for her and that she went home. Later, she had a wound on her buttocks and that her mother took her to hospital at Bondo.

On cross examination, she stated inter alia; that she was saying the truth; that Ja Ugenya had sexual intercourse with her and also Daddy and Ja Seme.

10. No. 98088 CPC Isaiah Aloo (PW3) testified that he was stationed at Bondo police Station and the investigations officer in the case. He recalled that on 20/11/2023 a report was made by PW1 that PW2 had been defiled by a person well known to her. That he recorded witness statements. That the village elder and assistant chief assisted in arresting the perpetrator. That he issued a P3 form which was duly filled at Siaya County Hospital and returned. That he was given the minor's birth certificate which indicated that she was born on 21/8/2009. That he produced the same as exhibit 1. That he charged the Appellant with the offence of defilement.

On cross examination, he stated that there was no photo of the Appellant and the minor.

11. Brian Chengech Chemengu (PW4) was the clinical officer in the case and who stated that he was attached at Siaya County Hospital. He testified he had the P3 form of a 13-year-old minor whom he examined and filled the P3 form on 13/1/2023. That on detailed examination, there was normal external genitalia, no bruises, no lacerations and that the hymen was torn. That there was whitish vaginal discharge, epithelial cells were seen on High Vaginal Swab (HVS). That he concluded that there was evidence of penetration. That he produced the P3 form as exhibit 3, lab report as exhibit 4 and the treatment notes as exhibit 2, while the PRC form was produced as exhibit 5.

12. 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 an unsworn statement.

13. Fredrick Ochieng Onyango alias Ja-Ugenya (DW1) testified in his defence that he was from Ugenya but worked in Bondo looking after cattle. He denied the charges. He stated that on 31/1/2023 he went to work then returned to sleep. That two days later, two people came to arrest him. That three people were arrested but he alone was charged and the rest released. The defence case was closed.

14. The appeal was canvassed by way of written submissions. Both parties duly complied. The Appellant submitted that the Respondent failed to prove the charges against him beyond reasonable doubt. He submitted that the witnesses for the prosecution gave contradictory evidence and that the evidence of the single witness was not credible at all. He urged the court to allow the appeal and proceed to quash the conviction and set aside the sentence and that he be set free.

15. 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.

16. 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.

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

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(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.

18. 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 the 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.

19. 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.

20. As regards the aspect of the age of the Complainant, the investigating officer (PW3) produced a birth certificate of the complainant which indicated that she was born on 21/08/2009. This thus placed her about 13 years 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. I find that this ingredient was proved by the prosecution beyond any reasonable doubt.

21. As regards the aspect of penetration, section 2 of the *Sexual Offences Act* states 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.

22. The complainant testified that on 26/12/2022 Ja Ugenya called her to his house, gave her ksh 20/= and had sex with her. That he removed her clothes made her lie on the bed, he removed his clothes too and then inserted his dudu (which he uses to urinate) inside her dudu (which she uses to urinate). The clinical officer (PW4) who examined the complainant drew the conclusion that there were features suggestive of vaginal penetration. I find the ingredient of penetration was thus proved as the testimony of the minor remained consistent all through and was corroborated by that of the clinical officer (PW4). I find the Respondent proved this ingredient beyond reasonable doubt.

23. The third aspect to be proved was the identity of the Appellant as the perpetrator. It transpired from the evidence of the complainant and PW1 that she had known the Appellant prior to the incident as he their herd's man looking after their cattle. Thus the complainant had no problem identifying the Appellant and further the incident took place in broad daylight.

24. 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."

25. 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."

26. 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..."

27. In the instant case, it is the minor's testimony that the Appellant was their herdsman. This testimony was corroborated by that of her mother (PW1). The Appellant (DW1) stated that he works in Bondo as a herdsman. He did not dispute that he does not work at the complainant's home.

28. 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..."

29. Guided by the above authorities, I find that the Appellant was well known to the complainant. It also transpired that there was nothing to suggest that a grudge existed between the complainant, her family and the Appellant so as to suggest a frame up. Besides, it is highly unlikely for the family of the complainant to use their daughter as a victim of defilement so as to settle scores with the Appellant herein. Iam satisfied that the identity of the Appellant as the perpetrator was proved by the Respondent beyond any reasonable doubt.

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

31. It is noted from the Appellant's grounds of appeal that he has contended that the sentences 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."

32. 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."
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> 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."

33. 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.

34. From the foregoing, it is noted that the trial court imposed a sentence of 15 years imprisonment instead of 20 years imprisonment as the complainant was found to be aged between 12 and 15 years old. The issue which must be dealt with is whether this court should interfere with the said sentence. It is noted that the Respondent did not seek to file a notice of enhancement of sentence and hence iam inclined to leave it as it is. I find the sentence was thus the minimum possible in law and must be upheld. 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. Indeed the trial court duly took this into account by directing that the sentence commences from the date of arrest namely 27/1/2023.

35. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The trial court's conviction and sentence is upheld.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 7TH DAY OF NOVEMBER 2025.

D. KEMEI

JUDGE

In the presence of:

Fredrick Ochieng Onyango.....Appellant.

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

Kimaiyo/Maureen.....Court Assistant.