Omedi v Republic (Criminal Appeal E044 of 2025)
[2026] KEHC 102 (KLR) (19 January 2026) (Judgment)

Neutral citation: [2026] KEHC 102 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E044 OF 2025

DK KEMEI, J

JANUARY 19, 2026

BETWEEN

WILFRED OTIENO OMEDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the judgment of Hon. Erick Malesi (P.M) delivered on 28th March 2024 at Madiany Principal Magistrates Court in Sexual Offence case No. E016 of 2024)

JUDGMENT

1. The Appellant herein Wilfred Otieno Omedi was charged at 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 are that on 7/9/2024 around 1700 hours at [name withheld] in Rarieda Sub County within Siaya County he intentionally caused his penis to penetrate the vagina of I.A.O a child aged fifteen (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 were that on 7/9/2024 at around 1700 hours at [name withheld] in Rarieda Sub County within Siaya County intentionally touched the vagina of I.A.O a child aged fifteen 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 called three witnesses. The learned trial magistrate later convicted the Appellant and later ordered him to serve twenty (20) years' imprisonment.

4. Aggrieved by the conviction and sentence, the Appellant filed his petition of appeal dated 29/7/2025 wherein he raised the following grounds of appeal.

i. That the learned trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt.

ii. That the learned trial magistrate erred in law and fact by failing to consider adequately or at all the defence evidence which was coherent and effectively corroborated.

iii. That the learned trail magistrate erred in law and fact in finding that there existed a room adjoining the shop operated by the Appellant contrary to the evidence on record which confirmed that no such room existed.

iv. That the learned trial magistrate erred in law and fact in concluding that the Appellant committed the offence of defilement while disregarding credible evidence that the Appellant's wife was present in the adjacent room and would likely have heard any incident had it occurred.

v. That the learned trial magistrate erred in law and fact in finding that there was penetration despite medical evidence attributing the presence of blood in PW1's underwear to menstruation rather than to any sexual activity.

vi. That the learned trial magistrate erred in law and fact in relying on the uncorroborated testimony of PW1 regarding the alleged incident on the material date.

vii. That the learned trail magistrate erred in law and fact in reiterating existence of a room adjoining the shop as the scene of the offence contrary to the evidence adduced by the defence.

viii. That the learned trial magistrate erred in law and fact in disregarding the medical findings of the examining doctor (PW5) who testified that he could not reach conclusive findings due to the complainant's menstrual state at the time of the examination.

ix. That the learned trial magistrate erred in law and fact in relying on the contents of Exhibit No. 2 where authenticity was challenged and which ought to have been excluded for failing to meet the threshold of admissibility.

x. That the learned trial magistrate erred in law and fact in relying on the testimony of PW5 to bolster the account given by PW1 while ignoring material inconsistencies in both testimonies.

xi. That the learned trial magistrate erred in law and fact in failing to address and reconcile the material inconsistencies between the testimonies of PW1 and PW4.

xii. That the learned trial magistrate erred in law and fact in treating Exhibit 6 as corroborative evidence for penetration not withstanding that the blood stains thereon were explained by the complainant's menstruation.

xiii. That the learned trial magistrate erred in law and fact in failing to consider that no notable injuries were observed on PW1's genitalia which would have been expected given the significant age and physical disparity between the Appellant (46) years and PW1 (15) year.

xiv. That the learned trial magistrate erred in law and fact in failing to take into account the Appellant's mental status which militated against any pre-disposition to commit the alleged offence.

xv. That the learned trial magistrate erred in law and fact in failing to consider that the examining doctor did not observe a broken hymen nor was he able to visualize it due to the presence of menstrual blood.

xvi. That the learned trial magistrate erred in law and fact in failing to consider indications that PW1 may have been sexually active which raised the doubt of to the identity of the alleged perpetrator.

xvii. That the learned trial magistrate erred in law and fact in failing to consider that no spermatozoa were detected from the High vaginal Swab from PW1 thereby weakening the evidentiary link between the Appellant and the alleged offence.

xviii. That the learned trial magistrate erred in law and fact in failing to find that PW1's testimony was riddled with inconsistencies rendering her an unreliable and an untruthful witness.

The Appellant therefore prays that the conviction be quashed and the sentence imposed be set aside.

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 v 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 respect 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 v Dpp [1935] AC 462 and Sawe v Republic [2003] Eklr.

7. The Complainant I.A.O was taken through a voire dire examination by the learned trial magistrate and who directed her to testify under oath. She testified that she is fifteen years old having been born on 7/9/2009 as per the certificate of birth marked as PMFI 1. That on the material date she was at home staying with her grandmother and that she was later sent in the evening at 5.00 pm to Lwak market to buy groceries. That she went to Omondi's shop and while there, Baba Sarah came to where she was and greeted her and inquired about her name. That Baba Sarah was the Appellant herein and a person she had known as she had been seeing him at [name withheld] and who deals in timber and had a shop within [name withheld]. That the Appellant asked her to accompany him so that he could give her something and thus they went to his shop where he led her into one of the rooms behind the shop and gave her fifty shillinhs and directed her to sit on a mattress which had a blue cover. That the Appellant later came and slept on her and removed his clothes and had sexual intercourse with her. That she tried to resist and that after the Appellant was through he opened the door and let her go. That there was a woman who had seen her entering the Appellant's shop and who confronted her as soon as she left the shop and inquired as to what she was doing with the Appellant. That she informed her that she had sex with the Appellant. That she later went home while feeling pain. That later, her mother arrived in company with her uncle. That her mother inquired about the incident and that she briefed her. That she was taken to hospital in Lwak and was referred to Ongielo. She identified the treatment booklet from St. Elizabeth Lwak. That they were again referred to Bondo Sub County hospital. That she identified the treatment notes and lab request forms. That they went to Bondo Police station but were referred to Aram police station. That she handed over her stained inner wear to the police and which she identified it in court as PMFI-6. She also identified the P3 form as PMFI 4. That she bled as a result of the sexual intercourse. That she usually sees the Appellant at [name withheld] and that at one time he had come to her grandmother's place to cut trees.

On cross-examination, she stated inter alia; that the Appellant found her at Omondi's shop; that she was at the Appellant's room for about twenty minutes; that she never screamed; that she received

treatment at Bondo hospital; that she experiences menses which commences on the 26th of every month.

8. LA (PW2) was the mother of the complainant. She testified that her daughter is aged 15 years old and a pupil in grade seven. That she received a report that her daughter had been spotted entering the Appellant's room and that she called her brother to accompany her home and confront her daughter. That she learnt from the complainant that she had had sexual intercourse with the Appellant. That she took her to Ongielo health centre and later to Bondo Sub County hospital. That she lodged a report to the police and that her daughter was ordered to surrender her underpants to the police. That the lady who had spotted the complainant entering the Appellant's room was reluctant to come and testify.

   On cross-examination, she stated inter alia; that it was Nyalego who alerted her of the incident; that the stains on the underpants was blood; that the complainant confirmed that the Appellant was her assailant.

9. Gilbert Ambila (PW3) who is a clinical officer at Bondo sub county hospital testified that he attended the complainant and went ahead to produce the treatment notes (exhibit 3), P3 form (exhibit 4) and lab request form (exhibit 5).

   On cross-examination, he stated inter alia; that no spermatozoa was seen; that he examined the inner wear worn by the complainant; that he did not conduct a DNA analysis; that the inner wear was bloodstained; that there are other possible cuses of hymen breakage like trauma. That the complainant had been examined by a colleaque named Charles.

10. Georgina Akinyi (PW4) testified that she knew the Appellant as "Baba Sarah" and also known as Otieno and who is a neighbour at [name withheld]. That she was at her place of business when she saw the complainant coming out of the Appellant's shop and that the two disappeared into a corridor besides the shop. That she later alerted the complainant's family about the incident.

    On cross-examination, she stated that she saw the complainant and the Appellant together and that she did not know where thet two disappeared to.

11. Anastacia Dona Nanzala (PW5) testified that she is a nurse at Lwak Mission Hospital and had issued a patient card to the complainant and then referred her to Ongielo health centre.

    On cross-examination, she stated that she physically examined the complainant and learnt from her that the perpetrator took her into a room behind his shop and defiled her.

12. No. 11XXXX Pc (W) Jackline Nyaga (PW6) testified that she investigated the matter and learnt the Appellant had lured the minor to his shop and then to an adjoining room where he defiled her after giving her 50/. That the complainant was seen leaving the Appellant's room by PW4 and who enquired from her about what had happened between her and the Appellant and that she confirmed that she had engaged in sex. That the complainant was escorted to hospital for examination and treatment. That she obtained a birth certificate of the minor which she produced as exhibit one. That she also recovered the complainant's underpants which she had worn on the fateful day and produced them as exhibit 6.

13. 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 and called three witnesses.

14. Wilfred Otieno Omedi (DW1) testified in his defence that he has a wife and four children. That on the material date he was unwell and took medication and later went and joined his wife at their shop and later went back home with his wife. That the allegations were false and that he did not know the complainant.

On cross-examination, he states inter alia; that he is usually referred to as ''Baba Sarah''; that he did not know PW4.

15. JAO (DW2) testified that the Appellant is her husband. That on the material date she went to operate the family shop and later her husband joined her and they worked up to 7.00 PM and that her husband di not leave the shop. That she would have seen the complainant whom she knew had she come to the shop.

    On cross-examination, she stated that the complainant's mother is her customer at the shop. That she did not have any ill will with the family of the complainant.

16. Benard Willis (DW3) testified that he is a tailor at [name withheld]. That on the material date he was at his shop near that of the family of Appellant and that he saw the Appellant's wife arriving at around 11.00 AM and later joined by the Appellant's sister and then the Appellant at 2.00 PM and that he later saw them leaving for their home in the evening. That he knew the complainant but that he did not see her going to Appellant's shop.

    On cross-examination, he stated that PW4 operates her shop opposite that of the Appellant.

17. Eudiah Wasonga (DW4) testified that she is a partner at the shop which was being run by the Appellant and that on the material date she had gone to Lwak to do some stock taking. That she joined the Appellant's wife and that the Appellant arrived around 2.00 Pm and that at around 7.00 Pm the Appellant and his wife left for their home. That the Appellant did not leave the shop all that time. That she did not know the complainant.

18. The appeal was canvassed by way of written submissions. However, it is only the Appellant's counsel who complied.

19. I have considered the trial court proceedings plus the submissions on appeal. I find the issue for determination issues are firstly, whether the prosecution proved the charges against the Appellant beyond reasonable doubt and secondly, whether the sentences imposed was appropriate.

20. Starting with the offence (main count), it is noted that 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.

21. The burden of proof as by law 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 v Dpp [1935] AC 462 and Sawe v 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 [1935] AC 462 where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt.

22. 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.

23. As regards the aspect of the age of the Complainant, the investigating officer (PW6) produced a birth certificate of the complainant which indicated that she was born on 7/9/2009. This thus placed her exactly 15 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 Respondent beyond any reasonable doubt.

24. 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.

    The complainant testified that the Appellant took her to a room behind his shop and had sex with her on a bed after giving her Kshs 50. The complainant was first checked at Lwak Mission hospital by PW5 who examined her and later referred her to Angielo health centre and then to Bondo Sub County hospital where a clinical officer (PW3) examined the complainant and drew the conclusion vide the P3 form that there was penetration by human penis. 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 (PW6) and PW5. Even though the Appellant's counsel vide the Petition of appeal and submissions has sought to discredit the evidence of the complainant and the two witnesses (PW3 and PW5), I find the evidence of the prosecution regarding the issue of penetration met the threshold of proof. The Appellant's counsel has submitted that the issue of the blood stains on the complainant's inner wear has to do with her menses. It is instructive that there was no distinction between blood emanating from effects of penetration and blood emanating as a result of a menstrual cycle. The evidence of the complainant is that penetration took place and that she informed PW4 as soon as she emerged from the room where she had had sexual intercourse and later informed her mother (PW2). I am satisfied that indeed the ingredient of penetration was proved by the Respondent beyond reasonable doubt.

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 who lived within Lwak Trading Centre and who was popularly known as "baba Sarah". Indeed, the evidence of the Appellant's witness (DW2) who is wife to the Appellant is that she had known the mother of the complainant as she was her customer. It is instructive that the incident took place in broad daylight at around 5pm. According to the complainant, the Appellant found her while at Omondi's shop and who greeted her and asked her to accompany him so that he could give her something and that he led her to his shop and into a room behind the shop wherein he gave her Ksh50/= and who instructed her to sit on a mattress which had a black cover and that the Appellant removed his clothes and had sexual intercourse with her. The complainant further stated that after the act, the Appellant opened the door for her and as she came out a certain lady who ran a business across (PW4) spotted her and inquired from her as to what she was doing with the Appellant and that she informed her that she had had sex with the Appellant and then the lady allowed her to proceed home. It was the said lady (PW4) who alerted the complainant's mother and that the mother confronted the complainant who then disclosed to her that

she had had sexual intercourse with the Appellant in his room at [name withheld]. It is therefore clear that the complainant was not mistaken as to the identity of the person who had defiled her. It is also instructive that such kind of offences are committed away from the public eye and hence in most cases it is the evidence of the victim to be considered in the absence of any corroboration and that is why the provisions of Section 124 of the *Evidence Act* in offences of this nature comes in handy. The evidence of PW4 is that she had seen the Appellant and the Complainant moving together to the room along a shop corridor and that as soon as the complainant emerged, she confronted her about what they had gone to do with the Appellant in that room. The aforesaid evidence clearly placed the Appellant at the scene of crime as the perpetrator. The Appellant in his defence evidence attempted to present an alibi to the effect that at no time did he venture out of the shop after he had arrived at 2.00pm and joined his wife and sister to conduct stock taking and that he remained in the shop until 7.00 pm when he left with his wife for home vide his motor cycle. Indeed, the Appellant called his wife (DW2), business neighbour (DW3) and his sister (DW4) who all backed his alibi. However, it is noted that the said alibi defence was raised quite late in the day and did not accord the Respondent an opportunity to investigate the same. This evidence must be weighed against that of the complainant and PW4. The complainant was categorical that it was the Appellant who had given her the sum of Ksh50/= and led her into a room behind the shop and later defiled her. PW4 saw the duo heading to the room behind the shop and that she later confronted the complainant who confirmed having been with the Appellant and engaged in sexual intercourse. The defence alibi was weakened by the evidence of the complainant and PW4. It is also instructive that there was no grudge that existed between the family of the Appellant and the complainant as well as PW4 so as to suggest the possibility of a frameup. The evidence of the complainant and PW4 is that the Appellant's shop was closed on that day and which raised doubt about the Appellant's claim that he was at the shop together with his wife and sister. Further, even if the shop was open, it is highly unlikely that the Appellant could stay put in the shop the whole afternoon without even venturing out to answer a call of nature. I find the evidence of the complainant and PW4 was credible and placed the Appellant at the scene of crime. I also find the Appellant's late alibi defence to have been raised so as to seek to cast out on the evidence of the Respondent but which in my view did not succeed to do so. I am satisfied that the circumstances prevailing at the time were favourable and that the complainant truly recognized the Appellant as her assailant in that she had known him and chatted with him as they walked to the room behind the shop and spent about 20 minutes engaging in sexual intercourse. In Wamunga v 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 v 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 v 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 Looking at the entire evidence, I am satisfied that the Appellant was identified as the person who had defiled and assaulted the complainant on the material date. I find the Appellant's defence evidence did not cast doubt or shake that of the Respondent which was quite overwhelming. Hence, I find the ingredient regarding the identity of the Appellant as the assailant was proved beyond any reasonable doubt.

29. 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 was quite sound and must be upheld.

30. As regards the issue of sentence, 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."

31. The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owuor v 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:
>
> "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."

32. 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 v 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 fifteen (15) instead of twenty (20) years' imprisonment. It is also noted that the Respondent has not filed a notice of enhancement of sentence and hence, I will not interfere with the said sentence of 15 years imprisonment for the offence in count one. It is instructive that the Appellant took advantage of a young and vulnerable girl who has been psychologically scarred. The Appellant was expected to protect the girl but instead he turned into a predator. I find that the Appellant deserves a custodial rehabilitation before being released back to the society. As regards the sentence in count two, it is noted that the Appellant was ordered to serve four (4) years imprisonment. Under Section 251 of the Penal Code, a maximum sentence of five years is provided for. I find the sentence of four years to be reasonable. It is instructive that the injuries sustained by the complainant were serious and which called for a deterrent sentence. From the above, I am persuaded that the trial court addressed its mind correctly to the facts and the law thereby reaching a correct decision and I find no reason to interfere with the same. The sentences imposed the main count one was not excessive as it is the minimum possible in law and which is hereby affirmed.

33. Finally, it is noted that the Appellant managed to post bail and thus the application of Section 333(2) of the Criminal Procedure Code does not arise. The sentences imposed must therefore commence from the date of conviction which was done by the trial court.

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

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF JANUARY 2026.

D. KEMEI

JUDGE

In the presence of:

Wilfred Otieno Omedi.....Appellant

Odhiambo D.....for Appellant

Soita.....for Respondent

Maureen/Kimaiyo.....Court Assistant