Omanya v Republic (Criminal Appeal 280 of 2019)
[2026] KECA 171 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 171 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 280 OF 2019

DK MUSINGA, PO KIAGE & GV ODUNGA, JJA

JANUARY 30, 2026

BETWEEN

EMMANUEL ONYANGO OMANYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Homa Bay (H. A. Omondi, J.) delivered on 15th May 2017 in H. C. Criminal Appeal No. 29 of 2016)

JUDGMENT

1. This is a second appeal from the original conviction and sentence of the appellant for the offence of defilement of a 9-year-old girl by the Principal Magistrates' Court at Homabay, for which the appellant was sentenced to life imprisonment. His first appeal to the High Court at Kisumu was unsuccessful.

2. The facts that gave rise to the initial charge and subsequently to this appeal are that on the 5th day of August 2014 at Kakangutu West Sub-location in Rachuonyo South District, Homa Bay County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of J.A, a child aged nine years.

3. This being a second appeal, the jurisdiction of this Court is limited to a consideration of matters of law only. See Njoroge v Republic [1982] KLR 388.

4. The evidence that was led before the trial court was that on the material day, J.A, who testified as PW1, was sent by her mother, PW5, to take charcoal to a neighbour's home, but she missed her way and ended up at the appellant's home. J.A. found the appellant and his daughter, B.A. (PW4), who was an age mate of the complainant and they were classmates at a nearby primary school.

5. The appellant sent his daughter somewhere, and thereafter locked the door, undressed the complainant, took her to a bed and defiled her. After the ordeal the appellant warned the complainant

not to tell anyone about the incident and gave her Kshs.5. Meanwhile, in the course of the act, the appellant's daughter, PW4, returned. She found the main door locked from inside, and when she peeped through the window, she was shocked at the sight of her father, (the appellant), defiling J.A.

6. PW4 leaked the incident to some of her classmates, and their class teacher, PW2, heard them making fun of the complainant in the course of child play. PW2 summoned J.A to her office, and J.A told her what the appellant had done to her. In turn, PW2 notified the complainant's parents, who reported the incident at Othoro Police station and took J.A. to Othoro Sub-district hospital, where she was examined by Samuel Koech, a clinical officer, PW8, who testified that she had a wound on her clitoris that was healing and her hymen was missing. He therefore concluded that she had been defiled.

7. In his defence, the appellant merely denied having committed the offence and alleged that he was not at his home on the material day. He, however, conceded that he was a neighbour of the complainant's parents and his daughter was then a classmate of the complainant.

8. In his appeal before this Court, the appellant faults the first appellate court for affirming his conviction, despite the fact that his arraignment before the trial court was in violation of his constitutional rights because he was unlawfully held for seven days before he was charged. He further complained that the charge sheet was defective; that there was insufficient evidence to warrant his conviction; that the sentence imposed is unconstitutional; and that his mitigation was not considered. The appellant filed submissions in support of his grounds of appeal.

9. The respondent opposed the appeal. Bernice Daisy Kagali, Principal Prosecution Counsel, filed submissions which she briefly highlighted when the appeal came up for hearing on 4th September 2025. In summary, she submitted that all the ingredients of the offence of defilement were proved beyond reasonable doubt; that the appellant's constitutional rights under Article 49(1)(f) were not infringed because the appellant was arrested on Friday, 26th September 2014 and the plea was taken on Monday, 29th September 2014; and that the sentence that was passed by the trial court and affirmed by the first appellate court is constitutional.

10. In our view, the issues of law that fall for determination are as follows: whether the appellant's constitutional rights under Article 49(1)(f) were violated; whether the ingredients of the offence of defilement were proved beyond reasonable doubt; and whether the sentence that was passed by the trial court and affirmed by the first appellate court is unconstitutional.

11. Article 49(1)(f) states that an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested; or if the twenty- four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

12. PW9, P.C. Meidiki Sammy testified that he arrested the appellant on 26th September 2014. He did not indicate the specific time of the arrest. There was no dispute that the said day was a Friday. However, in his defence, the appellant said that he was arrested on 22nd September 2014. He alleged that he was unlawfully held in police custody for eleven (11) days before he was arraigned in court.

13. The first appellate court did not make any definite finding as to whether the appellant's constitutional right under Article 49(1(f) was breached. The court simply held:

> " 53. The appellant claims to have spent 11 days in custody – if that be the case then he is at liberty to file a constitutional matter seeking a declaration as regards such violation and he can pursue compensation by way of civil redress."

14. We cannot fault the first appellate court for that holding. If at all there was any unreasonable delay in charging the appellant, his remedy can only lie in damages, not in an acquittal. However, the record shows that the appellant was arrested on Friday, 26th September 2014, and plea was taken on Monday, 29th September 2014. That accords with the provisions of Article 49(1)(f), considering that there was a weekend between the day of arrest and the day of plea taking. We must, therefore, dismiss this ground of appeal.

15. We now turn to consider whether the ingredients of the offence of defilement were proved beyond reasonable doubt. The key ingredients are proof of the age of the complainant; proof of penetration, and proof that the appellant was the perpetrator of the offence. See G O A v Republic [2018] eKLR.

16. As regards the age of the complainant, her mother testified that she was born on 13th December 2006. She produced a baptism card as evidence. It would, therefore, appear that the complainant was under 9 years when the offence was committed, as noted by the trial court. Section 8(2) of the *Sexual Offences Act* stipulates a sentence to life imprisonment for a person who defiles a child aged eleven years or less. The complainant was within that age bracket.

17. Regarding proof of penetration, the complainant herself testified that the appellant penetrated her vagina with his penis. The trial court was convinced that she was truthful. A clinical officer, PW8, examined the complainant and noted that she had an old healing wound on the lower third of the clitoris on the right side, and her hymen was missing. That was conclusive evidence of penetration to the complainant's vagina.

18. Was the penetration by the appellant? We emphatically answer this question in the affirmative. The appellant's own daughter, PW4, testified that she saw the appellant defiling the complainant. When the appellant cross-examined PW4 and suggested that she may have been told to implicate him, she stated:

> "I was not told, I saw you. Our windows are made of glass. After sitting on the verandah for a while I stood up, peeped through the window then I saw you undress her before you undressed yourself then proceeded to defile her."

19. We therefore find that all the ingredients of the offence of defilement were proved beyond reasonable doubt.

20. Lastly, regarding the sentence that was passed, the issue of constitutionality of mandatory life sentence was not raised in the two courts below and we cannot therefore deal with it in this second appeal. Suffice it to say that it is lawful as per section 8(2) of the *Sexual Offences Act*.

21. Having found all the grounds of appeal devoid of merit, we hereby dismiss the appeal it in its entirety. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY 2026.

D. K. MUSINGA, (PRESIDENT)

..... JUDGE OF APPEAL

O. KIAGE

..... JUDGE OF APPEAL

G. V. ODUNGA

..... JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR