Ochieng v Republic (Criminal Appeal E008 of 2023)
[2026] KEHC 970 (KLR) (2 February 2026) (Judgment)

Neutral citation: [2026] KEHC 970 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E008 OF 2023

WM MUSYOKA, J

FEBRUARY 2, 2026

BETWEEN

ANDREW VICTOR OCHIENG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment and sentence, by Hon. EC Serem, Resident Magistrate, RM, of 6th December 2022, in Busia MCSOA Case No. E049 of 2021)

JUDGMENT

1. The appellant was convicted, and sentenced to 20 years imprisonment, of the offence of defilement of a minor of 15 years, on 15th October 2020, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya.

2. Upon arraignment, the appellant had denied the offence. A trial was conducted. 4 witnesses testified. PW1 was the complainant. She identified the appellant, as the perpetrator, and detailed where and how the defilement happened. She got pregnant out of the encounter. PW2 was a Clinical Officer. He provided the forensics, after examining PW1, 5 months after the event. PW3 was the local Assistant Chief. He arrested the appellant, on 6th March 2021, on claims that he had impregnated PW1. PW4 was the Investigating Officer. She confirmed that a report was made, on 6th March 2021, to the police, and the appellant was brought to the police station the same day.

3. The appellant was found, on 27th September 2023, to have a case to answer. He was put on his defence. He gave an unsworn statement, on 25th October 2022. He denied the offence.

4. He was aggrieved, hence the appeal. He claims that the charge was incurably defective; the evidence amounted to hearsay and was contradictory; the evidence lacked probative value; the defence was disregarded; the sentence was harsh and degrading; and his fair trial rights were disregarded or violated.

5. Directions were given, to the effect that the appeal would be canvassed by way of written submissions. I only see submissions by the appellant, in the record before me.

6. He submits around being denied his right to legal representation, contrary to Article 50(2)(g) of *the Constitution* and section 43(1)(a)(b) of the *Legal Aid Act*, Cap 16A, Laws of Kenya, where the accused is indigent. He also submits that no voir dire was conducted. He argues that there was no interval, by way of a mention, between close of defence and the date of judgment, and that he was not given a chance to address the court. It is also submitted that the case was not proved to the required standard. It is argued that the age of PW1 was not proved.

7. On the right to legal representation being denied, I have gone through the record, and I have not come across a minute where the trial court denied the appellant his right to instruct an Advocate of his own choice, or to pursue one to be paid for by the State. I have also not seen material suggesting that the appellant was indigent.

8. On the voir dire examination not being conducted, I note that the offence was allegedly committed when the complainant was 15 years old. She was a teenager. She was not of tender years. Voir dire examination is intended for children of tender years, not teenagers. It is meant to assess the intelligence of the child witness, in terms of ability to answer questions, to explain themselves and to appreciate the importance of telling the truth. There would be no need to test a 15-year-old on such, unless there was an allegation that she had a form of mental disability or retardation.

9. On not being given an opportunity to address the court, after the close of the oral hearings, that is by way of closing arguments or submissions, I would say that the trial court determines a matter on the basis of the evidence adduced, by way of the testimonies, from the witnesses, and any documents or exhibits, that they may produce. Arguments, whether made orally or in writing, are of no evidential value. The omission to make them, either because the opportunity was denied by the trial court, or otherwise, would not be a reason for setting aside the final decision of the trial court, as set out in the judgment.

10. I am not, by no means, suggesting that trial courts should deny parties an opportunity to make closing arguments. Far from it. It is allowed by law. It is a right accruing to the parties, that they should be allowed to make closing arguments, to assist the court understand their positions better. However, the omission to make the closing arguments, or denial of the right to make them, is not fatal, for the final determination of the matter is not dependent on the arguments.

11. Arguments or submissions are critical, in proceedings initiated by way of application, where the court has only written statements and documents to work with, where no oral evidence is taken from witnesses, and subjected to cross-examination. In applications, where no viva voce trial is conducted, there may be need to explain the documents, relied on, or the facts, adduced through affidavits. Such explanation invites arguments or submissions. That does not apply here. Viva voce evidence was taken. Witnesses testified orally, and were cross-examined. Whatever clarifications were needed, were given or came out of the oral statements made by the witnesses.

12. On the case not being proved beyond reasonable doubt, the starting point should be with the elements of the offence of defilement, which are the age of the complainant, penetration of his or her genitals, and identification of the person causing the penetration. These are what the prosecution is required to prove.

13. On penetration, the law was previously strict on corroboration. That is not the case anymore. All what is required, now, is for the court to be satisfied as to the truthfulness of what it hears from the complainant.

14. In this case, the complainant, PW1, was a teenager. She was in school. She was old or mature enough to coherently and clearly express herself. She could describe what she saw, or experienced, or what happened to her, without any form of confusion. She described it to the court. She said the appellant had sex with her. He inserted his penis "down there." She said that, no doubt referring to her vagina. That required no further explanation or exposition. She was testifying in open court, before a crowd. She was the victim. It was her vagina that was penetrated. She testified that it was. The trial court saw and heard her testify, and believed her. I would have no reason to find that PW1 lied, for I did not see and hear as she addressed the trial court.

15. On the age, the appellant is not really arguing that her age, at the material time, was not what was alleged. His argument is that the certificate of birth produced was a copy. That could be true. What I see, on the record of the trial court, is a photocopy of the certificate. However, I cannot tell, from that record, whether what was produced was the original or the copy, whether the original was substituted with a copy, and the original returned to the police, for the certificate of birth is a critical document. Whatever the case, the appellant did not protest, at the trial, to production of the copy, if, indeed, it was the copy that was produced. There is nothing that prevents production of a copy, so long as basis is laid for it, and no objection is raised to it.

16. On the identification of the appellant as the perpetrator, PW1, a teenager, of 15, at the time the offence was committed, could have had no difficulty identifying the appellant. The sexual intercourse was consensual, according to her. She said the appellant enticed or seduced her, or negotiated with her. For enticement or seduction or negotiation to happen, the parties must have been facing each other, and, therefore, they must have been at close proximity. The sexual encounter itself brings the persons involved to very close proximity, their faces would, literally, be colliding or rubbing at each other. The defilement happened at a barbershop, where the complainant had gone for a hair shave. The appellant was the barber. The probability is that it happened at daytime, for a schoolgirl would not be visiting a barbershop for a shave at night time.

17. Overall, I am not persuaded that the appeal herein has any merit. I, accordingly, disallow it. It is hereby dismissed. The conviction is affirmed, and the sentence confirmed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 2ND DAY OF FEBRUARY 2026.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Andrew Victor Ochieng, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.