

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
CRIMINAL APPEAL NO. E093 OF 2025

EUGENE SAMUEL ODHIAMBO
.....**APPELLANT**

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 21st May 2025 by Hon. A. Mwangi (CM) at Kibera Chief Magistrate's Court, Sexual Offences Case No. S.O 099 of 2023 Republic vs Eugene Samuel Odhiambo)

JUDGEMENT

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the diverse dated between 15th and 31st August 2023 at Kawangware Lejo Maria area in Dagoretti Sub-County within Nairobi County, intentionally and unlawfully caused his penis to penetrate a female genital organ namely (vagina) C.M.D a child aged 15 years old. He was sentenced to serve fifteen (15) years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in **Okeno v. R [1972] EA 32**, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the

evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court, but bearing in mind that it never saw the witnesses testify.

4. PW2, the complainant C.M.D, a minor born on 5th June 2008 and aged 15 years at the time of the incidents, testified that she had been in a love affair with the appellant. She explained that he had previously been her tuition teacher before becoming a regular teacher at her school. PW2 stated that the appellant impregnated her as a result of their sexual relationship.
5. She described three separate occasions of sexual intercourse with the appellant. The first occurred in the school office during the morning. The second took place on 29th August 2023 at lunchtime, when the other teachers were absent on their lunch break. The third incident occurred on 31st August 2023 at approximately 9:00 a.m., shortly after the school parade. On this occasion, while she was still wearing her school uniform, the appellant removed her underpants, unzipped his trousers, laid her on a table, positioned himself on top of her, and inserted his penis into her vagina. She stated that the act lasted about 30 minutes and noted that Teacher Phyllis was present in class while Teacher Emmanuel had not yet arrived at school.
6. PW2 consistently maintained that she had never had sexual intercourse with any man other than the appellant. She was uncertain whether the appellant had infected her with HIV or whether she had been born HIV positive.
7. She further testified that her sister discovered the pregnancy, which led to the matter being reported at Muthangari Police

Station, where statements were recorded. She was subsequently taken to Nairobi Women's Hospital for medical examination and treatment, where her pregnancy and HIV-positive status were confirmed.

8. In cross-examination, PW2 confirmed that the appellant had been their tuition teacher prior to becoming a regular teacher and reiterated that the second act of intercourse occurred on 29th August 2023, the day third term resumed. She again affirmed that she had never had sexual relations with anyone else. In re-examination, she confirmed that they had sex on the day school reopened on 29th August 2023 and repeated that the appellant was her only sexual partner.
9. PW1, Virginia Mwikali David, the sister of the complainant PW2, testified that on 3rd September 2023 she observed PW2's suspicious behaviour, including irritability and choosiness with food. She purchased a pregnancy test kit, which PW2 used and tested positive. PW2 told PW1 that Teacher Eugene (the appellant) had impregnated her.
10. On the following Monday, PW1 went to the school late, accompanied by one Munyoki, to discuss PW2's admission despite school fees arrears. The headteacher, Teacher Emmanuel, agreed to admit PW2. While leaving the school, PW1 spoke to the appellant, who neither denied nor admitted responsibility but promised to visit their home later. He arrived at around 3:00 p.m. and told PW1 that she (PW1) was the one he wanted, not PW2. They had a long conversation. At about 6:30 p.m., PW1, the appellant and PW2 met on the way from school and returned to

the house together. The appellant asked to be left alone with PW2, so PW1 left them in the house.

11. When PW1 returned, PW2 reported that the appellant had asked her to deny that the child was his and offered to raise the child himself. PW2 refused, angering the appellant, who became aggressive. PW1 locked them both inside and went to Gatina Police Post to report the matter. Police arrived, arrested the appellant, and the case was taken to Muthangari Police Station before referral to Nairobi Women's Hospital for PW2's examination. PW1 stated that PW2's age was assessed at Mbagathi Hospital due to the absence of a birth certificate. She added that PW2 was taken to a children's home and that she had no prior interaction with the appellant until confronting him about the pregnancy. In cross-examination, PW1 confirmed she had seen the appellant when paying fees but did not know him personally.
12. PW3, John Njuguna, a clinician at Nairobi Women's Hospital, produced medical records showing PW2 was attended on 5th September 2023, escorted by PW1, on allegations of defilement by her class teacher. Examination revealed a torn hymen with an old scar, pregnancy, a sexually transmitted infection, and HIV-positive status. In cross-examination, he explained that PW2 gave varying dates, leading to the scar being assessed as weeks old, and confirmed the pregnancy and HIV findings.
13. PW4 Sergeant Mbogo Waiganjo of Gatina Police Station and PW5 Isaac Kangongo of Gatina Police Post corroborated the accounts of PW1 and PW2 regarding the report and arrest.
14. PW6 PC Farhiya Bulla of Pangani Police Station testified that PW2 was 15 years old, her age having been assessed at Mbagathi

Police Station in the absence of a birth certificate. She corroborated the evidence of PW1 and PW2. In cross-examination, she stated that PW2 later delivered a baby, efforts to conduct a paternity test failed as PW2 could not be reached. PW6 confirmed that the complainant tested HIV positive while the appellant tested HIV negative. Further that PW2 was handed over to her parents, and certain witnesses who saw the appellant at the complainant's house declined to testify.

15. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.

16. To succeed in a prosecution for defilement, it must be proven that the appellant committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means, **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

17. Further, section 8(1) and (3) of the Sexual Offences Act, No. 3 of 2006 provides thus:

8. Defilement

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

(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.

18. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to

the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.

19. The complainant PW2 indicated that she was born on 5th June 2008 and thus 15 years old at the time of the alleged incidents. The trial court considered the age assessment at Mbagathi Hospital, as confirmed by PW1 and PW6, establishing that indeed the complainant was a child within the meaning of the law. There is no doubt that PW2 was a minor.
20. The central issue for determination is whether the prosecution proved beyond reasonable doubt that the appellant defiled the complainant. PW2 testified that the appellant, initially her tuition teacher and later a regular teacher at her school, engaged her in a sexual relationship culminating in pregnancy. She alleged three acts of sexual intercourse, the last said to have occurred on 31st August 2023 at about 9.00 a.m., and maintained that the appellant was her sole sexual partner.
21. The complainant was medically examined on 5th September 2023, two days after the matter was reported. PW3, a clinician from Nairobi Women's Hospital, found a torn hymen with an old scar assessed as weeks old, pregnancy, a sexually transmitted infection, and HIV-positive status. Crucially, the appellant tested HIV negative, while PW2 and the child later born tested HIV positive. No medical explanation was offered to reconcile this discordance.

22. As a first appellate court, I am obligated to re-evaluate the entire evidence and draw my own conclusions, while bearing in mind that I did not see or hear the witnesses testify.
23. Upon re-evaluation, material inconsistencies emerge. PW2 asserted exclusive sexual contact with the appellant, yet the HIV discordance between the parties strongly suggests infection from another source. No expert evidence was adduced to explain transmission, nor were further tests undertaken to eliminate the possibility of another perpetrator. PW2 herself was uncertain as to the source of infection. This directly undermines the credibility of her claim of exclusivity.
24. The pregnancy timeline was equally unclear. PW6 stated that PW2 delivered while still in Nairobi, but no birth date was placed on record. Given the pregnancy allegation, the trial court on 3rd September 2024 ordered that the appellant be escorted to Mbagathi Hospital for DNA sampling. On 17th September 2024, the prosecution informed the court that it could not trace the minor, and DNA analysis was could not be conducted. This was despite ample time between delivery and the close of the prosecution case. The appellant consistently pressed for DNA testing, asserting that it would exonerate him.
25. While section 36 of the Sexual Offences Act does not render DNA mandatory, the circumstances of this case made it necessary. DNA testing would have resolved paternity, clarified the source of pregnancy and infection, and excluded the possibility of another defiler. The unexplained failure to subject the child to DNA testing left a critical evidentiary gap, which must be resolved in favour of the appellant.

26. The High Court has recognised that DNA evidence may be indispensable where certainty is required. In **Republic v Timothy Mwenda Gichuru & 2 others [2017] eKLR**, the court stated:

“In this age of technology, DNA has become an investigative tool which will determine with almost certainty that a person committed or did not commit an offence.”

27. Similarly, in **Stephano Ngigi Maigwa v Republic [2022] eKLR**, the court held that where the link between the accused and the offence is not clearly established, failure to conduct DNA testing may be fatal to the prosecution case.

“The confrontation between PW1 and the appellant on 3rd September 2023 merely explained the circumstances of arrest. It did not corroborate the alleged acts of defilement.”

28. The confrontation between PW1 and the appellant on 3rd September 2023 merely explained the circumstances of arrest. It did not corroborate the alleged acts of defilement.

29. The medical findings further complicated the prosecution case. The presence of an old hymenal scar and an STI, coupled with the appellant’s HIV-negative status, pointed to possible prior or concurrent sexual activity that was neither investigated nor explained. The alleged acts were said to have occurred on 29th and 31st August 2023, with examination on 5th September 2023. The failure to explain HIV transmission or to conduct DNA testing raises a real possibility that another person may have defiled, impregnated, and infected the complainant.

30. The law is settled that not every inconsistency is fatal. However, where contradictions go to material facts and the core of the prosecution case, they cannot be ignored. In **Richard Munene vs**

Republic [2018] eKLR, the Court of Appeal held that substantial contradictions must be resolved in favour of the accused. It was held that:

Contradictions, discrepancies, and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favor of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

31. The test as to whether the contradictions are minor or substantial was laid out in the case of **Sigei v Republic [2023] KECA 154 (KLR)**:

“In assessing the impact of contradictory statements or discrepancies on the prosecution’s case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.”

32. From the above authorities, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.

33. Having analysed and re-evaluated the evidence on record, it is my finding that the prosecution's evidence was marred with contradictions and inconsistencies particularly the unresolved DNA and HIV issues. The said contradictions are so substantial as they relate to material facts. I therefore disagree with the trial magistrate that they were minor and trivial and did not affect the credibility of the witnesses. In the absence of DNA testing, the evidentiary gaps remain unresolved. That unresolved doubt must, as a matter of law, be resolved in favour of the appellant.
34. These principles apply squarely. The evidence adduced falls manifestly short of the required standard, and the trial was marred by material irregularity and failure to safeguard the minor's interests, rendering the proceedings a miscarriage of justice.
35. Having reached that conclusion, the only remaining issue is the appropriate order to make. In **Muiruri v Republic [2003] KLR 522**, the Court of Appeal held that a retrial may be ordered where the interests of justice so require, considering all the circumstances of the case, including the nature of the offence and the evidence on record. Further, in **Francis Ndungu Wanjau v Republic [2011] eKLR**, the Court of Appeal stated: -
- “Whether or not there ought to be a retrial in any particular case is a matter for discretion of the court depending on the circumstances of the case.”*
36. In this case, taking into consideration the nature of the offence and the evidence presented before the trial court, this Court is persuaded to find that this is a suitable case to order a retrial.
37. Accordingly, I make the following orders;

- a) The trial **in Kibera Magistrate's Court in Criminal Case Number E099 of 2023; Republic Vs. Eugene Samuel Odhiambo** is hereby declared a mistrial.
- b) The conviction entered against the appellant is hereby quashed, and the sentence imposed is set aside.
- c) The appellant shall be escorted to Muthangari Police Station.
- d) The appellant shall be presented to the Chief Magistrate's Court on 16th February 2026 for fresh plea.
- e) The trial court shall be at liberty to issue new bail/bond terms.

Orders accordingly.

**Judgement dated and delivered virtually this 12th day of
February 2026**

**D. KAVEDZA
JUDGE**

In the presence of:

Appellant Present

Mr. Mutuma for the Respondent

Karimi Court Assistant.