



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Okumu v Republic (Criminal Appeal 25 of 2017)  
[2026] KEHC 1315 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1315 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL 25 OF 2017  
ACA ONG'INJO, J  
FEBRUARY 5, 2026**

**BETWEEN**

**EVANS ODHIAMBO OKUMU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of Hon. R. K Langat SRM in the Senior Resident Magistrate's Court at Rongo Criminal Case No. 750 of 2015 delivered on 30<sup>th</sup> August 2017)*

**JUDGMENT**

1. The Appellant Evans Odhiambo Okumu was charged with the offence of defilement contrary to section 8(1) as read with section (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars are that on the 15<sup>th</sup> day of December 2016 at South Kamagambo Location within Migori County in the Republic of Kenya intentionally caused his penis to penetrate the Vagina of WA a child aged 8 years.
3. In the Alternative count he was charged with the Offence of Committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The particulars are that on the 15<sup>th</sup> day of December 2016 at South Kamagambo Location within Migori County in the Republic of Kenya the appellant intentionally by use of his Penis caused contact with the Vagina of WA a child aged 8 years.
5. Based on the evidence of six (6) prosecution witnesses and the Appellant's unsworn testimony the Trial Magistrate convicted and sentenced him to serve life imprisonment.
6. The Appellant was aggrieved by the conviction and sentence of the subordinate court and he lodged his Petition of Appeal dated 13<sup>th</sup> September 2017 on the following grounds:



- a. That the Appellant Maintained plea of Not Guilty.
- b. That the Trial Court erred in law and facts by so relying on insufficient investigations and by unfounded and non-reasoned evidence to award the Appellant a harsh judgement.
- c. That New and compelling evidence is available and due to accompany appeal submissions.
- d. That he be heard in his presence and as possible.

Prosecution's case was supported by six (6) witnesses who testified as follows:

7. PW1 - Lilian Nyaboke testified that she was a clinical officer at Rongo Hospital and She stated that she had the P3 Form (MFI 1), PCR Form (MFI 2), Treatment notes from Royal Hospital and the Age assessment form in respect of the complainant WA who was referred from Kamagambo Police Station with a history of sexual assault and defilement by a person well known to her on 15/12/2016 at 5.00p.m. She said that the complainant was in the company of her grandmother and a police officer. She stated that she saw the patient who was in fair general condition and her estimated age was 8 years. She also testified that on examination the complainant had normal external genitalia with bruises on the entry of vagina. That there was no presence of vaginal discharge and the HIV test done turned out negative. She further stated that urinalysis revealed red blood cells, yeast cells and pus. PW1 gave the complainant treatment PEP to prevent HIV. She stated that from the urinalysis, the red blood cells meant that there was breaking of hymen and the cells showed there was infection. She stated that she concluded that the minor was defiled. PW1 said that she signed and stamped the P3 form on 25/12/2016. She also testified that she saw the treatment notes from Royal Clinic prepared on 16/12/2015 stating that there was defilement as per the doctor's examination. That there were bruises on the face of vagina and that the PRC form she filled on 28/12/2016 reflected what was in the P3 form and treatment notes. It was her further testimony that a Trauma counselling was recommended for the minor whose age as approximately 8 years. PW1 produced the P3 form, PRC Form, Age Assessment, and Treatment notes from Royal Clinic (MFI 4) as exhibits 1-4.
8. PW2 - YMO testified that she was a farmer and resident of Kamagambo and was aged 45 years. That WA is her granddaughter who lived with her and studied at [Particulars withheld] Academy in Nursery. PW2 testified that on 15/12/2016 at 5pm she had gone to Banda Market and went home later where she found WA who informed her that the Appellant herein had defiled her. She testified that the Appellant used to reside at his uncle's home at Kamagambo and they were neighbors. That the Appellant used to work, and crush sugar at his uncle's home and had stayed there for one year. PW2 testified that the distance from her home to where the Appellant resided is 10 meters apart. It was her testimony that WA told her that the Appellant had "shika" her. It was her testimony that WA told her that she had gone to heard 2 goats and the Appellant was herding cows at a place next to the river. That they met there and the Appellant called her and bought her mandazi. That the Appellant "shika" her, lay her down and told her to remove her clothes. That WA removed her clothes and the Appellant removed his trouser and did "tabia mbaya" to her. PW2 stated that WA told her in dholuo that the Appellant removed his penis on her vagina and when PW2 examined the minor, she could not walk properly as she walked with her legs apart and was crying in pain, and she saw blood on WA's private parts.
9. PW2 further testified that when she left WA to go to market, the minor had her clothes on. It was her further testimony that the Minor knew the Appellant as he was the person who had defiled her. That the Minor knew and called the Appellant Odhiambo and they were neighbors. Furthermore, PW2 testified that the Minor told her that Odhiambo had done "tabia mbaya" to her. PW2 stated that she went to the sub-chief, David Otieno the same night and reported the same and in the morning, the



Sub-chief came and arrested the Appellant. She stated that they then took a motor bike and went to the Royal Clinic where the treatment notes (MFI 4) were given. PW2 said that when they questioned the Appellant the night before he was arrested, he denied having done the act and when they went back home from Rongo hospital the next day, they found him being arrested and he was taken to Ayola Police Post as PW2 and WA recorded their statements at Kamagambo Police Station. She further stated that they had no grudge with the Appellant or his family.

10. Upon cross-examination by the Appellant, PW2 stated that WA came home limping from grazing field till home and that the Goats went home alone. It was her testimony that the Appellant had gone to her home that day and borrowed oil at noon and that at 5pm the Appellant was grazing cows and was not at Kandongo. She stated that at 4pm the cows were not tied in homestead and that PW2's aunt went to the place the Appellant was going and reported to the Appellant's aunt on what he had done. That it was not until 6Pm that the Appellant went home with the cows and left for Nyandogo.
11. PW3 - WA who was the complainant in this case testified that she schooled at Nyariwana Academy and lived with her grandmother and her sister. She stated that they had 2 goats that she grazes when her grandmother is not around. It was PW3's testimony that in the incident year her grandmother had gone to the market when she took the two (2) goats to graze and when her grandmother came back, PW3 was taken to the hospital since her clothes had blood and she stated that the Hospital was for treating sick people. PW3 stated that her grandmother saw the blood and that it was coming from her stomach.
12. It was PW3's testimony that the Appellant Odhiambo was grazing 4 cows when he told PW3 to accompany him to the grazing fields. That when they got to the grazing field Odhiambo took her to a forest away from the grazing field and lay her on the forest leaves where he removed PW3's clothes and removed his trouser as well. PW3 stated that no one saw them and Odhiambo did to her "tabia mbaya" while demonstrating and pointing at her private part between her legs. PW3 stated that Odhiambo removed his thing of urinating and inserted it into her "urinating thing." She stated that thereafter she went home alone with the goats.
13. Upon cross-examination by the Appellant PW3 stated that she was alone when the Appellant did to her "tabia mbaya" and that they left the goats and the cows with some Children some of whom came from Otieno's home. She testified that the other child came to the place she was being defiled and the Appellant told the children that he defiled Emily and not PW3.
14. PW4 -Vincent Nyakundi testified that he was a clinical officer at Rongo Hospital, a private facility. He acknowledged the outpatient treatment card at Rongo Clinic and confirmed that he was the one who made the notes on the patient named WA aged 8 years old. It was his testimony that WA went to hospital with allegation of defilement by known person the previous day and she sustained injuries. That upon Vaginal examination he found that the outside part was normal and upon inner examination, there was no bleeding or discharge but on the walls of vagina there was remarkable bruises although not actively bleeding. He stated that they formed an impression of soft tissue injury secondary to defilement and administered prevention drugs for HIV. He then produced the Treatment notes as PEX.4.
15. Upon cross-examination by the Appellant, he stated that there were bruises within the vagina showing penetration.
16. PW5 - David Otieno Onyango testified that he was the Assistant Chief of South Kanyajuok Sub-location. That on 15.12.2016 at around 6.30 p.m., Mrs. J went to his home and reported that her granddaughter had been defiled. He stated that he advised her to take care of the child- till the next date as it was late and the following day, he organized for them to go to Rongo Sub County Hospital and



- Rongo Police Station. It was PW5's testimony that the grandmother suspected the Appellant herein who worked near her home. That PW5 then located where the suspect was and established that he was known to the complainant before arresting the suspect and taking him to Complainant's home where the Complainant confirmed that he was the one who defiled her. PW5 then stated that he handed over the suspect to the AP officers.
17. Upon cross-examination by the Appellant, he stated that he did not find him with the child rather it was the complainant who identified him.
  18. PW6 - PC Melanine Kerubo testified that she was based at Kamagambo Police Station, Crime Office and Investigated this case. She stated that on 16.12.2016 at around 10am, she was in the office when complainant in company of her grandmother reported a defilement case. That they complained that the minor had been defiled by the Appellant and she recorded the statements. It was PW6's testimony that the victim told her she was defiled by the Appellant who met her at a grazing field and defiled her. PW6 Stated that the Appellant had been brought to the police station and she prepared the charges and took the minor to Rongo Sub County Hospital for examination. She further stated that the doctor confirmed that the minor had been defiled. PW6 escorted the minor to the hospital for age assessment and it was established that the complainant was 8 years old and the Appellant 20 years. PW6 then produced age assessment for the Appellant as Ex P5. Upon cross-examination by the Appellant, PW6 stated that the doctor confirmed that the Appellant defiled the girl.
  19. At the close of the Prosecution's case the Appellant - Evans Omondi Okumu was placed on his defense and he testified that on 11/12/2016 he was crushing jaggery at certain a home at Kamagambo and after finishing when he was about to head home, a certain woman (Widowed) called him and requested for some money from her. He testified that he gave Kshs. 600 to the woman who told him that she was headed to purchase some maize and was to return the money in 3 days' time. It was his further testimony that he went to the woman's home and found her drunk upon which he proceeded to his house. That at 6am the next day someone knocked on his door and when he opened, he found the Chief and AP who took him to the Chief's office and later to Police Station. It was his testimony that he was later brought to court with charges he was not aware.
  20. This appeal was canvassed by way of written submissions.
  21. The Appellant did not file his written submissions however, he adduced four (4) grounds of appeal in his petition dated 13<sup>th</sup> September 2017 on the following grounds:
    - a. That he Maintained plea of Not Guilty.
    - b. That the Trial Court erred in law and facts by so relying on insufficient investigations and by unfounded and non-reasoned evidence to award him a harsh judgement.
    - c. That New and compelling evidence is available and due to accompany appeal submissions.
    - d. That he be heard in his presence and as possible.
  22. The Respondent's submissions are dated 14<sup>th</sup> March 2025 and were filed on even date.
  23. On whether or not the evidence was sufficient to sustain the charge, the Respondent submitted that the three elements of defilement namely: Age, Penetration and Positive Identification were well established and proven by the prosecution.
  24. On the element of age, the Respondent argued that PW1- The Clinical officer testified that the minor was approximately 8 years of age and produced an age assessment report as exhibit No. 3 which indicated the that the minor was 8 years old.



25. On the element of Penetration, it was submitted that PW1 in her testimony stated that she observed the minor and that she had signs of defilement and that the hymen was absent. That P3 form was produced as Exhibit P1 confirming the minor had been defiled and her hymen was broken.
26. On positive identification, it was submitted that PW2 testified that the minor is her granddaughter and that she told her that she had been defiled by a neighbor known as Odhiambo. It was also submitted that the Appellant was positively identified by PW3.
27. Consequently, the Respondent submitted that the Appellant's ground of appeal that the evidence was insufficient is unfounded and prayed that the court dismisses it.
28. On whether or not the alleged new evidence is admissible, it was submitted that while Section 358 of the Criminal Procedure Code (cap. 75) allows an appellate court to admit fresh evidence in the interest of Justice, in this particular matter the Appellant has not provided additional evidence that he claims to have. As such, it is impossible to ascertain if indeed this evidence was not available at trial or the credibility and relevance of the said evidence. The Respondent submitted that the said ground of appeal lacks merit and should be dismissed in line with the Case of *Elgood v Regina (1968) E.A 274* which outlined the principles upon which an appellate court in a criminal case can exercise its discretion to decide whether or not to allow additional evidence for the purpose of an appeal. The principles referred to are:
  - i. That the evidence that is sought to be called must be evidence which was not available at the trial.
  - ii. That it is evidence that is relevant to the issues.
  - iii. That it is evidence that is credible in the sense that it is capable of belief.
  - iv. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at trial.
29. Similarly, the Respondents referred to the case of *Samuel Kangu Kamau v Republic (2015) eKLR* where the Court of Appeal stated that;

“It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal.”
30. In conclusion, the Respondent's Counsel submitted that there was sufficient evidence to sustain the charge and that the second ground of appeal is unfounded as the Appellant has not provided the alleged new evidence. Reasons wherefore they prayed that this honorable court dismiss this appeal as it lacks merit.

### **Analysis and Determination**

31. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion



as to whether or not to uphold the decision of the trial court. In the case of *Okeno v Republic* [1972] EA 32, the East Africa Court of Appeal stated on the duty of the court on first appeal that:

“an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination.”

32. Further, in the case of *Mark Oiruri Mose vs R* (2013) eKLR, it was reiterated that:

“... the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

33. Having considered the grounds of Appeal, and reviewed/revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are: -

1. Whether the ingredients of the offence of defilement namely (1) Age, (2) Penetration, and (3) Identification were proven beyond reasonable doubt?

2. Whether the Appellant’s alleged New Evidence is admissible.

Section 8(1) & (2) of the Sexual Offence Act No. 3 of 2006 provides that:

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.

34. In this regard, the offence of defilement is anchored on three (3) main ingredients namely; (1) The Age of the victim, (2) Penetration, and (3) The Proper Identification of the Perpetrator.

35. On proof of age the Court of Appeal in *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR) stated that:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

36. Similarly, the Court of Appeal in *Edwin Nyambogo Onsongo vs Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”



37. Further in P.M.M vs Republic [2018] eKLR, it was held:
- “... whilst the best evidence of Age is the birth certificate followed by age assessment, the mother’s evidence of the complainant’s age together with the combination of all other evidence available can be relied on to determine the age of the complainant...”
38. PW1 the Clinical Officer testified that she conducted an age assessment for the complainant herein where she established the minor’s age to be approximately 8 years old. The age assessment Report was produced as Ex P3.
39. The Trial Court also conducted a voir dire examination of the Complainant and declared her vulnerable owing to her age and inability to answer questions. Even though she testified without being sworn, the trial court still allowed the matter to proceed through an intermediary who is PW2- The Grandmother.
40. The observation and declaration by the trial court that the complainant was a vulnerable witness, coupled with the evidence of PW1 is sufficient proof of the approximate age of the Complainant which falls within the provisions of Section 8(2) of the Sexual Offences Act No. 3 of 2006. As such, the complainant’s age was proven beyond reasonable doubt.
41. On Penetration, Section 2 of the Sexual Offences Act defines penetration as-
- “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
42. This definition has been given judicial interpretation in the case of Mark Oiruri Moses V R [2013]eKLR when the Court of Appeal stated thus:
- “Many times the attacker does not fully complete the sexual act during commission of the sexual act. That is the reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”
43. This position was fortified by the same court, differently constituted, in Erick Onyango Ondeng v Republic [2014] eKLR where it was held:-
- “In sexual offences, the slightest penetration of female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen is ruptured.”
44. PW1 the Clinical Officer testified that she examined the Complainant’s genitalia and observed bruises on the entry of vagina. She further stated that urinalysis done showed red blood cells, yeast cells and pus. It was her testimony that from the urinalysis, the red blood cells meant that there was breaking of hymen and the cells showed there was infection. She concluded that the minor was defiled and she signed and stamped the P3 form on 25/12/2016 to that effect.
45. PW2 also testified that when she examined the complainant who went home after the incident, she observed that WA could not walk properly as she walked with her legs apart and was crying in pain, and that she saw blood on WA’s private parts.
46. PW4 testified that he conducted the Complainant’s vaginal examination and observed that on the walls of her vagina there was remarkable bruises although not actively bleeding. That he formed an impression of soft tissue injury secondary to defilement and administered prevention drugs for HIV.



47. PW6 testified that she accompanied the complainant and PW2 to the clinical officer who confirmed that the complainant had been defiled and an age assessment was done establishing the complainant as 8 years old and the Appellant 20 years.
48. Going by the above evidence of PW1, PW2 and PW6 it is apparent that there was penetration of the complainant's genitalia. As such, the element of penetration was proven beyond reasonable doubt.
49. On whether the perpetrator was properly identified the court in *Stephen Kimari Gathano v Republic* [2022] eKLR stated:
- “It bears repeating that the Appellant was a person known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was Mzee was Purity- She knew the accused as such.”
50. Moreover, the Kenya Judiciary Criminal Procedure Bench book 2018 at paragraph 94 and 95 it is provided that:
- “In cases involving sexual offenses, if the victim's evidence is the only evidence available, the court can convict on basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings ( see *Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'Birithia v R* High Court at Meru Criminal Appeal No. 111 of 2011)”
51. PW2 testified that WA told her that the Appellant known as Odhiambo had "shika" her, lay her down and told her to remove her clothes and the Appellant removed his trouser and did "tabia mbaya" to her. She also testified that WA told her in dholuo that the Appellant removed his penis on her vagina and when PW2 examined the minor, she could not walk properly as she walked with her legs apart and was crying in pain, and she saw blood on WA's private parts.
52. PW3 the complainant herein testified that the Appellant - Odhiambo took her to a forest away from the grazing field and lay her on the forest leaves where he removed PW3's clothes and removed his trouser as well. PW3 stated that no one saw them and Odhiambo did to her "tabia mbaya" while demonstrating and pointing at her private part between her legs. PW3 stated that Odhiambo removed his thing of urinating and inserted it into her "urinating thing."
53. PW5 also testified that when he located where the suspect who is the Appellant herein was and established that he was known to the complainant, he took him to Complainant's home where the Complainant confirmed that he was the one who defiled her. That he then arrested the Appellant after identification and handed him over to the AP officers.
54. Based on the foregoing, it then follows that once PW3 identified the perpetrator as someone known to her, the prosecution's case had been proven beyond reasonable doubt. In this instance she positively identified the perpetrator as Odhiambo when she told PW2 how Odhiambo did to her "tabia mbaya" and was able to point him out when PW5 took him to her home. As such, the Appellant was positively identified as the perpetrator of the offence herein.
55. On the second Issue as to Whether the Appellant's alleged New Evidence is admissible, the Case of *Elgood v Regina* (1968) E.A 274 outlined the principles upon which an appellate court in a criminal case can exercise its discretion to decide whether or not to allow additional evidence for the purpose of an appeal as follows:



1. That the evidence that is sought to be called must be evidence which was not available at the trial.
  2. That it is evidence that is relevant to the issues.
  3. That it is evidence that is credible in the sense that it is capable of belief.
  4. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at trial.
56. Further, in the case of *Samuel Kangu Kamau v Republic* (2015) eKLR the Court of Appeal stated that;
- “It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal.”
57. The Appellant did not submit or file his written submissions and neither did he provide the additional evidence that he claims to have in his Petition for Appeal dated 13<sup>th</sup> September 2017. Consequently, this court finds that his third ground of appeal is unfounded and the same is dismissed.
58. This court has noted that although the Appellant was charged with the offence under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, the age of the complainant was established as 8 years and therefore the applicable Section of the law is Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which provides for mandatory life imprisonment. Although the trial magistrate convicted the Appellant for the offence under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, he properly sentenced the Appellant to life imprisonment since it was confirmed that the minor was 8 years old. Being that the Appellant went through trial knowing that the age of the complainant was 8 years this court finds that there was no prejudice suffered in the misalignment between the age of the victim and the applicable section of the law under which he was charged. That discrepancy is curable under Section 382 of the Criminal Procedure Code and must not result in unlawful sentencing.
59. In conclusion, the
1. The conviction and sentence by the trial court is upheld and the appeal is dismissed for lack of merit.
60. Right of appeal within 14 days.
- It is so ordered.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**HON. ANNE ADWERA- ONG'INJO**

**JUDGE**

In the Presence of:

Victor – Court Assistant

Mr. Oimbo – Counsel for the Respondent/ State

Appellant -

