

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. E053 OF 2025

JUSTUS OTIENO ONGWANG ALIAS OTIS...

.....**APPELLANT**

VERSUS

REPUBLIC.....

RESPONDENT

(Appeal against the conviction and sentence of Hon Eric Malesi (PM) in Madiany PMCR S.O No. E012 of 2025 dated 14/8/2025)

JUDGMENT

1. The Appellant herein **Justus Otieno Ogwang alias Otis** was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on various dates between 10th June 2025 and 19th June 2025 at Akom Sub Location, South Asembo Location within Rarieda Sub County in Siaya County intentionally

and unlawfully caused his penis to penetrate the vagina of V.A a child aged 5 years.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual offences Act No. 3 of 2006. The particulars are that on various dates between 10th June 2025 and 19th June 2025 at Akom Sub Location, South Asembo Location within Rarieda Sub County in Siaya County intentionally and unlawfully touched the vagina of V.A a child aged 5 years with his penis.
3. The Appellant pleaded not guilty to all the charges and the case went to full trial in which the prosecution called five (5) witnesses. At the close of the prosecution's case, the court found that the Appellant had a case to answer and thus placed him on his defense under section 211 of the Criminal Procedure Code. By judgment delivered on 14th August 2025, the Appellant was convicted and sentenced to serve life imprisonment.
4. Being dissatisfied with the decision of the trial court, the Appellant instituted this appeal against the conviction and sentence on four (4) grounds of appeal on the face of his petition of appeal dated 16th September, 2025:

- i). THAT the trial proceedings were fundamentally flawed and failed to comply with Article 50 of the Constitution on

the right to a fair trial, thereby occasioning a miscarriage of justice.

- ii). THAT the trial court failed to adequately consider and evaluate the Appellant's defense that the prosecution was actuated by a family grudge, resulting in a conviction based on uncorroborated and biased evidence.
- iii). THAT the prosecution failed to prove the case against the Appellant beyond reasonable doubt.
- iv). THAT the Appellant reserves the right to adduce further and/or supplementary grounds of appeal upon being supplied with certified copies of the trial court proceedings and judgment.

5. Being a first-time appeal, this Court's duty is to re-evaluate the evidence presented to the trial Court and subject to an independent analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court must also take with caution that it neither heard nor saw the witnesses and therefore to give due allowance for that. In **Okeno - VS - Republic (1972) EA 32**, it was held that;

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not

the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses". (Emphasis added)

6. The evidence tendered before the trial court was as follows;
7. **M.A.O (name withheld) (PW1)** the grandmother of the minor complainant that on 18th, June 2025, while attempting to bathe the minor, the child closed her legs and refused to be washed while complaining of pain. That she later learned from the child's mother that the minor had been defiled, prompting her to question the child herself. She stated that the minor disclosed to her the Appellant, known to her as a son to her in-law, had been defiling her and giving her money to keep it a secret. That she noted that the Appellant resided in the same homestead and had previously been left in the company of the minor. She produced the minor's baptismal card as an exhibit to prove the child's age.

During cross-examination, she admitted that she had no dispute with the Appellant and had always treated him as a son by allowing him to live freely in her house. She acknowledged that the Appellant had previously bought sugar for his mother but maintained that she was surprised that he was capable of committing such an offense. She reaffirmed that there was no grudge between them.

8. **V.A (PW2)**, a minor of tender years, gave an unsworn statement after a voire dire examination and testified he identified the Appellant as "Otis," a neighbour, and stated that he had done "tabia mbaya" (bad manners) on her on multiple occasions. She detailed that the Appellant would call her, give her money, and warn her not to inform her mother. The minor described a specific incident in which the Appellant took her to his house, removed her clothes, and placed her on his bed. She recounted that he tied her hands and legs using his clothes and placed a cloth in her mouth to silence her before proceeding to defile her. She stated that she felt pain and saw "white urine" coming from his private parts.

During cross-examination, the minor stated that she had not been coached to lie, affirming that what she told the court was the truth. She clarified that while she was sent to fetch water and buy mandazis, the Appellant would call her, though she sometimes refused. She maintained her account of the assault.

9. **C.A (PW3) testified that she is** the mother of the minor and that on on 17th, June 2025, while washing the minor, the child complained of pain in her pelvic area and closed her thighs. Upon inquiry, the minor revealed that the Appellant, Otis, had blocked her mouth and defiled her and later wiped her with his clothes and warned her not to tell her mother. That she and her mother (PW1) reported the incident to the village elder and the Appellant's father, who suggested that the matter be resolved at home, but she opted to take the minor to Ongiello Hospital. She identified the Appellant as a neighbour residing approximately 20 meters from her mother's house. She produced treatment notes, a PRC form, and a P3 form as exhibits.

On cross-examination, she maintained that she had lived peacefully with the Appellant and that he was close to the family. She denied ever stopping at his house or knocking on his door at night. She dismissed the defence's implications of a grudge, stating simply that the Appellant was lying.

10. **Alfred Odhiambo Ongara (PW4)** a registered clinician at Ongiello Sub County Hospital testified that he examined the minor on 20th, June 2025. That he found that the child's hymen was broken, her vagina was red and inflamed, and that there was a whitish discharge, all signs consistent with penetration.

He confirmed the child was five years old at the time of the examination. He filled out the P3 form and the Post Rape Care (PRC) form, which he produced as exhibits. That he noted that the injuries to the hymen appeared fresh and were healing, concluding that there was a sign of penetration. That a Urinalysis and VDRL tests returned negative results, and no spermatozoa were seen.

During cross-examination, he clarified that the broken hymen could have been caused by a penetrating object and that he relied on the minor's history to understand the nature of the assault. He affirmed that the medical findings were consistent with the allegations made by the child.

11. **PC Jackline Nyaga (PW5)** - Investigating Officer attached to Aram Police Station, testified that she received the five-year-old minor on June 20, 2025. She recorded the child's statement, in which the minor alleged that "Uncle Otis" had defiled her on several occasions and that he had "urinated" on her private parts. She further stated that she obtained the minor's baptismal card to verify her date of birth, establishing that the minor was born on 24th, August 2019. She then escorted the child to the hospital for medical examination and treatment. She produced the baptism card as an exhibit to prove the age of the victim. She confirmed that the Appellant, a cousin to the minor's mother, was arrested and charged

following the investigations. She noted that the Appellant resided approximately 150 meters from the grandmother's house.

12. The prosecution subsequently closed its case. The trial court later ruled that a prima facie case had been established and thus the Appellant was placed on his defence. He opted to tender an unsworn statement.
13. **Justus Otieno Ongwang (DW1)**, denied the charges. He stated he is a fisherman from Got Akao and claimed that on 17th, June 2025, the minor's grandmother (PW1) came to his home looking for his mother. He further alleged that on 1st July, 2025, the minor's mother (PW3) came to his house late at night requesting a lantern, but his wife was away at a funeral. He claimed that following this interaction, he was arrested by police officers at Aram on July 20, 2025. He maintained that he was a relative of the family and had previously bought sugar for his mother. He denied committing the offense of defilement.
14. When considering the evidence on record, the learned trial Magistrate observed that the defense brought by the Appellant did not in any way cast doubt on the prosecution's case and convicted him under section 215 of the Criminal Procedure Code.

15. The appeal was canvassed by way of written submissions. Both parties duly complied.

16. I have considered the record of the trial court and the submissions tendered. I find the issue for determination is whether the Respondent proved its case beyond reasonable doubt.

17. The burden of proof in all criminal trials is upon the prosecution to prove and that the standard is one of beyond any reasonable doubt. See **Woolmington Vs DPP [1935] AC 462.**

18. The offence of defilement has three essential ingredients which must be proved by the prosecution before a conviction can be achieved. The said elements include; **age** of the victim (must be a minor), **penetration** and the proper **identification** of the perpetrator. These ingredients are provided for under section 8(1) of the sexual Offences Act No. 3 of 2006 and must each be proved for a conviction to ensue.

“Section 8(1) of the Sexual Offences Act No. 3 of 2006 provides as follows: -

(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 age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**
- (5) It is a defence to a charge under this section**
if -
- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
- (b) the accused reasonably believed that the child was over the age of eighteen years.**

- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.**
- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children’s Act.**
- (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees.**

19. As regards the age of the victim, it is noted that the same is crucial in that the eventual sentence to be imposed upon conviction is dependent upon the age of the victim.. 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.” (emphasis added).

20. Regarding proof of age, we wish to state at the outset that the importance of proving the age of a victim in sexual offences is paramount considering that under the Sexual Offences Act, the prescribed sentence is determined by the age of the victim.

21. Section 2 of the *Children’s Act* defines a child as a person under the age of eighteen (18) years, there are various ways which can be used to prove a victim’s age as held in **Mwalango Chichoro Mwajembe V Republic, Criminal Appeal No. 24 of 2015 (UR)** where the court stated as follows:

“.....the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary

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” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...”

22. In the present case, the prosecution discharged this burden through the Baptismal Card (Exhibit 1) produced by PW5, which established that the minor was born on 24/08/2019, making her 5 years old. This was further corroborated by the Clinical Officer (PW4), satisfying the legal threshold. The

Appellant's ground of appeal alleging a "grudge" or procedural prejudice under Article 50 fails to challenge this specific ingredient, as the documentary proof of age is an objective fact that cannot be fabricated by a family dispute. Consequently, the sentence of life imprisonment was legally anchored on the proven age of the victim. I find that the age of the minor was proved beyond reasonable doubt.

23. As regards the aspect of penetration, Section 2 of the Sexual offences Act No. 3 of 200 defines "**penetration**" as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Penetration is proved through the evidence of the victim. The testimony of the victim in this case coupled with evidence from other witnesses was sufficient to determine whether penetration occurred.

24. **Section 124** of the Evidence Act, Cap 80 provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him. Provided that where in a criminal case involving a

sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

25. In the case of **Bassita vs. Uganda S.C. Criminal Appeal No. 35 of 1995**, the Supreme Court of Uganda had the following to say in respect of proving penetration: -

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

26. In the present case, PW2 gave a graphic account of the Appellant inserting his genitalia into hers, which was corroborated by PW4’s medical findings of a broken hymen, inflammation, and discharge.

27. The Appellant's defense of a grudge is diminished by the medical evidence; as held in ***Seme v Republic [2008] eKLR***, that a mere denial cannot overturn positive medical findings corroborating the commission of the offense.
28. Kenyan courts have repeatedly held that a child's testimony on penetration need not be scientifically perfect so long as it conveys the fact of intrusion. In ***Mark Oiruri Mose v Republic [2013] eKLR***, the Court of Appeal stressed that a victim's account of how the male genitalia came into contact with her genitalia is sufficient to prove penetration.
29. In this case, the ingredient of penetration, the prosecution relied on the unsworn testimony of the minor describing the insertion of a penis into her vagina, which was corroborated by the medical evidence of PW4. The Clinical Officer noted bruises on the labia minora and concluded that there was partial vaginal penetration. This aligns with the definition of penetration under Section 2 of the Sexual Offences Act, which requires even the slightest partial insertion. This principle was reinforced in ***Mark Oiruri Mose v Republic, Criminal Appeal No. 295 of 2006***, where the Court of Appeal at Kisumu held that the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the

offence, and such penetration need not be complete or rupturing the hymen.

30. Furthermore, Kenyan jurisprudence makes clear that medical evidence is not indispensable where the complainant's testimony is credible, but in this case it is overwhelmingly present and supportive. In **Fappyton Mutuku Ngui v Republic [2012] eKLR** and **Geo Philip Muthuka v Republic [2015] eKLR**, the courts held that penetration may be proved through either direct testimony or circumstantial indicators such as genital injuries. Here, the clinical findings are direct, immediate, and consistent with recent sexual intrusion. The defence offered no expert evidence to challenge these findings. As such, the trial court correctly held that the element of penetration was proved beyond reasonable doubt. Hence, I find the second ingredient namely penetration was adequately proved based on the victim's evidence and the medical evidence.

31. As regards the issue of identification/participation of the Appellant, the same was firm, consistent, and free from any possibility of mistake. The complainant knew the Appellant prior to the incident and positively recognized him as the perpetrator. She knew him as uncle "Otis" This was therefore a case of recognition rather than identification of a stranger, which Kenyan courts have consistently held to be the most

reliable form of identification. In **Anjononi & Others v Republic [1980] eKLR**, the Court of Appeal held that recognition is “more reliable than identification of a stranger because it is based on the witness’s prior knowledge of the assailant.” The complainant’s evidence was direct, unwavering, and supported by the circumstances of close physical proximity during the commission of the offence, which left no room for doubt.

32. The environmental circumstances also favoured accurate identification. The incident occurred in a setting where the complainant had sufficient opportunity to see and recognize the Appellant. The Court of Appeal in **Wamunga v Republic [1989] eKLR** emphasized that courts must evaluate lighting, distance, and duration of encounter when assessing identification. Here, the interaction was prolonged, intimate, and involved direct contact, making misidentification practically impossible. The complainant’s emotional distress immediately after the incident further supports the reliability of her identification as she described the perpetrator by name to PW1 and PW3 without hesitation.

33. Finally, on identification, the complainant recognized the Appellant as “Uncle Otis”, a close relative living nearby. Jurisprudence establishes that recognition is more reliable than identification of a stranger (**Anjononi v Republic [1980]**

eKLR). The trial court correctly analyzed the "grudge" defense and found it implausible that a mother (PW3) would subject a 5-year-old to the trauma of a medical examination and trial for a domestic squabble. Indeed, I find that it was highly unlikely that the mother of the victim would use her young and vulnerable daughter as a victim of defilement just to fix the Appellant because of an alleged family dispute. The identification was thus safe, and the defense was rightly rejected as a diversionary tactic.

34. In the landmark case of ***R v Turnbull & Others [1977] QB 224***, the court established guidelines for identification evidence, stating that recognition of a known person carries more weight than the identification of a stranger. Although the Appellant raised an alibi defence, the trial court was justified in rejecting it because he admitted being within the same neighbourhood, and in ***Uganda v Wabwire Benson, HCT-09-CSC-0259-2016***, it was held that a defence of alibi cannot stand where the accused is positively placed at the scene by the prosecution evidence.

35. Furthermore, the Appellant's own conduct reinforced the prosecution's case on identification. His presence with the complainant shortly before the incident, his inconsistent explanations, and the absence of any credible contrary account undermine the defense and strengthen the

recognition evidence. Courts have held that where recognition is supported by the conduct of the accused and surrounding circumstances, the evidence is exceptionally strong. In ***Simiyu & Another v Republic [2005] eKLR***, the Court of Appeal held that prompt and consistent reporting of the assailant's identity enhances evidential reliability. In this case, the complainant reported the Appellant's name immediately and that PW1 and PW3 confirmed the consistency of her report, and that no evidence exists of animosity or mistaken identity. The identification was therefore accurate, reliable, and proved beyond reasonable doubt. The ingredient of identification was therefore sufficiently proved, going by the above evidence, it is clear that the cumulative and conjunctive elements in a charge of defilement all proved and the evidence was consistent and corroborative hence sufficient to convict the Appellant for the offence. It is highly unlikely for the parents of the victim to use their young and vulnerable daughter as a victim of a sexual act so as to settle scores with the Appellant. Hence, the finding on conviction by the learned trial magistrate was quite sound and must be upheld.

36. On whether the sentence imposed upon the Appellant was appropriate, the statutory prescription and judicial discretion, the trial court imposed a sentence of life imprisonment pursuant to Section 8(2) of the Sexual Offences Act, which prescribes this penalty for the defilement of a child aged

eleven years or below. While the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** declared mandatory minimum sentences unconstitutional, it affirmed that courts must consider the gravity of the offense and the specific circumstances before sentencing.

37. In **Jared Koita Injiri v Republic [2019] eKLR**, the Court of Appeal upheld a life sentence for defilement of a minor, noting that despite the discretion granted by **Muruatetu**, the severity of the crime against a child of tender years justifies the harshest penalty. The trial magistrate exercised this discretion judicially, noting the mandatory nature of the provision and the need to deter such conduct.

38. In the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus as regards interference with sentence: -

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)”

The Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

“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 states is shown to exist.” (Emphasis added)

39. As regards aggravating factors and breach of trust, the sentence was just given due to the presence of significant aggravating factors. The victim was merely 5 years old, a child of extremely tender years who required protection rather than predation. Furthermore, the Appellant was a close relative (an

uncle) living in the same homestead; he occupied a position of trust and authority over the child.

40. In ***Mumbai v Republic [2014] eKLR***, the court emphasized that breach of trust is a serious aggravating factor. The Appellant abused this trust by not only defiling the minor but also attempting to silence her with money and threats, which speaks to his moral blameworthiness.

41. As regards proportionality and protection of the public, the sentence of life imprisonment is proportionate to the offense and serves the interests of justice. The victim impact statement noted the trauma suffered by the child, and the medical evidence confirmed physical injury (a broken hymen) to a 5-year-old. Courts have consistently held that sentences in sexual offenses must reflect the societal outrage and the need to protect vulnerable children from sexual predators. Given the Appellant's lack of remorse and his attempt to dismiss the proceedings as a "grudge," the life sentence ensures the protection of the public and serves as a deterrent, aligning with the principles of sentencing set out in the Criminal Procedure Code. I am therefore not inclined to interfere with the sentence imposed by the trial court as the same is the minimum possible in law and was warranted in the circumstances.

42. In the result, it is my finding that the Appellant's appeal is devoid of any merit. The same is dismissed. The conviction and sentence by the trial court is hereby upheld

Dated and delivered at Siaya this 17th day of April 2026.

**D.KEMEI
JUDGE**

In the presence of :

Justus Otieno Ojwang alias Otis.....Appellant.

Soita.....for Respondent.

Maurine.....Court Assistant.