Ondicho v Republic (Criminal Appeal E019 of 2025)
[2026] KEHC 4633 (KLR) (27 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4633 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E019 OF 2025

PJO OTIENO, J

MARCH 27, 2026

BETWEEN

EZEKIEL ONDICHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the lower court, (Hon Mary A Ochieng, PM in the original Kitale SOC No. E024 of 2024)

JUDGMENT

Background of the Appeal

1. The Appellant, Ezekiel Ondicho, was charged with an 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 of the charge were that on the 31/01/2024, at Kwanza Sub-County within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina, of V.N., a child then aged 12 years. The Appellant was also charged with an alternative count of committing an Indecent Act with a child, contrary to Section 11(1) of the *Sexual Offences Act*.

2. The Appellant denied the charges and pleaded not guilty to both counts when he was first arraigned court and the matter proceeded to a full trial. Following a full trial, the court convicted the Appellant to the main count of defilement upon establishing the prosecution had proved its case to beyond reasonable doubt. The Appellant was consequently sentenced to serve twenty (20) years imprisonment.

3. The Appellant being aggrieved by both the conviction and sentence of the trial court, lodged the instant Appeal which raises several grounds and attacking both the conviction and sentence.

4. The primary contention is that the prosecution failed to prove its case to the required standards and on the flip side that the trial court failed to give due consideration to the defence case. The Appellant prays that this Honourable court in allowing the appeal, do quash the conviction, set aside the sentence, and set him at liberty.

Summary of the Prosecution's Case

5. The prosecution's case at the trial court was propelled by the testimonies of five witnesses. PW1 and the complainant in the matter testified under oath after the court conducted a voire dire examination and found her to be a child of sufficient intelligence to understand the nature and sanctity of an oath.

6. She stated that she was 13 years old and a Grade 7 pupil at [Name Withheld] and had been staying with her parents, brother, and cousin. It was her case that on 31/01/2024, at approximately 6:00 p.m., she left her grandmother's house to go to her father's workplace to get money for school remedial fees. Her father was a guard on a specific parcel of land, and she knew the Appellant because he worked in the same vicinity as her father. She however never found the father at the workplace and on her way back, she met the Appellant with whom she began walking as they talking.

7. She went on to add that as they walked toward a river, it began to grow dark. She expressed a desire to go home, but the Appellant continued talking to her. When they neared her home, she heard her mother quarrelling outside her grandmother's house. Fearing reprimand for her lateness, she returned to where the Appellant was standing and later accompanied him to his house, which was located within the neighbourhood.

8. Inside the house, PW1 indicated that they both undressed before having sex with the Appellant. She then fell asleep, and when she woke up in the morning, her mother arrived with police officers, and she was arrested alongside the Appellant. She spent the following night at the Kapkoi police station before being taken to the hospital on 02/02/2024.

9. On cross examination, she told the court that the appellant never lived at the father's place of work but she found him there and that she did not frame up the appellant.

10. VB gave evidence as PW2 and introduced herself as the mother to the complainant and that her daughter failed to return home on the evening of 31/01/2024. The failure prompted a search involving her son Derick, her husband, and teachers from the school and which search led them to the Appellant's house the following morning on 01/01/2024. When the search part got to the Appellant's house, they found PW1 in the Appellant's company, both at the moment were undressed. The Appellant was then arrested and taken to Kapkoi Police Station. PW2 maintained that the appellant worked with her husband, that she had no prior grudge against the Appellant and thus had no reason to frame him for such a serious offence.

11. On cross examination she admitted that she never reached the appellant's house and that it would be better if Alice testified.

12. The investigating officer, No. 112037, Corporal Ruth Kimani, was PW3 who testified that she was tasked with processing the case following the arrest. She issued an arrest order and confirmed that the Appellant and the minor were found together in a house on 01/01/2024. She produced the birth certificate of the complainant which established the child's date of birth as 12/01/2012. The complainant was thus a minor at the time aged approximately 11 years and 2 months old at the time of the incidence. She told the court that on being interviewed, the complainant told her that she had been in a relationship with the appellant

13. Upon cross examination she denied having been the arresting officer but maintained that medical examination had established that the complainant had been defiled.

14. PW4 was the clinical officer in the matter who attended court to produce the medical notes and P3 form on the complainant. He produced the medical records of the complainant including the treatment notes and the P3 Form on behalf of Edwin Rotich, who had examined the girl on 02/02/2024, but had subsequently been transferred. The records he had in court indicated that the child had a tender thorax and abdomen upon palpation. The clinical findings revealed bruise marks at the posterior fourchette and an old torn hymen with remnants in place. He made a conclusion of there being clear signs of past vaginal penetration. He explained that while the hymen tear was described as old, the presence of bruise marks was consistent with trauma to the genital area even though the labia minora had no visible injuries. Lab test conducted revealed no disease just as there was no pregnancy. He produced the P3 as PEH1

15. On cross examination, he told the court that Dr Rotich was his junior and that penetration was by a blunt object.

16. With the four witnesses, the prosecution closed its case and gave the appellant a chance to displace the prima facie case made out by the prosecution.

Defence Case

17. In his defence, the Appellant gave sworn testimony and called three other witnesses. In his said evidence he maintained the plea of not guilty on both the counts. He denied knowing the complainant or her father. It was his case that on 31/01/2024, he went to pick up a tractor at 1:30 p.m. and was accompanied by his turn-boy, DW2. They went to a farm where they were engaged in ploughing until 10:00 p.m. He added that they later went to sleep at the home of DW2 and only returned to the farm the following morning to complete the work which they accomplished at 11:00 a.m. He went on to state that he was later arrested at 2:00 p.m. and thus contended that the prosecution witnesses were mistaken and lying about finding him with the girl.

18. Upon cross examination the witness told the court that he did not know the complainant, never worked with her father and had never sent a text message to the mother. He said his work was seasonal and in executed in different destinations.

19. DW2 confirmed that he was working with the Appellant on the material dates. He stated that they ploughed on 30th January 2024 from 2.00pm till 5.00pm when the tractor broke down and they could not complete the work. That evening, the two went to the witness' home at 10 pm took supper and slept till the next day at 5.00am when they made it back to the tractor, had it repaired and embarked on the work which then got completed at 11.00 on the 31.01.2024. the witness then parted ways with the appellant and did not meet him till the day he was giving evidence.

20. On cross-examination, he admitted that he parted ways with the appellant at 11am and was not with him at 6:00 p.m. on the material date and could not account for the Appellant's location during the evening or night hours.

21. DW3 testified that she last saw the Appellant at 11:00 a.m. on 31/01/2024, when he dropped off her husband. She confirmed that she did not know what the Appellant did after that time or where he went.

22. DW4's testimony was that at around 6:00 p.m. on 31/01/2024, he transported the Appellant on his motorcycle and dropped him at the river at 6:30 p.m. He conceded not to have taken the Appellant to his home and could not attest to the Appellant's subsequent actions after dropping her at 6:30 p.m.

Summary of the Appellant's Submissions

23. The Appellant submit that the clinical officer's testimony was insufficient to prove penetration in that if penetration had occurred on the night of 31/01/2024, and the examination conducted on February 2, within the 72-hour window, the same should have revealed fresh injuries contrary to the information in the medical report that described the hymenal tear to have been old with no fresh blood, pain, or pus cells. He cited the case of Erick Onyango Ondeng vs Republic [2012] KEHC 3600 (KLR) for the proposition that while the slightest penetration suffices, it must be proved beyond reasonable doubt that the accused was the perpetrator of that specific act.

24. The Appellant further submits on violation of his rights under Article 49(1)(f) of *the Constitution* asserting that he was arrested on 01/02/2024, but was not arraigned for plea until 05/02/2024 representing a five-day delay. He argues this constitutes a miscarriage of justice and cites Gichuku v Republic 2007 CA EA 83, which held that breaches of the 24-hour arraignment rule can lead to the nullification of a prosecution. He asserts that the failure to bring him to court promptly is a violation of his fundamental right to a fair trial.

25. Finally, the Appellant attacks the credibility of the prosecution's case by pointing out that key witnesses mentioned in the evidence were not called. He refers to the complainant's brother Derick, her father, and the teacher who allegedly helped trace her through Facebook. He argues that their absence, coupled with the discrepancy between the girl's stated age 13 at trial and the birth certificate of 11 at the time of incident, creates a reasonable doubt that should have been resolved in his favour.

26. Notwithstanding the direction by the court for parties to file and exchange submission, and contrary to the assurance by Mr Mugun that the respondent had filed submissions, none is in the court file just as there is none in the CTS. This decision is thus prepared on the understanding that the respondent never filed any submissions

Issues for Determination

27. The court has perused the record and considered the judgement of the trial court as well as the submissions by the appellant. From that analysis, the sole identified issue for determination towards the disposal of the appeal is whether the prosecution proved its case to the required standard at the trial.

28. From the outset, the court appreciates that this being a court of first appeal, it is duty bound to re-evaluate and re-consider the trial evidence in its entirety in reaching its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that.[1]

29. The standard of proof required in criminal cases remains to be beyond reasonable doubt. Not every doubt passes to save the accused from conviction yet the degree of proof is never expected to reach the level of absolute certainty.

30. The first grievance by the appellant concerns the five-days spent in custody before being arraigned in court. He contends that the delay affronts article 49(1)(f) of *the Constitution* of Kenya 2010 which commands that an arrested person be brought before a court as soon as reasonably possible, but

[1] Ajode vs Republic 1972 EA 32

not later than twenty-four hours after being arrested. From the records, it is not in dispute that the Appellant was arrested on 01/02/2024 and was only presented for plea on 05/02/2024, five days later.

31. The court is alive to the fact that every violation of any provision of *the constitution*, including article 49(1)(f) are serious and reflect a failure on the part of the state to respect the liberty of individuals. However, the legal consequence of such a violation has evolved through judicial precedent overtime. While the decision in Gichuku -vs- Republic (2007) CA. EA 83 cited by the appellant suggested that such a breach might nullify a prosecution, subsequent superior court decisions, including those from the Court of Appeal and the Supreme Court, have clarified that a pre-trial constitutional violation does not automatically result in the quashing of a conviction based on solid evidence. The prevailing legal principle is that while a person whose rights are so violated is entitled to constitutional damages or other remedies against the state, the conviction remains safe unless the delay itself prejudiced the accused's right to a fair trial or the ability to prepare a defense.

32. The above was the holding by the Court of Appeal in Douglas Komu Mwangi vs Republic [2013] eKLR where it was held that:

> " There are many instances in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessary entitle the suspect to an acquittal. (See Dominic Mutie Mwalimu v Rep, Criminal Appeal No. 217 of 2005; and Evanson K. Chege "v- R Criminal Appeal No. 722 of 2007). This court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages."
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> See also Julius Kamau Mbugua vs Republic, Criminal Appeal No. 50 of 2008,

33. In the instance matter, there is no evidence that the four-day delay in arraignment led to the fabrication of evidence or hindered the Appellant's cross-examination of the prosecution witnesses. He was informed of the charges, provided with witness statements, and afforded a full trial. Therefore, while this court notes the procedural irregularity, it does not find it sufficient to vitiate the entire trial process.

34. The court finds and holds that the delay in arraignment has not visited a prejudice upon the appellant as to merit disturbance of the conviction founded upon credible evidence.

35. The second grievance concerns allegation that the there was a defect in charge sheet. The Appellant argues that citing Section 8(2) of the SOA for a child who testified she was 13 was incorrect. However, the court notes that the birth certificate confirmed the child was born in November 2012, making her 11 years old at the time of the incidence. Section 8(2) covering children aged eleven years or less and the victim having not reached her twelfth birthday on 31/01/2024, the citation was legally accurate. The court holds that any minor variance in the age stated in the particulars versus the testimony is curable under Section 214 and 382 of the Criminal Procedure Code, as long as the accused was not misled as to the nature of the charge. In any event, provided one is proved to be a child, the difference in age within the bracket of age of minority only go to the severity of the sentence but does not concern the conviction.

36. Onto the substance of the appeal, the offence of defilement is rooted on three main ingredients being; the age of the victim (must be a minor), penetration of such minor, whether partial or complete, and the proper identification of the perpetrator.[2]

[2] See Dominic Kibet Mwareng vs Republic [2013] eKLR]

37. On the evidence required to prove the age of the victim, the Court of Appeal in the case of Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated as follows:

> "... 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."

38. As a matter of fact, the age of the complainant is a pivotal ingredient because it determines both the legality of the act and the severity of the penalty. Age can be proven by documentary evidence, medical assessment, or credible oral testimony. In the circumstances of this case, the prosecution produced a copy of the birth certificate showing the date of the minor's birth as 12/11/2012. The court is satisfied as was the trial court that the victim was indeed aged 11 years as at the date of the incident.

39. The Appellant also challenges the trial court's finding of penetration on the basis that the clinical findings noted an old torn hymen rather than a fresh injury. It is interest to the court that the alleged defilement happened on the 31st January and examination of the victim took place within two days, on the 2nd February of the same year. The case was not whether the victims had lost her virginity. It was about if the victim had been penetrated by the appellant on the day alleged.

40. When the medical report intended to corroborate the evidence of the victim places possible intercourse outside the alleged date, a reasonable doubt arises. The fact that the hymenal tear observed on the victim were 71 hours old with nothing abnormal on the labia minora is beyond trivia but a significant question of when and by who the tear was done. The court in coming to this conclusion draws from the learning that penal penetration is not the only known cause of hymenal tear. Even exercise does.

41. The other reason the evidence of the victim cannot pass as cogent and capable of belief on its own is the fact that while he says they were arrested in the company of her mother, PW2, that same mother says she never reached the appellant's home. The test of credibility would beg the question why the victim was keen to make the court believe that the mother was with the arresting team when she was in fact not there. It also begs the question as to what other fact in her evidence was inaccurately stated.

42. At the end of the prosecution's case, it was not clear where the appellant was arrested yet the arresting party was, inferably by known people including the victim's father and police officers who for no explained reason were never called as witnesses. The court views the prosecution to have been sloven and lacking in vigour thus leaving gapping windows unsealed. Such gaps create reasonable doubt which the law demand to be resolved in favour of the appellant.

43. The totality of the evidence by the prosecution left unresolved if indeed sexual assault happened to the victim on the date charged, if the perpetrator was the appellant and how the appellant was arrested.

44. Such a scenario persuades the court to find that it might be safe to release a reasonably suspected offender into liberty than to jail one who the court entertains a scintilla of suspicion that he could be innocent.

45. In the end the court finds the conviction to have been entered upon shaky evidence and it is adjudged unsafe. Being unsafe, the conviction is quashed and the sentence founded upon it set aside. The appeal is allowed in entirety.

46. Let the appellant be forthwith set free and released into liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH, 2026

PATRICK J O OTIENO

JUDGE