



**Ombonya v Republic (Criminal Appeal E036 of 2023)
[2025] KEHC 633 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E036 OF 2023
SC CHIRCHIR, J
JANUARY 30, 2025**

BETWEEN

KENNEDY AKHAYERE OMBONYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the judgment of Hon. G.A Ollimo S.R.M in Butere
Criminal case number Sexual offences no. E019/2021 delivered on 7th June 2023)*

JUDGMENT

1. The Appellant was charged, with the offence of defiling an 8-year-old girl contrary to section 8(1) and 8(3) of the [sexual offences Act](#).
2. The particulars were that on 4th day of March 2021 at xxxxx, sub-location xxxxxx sub-county within Kakamega County, he unlawfully caused his penis to penetrate the vagina of EN a child aged 8 years old.
3. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act.
4. He was convicted of the main charge and sentenced to serve life imprisonment.
5. The Appellant was aggrieved with the outcome and filed the present Appeal.

Petition of Appeal

6. The Appellant has set out the following grounds:
 - a. That the learned trial Magistrate grossly erred in law and in fact in the evaluation of the evidence before her



- b. That the learned trial Magistrate grossly erred in her finding that the ingredients of defilement had been proved beyond reasonable doubt.
 - c. That the learned trial magistrate failed to consider the contradictory evidence in the defilement Report and that of the investigating officer.
 - d. That the learned trial Magistrate did not have any regard to the evidence of both PW1, PW 2 PW3 and PW4 which contradictory and incredible to convict in a criminal case.
 - e. That the learned trial Magistrate relied on circumstantial evidence to convict the appellant when it was not safe to do so.
 - f. That the learned trial magistrate erred in law and in fact by failing to consider that there were inconsistencies in the narrative of the complainant, as her grandmother whom she lived with at xxxx sub-location failed to record statement as she was the first person to visit the crime scene.
 - g. That the entire charge sheet was fatally defective on account of particulars of the offence as the investigating officer had indicated in her statement that she charged the Appellant herein with the offence of assault and further, the alternative charge was placed under wrong sections of the Act.
 - h. That the learned trial Magistrate erred in law and in fact for meting upon the Appellant a sentence that was harsh and excessive in the circumstances of the case.
 - i. That the trial magistrate sentence and conviction was not in tandem with recent development and interpretation of the *sexual offences Act*.
 - j. That the trial Magistrate exhibited actual bias against the appellant.
7. The Appeal was canvassed by way of written submissions.

Appellant's submissions

- 8. The appellant challenges the identification of the perpetrator which was based on the testimony of a single witness. He points out that according to the complainant the attacker was not previously known to her; that the only identification was in the dock . He further submits that it is apparent that his identification was based on the clothes that he allegedly wore that day, but the said clothes were not produced as exhibits; and that the attires he wore in any event were not enough to sustain a conviction.
- 9. The Appellant further submits that the trial court failed to consider his defence and that he was not given the benefit of the less severe form of punishment

Respondent's submissions

- 10. The Respondent is in support of the Appeal. The prosecutor submits that the conviction based on a single witness was not safe; that an identification parade ought to have been held; that the clothes which the perpetrator wore were not recovered and that the complainant's grandmother ought to have been called to testify. The respondent supports the acquittal of the Appellant.
- 11. Each of the parties have relied on a number of Authorities which I have perused.

Summary of the evidence

- 12. PW1 was the complainant. She testified that on 4th March 2021, at around 6.00 p.m. she had gone to fetch water at a river. On her way back she saw someone standing inside an unfinished building. He



summoned her to go to where he was standing but she ignored him and walked on. she was suddenly grabbed from behind and the person carried her to a forest.

13. She further stated that the attacker covered her mouth with a handkerchief , removed her panty and inserted his penis into her vagina . After he was done, he told her to wipe herself with her panty and threatened to slaughter her if she told anyone.
14. On cross- examination, she admitted that she did not know the accused before and that the encounter was the first; that she later came to know that he was from their village. She recalled that he had worn a black trouser, a jacket with white and black stripes and a white cap with a tiktok sign; that when she arrived home, her grandmother immediately left to search for the man . she came back and reported that he had seen him clad in the same clothes , the description of which, the complainant had given her.
15. PW4 was the clinical officer. She testified that the complainant was examined on 4/3/2021. Upon examination, she was found to have hyperaemic (red) genitalia which was tender. The hymen was absent and she noted that it had been freshly broken; the vagina was bruised and there was a whitish discharge.
16. PW5 was the investigating officer. He testified that the complainant was escorted to the station by her uncle. She told the court that according to the complainant, she went and reported to her grandmother that she had been defiled by a man; that the complainant reported that the person who attacked her wore a black trouser and a stripped white and black jacket and a hat. Later on the complainant told her she had informed her grandmother that she had been defiled by Kennedy Akhayere Obedi. He subsequently arrested the Appellant at his homestead and that it was the complainant who identified him. She produced the complainant's birth certificate indicating that she was born on 10th October 2012.
17. On cross- examination, she told the court that the complainant reported that the assailant wore a black trouser, a black and red cap and a white and black stripped jacket , while the investigation dairy indicated that the person wore black trouser, yellow t-shirt and black jacket with stripes. She told the court that the complainant's grandmother did not record a statement.
18. Upon being put on his defence, the Appellant opted for a sworn testimony. He testified that on the material day at around 5.30 pm he left work at his shamba and went home . His mother prepared food and they ate together and around 7 p.m , he went to his house and slept. On 7/3/2021, he woke up to a knock on his door and on opening , he found 4 police men together with PW2. They took him to Khwisero police station on claims that he had defiled PW1. He denied the accusation.
19. The Appellant also called his parents as his witnesses, who testified that the Appellant was at home at the material time.

Analysis and determination

20. This is a first Appeal and this court is obligated to review the evidence afresh, do its own evaluation of the evidence and make its own findings.
21. I have considered the grounds of Appeal, the lower court record and the submissions by the parties and am of the view that the only issue for determination is whether the offence of defilement was proved beyond reasonable doubt.
22. The offence of defilement is grounded on three ingredients, that is , the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. That is the import of section 8(1) of the Act.



23. The Section provides as follows:
8. “(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
- While 8(2) provides that : “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”.
24. The above provisions were restated in the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 where the court held:
- “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
25. In the present case, the age of the complainant was never disputed. Equally the evidence of the complainant as corroborated by the evidence of the clinical officer(PW4) proved, without a doubt, that the complainant was defiled.
26. Thus two of the ingredients of the offence were proved beyond reasonable doubt.
27. However the main issue in this case is the identification of the perpetrator. The totality of the prosecution witnesses’ accounts show that the only one who claimed to have seen the Appellant was the complainant.
28. In Cleophas Otieno Wamunga vs Republic [1989] eKLR: the court held that;
- “Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.....”
29. On identification by a single witness such as in this case ,In Abdalla bin Wendo v Shah Bin Mwambere [1953], 20 EACA the court held “Subject to certain well known exceptions a fact may be proved by the testimony of a single witness ,this does not lessen the need for testing with the greatest care the evidence of such witness respecting identification, especially where it is known that the conditions favouring a correct identification are difficult. In such circumstances, other evidence, circumstantial or direct, pointing to guilt, is needed from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error.”
30. The following portions of the complainant are relevant on matter identification: she saw a man standing inside a building under construction, he called her “ wewe kuja hapa”(you, come here!); she ignored and moved on but she was suddenly grabbed from behind.
31. This follows that she could not have seen the face of the person who grabbed her. She also described the clothes the perpetrator wore as a black trouser, a jacket with white and black stripes, a black and white cap.
32. A cap has the effect of partially concealing a person’s face and it raises the question of whether the complainant was certain of the identity of the person she saw. Further the clothes that the Appellant



- allegedly wore, were never produced in court. How then was the court supposed to ascertain that the complainant's description of the clothes was correct .
33. The complainant admitted that she had never seen the attacker before, and only saw him the first time he defiled her. The next chance at identification was when she accompanied the investigation's officer to effect arrest.
 34. This far , I wish to point out the gaps in this piece of evidence: what made the complainant lead the police officers to the complainant's house, yet it was her evidence that she did not know him previously, and hence could not have known his home? Is it that the Accused was still wearing the same clothes he wore the previous day? . Further the complainant told the court that her grandmother went out in search of the attacker , and when she came back she reported that the attacker was wearing the clothes that the complainant had described to her. But then the grandmother , whose evidence would have corroborated that of the complainant was not called to testify.
 35. I have considered the findings of the trial court . According to the Magistrate the circumstances allowed for ample time for positive identification. She stated for instance that the attacker spoke to the complainant at least two times; that the complainant had close contact with the accused by the very nature of sexual encounter and the time was 6pm , when there was still light.
 36. The fact that the perpetrator spoke to the complainant was not helpful as the said voice was unknown to the complainant before; the finding that the incident happened in broad daylight was speculative as that did not emerge from the evidence . It was only known that the incident happened at 6pm, and as to whether it was broad day light depends on the movement of the sun at that particular period of the year. Further I doubt whether the sexual encounter , violent as expected , would have allowed the complainant to focus on the face of the attacker.
 37. The prevailing circumstances , called for an identification parade. An identification parade would have given a certain degree of certainty to identification. There was no evidence that an identification parade was held.
 38. Further the above gaps in the complainant's testimony would have been taken care of by corroboration of her testimony. The child's grandmother who was said to have equally seen the perpetrator was never called as a witness.
 39. In a nutshell, there was insufficient identification of the perpetrator. It cannot be said with certainty that the Appellant herein was positively identified as the perpetrator of the crime. The conviction was far from being safe.
 40. It must always be remembered that in criminal cases , the benefit s doubt must and always goes to the Accused.
 41. In the end , the Appeal succeeds. The conviction of the Appellant is hereby quashed and sentence set aside. He shall be set free forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

In the presence of:

Godwin Luyundi- Court Assistant

Ms. Kagai for the Respondent .

The Appellant- present in person.

