



REPUBLIC OF KENYA



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**Okwiri v Republic (Criminal Appeal E009 of 2023)
[2025] KEHC 1272 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E009 OF 2023
DK KEMEL, J
FEBRUARY 28, 2025**

BETWEEN

BENARD OKWIRI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. Erick Malesi (P.M) delivered on 26th January 2023 in Madiany Principal Magistrate's Court S.O No. E56 of 2022)

JUDGMENT

1. The Appellant herein, Benard Okwiri was charged before the trial court for the offense of gang defilement contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 17th May 2022 at around 1930hrs in Rarieda sub-county within Siaya County with others not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of H.A., a child aged 16 years.
2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 17th May 2022 in Rarieda sub-county within Siaya County with others not before the court, intentionally and unlawfully touched the vagina of H.A. a child aged 16 years with his penis.
3. The Appellant denied the charge and after a full trial, he was convicted and sentenced to serve 15 years' imprisonment.
4. Dissatisfied by the trial court's decision, the Appellant has now filed this appeal against both the conviction and sentence on the following grounds:
 - i. That the trial magistrate failed to observe that the prosecution did not prove their case beyond reasonable doubt.



- ii. That the trial magistrate failed to observe that the sentence imposed was against the evidence adduced.
- iii. That the trial magistrate failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.
- iv. That the trial magistrate erred in law and in fact in convicting the Appellant on insufficient evidence of the prosecution.
- v. That the trial magistrate failed to observe the provisions of section 36(1) of the [Sexual Offences Act](#).

Ultimately the Appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.

5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court so as to arrive at its independent findings and conclusions. (See *Okeno v Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v Republic* [2004] KLR 81.
6. The prosecution called a total of six witnesses in support of its case.
7. PW1 HA, a minor, gave a sworn statement after a *voire dire* examination by the trial magistrate. She stated that she was 16 years old and was born on 02/04/2006. She continued that on 17/05/2022 at about 7.30 p.m., she went to [Particulars Withheld] center to a barber shop to shave. That on her way back home on reaching [Particulars Withheld] primary school, a motor cycle boda boda rider came and stopped where she was. There were three people on the motorcycle, she knew one of them who was the Appellant herein. That she had a torch that was on. That the Appellant was sandwiched between the rider and another person. The accused asked her to climb on the motor bike but she informed him that she was about to reach her home. The appellant then alighted and that she started running. The Appellant and another person pursued her until they apprehended her. That they then took her to a certain house where the appellant pushed her onto a bed while the other two locked the door from outside. The Appellant removed her clothes as well as his. That he then caused his penis to penetrate her vagina. That when he was done, the second person came and caused his penis to penetrate her vagina too. When he was also done, he went outside and a third person came and caused his penis to penetrate her vagina too. The following morning, they took her to [Particulars Withheld] center at a shop near a hotel. That her mother came and she explained the ordeal to her. That she was taken to Manyuanda hospital then referred to Madiany Hospital where she was admitted as she had difficulty in walking. She further stated that she knew the Appellant as she used to see him as a boda boda operator at [Particulars Withheld] center where her mother has a business.

On cross examination, she stated that as she went home that evening at 7.30 pm she left her mother who sells clothes, at [Particulars Withheld] center. That her mother released her to go prepare dinner for them. That the other two people that were with the Appellant were wearing helmets and thus she did not see their faces. That the two did not speak. That she ran away because she did not want to board the motorcycle of the Appellant. The Appellant and his accomplices defiled her all night and took her to Manyu [Particulars Withheld]anda center at 8.00 Am the following day.

8. PW2 Dolrose Anyango Otieno testified that she is the mother of PW1, who was born on 02/04/2025. She produced her certified copy of a birth certificate as P exhibit 1. That on 17/05/2022 at around 6.30 pm she was at [Particulars Withheld] center where she sells clothes when PW1 went and requested for money to go shave her hair, which she gave. That she returned back to her at about 7.30 pm and



immediately she instructed her to go home and study. At 8.00 pm she arrived home and that she did not find her daughter. She asked around her neighbours but none had seen her. The following day, she got word that her daughter had been spotted at [Particulars Withheld] center at a shop near a hotel. She immediately rushed there and found her. She asked her where she had been but she kept quiet. She then asked her to follow her home and that she noticed that she could not walk properly as she was bending. She inquired again on what had happened to her and that she narrated her ordeal to her while mentioning Ben as the perpetrator. She immediately took her to [Particulars Withheld] Health center who referred her to Madiany Hospital where she was admitted. She identified the treatment notes marked as PMFI-2, a filled PRC and marked PMFI-3. Thereafter after they were given a letter to take to the police station which she did. She later recorded her statement.

On cross examination, she stated that she released PW1 at 7.30 pm. That immediately she was informed of her daughter's whereabouts, she rushed there. She found Pw1 at [Particulars Withheld] at 8.00AM. That Pw1 informed her that she had been defiled by three people who took her to a certain house and that she was not told where the house was.

9. PW3 Florence Juma Ogutu, testified that she a resident and runs a hotel at Manyuanda center. She continued that on 18/05/2022 about 8.00am PW2 called her and informed her that PW1 had not been home the previous night. That while going to board a boda boda, she saw Pw1 and immediately alerted PW2 and informed her of the same. That Pw2 then arrived and she later recorded her statement.

On cross examination, she stated that she did not talk to PW1 because if she was on the wrong she feared that she would run away. That there are times that at 7.30 pm there is still light. It is the time when most people go home and its considered safe. That she would consider the time and distance before releasing her child. That Pw 1 is like a daughter to her.

10. PW4 Willis Agak testified that he is a pastor. That PW1 is his daughter. That on 17/05/2022 at 6.00 pm they met with PW1 as she went to be shaved at a barber shop at Manyuanda center. That later at 8.00pm PW2 came from the market and asked for the whereabouts of PW1 yet he thought that they had been together at Manyuanda center. At 9.00 pm PW1 was still not back. They asked around the neighborhood but none had seen her. They were very worried. The following morning, they went separate ways with PW2 looking for Pw1. Pw2 later informed him that she had found Pw1. That he was informed that Pw1 had been defiled and could not walk. That they later met with PW1 and PW2 at Madiany hospital who referred them to report to the police station. That he went first to Manyuanda police then later refered to Aram police station, where they were issued with a P3 form which was marked as PMFI 4.

On cross examination, he stated that PW2 went looking for pw1 as he remained to attend to the animals. That he was later called and informed that Pw1 had been defiled. He stated further that the Appellant hailed from Kobong and that PW1 had identified him to be among the three people who had defiled her. That he was a familiar face as he passed his home on the way to Manyuanda. That his home is 20 metres off the road and that he knew the Appellant's home.

11. PW5 Timothy Asiyo stated that he is a clinical officer from Madiany. That he had three documents from their facility, treatment notes, P3 form and PRC form for Hellen Akinyi. That Hellen Akinyi went to the health facility accompanied having been refered from Manyuanda health centre with a history of having been defiled by three people one of whom she knew on Tuesday 7.00 pm. That she was taken to a house where there was one chair, one table and a bed. On examination, she was sick-looking and depressed. She was clinically sick with a bending gait with her legs apart. The innerwear was brownish and blood-stained. Lab tests were done which showed pregnancy negative, on HVS, PVS cells were seen. Hepatitis A and B were negative and HIV negative. On examination of the genitalia, the vulva was swollen, the hymen broken, the labia minora had bruises and whitish stains, the vaginal walls



had lacerations and that there was brownish thick discharge on the vaginal area. There was evidence of forceful coitus. The patient sustained trauma to the spine and lower abdomen. He formed the opinion that she had been defiled. She was treated and then referred to physiological counseling because she suffered from depression. He is the one who examined the patient. Treatment notes (PMFI-2) were produced as P exhibit 2, PRC form (PMFI-3) was produced as P exhibit 3, and P3 form was produced as P exhibit 4.

The estimated age of the perpetrator was 35 years, the other two could not be identified. The patient (PW1) was depressed and could not walk properly.

On cross-examination, he stated that he had four years of experience. That the patient did not disclose the house she was defiled in. The patient was accompanied by both parents.

12. PW6 No 245450 .PC Martha Gasare a police officer at Aram police station stated that on 19/05/2022 she was assigned to investigate a case of defilement reported on the same date by the father of the complainant called Willis Otieno. That she issued a P3 form that was filled at Madiany sub county hospital. She later met the complainant who was admitted at the said hospital. The complainant narrated the ordeal to the police officer as stated in PW1s evidence herein above.

On cross examination, she stated that the Appellant was arrested from the chief's office. That the complainant was already admitted at the hospital when the report was made to the police. That the panga he had was not recovered.

14. The trial court later ruled that a prima facie case had been established and put the Appellant on his defense. He opted to give sworn testimony.
15. DW1 stated that he was Benard Okwiri and stayed in Rachar and worked as a mason. He confirmed that he was charged with defilement as he heard from the prosecution witness and was able to cross-examine them. That on 21/10/2022 he woke up in the morning and went to work. At 11.00 am he received a call from the assistant chief summoning him to his office. He went and while still talking with the chief, two police officers joined them and informed him about the reason for his arrest. He was thus arrested and arraigned to court and that he later found out that a girl had been defiled on 17/05/2022.

There was no cross-examination.

16. The appeal was canvassed by way of written submissions. However, it is only the Respondent who complied.
17. On the part of the Respondent, it was submitted that the Respondent had proved all the essential ingredients of the offense of gang defilement. As regards the aspect of age of the minor, they produced a copy of birth certificate which was marked as P exhibit 1 which showed her date of birth as 02/02/2006 and therefore aged 16 years at the time of defilement. They also submitted that the element of penetration was proved through the evidence of the clinical officer (PW5) who stated inter alia that:

“...On examination of the genitalia, the vulva was swollen, the hymen was broken, and the labia minora had bruises and whitish stains. There was evidence of forceful coitus. The patient sustained trauma to the spine and lower abdomen...”

18. The third aspect was that of gang defilement/gang rape. From the testimony of PW1 she stated that: ... The Appellant removed her clothes as well as his. That he then caused his penis to penetrate her vagina. That when he was done, the second person came and caused his penis to penetrate her vagina too. When he was also done, he went outside and the third person came and caused his penis to penetrate her vagina too...



19. On the fourth aspect of the identity of the Appellant as the perpetrator, the complainant stated that she was defiled by three people one of whom she identified as Ben, a boda boda rider at Manyuanda Center. Ultimately therefore the Respondent submitted that they had proved their case beyond reasonable doubt.
20. Having looked at the trial court proceedings, together with the submissions on record, i find that the issue for determination is whether the Respondent proved the offence of gang defilement beyond reasonable doubt.
21. Section 10 of the *Sexual Offences Act* provides thus as pertains gang defilement:

“ Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

22. The offence of gang defilement requires four elements to be proved beyond reasonable doubt. These are age of the minor/victim, penetration of the genitalia, the act being done by more than one person in turns and identity of the perpetrator.
23. On the aspect of age of the victim, it was PW1s testimony that she was 16 years at the time of the defilement, having been born on 02/04/2006. A certified copy of her birth certificate was produced by her mother (PW2) as P exhibit 1. This ingredient was proved beyond reasonable doubt.
24. On the element of penetration, PW1 testified that: ...The Appellant removed her clothes as well as his. That he then caused his penis to penetrate her vagina. That when he was done, the second person came and caused his penis to penetrate her vagina too. When he was also done, he went outside and the third person came and caused his penis to penetrate her vagina too...

On cross-examination PW1 stated that: “ ...You defiled me the whole night...” (see page 9 line 1-2 of the Record of Appeal.)

PW5 likewise testified that “...On examination of the genitalia, the vulva was swollen, the hymen was broken, and the labia minora had bruises and whitish stains. There was evidence of forceful coitus... He formed the opinion that she had been defiled...”

The ingredient on penetration was proved beyond any reasonable doubt. It is instructive that the complainant had difficulty in walking the following morning due to the act of being defiled in turn throughout the night.

25. . The third aspect was that of gang defile/gang rape. From the testimony of PW1 she stated that: ...The Appellant removed the clothes as well as his. That he then caused his penis to penetrate her vagina. That when he was done, the second person came and caused his penis to penetrate her vagina too. When he was also done, he went outside and the third person came and caused his penis to penetrate her vagina too...

I find that the ingredient on gang defilement was proved beyond any doubt. It is noted that the complainant had difficulty in walking the following morning following the act of her being defiled in turns throughout the night.



26. On the fourth aspect of the identity of the perpetrator, In *Wamunga v Republic* [1989] KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

27. Similarly, the Court further cited its own decision in *Abdala bin Wendo & Another v Republic* [1953], 20 EACA 166 where it held:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, 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 the possibility of error.”

28. In the instant case, PW1 stated that she was defiled by three people one of whom she identified as Ben, a boda boda rider at Manyuanda Center. That she had a torch as she walked home. It was also her testimony that she had seen him before at Manyuanda center as a boda boda operator. PW1’s testimony on the identification of the Appellant was not controverted in cross examination. I am therefore convinced that the Appellant was well identified and placed at the scene of crime. Indeed, the complainant had no difficulty in giving out the name of the Appellant as one of the perpetrators. I find that the identification of the Appellant was not in doubt. It is instructive that the Appellant spoke with the complainant prior to her running away and being pursued and thus she knew the Appellant as the one who kicked off the rape ordeal before letting in the other defilers to continue.

27. I am satisfied that the prosecution proved their case beyond reasonable doubt as by law required. I find the conviction arrived at by the trial court was quite sound. The Appellant’s grounds of appeal on conviction must fail.

28. On the issue of sentencing, Section 10 of the *Sexual offences Act* stipulates thus: “Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

29. In the instant case, the Appellant was sentenced to 15 years’ imprisonment. In his memorandum of Appeal, the Appellant indicated that the sentence meted out was unconstitutional.

In addressing this, I am guided by the landmark case by the Supreme Court in *Republic v Mwangi Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curie)* (Petition E018 of 2023) 2024 KESC34 (KLR) (12 July 2024) (Judgment) where the Supreme court stated that all minimum mandatory sentences under the *Sexual Offences Act* No. 3 of 2006 are lawful unless otherwise amended.

The sentence imposed was the possible minimum in law and that the same could as well be enhanced to life imprisonment. Indeed, the complainant suffered both physical and psychological trauma. I find the sentence imposed was neither harsh nor excessive. However, as the Appellant was in custody



throughout the trial, the period spent in custody must be factored in the sentencing. It is noted that the trial court did not make an order in that regard. The Appellant was arrested on 21/10/2022 and thus the sentence should commence from the said date.

30. In the result and save only that the sentence of 15 years' imprisonment shall commence from the date of arrest namely 21/10/2022, the Appellant's appeal lacks merit. The same is dismissed.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 28TH DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE.

In the presence of:

Benard Okwiri.....Appellant

Soita.....for Respondent

Ogendo.....Court Assistant

