



REPUBLIC OF KENYA



KENYA LAW
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**Ojwang v Republic (Criminal Appeal E049 of 2024)
[2025] KEHC 3653 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E049 OF 2024
DR KAVEDZA, J
MARCH 25, 2025**

BETWEEN

TIMOTHY CLINTON OJWANG APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
20th July 2022 by Hon. R. Kitagwa (SRM) at Kibera Chief Magistrate's Court
Sexual Offences Case No. 015 of 2022 Republic vs Timothy Clinton Ojwang)*

JUDGMENT

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006 (herein the Act). The particulars were that on the 18th of January 2021 at [Kibra Sub-county within Nairobi County, the appellant unlawfully and intentionally caused his male genital organ (penis) to penetrate the anus of SKO a child aged 10 years. He was sentenced to life imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended the learned magistrate erred by disregarding his cogent defence.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution availed five (5) witnesses in support of their case. PW2, S.K.O gave sworn evidence after a voir dire testimony. He testified that on 18th January 2021, the appellant led him to his house



under the guise of giving him money to buy mandazi when the appellant forcefully removed his trouser and did 'bad manners' on him. He stated that this had occurred several times prior and that the appellant was a teacher at Olympic Secondary whom he referred to as Teacher Timo. He informed one Teacher Judy of what had occurred, who later informed his mother. He identified the appellant in court.

5. His mother, PW1, EA testified that as soon as she was informed of the ordeal, she rushed him to Nairobi Women's Hospital where she was issued with a PRC form. The villagers arrested him after his house was identified by the complainant, upon which he was taken to the DC's office and thereafter Kilimani Police Station. She stated that the complainant's birth certificate got scorched in a fire, and he identified the appellant in court.
6. PW3, John Njuguna adduced the complainant's PRC form dated 20th January 2021. It was observed that there were no injuries on the body or his male genitalia. However, posterior examination indicated that he had a healing laceration, which was consistent with penal anal penetration.
7. PW4, JWM the complainant's teacher recalled that on the material day, PW2 complained of a stomach ache, upon which she sent him to the kitchen to get warm water. She followed him to the kitchen to further inquire about what was wrong. He revealed that the appellant had been penetrating his anus. Thereafter she informed his parents of the incident, after which he was taken to hospital.
8. PW5, PC Mercy Mwikali recounted that on 21st January 2021, the complainant together with his mother came to report an alleged defilement. She interrogated the child, who later took her to the appellant's house. By that time, the appellant was already in custody. Further, she conducted an age assessment at Mbagathi Hospital where he was found to be ten (10) years old. She produced the age assessment report in court dated 9th July 2021.
9. In his defence, the appellant maintained that the complainant's mother maliciously called the police on her claiming that he had defiled her child when he refused to be physically intimate with her. On the material day, he stated that he was in church for a Youth Rally and that he was not a teacher at that time. DW2, Christantus Conrad Onyango testified that on 18th January 2021, he was with the appellant during a youth rally at church.
10. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
11. Further, section 8(1) and (2) of the Act, No. 3 of 2006 provides thus: -
 8. Defilement
 - (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.
12. In this matter, the critical element of penetration was comprehensively established through cogent and compelling evidence. Primarily, the complainant's testimony provided a clear and detailed account of the incident, which was further substantiated by medical evidence adduced by PW4, the medical officer. PW4 tendered the complainant's Post Rape Care (PRC) form, accompanied by medical records that disclosed the presence of healing lacerations on the complainant's anus. This clinical finding unequivocally corroborated the complainant's assertion of penal anal penetration, lending significant



weight to his narrative of the events that transpired. The convergence of testimonial and medical evidence thus sufficiently satisfied this essential ingredient of the offence.

13. Further, the age of the complainant was a pivotal factor in these proceedings, and it was meticulously addressed. PW5, the investigating officer, escorted the complainant to Mbagathi Hospital, where an age assessment was conducted. The results of this exercise conclusively determined that the complainant was ten (10) years of age at the material time. Consequently, the trial court was correct in its determination that the complainant fell within the legal definition of a child, thereby fulfilling another requisite element of the charge.
14. The identity of the appellant as the perpetrator was established beyond a reasonable doubt. The complainant, having endured multiple incidents of defilement, had ample opportunity to become familiar with the appellant. This familiarity extended to knowing the appellant's name, residence, and place of employment, thereby rendering identification a matter of recognition rather than mere recollection. This position was fortified by the in-court identification of the appellant by both the complainant and his mother, which remained unchallenged and unimpeached.
15. In light of the foregoing analysis, it is abundantly clear that the prosecution discharged its burden of proof to the requisite standard beyond reasonable doubt. The evidence presented comprising the complainant's testimony, corroborative medical records, the age assessment, and the unequivocal identification of the appellant formed a cohesive and unassailable case. Accordingly, the conviction stands affirmed.
16. On sentence, the appellant was sentenced to life imprisonment. During sentencing, the court considered the appellant's mitigation, and the pre-sentence report and meted the minimum sentence provided in law. In the premises, I see no reason to interfere with the sentence.
17. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant.

