



REPUBLIC OF KENYA



KENYA LAW
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**Odongo v Republic (Criminal Appeal E026 of 2024)
[2025] KEHC 5552 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E026 OF 2024**

JR KARANJA, J

APRIL 30, 2025

BETWEEN

TOBIAS ODERO ODONGO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Tobias Odero Odongo was charged before the Senior Resident Magistrate at Kericho with the offence of defilement contrary to Section 8 (1) read with 8(4) of the Sexual Offence Act or in the alternative with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act.
2. It was alleged that on diverse dates between 4th and 16th January, 2022 at Kipkelion, Kericho county, the Appellant defiled CC, a girl aged sixteen (16) years old or that he committed an indecent act with the child within the same period.
3. After pleading not guilty, the Appellant was tried and convicted on the main count of defilement. A sentence of ten (10) years imprisonment was then imposed upon him. Being dissatisfied with the conviction and sentence the Appellant filed the present appeal. The grounds of appeal are set out in the petition of appeal and may be summed up as a contention that the Appellant was convicted on the basis of insufficient and uncorroborated evidence emanating from a grudge between him and the father of the complainant, his former employer.
4. The Appellant therefore prayed for the success of the appeal in its entirety. At the hearing of the appeal the Appellant appeared in person and placed full reliance on his written submissions containing amended grounds of appeal. The state/respondent opposed the appeal through the learned prosecution counsel M/s Chomba for reasons and grounds contained in its written submissions.



5. The duty of his court was to consider the appeal as grounded, the rival submissions and draw its own conclusion after re-considering the evidence availed at the trial bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.
6. In summary, the prosecution same was that the complainant (Pw1) was at the material time a form two (2) student aged sixteen (16) years old. On the 4th January, 2022, she had just visited her grandmother at Kipkelion and arrived at Duka Moja in Kericho at noon. She met the Appellant, a stranger to her. He greeted and offered to do some shopping for her at Kisii. She agreed and the two boarded a vehicle to Kisii.
7. On arrival in Kisii, the appellant proceeded to withdraw money in a sacco, but indicated that he had no money in the sacco. Thereafter, he took the complainant to his sister's house in Rangwe where he engaged in unprotected sexual intercourse with her during the night and on the following night while she was still at the place. The father called her on the 8th January, 2022 using the Appellants phone line and asked her to return home.
8. The complainant left for home on 16th January, 2022 after being handed transport money by the appellant, sister which enabled her to reach Ziwa Muhoroini where a good Samaritan lady accommodated her for the night. She proceeded to her grandfather home on the following day from where her father, RKM (Pw2) collected and took her home and then to the hospital where she was examined and found not to be pregnant. The appellant had already been arrested at the time.
9. The complainant's father (Pw2) indicated that the complainant did not return home on 4th September, 2022 after visiting her grandmother and that he was able to locate her after a stranger flashed her mother's mobile phone number. He sent some money on the strangers phone and it reflected the name Tobias Odero. Thereafter, on the 7th September, 2022 he proceeded to the complainant's school and obtained a letter to take to the police.
10. At the police station the strange telephone number was tracked to Rongo and Rangwe. Police officers accompanied By the complainants father proceeded to Rongo to look for the Appellant. He was found and arrested on 17th January, 2022 at a time when the complainant had already left for home and was at their grandmother's home. she was collected from the home by her father and taken to the police station where she was urgently required . she informed her father that she had gone away with Tobias, the Appellant.
11. Pc Lillian Cherotich (Pw4) of Kericho police station investigated the matter following a report made at the police station of a missing child. In the process she proceeded to Homabay and Migori counties in search of the Appellant while accompanied by the complainant's father and other police officers. They managed to trace and arrest the appellant who indicated that he had eloped the complainant and had been staying with her at his sister's place in Rangwe.
12. The investigations officer (Pw4) later learnt from the complainant through her statement to the police that she was not forced to have sex with the Appellant and was a sexually active individual who previously had a boyfriend with whom they had a baby who unfortunately passed away. A clinical officer, Robert Kipyegon Langat (Pw3), examined the complainant and compiled the necessary police P3 form (P exhibit 2(a) which indicated recent sexual penetrative action involving the complainant. The appellant was eventually charged with the present offence which he denied.
13. The Appellant's defence case was a denial and a contention that the Appellant had never met the complainant and did not even know her name. He attributed his predicament to disagreement with her father over payments due to him incurred while working for the complainant's father in his workshop.



- This led him to look for work elsewhere, but at a later date the complainant's father called and asked him to make a report at the police station on missing workshop items i.e a machine and grinder.
14. The Appellant indicated that he declined to make the report and was threatened by the complainant's father who said that he would do something to him. He (Appellant) further indicated that the charge facing him was a result of the threats made to him.
 15. After considering the entire evidence, the trial court concluded that the prosecution had proved its case against the Appellant beyond reasonable doubt. He was then sentenced to ten (10) years imprisonment. Grounds 1 to 5 of the appeal allude to conviction of the Appellant by the trial court's while ground 6 and 7 alludes to the trial court's disregard of the Appellant's defence and the sentence imposed upon the Appellant which he deemed to be excessive and unwarranted.
 16. In this court's opinion with regard to conviction there is nothing to show that the charge as framed was defective as alleged by the Appellant and that what really emerged as the main issue for determination was whether the complainant was defiled as alleged by the prosecution and if so, whether the Appellant was the person who was responsible for the unlawful act.
 17. A person commits defilement when he engages in a penetrative sexual act with a child, defined under Section 2 of the *Children Act* to mean a human being under the age of eighteen years. Under Section 8 (1) of the Sexual Offence Act, a person who commits an act which causes penetration with a child is guilty of defilement. Therefore, the major ingredients of the offence of defilement are firstly, the age of the child /victim, secondly, the act of penetration and thirdly, the identity of the offender.
 18. In this case, as established by the complainant (Pw1), her father (Pw2) and the clinical officer (Pw3) the complainant was of the age of sixteen (16) years or thereabout at the time of the offence. This was confirmed by necessary documentary evidence i.e the birth certificate (P exhibit 3) and the police form P3 (P exhibit 2 (a)), (Rule of the sexual offence rules 2014).
 19. Being a child, any person who committed an act of penetration against the complainant was criminally liable under the *sexual offences act*. The complainant's own testimony indicated that she was already a sexually active minor even prior to the time of the present offence but this did not mean that any male individual was at liberty to engage in sexual intercourse with her and if he did just that, then his action would be unlawful and punishable.
 20. The consent of the minor to engage in sexual intercourse with any male individual would be irrelevant and of no consequences with regard to the offence of defilement and even more so if the consent was obtained by coercion and/or deceit rather than voluntarily. In any event, the consent would be between two adult individuals and not between an adult and a child or minor.
 21. It was stated in *Ezekiel Cheruyot, Koros Vs Rep (2010)eKLR*, that the provisions relating to defilement in the *sexual offences act* were made on the realization that in our society, a girl of under the age of eighteen (18) years is either not fully mature to consent to and/or engage in sexual intercourse and is too vulnerable and requires protection of the law from those bent on engaging in immoral sexual acts.
 22. Therefore, the element of consent in a charge of defilement would be immaterial and would not constitute a defence to such charge. Under Section 43 of the *Sexual Offences Act* an act is intentional and unlawful if it is committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence. A minor or child would fall under that category of persons.
 23. In the case of *Bonu vs Rep [2010)eKLR* the Appellant therein alleged that he was involved in a love affair with the complainant and that she was an active and willing participant to the sexual relations. The court however, held that a minor has no capacity in law to give informed consent to sexual relations,



- thus no matter how willing the minor may have been, any and all acts of sexual intercourse with persons proved to be below the age of eighteen (18) years amount to an offence.
24. It was herein proved beyond reasonable doubt that the complainant (Pw1) was underage at the time of the offence. It did not matter that she may have consented to the unlawful act being a person who was already sexually active. Indeed, the medical evidence through the clinical officer (Pw3) clearly indicated that the complainant was sexually active and did engage in sexual intercourse at the material time of the offence. The medical evidence coupled with that of the complainant (Pw1) provided sufficient proof that an act of penetration was indeed committed against the complainant with or without her “consent”
 25. The defilement ingredients of age and penetration having been proved by the prosecution beyond reasonable doubt, and without any or substantial dispute from the defence, the crucial ingredient of identification of the alleged offender, is what stood between the appellant and his conviction or acquittal. Both the complainant (Pw1) and her father (Pw2) as may be deduced from the evidence were previously known to the Appellant. The trio were not strangers to each other prior to the material time of the offence even though the complainant and the Appellant attempted to lie and deny the fact.
 26. The allegation by the complainant and confirmed by her father (Pw2) that the Appellant was the person who sexually offended her was credible enough for the finding by the trial court that it was the Appellant who was responsible for defiling the complainant on the material diverse dates. The fact was actually not substantially disputed by the appellant. He attempted to defend himself by implying that the complainant was already sexually active and had consented to the act
 27. For all the reasons foregoing this court is satisfied that the Appellant’s conviction by the trial court was safe and sound and is hereby affirmed with the results that grounds 1 and 6 of the amended grounds of appeal are hereby overruled and dismissed. Ground 7, was on sentence which the Appellant considered to be excessive regard being given to the mitigating factors and the circumstances of the case.
 28. However, the sentence imposed by the trial court was neither excessive nor harshly considered being given to the fact that the Appellant took advantage of a naughty and naïve girl child to sexually offend her and the fact that he was sentenced to ten (10) years imprisonment for a charge which carries a mandatory minimum imprisonment sentence of not less than fifteen (15) years considering that the complainant was of the age of sixteen (16) at the material time of the offence.
 29. Under Section 8(4) of the *Sexual Offences Act*, 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. The trial court was therefore in error in sentencing the Appellant to ten years instead of a minimum term of fifteen years’ imprisonment. Ground 7 of the appeal must also fail. In the circumstances, the sentence imposed by the trial court is hereby set aside and substituted for a sentence of fifteen (15) years imprisonment.
 30. In sum the present appeal is without merit and is hereby dismissed in its entirety.
 31. Ordered accordingly.

J.R. KARANJAH

JUDGE.

DATED AND DELIVERED THIS 30TH DAY OF APRIL, 2025

In the presence of:-

M/s Chomba state counsel

Appellant present in person



Simon court assistant.

