



REPUBLIC OF KENYA



**Ochieng v Republic (Criminal Appeal E049 of 2024)
[2025] KEHC 6048 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E049 OF 2024
AM MUTETI, J
APRIL 28, 2025**

BETWEEN

GEOFFREY OCHIENG APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant in this appeal was charged with the offence of defilement contrary to section 8(1) of the *Sexual Offences Act* No. 3 of 2006.
2. The appellant also faced an alternative count of Indecent Act with a child Contrary to section 11 (1) of the *Sexual Offences Act*.
3. The appellant was tried, convicted and sentenced for the offence of defilement contrary to Section 8 (1) (2) of the *Sexual Offences Act*.
4. The appellant was sentenced to serve life imprisonment.
5. The appellant aggrieved by the decision of the court on the following grounds:-
 - i. That the trial magistrate erred in law and fact by conducting proceedings that violated the rights of I the appellant as per the provisions of the laws of Kenya hence null and void.
 - ii. That the trial magistrate erred in law and fact in arriving at a decision while relying on the evidences that were full of contradictions and without analyzing the same.
 - iii. That the trial magistrate erred in law and fact in failing to appreciate that the sentence of life is punitive, harsh, excess and unconstitutional as per the provisions Section 216 and 329 of the Criminal Procedure code cap 75 laws of Kenya in line with article 27 of *the constitution* of Kenya.



- iv. That the trial magistrate erred in law and fact in arriving at a decision while relying on extraneous factors that precipitated the opinion of the trial magistrate hence null and void.
 - v. That may the honorable court peruse appeal no.110 of 2022 of Makumbi Subui Manyeso - v- republic by(Nyamweya, Lesit & Odunga. (JJA) at Mombasa over life sentence and declare the same unconstitutional
 - vi. That the trial magistrate erred in law and fact in that I the appellant had language problem and failed to accord necessary just and constitutional fair trial to mitigate during sentencing.
 - vii. That I wish to raise more grounds of appeal when the same comes up for hearing.
6. The appellant filed written submissions which he adopted on the 4/12/2024 and the sate similarly filed submissions dated 22/11/2024.
7. The appellant contends that;-
- i. The prosecution’s evidence was contradictory
 - ii. The life imprisonment term imposed upon him is unconstitutional, excessive , punitive and harsh.
 - iii. The trial magistrate was influenced by extraneous matters in arriving at his decision.
At the trial he had a language problem thus he did not get a fair trial.
8. The law on defilement requires the proof of three key elements namely:-
- a. Age of the victim
 - b. Penetration
 - c. Identity of the perpetrator of the crime.
9. The duty of this court as a first appellate court is in the nature of a rehearing. The court is to re-evaluate the evidence a fresh and draw its own conclusions from the evidence while remaining alive to the fact that this court unlike the trial court has not had the advantage of hearing or seeing the witnesses thus due allowance ought to be made in that regard. See Kiilu & Another v Republic [2005] 1 KLR 174 where the court of appeal stated:-
- “In Kiilu & Another v Republic [2005] 1KLR 174 the Court of Appeal stated that:
- "1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
 - 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."
10. The appellant has taken issue with what he regards as inconsistencies in the prosecution’s case and according to him the inconsistencies in the prosecution evidence should have been resolved in



his favour. The appellant has however not brought out the alleged contradictions for the court to determine whether indeed there are contradictions in the prosecution's evidence and if so whether the contradictions are material in nature as to render the conviction of the appellant unsafe.

11. That notwithstanding this court has reviewed the evidence as recorded by the Lower court.
12. PW1 testified that she was aged 9 years and that she was in grade 9 at the time of giving evidence. She gave unsworn testimony following a *voire dire* examination by the trial court who determined that even though she understood the importance of telling the truth she was not able to understand the importance of an oath.
13. The victim stated:-

“I know that am in court the accused defiled me (yule alininajisi). He is called Geoffrey Ochieng. He lives near the road (points at the accused) he lives about (20 metres approximates to the court) from our home. It was at 3:00 pm I had been sent to the posho mill. It is near the milk shop, I went there and as I came back Ochieng called me he lied that he wanted to send me to the shop and I went to him. He asked me to eat first before I go, he said I go to his house first. When we went there he said eat this ugali first then I send you. When I wanted to leave , he held me and covered my mouth..... I finished eating and asked him to send me but he covered my mouth , I wanted to scream but he held my waist and put me on his bed, he removed all my clothes , he also undressed. I had worn a skirt and a top, my skirt was beige and my top was blue. I also wore a red panty , he removed all my clothes, he slept on top of me he removed his trousers after he finished he asked me to go home and he did bad manners to me, he took his thing and put it in mine (cries) he took the thing he uses to urinate and put it in where I urinate from, he then told me to go home..... I took the flour home my mother asked me where the blood on my skirt came from then she took a cane and she beat me , I told her I would take her to where I was, I took her there, my mother questioned Ochieng. We found him spreading his bed.”

14. The evidence of PW1 brings out the three elements of defilement. The victim stated she was 9 years old at the time of the offence.
15. She also was able to positively identify the appellant as the person who lured her to his house and defiled her.
16. She also positively testified on the issue of penetration. The appellant did insert his penis into her vagina and as a result she bled.
17. The witness remained unshaken under cross-examination. She emphatically stated that the appellant did bad manners to her which she vividly had described in her examination in chief.
18. The mother of the victim testified as PW2 and she stated the victim told her that the accused person had done bad manners to her.
19. The victim led the PW2 to the appellant's house. The victim positively identified the appellant as the one who did bad manners to her.
20. The witness PW2 called the village elder with whom they went to report the offence at the police station. The witness testified that the appellant ran away after denying having committed the offence. The accused was handcuffed before he ran away. He was pursued arrested and taken to hospital together with the victim.



21. The mother of the victim informed the court that the victim was 9 years old at the time of the offence. However, she did not produce any document as proof the victim's age.
22. The evidence of PW2 thus corroborated that of PW1 on the identity of the perpetrator.
23. The prosecution also called PW3 who stated that PW2 told him that Ochieng had raped the child. He witnessed Ochieng being left at the station as the child was taken to hospital.
24. At this point I must point out that the contradiction that is apparent from the evidence of PW1, PW2, PW3 is that the victim and the appellant were taken to hospital according to PW2 whereas PW3 states that he was left at the station.
25. It is the view of this court that the contradiction is immaterial for it does not negate the evidence of the actus reus on the part of the appellant.
26. The witness PW3 also testified that the child PW1 had blood stained clothes.
27. PW4 testified that the appellant was taken to the station by members of the public. The witness testified that he conducted investigations and established that the appellant defiled the child. It was PW4 who escorted the victim to hospital and got the P3 form filed.
28. The P3 form was filed and produced by PW6 Bonventure Oluodi Ogalla a registered Clinical Officer.
29. According to the witness when the victim was examined she appeared to be in pain and in a panic mode. She had bruises on Labia Majoria and on the Labia Minoria, the injuries showed there was penetration. She had heavy whitish discharge, there were no sperms found upon analysing the vaginal swabs. The witness confirmed that he did not examine the appellant.
30. The appellant offered a sworn defence and insisted that he was framed by the victim's mother. He denied having omitted the offence. He went on to allege that the village elder who arrested him was demanding money from him but he did not give out any money.
31. The evidence of the prosecution in this court's view established the offence of defilement beyond a reasonable doubt.
32. The appellant alleged that he was framed by the mother of the victim but one wonders how that could be true given the evidence of PW1 which was corroborated by PW6 the clinical officer.
33. The appellant apparently did not lay a basis for his defence that it was a frame up. He did not indicate to the court why for instance a 9 year old child would set out to frame him up.
34. It is the view of this court that his defence amounted to a mere denial.
35. Although the prosecution did not produce any evidence to prove when the victim was born, this court finds that the age of the child as stated by PW2 the mother was sufficient. In *Thomas Mwambu Wenyi v Republic* [2017] eKLR the court of Appeal cited with approval *Francis Omurori v Uganda Court of Appeal Criminal Case No.2 of 2000* which held that :-

“in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”
36. The learned Honorable magistrate applied observation and common sense and assessed the age of the victim to be below 10 years.



37. As for this court the evidence of the mother to the child on age was adequate enough to establish the age.
38. The upshot of the above is that the evidence tendered by the prosecution proved the offence of defilement beyond a reasonable doubt thus the conviction was merited. The appeal on conviction therefore fails.
39. Turning on to the issue of sentence the appellant has urged this court to find that the life imprisonment term imposed upon him was unconstitutional.
40. The jurisprudence that was settling in this country at the time of the hearing of the appeal was that any period between 30-40 years imprisonment would be deemed appropriate in place of an indeterminate life sentence.
41. The debate on life sentence however needs to find its way to the legislature as ordered by the Supreme Court because the current wave of very many senseless killings by very young individuals calls for a relook into our sentence regime in this country as regards the life sentence.
42. It would be of great help if the Honorable Attorney General or the Law reform Commission took steps to have the legislature revisit all the penal provisions in our laws where life imprisonment is provided for with a view to introducing legislative reforms that mirror the current situation in the country.
43. It should not be left to the courts to prescribe sentences when that clearly is the function of parliament.
44. Having said so, the appellants appeal on conviction is dismissed and the appeal on sentence equally fails in view of the recent jurisprudence from the Supreme court in Republic v Evans Nyamari Ayako Petition No. E002 of 2024 declaring life sentence constitutional.
45. The appeal fails on both conviction and sentence.
46. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Baraza for Applicant

Owuor for Respondent

