Joseph alias Jose Onyango v Republic (Criminal Appeal E059 of 2024) [2025] KEHC 7088 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7088 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E059 OF 2024

DK KEMEI, J

MAY 30, 2025

BETWEEN

JOSEPH ALIAS JOSE ONYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. J.A. Ayieta (RM) delivered on 24/10/2024 in Madiany Principal Magistrate's Court Sexual Offences Case No. E019 of 2024)

JUDGMENT

1. The Appellant herein Joseph Wanga Onyango alias Jose was charged with an offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offence *Act No. 3 of 2006*. The particulars were that on the diverse dates between 8th September 2024 and 13th September 2024 at Asembo location Rarieda Sub County within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of LSA a child aged 9 years old.

2. The Appellant also faced an alternative charge of committing an indecent act with a child. The particulars were that on the diverse dates between 8th September 2024 and 13th September 2024 at Asembo location Rarieda Sub County within Siaya County intentionally and unlawfully touched the vagina of LSA a child of 9 years with his penis.

3. That the Appellant denied the charge and after a full trial, the Appellant was found guilty of the main charge and was thus convicted and sentenced to imprisonment for life.

4. Aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal dated 7/11/2024 wherein he raised six grounds of appeal namely:

    i. That the learned trial magistrate failed to appreciate that the evidence adduced did not support the charge preferred against the Appellant.

ii. That the learned trial magistrate treated the evidence of PW6 the clinical officer selectively and failed to appreciate the evidence that the test she ran on the Appellant diagnosed him with syphilis and failed to question whether the complainant LSA was also affected if indeed there was penetration.

iii. That the learned trial magistrate erred in law and fact by relying on the evidence of PW4 and PW5 who were obviously unreliable witnesses whose credibility was in question.

iv. That the learned trial magistrate erred in law by shifting the burden of proof to the Appellant to explain the Respondent's case.

v. That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence adduced by the defence that he suffered from erectile dysfunction by dismissing the same without any justifiable cause.

vi. That the learned trial magistrate failed to ensure that the Appellant's right to a fair trial was observed throughout the hearing by failing to accord and provide the Appellant with counsel to represent him as required by *the constitution*.

vii. That the learned trial magistrate erred in law and fact by failing to observe that the Appellant was a first offender and a man of 80 years.

viii. That the learned trial magistrate erred in law and fact by imposing an excessive and harsh sentence upon the Appellant.

5. The Appellant thus prayed that the appeal be allowed and the sentence set aside.

6. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court to arrive at its independent findings and conclusions. (See Okeno vs. Republic [1972] EA 32). In doing so, the Court must 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 give due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.

7. The facts of the case are that the minor (PW1) in this case was aged 9 years, a pupil at [Particulars Withheld] Primary School, and who used to stay with her grandmother (PW2). That on 13/09/2024, as she was playing with her siblings, the Appellant came, called her by her pet name 'baby', and asked her to accompany him to Brian's shop. That they did not get to Brian's shop but on their way he took her to a bush where he asked her to remove her underwear, and lie down on the ground. That upon so doing, the Appellant likewise removed his trousers and innerwear. That the Appellant threatened that he would kill her if she cried or screamed. It was the Complainant's testimony that he did to her "vitu mbaya mbaya." That "he took his "dudu' and inserted it in her 'dudu." The Appellant continued to do so as the Complainant felt pain. That when the Appellant was done, she took a piece of paper and wiped blood from her thighs then she went home. That it was about the fourth time the Appellant was defiling her as it was not the first time. That she could not remember the first encounter but that the second encounter was in her grandmother's bedroom when her grandmother had gone to church. PW1 testified further that the Appellant had made several attempts on her which had failed. That at some point the Appellant asked her to meet him at a certain place but that she did not go. Later that evening when her grandmother was cooking in the kitchen, which was far from the house, the Appellant asked her to go sleep with him but that she did not go. That during the act in the bush she heard footsteps which she later found out that it was Oruko's mother and had witnessed what had happened. Oruko's mother then alerted Aunty Pamela who is wife to her uncle George who together with Oruko's mother reported the matter to her grandmother. The following morning after the act,

her waist was paining and that she informed her grandmother about it. That on Monday, she did not go to school but was taken by PC Lilian to Madiany sub county hospital together with the Appellant. That she was later given injections.

On cross-examination, she stated that she did not report the various incidences because the Appellant had threatened to kill her if she ever reported it to her grandmother.

8. MAA (PW2) testified that she was PW1's grandmother and had been away for a funeral since 13/09/2024 until 16/09/2024 when she returned. That upon her return on 16/09/2024 at about 7.30 pm, Esther Oruko visited her and reported to her that she had witnessed the Appellant defiling PW1 on the evening of 13/09/2024. That she asked PW1 who confirmed the same to be true. That the following day, she went to her son GA and enquired from him the steps to be taken. That they went to the village elder who summoned the Appellant. That she later confronted the Appellant on whether he had indeed defiled PW1 and who answered and said: "the Complainant was his and as such he was eating his own food" That the matter was reported to Kamito police post. She identified PW1's birth certificate which was marked as PMFI-1.

9. George Otieno Ayata (PW3) testified that on the evening 15/09/2024 his neighbor Esther Aruko went and reported to him that she had seen the Appellant defiling PW1 on 13/09/2024. That he reported to the village elder then later reported to Kamito police and an officer accompanied them to the hospital where both Appellant and the complainant were tested and given medication. He identified the treatment notes, P3 form, PRC form, lab results.

10. Esther Oruko (PW4) testified that that she and Monica saw the Appellant defiling the complainant. That she later informed the complainant's grandmother and that action was later taken against the Appellant.

11. Monica Adhiambo (PW5) testified that she saw the Appellant defiling the complainant inside a nearby bush and alerted Esther Oruko. That she found the Appellant naked from waist downwards while lying on top of the complainant.

12. Winnie Wambia (PW6), the clinical officer, stated that she examined PW1 on 17/09/2024 at 4.00 pm, who reported having been defiled by a person well known to her. On examination, the labia minora was bruised and that the hymen was not intact. She concluded that the minor had indeed been defiled. She produced treatment notes as Exhibit 2, minor's treatment card as Exhibit 3, P3 form as PEXH 4, treatment notes for the Appellant as Exhibit 5, patient card for the Appellant as exhibit 6, Lab request form for the Appellant exhibit 7, and lab request form for the complainant as exhibit 8.

13. Alphonse Ochieng (PW7) testified that he is the village elder and that he had interrogated the complainant and listened to the witnesses and later confronted the Appellant who confirmed having defiled the minor and who sought for forgiveness. That he escorted the complainant and Appellant to the police station.

14. No. 10xxx Lilian Aura (PW8) was the investigating officer who stated that she escorted the complainant and the Appellant to hospital and later recorded statements of witnesses and later charged the Appellant. She produced the birth certificate as exhibit 1.

15. The trial court later ruled that a prima facie case had been established against the Appellant and he was subsequently placed on his defense. The Appellant opted to tender a sworn testimony. He stated in his defense that he had lived with the complainant's grandmother for 35 years and that he a was 79 years old and that the family had loved him all along. That he knew the complainant as they stayed in the same house. That he had erectile dysfunction and thus could not engage in any sexual activity as he

could not sustain an erection. He stated that he did not bring any documentation to show that he was sick. That he had no dispute with any of the witnesses that had testified.

16. The appeal was canvassed by way of written submissions. the Appellant vide submissions dated 10/1/2025 submitted that the prosecution did not prove the charge of defilement beyond any reasonable doubt as by law required and prayed that the said conviction should be quashed. On sentence, the Appellant submitted that the sentence was harsh and manifestly excessive in the circumstances and ought to be interfered with.

17. The Respondent did not file submissions.

18. I have considered the record of appeal as well as the submissions filed. I find the issues for determination are firstly whether the prosecution proved the elements of the offence of defilement beyond reasonable doubt and secondly, whether the sentence imposed by the trial magistrate was appropriate in the circumstances.

19. On the first issue, the offence of defilement has three ingredients to be proved by the prosecution firstly, age of the minor, secondly, proof of penetration and thirdly, the identity of the perpetrator. It is the duty of the prosecution to prove the guilt of the accused beyond any reasonable doubt and which burden never shifts to the defence.

20. On the element of age, PW1 testified that she was born on 01/01/2008. The Investigating Officer (PW8) produced the minor's birth certificate as P exhibit 1 which confirmed that the minor was born on 25/1/2015 and was thus aged about nine years and some months at the time of the incident. In the case of Omuroni *versus Uganda Criminal Appeal No. 2 of 2000*, the court held that a birth certificate or a baptism card was prima facie proof of age; and it was sufficient as proof of age. (See also Mwalango Chichoro vs. Republic MSA C. Appeal no. 24 of 2015).

    There was therefore sufficient evidence that the complainant was a child and aged below 18 years under section 2 of the *Children Act* and below 11 years as per the provisions of section 8(1) and 8(2) of the *Sexual Offences Act* No. 3 of 2006. I find the Respondent proved this ingredient beyond reasonable doubt.

21. On the element of penetration, PW1 testified that on 13/09/2024, as she was playing with her siblings, the Appellant came and called her by her pet name 'baby' and asked her to accompany him to Brian's shop. That they did not get to Brian's shop as directed by the Appellant but on the way he took her to a bush where he asked her to remove her underwear, and lie down on the ground. That upon compliance, the Appellant likewise removed his trouser and innerwear. That the Appellant threatened that he would kill her if she cried or screamed. It was the complainant's testimony that he did to her "vitu mbaya mbaya". That "he took his "dudu" and inserted it in her 'dudu." That the Appellant continued to do so as she continued to feel pain. That when the Appellant was done, she took a piece of paper and wiped blood from her thighs then she went home. The complainant stated that it was about the fourth time that he had defiled her as it was not the first time. The clinical officer (PW6) who examined the complainant noted bruises on the labia minora and that the hymen was not intact and that she concluded that there was penetration. The clinical officer further went on to state that the Appellant then aged 77 years old was examined and found to be infected with syphilis and was instantly put on medication.

    On the issue of penetration, section 2 of the *Sexual Offences Act* describes it as the partial or complete insertion of the genital organ of a person into the genital organ of another person. The Appellant in his defence, maintained that he was too old and suffered erectile dysfunction and could not therefore engage in any sexual intercourse. However, from the description of penetration by section 2 of the

Act, it is possible for the Appellant to engage in partial insertion of his genitals into those of the complainant. Iam satisfied that the Respondent proved this ingredient beyond any reasonable doubt.

22. On the identity of the perpetrator, PW1 testified that the Appellant had been living with them and her grandmother in the same house. This was thus an issue of recognition and not identification. The complainant knew the Appellant who lived with her and her grandmother and thus there was no issue of mistaken identity whatsoever. Again, it is highly unlikely for the complainant's grandmother to use her as a victim of defilement so as to get at the Appellant yet she (PW2) did not have any grudges with the Appellant with whom she lived in under the same roof. In the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) eKLR the Court of Appeal in Nairobi held that :

> " .... recognition not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant..."

23. The Appellant in his defense did not adduce any evidence to rebut the evidence by the Respondent. The Appellant was found in the act (in flagrant delicto) by PW5 and who alerted PW4 who in turn alerted the grandmother (PW2) of the complainant. I am satisfied that the Appellant was positively identified as the perpetrator of the offense of defilement. I find that this ingredient was proved by the Respondent beyond any reasonable doubt.

24. The totality of the evidence adduced leads me to come to the conclusion that the Respondent proved the charge of defilement against the Appellant beyond any reasonable doubt. Hence, the finding on conviction by the trial court was quite sound and that the same must be upheld.

25. As regards the second issue of sentence, it is noted that section 8(2) of the *Sexual Offences Act* No. 3 of 2006 provides that:

'A person who commits an offence of defilement with a child aged 11 years and below is liable upon conviction to imprisonment for life.'

26. Sentencing is usually at the discretion of the trial magistrate or trial judge. It is trite law and based on the doctrine of stare decisis that an appellate court will not normally disturb the sentence imposed by the trial magistrate save where the said sentence is illegal, unlawful, or outrightly excessive in the circumstances. This position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S/O Owuor Vs Regina (1954) 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147: "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
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> To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher Shewky, (1912) C.C.A. 28 T.L.R. 364."

27. Ogola s/o Owuor's case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to-date.

28. In the instant appeal, the trial magistrate took into account everything that was urged before her by the Appellant. She did not disregard any material factor, nor did she take into account any matter immaterial. Similarly, she did not act on any wrong principle. The very same matters that the Appellant

urged before me were urged before the learned trial magistrate and that she took all of them into account.

29. The Appellant likewise claimed that the mandatory nature of the sentence was unconstitutional. As regards the Appellant's contention, I am guided by the Supreme Court Petition No. E018 of 2023 R Vs Joshua Gichuki Mwangi and Others (2023) eKLR, where the Supreme Court stated that all minimum mandatory sentences under the *Sexual Offences Act* No. 3 of 2006 are lawful unless otherwise amended.

30. Being guided by the foregoing Supreme Court's decision, I am convinced that the trial magistrate correctly addressed herself on both issues of conviction and sentence. I find the sentence imposed was within the law regardless of the age of the Appellant. It is instructive that the Appellant's conduct in defiling the hapless complainant has caused her untold suffering and torment. Her life has since been turned upside down and scarred for the rest of her life. The Appellant's claim that he is elderly must be pegged against the complainant's vulnerable situation. I find that the Appellant's actions deserved a deterrent sentence. The sentence imposed was neither harsh nor excessive but in accordance with the law.

31. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The trial court's conviction and sentence are hereby upheld.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 30TH DAY OF MAY, 2025.

D. KEMEI

JUDGE

In the presence of:

Joseph Alias Jose Onyango.....Appellant

BF Odhiambo.....for Appellant

M/s Kauma.....for Respondent

Okumu.....Court Assistant