



REPUBLIC OF KENYA



**KENYA LAW**  
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**Odhiambo v Republic (Criminal Appeal E027 of 2024)  
[2025] KEHC 7498 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E027 OF 2024**

**DK KEMEL, J**

**MAY 30, 2025**

**BETWEEN**

**MAURICE ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. JP Nandi  
delivered on 07/12/2022 in Bondo PMCC No. S.O E031 of 2022)*

**JUDGMENT**

1. The Appellant herein Maurice Odhiambo, was charged with an offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No.3 of 2006. The particulars were that on the 2<sup>nd</sup> July 2022 at around 0300 hours at Kaudha East Sub Location, South west Location, Gem Sub County within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of BAO, a child aged 15 years.
2. The Appellant denied the charges and the matter proceeded to full trial where the Respondent called eight witnesses in support of its case while the Appellant was the only witness. The Appellant was found guilty of the main charge, convicted and sentenced to fifteen years' imprisonment.
3. Aggrieved by the conviction and sentence, the Appellant appealed to this Honorable court vide his Petition of Appeal dated 3/6/2024 wherein he raised the following grounds:
  - i. That the prosecution erred in law and in fact in not proving the ingredients beyond reasonable doubt.
  - ii. The trial magistrate erred in law and fact by relying on fanciful remote possibilities in convicting the appellant.



- iii. The trial court erred in law and in fact in relying on conflicting evidence of the prosecution in convicting the Appellant.
  - iv. The trial court erred in law and in fact in not appreciating the Appellant's cogent defence which was overwhelming against the prosecution's case.
4. 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, 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.
  5. The summary of the case was that on that fateful day at around 0300hours, the complainant, B.A.0 (PW1) was walking from a disco matanga in the company of others such as Maurice Ouma Ogoyo (PW2), Vivian Anyango (PW5) and David Ouma Upunga (PW7) when they were attacked by the Appellant who was holding a machete and another who was holding a knife. The duo ordered them to sit down on the road then they took the complainant and one Sophie. The Appellant specifically took the complainant to the bush removed her trouser and inner pant, then inserted his penis into her vagina and had sexual intercourse with her. That the said sexual act was unprotected.
  6. After the ordeal, the Appellant who was complainant's neighbour ran away. The complainant and one Sophie then walked to the house of one Agnes Okwiri (PW3), a Community Healthy Volunteer and explained to her about the ordeal. PW3 then called the assistant chief, Susan Akoth Muga (PW4) who advised her to take them to a health center for examination which she did. Later on, she reported the matter to Akala police station where a P3 form was issued and that the complainant was referred to Akala health centre for examination.
  7. Reino Akoth Ooko (PW6) a clinician at Akala health Center examined the complainant on 2/7/2022 at 8.00 Am. She testified that upon examination, her clothes were blood stained, panty/inner wear was blood stained. That there were bruises on the labia majora and minora with freshly broken hymen. That there was also a whitish bloody discharge. According to the lab report, there was yeast cells and red blood cells. She concluded that the patient/complainant had been defiled and that penetration was proved. She produced the P3 Form as exhibit 3, PRC form as Exhibit 4, treatment notes as exhibit 5.
  8. No. 25XX95 PC Gladys Nashipai (PW8) of Akala police station testified that she is the investigating officer. That on 2/7/2022 at 8.00am the complainant named B, went to the station in the company of one Sophie and Agnes Okwiri (PW3). That the complainant reported having been defiled by one Maurice Odhiambo. That the Appellant was later arrested by the Assistant chief Susan Akoth Muga (PW4) upon receiving a tip off from the Appellant's father. That the complainant produced her baptism card which she produced as Exhibit 3.
  9. The trial court ruled that a prima facie case had been established and thus put the Appellant on his defense. He opted to tender a sworn testimony.
  10. In his defense, the Appellant claimed that on 6/7/2022 at around 7.00pm while at Ojola center, he was attacked by people and that Mama Agnes (PW3) directed that he be taken to the police station at Akala. That he knows nothing about the case and that he was framed by PW3 owing to a land dispute with her.
  11. On appeal, the Appellant submitted that the complainant's age is 16 years as captured in the judgment at page 21 paragraph 17 line 29-30 and not 15 years as captured on the charge sheet. The Appellant likewise submitted that he prosecution's evidence was marred with contradictions thus was unreliable.



Finally, he submitted that the trial magistrate did not consider the period spent in custody during the trial prior to sentencing. He prayed that the appeal be allowed.

12. On their part, the Respondent submitted that all the ingredients of the offence were proved beyond a reasonable doubt and thus prayed that the conviction and sentence be upheld.
13. I have considered the record of appeal plus the rival submissions and find the issues for determination are firstly, whether the prosecution proved the charge of defilement beyond reasonable doubt and secondly, whether the sentence imposed was appropriate.
14. The three ingredients to be proved in an offence of defilement are firstly, age of the complainant, secondly, whether there was penetration and thirdly, the identity of the perpetrator.

The investigation officer (PW8) produced the minor's/complainants baptismal card that showed that she was born on 0209/2006. This established her age as 15 years 11 months at the time of the offence. A baptismal card and /or a birth certificate are admissible in evidence as sufficient proof of age. (See *Omuroni v. Uganda Criminal Appeal No. 2 of 2000* and *Mwalango Chichoro vs. Republic, Msa Criminal Appeal No. 24 of 2015 (UR)*). In this regard I find that the Respondent sufficiently proved that the complainant was a minor as she was below the age of 18 years and thus a child pursuant to section 2 of the Children's Act.

15. The other crucial element to be proved is penetration. Section 2 of the *Sexual Offences Act* defines penetration thus:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

In *Langat Dinyo Domokonyang v. Republic (2017) KLR* where Githinji J held:

“for the offense of defilement, it must be established by the prosecution beyond reasonable doubt that a male penis partially or fully penetrated the victim's vagina and or anus”

In the instant case, the clinical officer (PW6) testified that upon examination of the complainant, she found that her clothes were blood stained and that her panty/inner wear was blood stained. That there were bruises on the labia majora and labia minora with freshly broken hymen. That there was also a whitish bloody discharge. According to the lab report, there was yeast cells and red blood cells. She concluded that the patient/complainant had been defiled and that penetration was proved. She produced the P3 Form as exhibit 3, PRC form as Exhibit 4, treatment notes as exhibit 5.

I am satisfied that penetration was sufficiently proved by the Respondent.

16. Lastly is the aspect of the identification of the perpetrator. The alleged incident occurred at about 0300 hours, at which time it was dark. The complainant (PW1) stated that she was able to see the Appellant as there was some street light which enabled her to see the Appellant. Maurice Ouma Ogoyo (PW2) testified that the Appellant stopped them and asked them to gather as a crowd. That is when he saw the Appellant using a torch light. David Ouma Upunga (PW7) testified that there was a motorcycle which enabled him to see the Appellant and that they were standing with him closely.
17. The three witnesses placed the Appellant squarely at the scene of crime. Besides, the Appellant hailed from the same village as the complainant and her witnesses and that he was well known to them. The Appellant's defense seemed to be full of mere denials. There was nothing in his defense that rebutted



the evidence of the Respondent. It is instructive that it was the Appellant's father who assisted in his arrest. I am therefore satisfied that all the elements of this offence were proved beyond any reasonable doubt. Hence, the finding on conviction by the trial court was quite sound and must be upheld.

18. On the issue of sentence, the same goes hand in hand with the age of the minor as provided for by the Sexual Offence Act No. 3 of 2006. The trial court imposed a sentence of 20 years' imprisonment. The charge sheet states that the age of the minor as 15 years. However, the baptismal card (Exhibit 1), shows that the complainant was born on 02/09/2006 putting her age at 15 years 11 months at the time of the offence. This therefore means that the complainant was not aged 15 years exactly but was above 15 years.
19. Section 8(3) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years' imprisonment. The minor herein was 15 years 11 months at the time of the offence and this therefore means that she did not fall within the above age limit under section 8(3) of the Act as held by the learned trial magistrate. I find that this provision was not applicable to her and that she will fall within the confines of section 8(4) of the Act. Indeed, the charge sheet indicated the correct section 8(4) of the Act but the learned trial magistrate seems to have gone off tangent when he applied the age of 15 years as indicated on the charge sheet yet the baptismal card established that the complainant was aged 15 years and 11 months at the time of the commission of the offence. The trial magistrate was supposed to proceed and sentence the Appellant under section 8(4) of the Act as stated on the charge sheet. To that extent, the sentence imposed by the learned trial magistrate was erroneous and thus it must be interfered with. Section 8(4) of the Act stipulates that 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. Hence, the appropriate sentence ought to have been 15 years' imprisonment and not 20 years' imprisonment
20. Further, under section 333(2) of the Criminal Procedure Code, the period the Appellant spent in custody prior to his sentencing must be considered and subtracted from the final sentence. This was the position in the case of Ahmad Abolfathi Mohamed & Another versus Republic (2018) eKLR.
21. Flowing from the foregoing, I find that the trial magistrate erred in sentencing the Appellant under section 8(3) instead of 8(4) of the Sexual Offences Act. In this regard, the appeal partially succeeds on sentence. As the Appellant remained in custody throughout the trial, the sentence of 15 years' imprisonment shall commence from the date of arrest namely 8/7/2022.
22. In the result, the Appellant's appeal on conviction lacks merit and is dismissed. The appeal on sentence partially succeeds to the extent that the sentence of twenty (20) years' imprisonment is hereby set aside and substituted with a sentence of fifteen (15) years' imprisonment which shall commence from the date of arrest namely 8/7/2022.

Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 30<sup>TH</sup> DAY OF MAY, 2025**

**D. KEMEI**

**JUDGE**

In the presence of:

Maurice Odhiambo.....Appellant

M/s Kauma.....for Respondent



Okumu.....Court Assistant

