



REPUBLIC OF KENYA



**Odhiambo v Republic (Criminal Appeal 33 of 2023)
[2025] KEHC 7090 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL 33 OF 2023**

DK KEMEL, J

MAY 30, 2025

BETWEEN

JAMES ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. J.P. Nandi (SRM)
dated 27th June 2023 in Bondo PMCR S.O E053 of 2022)*

JUDGMENT

1. The Appellant herein James Odhiambo was charged at the lower court with the offense 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 15th October 2022 at around 2000 hours, at Gem Sub-County within Siaya County willfully and intentionally caused his penis to penetrate the vagina of JA (J.A) a child aged 15 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offense *Act No. 3 of 2006*. The particulars were that on 15th October 2022 at around 2000 hours, at Gem Sub-County within Siaya County willfully and intentionally touched the vagina of J.A. a child of 15 years with his penis.
3. After a full trial, the Appellant was convicted and sentenced to 15 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant filed his undated Memorandum of Appeal wherein he raised the following grounds of appeal:
 - i. That the sentence imposed was unconstitutional due to its mandatory nature.



- ii. That the trial magistrate erred in law and in fact in awarding a sentence that was inordinately excessive without considering all the circumstances regarding the extent of the age gap of the Appellant and the victim.
 - iii. The trial magistrate failed to consider that nothing linked him to the alleged offence.
 - iv. The trial magistrate failed to appreciate that the prosecution's case was full of contradictions hence unsafe to base a conviction thereon.
 - v. That the trial magistrate failed to observe that the prosecution did not prove penetration.
 - vi. That the trial magistrate failed to consider that the Appellant's sworn-defense statement was capable of being awarded an acquittal.
5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its independent findings and conclusion. (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.
 6. The prosecution called a total of five witnesses in support of its case.
 7. EAM (PW1) testified that she was the mother to J the Complainant. That on 14/10/2022 at 9.00PM she went to her house and found that her daughter J was not at home. After a few minutes, she came and that she instructed her to light the jiko. That sometime later, she realized that her daughter was nowhere to be seen. That she checked around the house but she was nowhere and so she went to sleep. That the following morning, she enquired from her younger children and that she was informed that one James usually comes to take her. That her younger child S pointed the house of James to her. That she later lodged a report with the police. That when James saw the police, he ran away but the police caught up with him and arrested him and that they entered his house and recovered a blouse and a lessa belonging to the Complainant which she positively identified. The Appellant was interrogated to show the whereabouts of the complainant and that he claimed that she had gone to visit another friend. That the Appellant was taken to the police station. That two days later on 16/10/2022, the Complainant was found at Riat market and was taken to the police station and later escorted by the police to hospital. That the blouse and lessa showed that her daughter had been at the Appellant's house.
 8. JA (PW2) testified that she was 16 years old. That the Appellant was her boyfriend for one year. That on 15/10/2022 at 7.00PM she was at home when the Appellant came and called him behind their house where they talked until 8.00pm when she returned to the house and that her mother enquired as to where she had been. That fearing that her mother would cane her, she ran away and went to the house of the Appellant. That they had dinner and went to bed where they had sexual intercourse. That in the morning, he directed her to go home but she diverted and went to the market. That at night, she went to the Appellant's house but he was not there. That she returned to the market and slept there. That in the morning, another man came and offered to take her to his house and that she agreed where she was given food and a place to sleep. That in the morning she went to Riat market where her mother found her and took her to Akala police station and later the police escorted her to hospital where she was examined.

On cross examination, she reiterated that she went to the Appellant's house at 8.00pm, had dinner and slept and had sexual intercourse with him.
 9. Mogenya Akinyi (PW3) testified that she is a friend of the mother to the minor (PW1). That when her friend (PW1) confided in her of her missing daughter and that she advised her to report to the



authorities. That she went ahead and escorted her to make the report and later, through the help of the complainant's young sibling, they went with the police to the Appellant's house where he was arrested. That the Complainant's blouse and her mother's lessso were recovered from the Appellant's house which were identified by the complainant's mother.

10. Humphrey Odhiambo Owino (PW4) testified that he is a clinical officer from Akala Health Center. That he had a P3 form for the Complainant who had been brought to the facility on 18/10/2022 for examination and treatment. That the Complainant disclosed that she had been engaging in consensual sexual intercourse with her longtime boyfriend. That on examination, there were no physical injuries. That on examination of the genitalia, there were no bruises, no lacerations and that the hymen was partially broken with remaining part intact. That there was a foul smelling whitish vaginal discharge. That lab tests revealed numerous intercourse spermatozoa with epithelial cells too. It was concluded that a recent vaginal penetration had occurred. That the P3 form signed and dated 18/10/2022 was produced as exhibit 2, treatment notes as exhibit 3, and PRC form as exhibit 4.
11. Gladys Nashipai (PW5) testified that she is stationed at Akala police station and the investigation officer. That on 16/10/2022, while at the station, PW1 went to report that her child was missing and that she had information that she was in the house of one James Odhiambo. That they proceeded to the said house where they found him. That upon searching the house, they recovered a top blouse and lessso of the Complainant which were identified by PW1. That they arrested the Appellant and took the recovered clothes to the station. That she produced the said clothes as exhibit 5(a) and (b) respectively. That on 17/10/2022 the Complainant was brought home by a boda boda rider who claimed that he had found her at Riat market.

On cross examination, she stated that she did not find the complainant in the Appellants house and that the clothes were identified by PW1. That the second defiler was unknown to the complainant and that the Complainant's statement stated that it was the Appellant who had defiled her first.
12. That marked the close of the prosecution's case. The trial court later ruled that a prima facie case had been established by the Respondent. The Appellant was thus placed on his defence. He opted to tender an unsworn statement.
13. James Odhiambo (DW1) stated that he still denies the charges. That on 16/10/2022 he went to church at Akala at 8.00 Am and returned at 4.00PM. That after church, a lady requested for a boda boda and that he called one for her. That he took the keys of the boda boda and went to open for his children and as he opened the door the police came to arrest him. That he was arrested despite him telling them it was not his house. He insisted that he did not commit the offence.

That marked a close of the defence case.

14. The appeal was canvassed by way of written submissions. Both parties duly complied.
15. I have considered the evidence tendered before the lower court as well as the submissions filed. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond reasonable doubt.
16. It is noted that the Appellant was charged under section 8(1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006 which stipulates as follows:
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- (4) 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.
13. The essential ingredients that must be proved in a defilement case are, age of the complainant/victim, penetration and the identity of the perpetrator.
14. As regards the aspect of age, the investigating officer (PW6) produced the birth certificate of the minor as exhibit one. The same indicated that the minor was born on 4/11/2007 thus, she was about 15 years old at the time of the offence. In the case of Omuroni *versus Uganda Criminal Appeal No. 2 of 2000*, the court held that a birth certificate was a 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).

The certificate of birth produced herein showed that the complainant was aged 15 years old at the time of the incident and thus she was below the age of 18 years and a minor at that and who had no capacity to consent to the sexual intercourse. I find this ingredient was proved by the prosecution beyond reasonable doubt.

15. As regards the aspect of penetration, PW2 stated that ‘Fearing that her mother would cane her, she ran away and went to the house of the Appellant. That they had dinner and went to bed where they had sexual intercourse.’

The clinical officer (PW4) stated that ‘The Complainant disclosed that she had been engaging in consensual sexual intercourse with her longtime boyfriend. On examination, there were no physical injuries but however, on examination of the genitalia, there were no bruises, no lacerations and that the hymen was partially broken with remaining part intact. That there was a foul smelling whitish vaginal discharge. That lab tests revealed numerous intercourse spermatozoa with epithelial cells too. It was concluded that a recent vaginal penetration had occurred. That the P3 form signed and dated 18/10/2022 was produced as exhibit 2, treatment notes as exhibit 3, and PRC form as exhibit 4.’

I am satisfied that the element of penetration was articulately explained by PW4 whose evidence corroborated that of the complainant (PW2). I find that the ingredient of penetration was proved by the prosecution beyond reasonable doubt.

16. As regards the aspect of identification, the complainant recognized the Appellant as James whom she described as ‘her boyfriend she had known for one year since 2021’ thus a person well known to her previously. In fact it was the evidence of the complainant that ‘on 15/10/2022 at 7.00PM she was at home when the Appellant came and called her behind their house where they talked until 8.00pm when she returned to the house and her mother asked where she was coming from. That fearing that her mother would cane her, she ran away and went to the house of the Appellant. That they had dinner and went to bed where they had sexual intercourse.’

17. I find that this was a case of recognition because he was a person well known to the Complainant. I am therefore satisfied that the perpetrator was properly identified by the witnesses. The Appellant was placed at the scene of crime and apprehended. It also transpired from the evidence that the complainant’s siblings informed their mother that the Appellant had been frequently picking up the complainant and going with her to his house. Again, during the Appellant’s arrest, his house was searched and that a blouse and a lessa were recovered and which the complainant’s mother (PW2) positively identified as having been worn by the complainant. The Appellant’s defence evidence did not cast doubt upon that of the prosecution which was overwhelming against him. The Appellant’s claim that there was another defiler after him did not absolve him of involvement in the crime as the complainant gave a vivid account of how the Appellant took her to his house where they spent the



night and had sexual intercourse. It matters not that there could have been a subsequent defilement the following since the charges related to the incident of 15/10/2022 and not any other date. The complaint raised by the complainant is about the sexual intercourse that took place on the 15/10/2022. In any event, the complainant indicated that the Appellant had been her boyfriend for one year and thus his identity as the perpetrator was not in doubt at all. I find this ingredient was proved beyond reasonable.

18. An analysis of the evidence as a whole leaves no doubt that the finding on conviction by the learned trial magistrate was quite sound and that the same must be upheld.
19. As regards the sentence, it is noted that the Appellant in his petition of appeal has challenged the aspect of the sentence. I am therefore inclined to consider the issue of sentence. It is noted that the Appellant was ordered to serve a sentence of 15 years' imprisonment. Indeed, under section 8(4) of the *Sexual Offences Act*, a person convicted thereby warrants a sentence of not less than fifteen years' imprisonment. The trial court received the Appellant's mitigation as well as being a first offender. The sentence imposed, in my view was neither harsh nor excessive as it is the minimum possible in law. I am guided by the Supreme Court's decision in Petition No. 18 of 2023 R Vs Joshua Gichuki and Others [2023] eKLR which held that minimum sentences under the *Sexual Offences Act* No.3 of 2006 are lawful until the same is amended or declared unconstitutional. Hence, the Appellant's contention that the sentence was unconstitutional lacks any basis and must be rejected.
20. It is also noted that the Appellant remained in custody throughout the trial and thus the said period prior to conviction must be considered in line with the provisions of section 333(2) of the *Criminal Procedure Code*. The charge sheet indicates that the Appellant was arrested on 16/10/2022. Hence, the sentence should commence from that date.
21. In the result, it is my finding that the Appellant's appeal on conviction lacks merit and is dismissed. However, the appeal on sentence partially succeeds to the extent that the sentence of 15 years' imprisonment shall commence from the date of arrest namely 16/10/2022.

It is so ordered.

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

D. KEMEI

JUDGE

In the presence of:

James OdhiamboAppellant

M/s Kauma.....for Respondent

Okumu.....Court Assistant

