



REPUBLIC OF KENYA



KENYA LAW
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**Odhonji v Republic (Criminal Appeal E048 of 2023)
[2025] KEHC 7154 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E048 OF 2023**

DK KEMEL, J

MAY 30, 2025

BETWEEN

JULIUS OCHIENG ODHONJI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. Lester Simiyu (SPM)
delivered on 19/10/2023 in Sexual Offences Case No. E042 of 2021)*

JUDGMENT

1. The Appellant herein, Julius Ochieng Odhonji, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 20th August 2021 at about 6.30 hours at [Particulars Withheld], Sirembe sub location North west Gem location within Gem sub county in Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of JAO a child aged 10 years.
2. The Appellant was likewise charged with an alternative charge of committing an indecent act with a child. The particulars were that on 20th August 2021 at about 6.30 hours at [Particulars Withheld], Sirembe sub location North west Gem location within Gem sub county in Siaya County, intentionally and unlawfully touched the vagina of JAO a child of 10 years with his penis.
3. That the Appellant denied the charge and upon a full trial the Appellant was found guilty of the main charge, convicted and sentenced to fifteen years' imprisonment and that the sentence was to run from his date of arrest.
4. Aggrieved with the court's verdict, the Appellant has since appealed to this Honorable Court against both the conviction and sentence on the following grounds:



- i. That the trial magistrate failed in law and in fact in failing to observe that penetration was not proved.
 - ii. The trial magistrate erred in law and fact in convicting the Appellant by failing to appreciate that the prosecution did not prove their case beyond a reasonable doubt.
 - iii. That the Trial magistrate failed in law and in fact by basing the Appellants' conviction on contradicted evidence of the prosecution.
5. The Appellant thus prayed that the appeal be allowed, conviction quashed 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, 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.
 7. The facts of the case are that the minor JAO (PW3) in this case is aged 10 years, a class two pupil at [Particulars Withheld]. That she usually leaves for school at 0700hours and returns at 1300hours. She recalled that one day, as she headed to school, Ochieng called her to pick some fruits from his house. They walked through the gate to his house where he locked the house from inside. That the said Ochieng then removed her inner pants, placed her on a table, removed his trousers and inner pant too, inserted his penis inside her vagina. That during the ordeal, she felt pain and that she bled. That the blood stained her uniform which she was then wearing. She informed one Q, a sister to her mother who then informed her mother VAO (PW2) and that she was taken to hospital. That at the hospital, the clinical officer Iveti Konzolo examined her and that Audrey Apiyo (PW5) produced the P3 form, lab report, age assessment and patient card as exhibits. That during the examination, it was established that she had blood stained under pants. That the examination of the genitalia showed bruises on the vaginal wall, broken hymen and fresh, whitish discharge noted, labia majora was swollen and reddened. That High Vaginal Swab showed puss cells present. That a urinalysis test showed the presence of red blood cells and puss cells. VDRL test was positive. That it was concluded that indeed the minor had been defiled and infected with Syphilis. That the minor was treated. That an age assessment was also conducted and confirmed the complainant to be 10 years old. That the P3 form was produced as P Exhibit 1, age assessment report as exhibit 2, card as exhibit 3, lab report and request as exhibit 4 and patient card as exhibit 5.
 8. PW1 No. 11xxxx Volin Wekesa was the Investigation officer from Yala police station, who testified that on 23/8/2021 a defilement case was reported. That the Appellant was taken to the police station by the area chief and members of the public. That later, the minor and her mother arrived at the station. That he issued a P3 form and referred the complainant to Yala Referral Hospital. He testified further that the P3 form was duly filled and that the doctor confirmed that indeed the minor had been defiled.
 9. Peter Owiti Adede (PW4) testified that he was alerted of the incident and went to the home of the complainant and advised that she be taken to hospital and that later the Appellant was apprehended by bod boda operators and handed over to the police. That he went to the police station and found the Appellant whom he had known previously.
 10. The trial court later ruled that a prima facie case had been established against the Appellant and he was subsequently placed on his defense. He opted to tender a sworn testimony.
 11. The Appellant Julius Ochieng Odhonji (DW1) stated in his defense that the allegations were false and that he never defiled the minor. That on the material day, he left his house at 0600 hours and went



- to pursue a land case where someone was illegally farming on his land. That he was later arrested and beaten for no reason and taken to the police station. That he had no dispute with any of the witnesses who had testified. He closed his case.
12. The appeal herein was canvassed by way of written submissions. Both parties duly complied.
 13. The Appellant 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. Regarding sentence, the Appellant submitted that the sentence was harsh and manifestly excessive in the circumstances.
 14. The Respondent submitted that all the essential ingredients requisite for the commission of the offence of defilement had been proved and that the conviction should be upheld and sentence affirmed.
 15. I have considered the record, the submissions and authorities and find the issues for determination as follows:
 - a. Whether the prosecution proved the elements of the offence of defilement beyond reasonable doubt.
 - b. Whether the sentence imposed by the trial magistrate was harsh, manifestly excessive.
 16. As regards the first issue, there are three essential ingredients to be proved in a case of defilement namely, age of the minor, proof of penetration, the identity of the perpetrator.
 17. As regards the aspect of age, the clinical officer (PW5) testified that an age assessment was conducted and which confirmed that the minor was 10 years old. The age assessment report was produced as Exhibit 2. This was corroborated by the testimony of the complainant and her mother. The issue of age is a critical component under the *Sexual Offences Act* as the same is the yardstick and determines the sentences to be imposed upon conviction. I find that the Respondent proved this ingredient beyond reasonable doubt.
 18. As regards the aspect of penetration, the complainant /minor (PW3), testified that as she headed to school, Ochieng called her to pick some fruits from his house. That they walked through the gate to his house where he locked the house from inside. That the said Ochieng then removed her inner pants, placed her on a table, removed his trousers and inner pant too and then inserted his penis inside her vagina. That during the ordeal, she felt pain and that she bled. The clinical officer (PW5) testified that an examination of the complainant's genitalia showed bruises on the vaginal wall, broken hymen and fresh, whitish discharge noted and that labia majora was swollen and reddened. That a High Vaginal Swab showed presence of puss cells. That a urinalysis tests showed red blood cells as well as puss cells. That a VDRL test was positive. That the conclusion by the clinical officer was that indeed the minor had been defiled and infected with Syphilis. The clinical officer produced the P3 form, age assessment report, patient card, lab report and request and card as exhibits. Section 2 of the *Sexual Offences Act* No. 3 of 2006 defines penetration as the partial or complete insertion of the genital organs of a person into the genital organ of another person. The evidence of the complainant was corroborated by the clinical officer who confirmed that there was penetration of the complainant's genital organs. I am satisfied that the Respondent proved this ingredient beyond any reasonable doubt.
 19. As regards the perpetrator's identity, PW3 testified that the Appellant is someone well known to her. That she had seen her mother talk to Ochieng several times and that her mother had sent her severally to fetch water for the Appellant. That this was thus an issue of recognition and not identification. In



the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) eKLR by 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...”

The complainant stated that she was on her way to school when the Appellant waylaid her and led her into his house where he defiled. It is noted that the incident took place during the day and that the complainant had no difficulty in recognizing her assailant. After the ordeal, the complainant who had been overwhelmed by pain owing to the defilement decided to lie near the road and that she was later rescued and taken home and then to hospital. The complainant in her evidence was categorical that the Appellant was her assailant and not any other person.

20. The Appellant in his defense evidence raised an alibi but which did not shake that of the Respondent. I find the Appellant was placed at the scene of crime and was the complainant’s assailant. I am satisfied that the Respondent had presented credible evidence against the Appellant. Indeed, the Appellant confirmed in his evidence that he had no issues with all the witnesses and hence I find the evidence of the witnesses was not made up against him but it was the truth of what had happened. Hence, this ingredient was proved beyond reasonable doubt.

21. An analysis of the entire evidence leads me to come to the conclusion that the Respondent had proved its case against the Appellant beyond any reasonable doubt. The finding on conviction by the learned trial magistrate was therefore quite sound and must be upheld.

22. On the second issue regarding sentence, 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.’

23. 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 out rightly excessive in the circumstances.

24. 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."

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."

25. 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.



26. 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.
27. The Appellant likewise claimed that the mandatory nature of the sentence was unconstitutional. However, I need to point out that the Supreme Court of Kenya has settled the said issue of minimum sentences in sexual offences. The Supreme Court in Petition No. E018 of 2023 R Vs Joshua Gichuki Mwangi and Others [2024] eKLR stated that all minimum mandatory sentences under the [Sexual Offences Act](#) no. 3 of 2006 are lawful unless otherwise amended.
28. In light of the foregoing, I am satisfied that the trial magistrate correctly addressed herself on the issue of sentence as the same is neither harsh nor excessive. It is instructive that the Appellant ought to have sentenced to life imprisonment as provided by section 8(2) of the [Sexual Offences Act](#). However, it is noted that the Respondent did not issue a notice of enhancement of sentence and hence I will not interfere with the sentence. It is also noted that the actions of the Appellant in waylaying young and vulnerable school going children and defiling them is abhorrent and must be deprecated. He was expected to protect the vulnerable segment of the community but not to turn into a predator and prey on them. The complainant has been psychologically scarred as a result of the incident. I find the Appellant deserves a custodial rehabilitation before being released back to society. It is noted that the trial magistrate did consider the period spent in custody by the Appellant and thus ordered the sentence to commence from the date of arrest and hence I will not interfere with the same.
29. In the result, it is my finding that the Appellant's appeal is devoid of merit. The same is dismissed. The conviction and sentence arrived at by the trial court is hereby upheld and affirmed.

It is so ordered.

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

D. KEMEI

JUDGE

In the presence of:

Julius Ochieng Odhonji.....Appellant

M/s Kauma.....for Respondent

Okumu.....Court Assistant

