



**Otieno alias Daddy v Republic (Criminal Appeal E035 of 2023)
[2025] KEHC 7399 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E035 OF 2023
BM MUSYOKI, J
MAY 30, 2025**

BETWEEN

VINCENT OCHIENG OTIENO ALIAS DADDY APPELLANT

AND

THE REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence in the Senior Principal Magistrate's Court (R.S. Kipngeno PM) in sexual offence case number 25 of 2020 dated 30th September 2021)

JUDGMENT

1. This is an appeal from both conviction and sentence in Nyando Senior Principal Magistrate's court sexual offence case number 25 of 2020 where the appellant was convicted of defilement of a child of 17 years contrary to Section 8(1) and (4) of the [Sexual Offences Act](#) and sentenced to a jail term of 15 years. The particulars of the charge were that;

‘On 2nd day of March 2020 at Muhoroni Sub-County within Kisumu County, intentionally caused his penis to penetrate the vagina of SA a child aged 17 years.’

2. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). In convicting the appellant, the trial court held that the three ingredients of the offence of defilement had been proved. The court did not say anything about the alternative charge, I believe for obvious reason that it could not convict on both counts although it is always desirable to hold the alternative count in abeyance.
3. The appellant was aggrieved by the decision and preferred this appeal in which he has raised 14 grounds which I do not need to reproduce in this judgement. But having gone through the said grounds, I discern that the appellant faults the trial Magistrate on the following areas of submissions;



- a. The trial court was biased and denied the appellant his rights under Article 50(2) of the Constitution.
 - b. The court failed to believe the appellant's defence of alibi.
 - c. The evidence tendered was not sufficient to sustain a conviction due to its unreliability and inconsistencies.
4. In order to establish whether the above grounds as summarised are merited, this court will do its duty to re-evaluate and re-analyse the evidence produced before the trial court and come to its own independent conclusion as this is a first appeal. I will however keep in mind that I did not take the evidence of the witnesses or observe their demeanour and therefore give due allowance for that.
 5. The prosecution called five witnesses in support of its case. They were the complainant (PW1), the complainant's father (PW2), the complainant's mother (PW3), clinical officer from Masogo Sub-County Hospital (PW4) and the investigations officer (PW5) while the appellant testified in defence and did not call any witness.
 6. The complainant told the court that on 2-03-2020, she was sent home for school fees. She was a student at [Particulars Withheld] Secondary School. She was at home at 8 am when their neighbour nicknamed Daddy who she identified as the appellant gave her 100/= to buy rice for him and take it to his one roomed house. The house had a table, chairs and bed. The appellant asked him to sit on the bed then started touching her panties which she resisted. He caressed her more and removed her panties, laid her on the bed, removed his shorts and defiled her by removing his penis and inserting it into her vagina.
 7. The complainant added that she felt pain as it was her first time. She tried to shout and make noise asking him to leave her alone. The appellant had used a trust condom and when he was done, he put on his shorts and promised to give her pocket money. He opened the door and saw her father in the bathroom. When she put on her cloths, the appellant directed her to follow him through the backdoor of their home but her father saw them.
 8. The complainant testified further that she went home and kept quiet as her father went for work. Her mother came home at 2 pm and asked her where she had been and she told her the truth about what happen between her and the appellant. The mother took her to Masogo hospital and they reported at Masogo police station the following day where they recorded statements and she went back to school. She took a P3 form which was filled at Masogo health centre. She identified the P3 form as PMFI1, treatment notes from the health centre as PMFI 2 and PRC form as PMFI 3.
 9. PW2 stated that on 2-03-2020, he was at Masogo ferrying pillion passengers as he was a boda boda operator. At around 7.50, he met his daughter on her way home as she had been sent from school over school fees and told her to go home. At about 8.30 am, he went home and saw her coming out of a neighbour's house crying. He asked her why she was crying and she told him that the appellant and defiled her. He called her mother and instructed her to take the complainant to hospital as he went to report at Masogo police station. According to what is recorded, this was about 10.00 am.
 10. PW3 told the court that she was a business lady and that on 2-03-2020, while at the market, her husband called and told her to go home. When she got home, her husband, PW2 told her to take the complainant to hospital. He informed her of what had transpired. She proceeded and took the complainant to the health centre where she was examined. She then went to police station where the matter had been reported and was issued with a P3 and PRC forms which were filled. She thereafter took back the forms to the police station. The witness added that the appellant went underground.



11. The court heard from PW4 that he worked at Masogo Sub-County hospital and confirmed that he was the one who attended the complainant. He added that P3 form for the complainant who was 15 years was filled on 10-03-2022 at night. The complainant was accompanied by her parents. She had come with a history of being defiled by a person known to her. On observation, the complainant was found to had a torn panty, in fair condition while the age of injury was unspecified hours. The labia and vagina were normal but with whitish discharge which was not clear. He thought that the discharge could be sperms.
12. The witness added that specimens of the discharge were forwarded to the government chemist. He said further that due to the fact that their facilities were on a go slow, the samples were taken to another facility in Kisumu but the results never came back. According to the witness, the hymen was blocked with fluid and they could not confirm whether it was broken or not. He added that they could not confirm whether defilement took place. He produced the P3 form as exhibit 1, treatment notes as exhibit 2 and PRC forms as exhibit 3. The PRC forms showed whitish discharge, vaginal discharge, no tears or bruises. It was also stated that, it could not be established whether hymen was intact of broken.
13. The last prosecution witness stated that on 16-03-2020 he was at the station when a woman and her daughter came and reported a case of defilement and the OCS assigned the case to him. He perused the file and took statements of the wasteness. He narrated what he had been told by the witnesses. He stated that he ascertained the age of the complainant through a letter given to him which was authored by the Registrar showing that the child was born on 1-07-20023. He produced the letter as exhibit 4. In his assessment, he observed the complainant and considered the fact that she was a pupil and then charged the appellant.
14. When the accused was put on his defence, he gave an unsworn statement and told the court that on the alleged date, he started the day with washing his clothes. His neighbour's daughter came home from school and he asked her the reason for coming home and she told him that she had been sent home over school fees. She changed and wore home clothes upon which he sent her to buy rice at Masogo market. She brought the rice and found him still washing and he asked her to place it on the table. He added that they talked in his house for some time then she left as he also went out and when her father saw her coming out of his house, he quarrelled her. Her mother then came to his house and reminded him of an assault case of 2017 for which he had not paid although she had withdrawn the matter and told him that he will now pay dearly. He denied defiling the child at all. He added that the complainant's step mother had also complained of defilement as he was carrying the complainant on his boda boda.
15. The appeal was disposed by way of written submissions. The appellant filed undated submissions while the respondent's submissions were dated 26th February 2024. I have read the submissions of the parties and the judgement of the trial court and I have also keenly examined the evidence of the witnesses as reproduced above as well as the exhibits produced in court.
16. The appellant has submitted that the court was biased against him. I have gone through the proceedings and I have been unable to see the instances of bias the appellant claims. In his submissions, he has not pointed to this court in which way the trial court was biased against him. Nothing in the proceedings suggests that the trial court was biased and I dismiss this argument.
17. The appellant has claimed that his rights under Article 50(2) of the *Constitution* were violated and refers this court to proceedings of 11-02-2021 where he quotes the prosecution as saying 'the accused person was not supplied with copies of the documents the prosecution relies on'. My reading of that part shows that the prosecution in response to the appellant's advocate's application for adjournment stated 'we did supply the accused with statements- he signed for them'. It is the appellant's newly appointed



advocate who alleged that the prosecution had not supplied him with the documents as he asked for an adjournment. This argument is misleading and I also dismiss it.

18. The appellant has submitted that the court ignored his defence of alibi. A defence of alibi is that in which the accused person alleges that he was not at or near the scene of the crime he is accused of and as such could not have committed the same. The offence in this matter is said to have been committed in Masogo market where the complainant lived with her parents. The appellant in his defence confirmed that he was a neighbour to the complainant's family and that on the stated date, he was at home and in fact confirmed that he was with the complainant in his house and they had a talk for some time. His defence was that he did not defile or touch the complainant. He did not offer defence of alibi and the court cannot be faulted of having ignored a defence which was not offered.
19. I now turn to the ground of insufficiency and inconsistency of the evidence. The ingredients of the offence of defilement are well settled. The prosecution need only establish beyond reasonable doubt that the complainant was a minor, the identification of the perpetrator and penetration. In *DS v Republic* (2022) KEHC 2502 (KLR), it was held that;

‘The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to ensue.’
20. To prove the above ingredients, the evidence led by the prosecution must be consistent, truthful to the opinion of the court and cogent enough not to cast any reasonable doubt in the mind of the court. If in their evidence the witnesses appear to waver in a material aspect so as to leave the court doubting the credibility of the witnesses or any evidence produced, the court must give the accused person the benefit of doubt. In *Joseph Ndungu Kimanyi v Republic* (1979) KECA 5 (KLR), the Court of Appeal held that;

‘The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.’
21. The complainant told the court that after she was defiled, she opened the door and they saw her father then she was led to a backdoor of their house. She added that she went home and her father left for work. She did not talk of the father having a discussion with her or asking her about the incident. According to what is recorded, she kept silent and waited for her mother to come at 2 pm when she narrated to her what happened.
22. On the other hand, the father testified that she saw the complainant crying and when asked her why she was crying, she told him that the appellant had defiled her and then he called the wife as he went to report to the police. In further contrast, the mother stated that when PW2 called her, she went home and found him and he narrated to her what happened and she proceed to take the girl to the health centre at around 10.00 am while the complainant's evidence was that the mother came home at 2 pm when the father had long gone to work.
23. In my view, the above inconsistencies cast doubts on the sequence of events. The complainant was approaching the age of majority and in my view, she was able to narrate and tell the court of the correct timelines and the sequence of events. The gap between the timing and the sequence of events between these three witnesses must be taken into account while the court is evaluating the other pieces of evidence in order to ascertain the credibility of the witnesses. The inconsistencies in my view would



call for a more clear and corroborative evidence to escape the net of reasonable doubt. I pause to ask whether the other corroborative pieces of evidence would have cleaned these inconsistencies.

24. PW4 is on record stating that they were unable to ascertain whether there was defilement. He claimed that there was fluid covering the hymen which prevented him from ascertaining whether the hymen was intact. In my view this evidence is shaky and calls for more scrutiny. I may not be a doctor but it should be common knowledge that a doctor or even a clinical officer would be able to clear the hymen of any discharge to ascertain its state unless the person attending to the complainant was not qualified. If this is not possible medically, the prosecution should have led the witness to expound on that. All investigations have a set goal. In this case, the goal must have been to ascertain the status and condition of the hymen and one would expect a professional to go to full length or give reasons for stopping midway.
25. The complainant stated that she went back to school after reporting the incident to the police but it is indicated that the P3 form was filled ten days after the incident. The PRC form which was filled the same day as P3 form showed that the complaint had no tears or bruises and there was no conclusive determination if the hymen was intact or broken. This evidence in my view raises a question of whether there was really penetration.
26. The appellant submits that the results of the discharge found in the vagina of the complainant and suspected to be sperms should have been subjected to laboratory tests. This would not have been necessary since the complainant had stated that the appellant used a condom in defiling her and in any event presence of sperms in cases of defilement is not mandatory in order to sustain a conviction.
27. Based on the above, this court highly doubts that there was any penetration. I am alive to the fact that a partial penetration constitutes penetration for purposes of the *Sexual Offences Act* but the fact that the witnesses could not tell whether the hymen was intact in addition to the failure by the prosecution to explain their partial investigations coupled with the inconsistencies of the evidence of the PW1, PW2 and PW3 as indicated above especially PW1's narration of how she was defiled which suggested full penetration, I must hold that there are glaring gaps which would make the court doubtful of the evidence. I would follow the decision of the Court of Appeal in *John Mutua Munyoki v Republic* (2017) KECA 376 (KLR) where it held that;

‘It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.’

28. I now turn to the age of the complaint. This is an important ingredient of the offence of defilement as it was held in *Hadson Ali Mwachongo v Republic* (2016) KECA 521 (KLR) thus;

‘The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.’

29. The investigations officer stated that he looked at the complainant and the fact that she was in school to determine that she was a child. To me, this is a weird way of conducting investigations in a serious matter like this one. The age of a child shy of age of majority by one year cannot be ascertained by observing her anatomy and the fact that she was in school. In any event there was no proof that she was a student and in which class.



30. I have looked at the letter dated 27-03-2018 which is addressed to the headteacher of Kibworo Primary School. It makes reference to one Cheril Akinyi Oyoo while the complainant's name in this matter is SAO. One may say that it was a writing error but there is more to it. The letter shows that the child was born on 1-07-2003 and claims that there was shortage of leaflets for birth certificates in the ministry and it was asking the headteacher to register the child as they waited for availability of the leaflets. This letter was written four years before the alleged act. Does it mean that since the date of the letter the birth certificates leaflets had not been availed?
31. I recognise that a birth certificate is not the only proof of age but in circumstances where the evidence of the prosecution is wanting, a strict method of proving the age must be applied. None of the complainant's parents stated the age of the child or her date of birth. Even the complainant did not state how old she was or when she was born. The letter was produced by the investigations officer and was not identified by the complainant or her parents. The P3 form differed with this evidence as it indicated the age of the complainant as 15 years.
32. The investigations officer did not explain why he did not take the complainant for age assessment. Having found the complainant and her parents were inconsistent and possibility telling what appears to me as small lies, there is more likelihood that they could also tell lies on the issue of the age. This is a regrettable position and the prosecution and the police who investigated the matter must take blame of taking such a serious case casually.
33. In the final analysis, I find that the prosecution did not prove the age of the complainant and the penetration. It is my holding therefore that it was not safe to convict the appellant on the evidence tendered in court and I accordingly allow this appeal and quash both the conviction and sentence. The appellant shall be released and set free forthwith unless otherwise lawfully held.

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

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered online in presence of the appellant (from Kibos Maximum Prison) and in absence of the respondent.

