



REPUBLIC OF KENYA



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**Oyuga v Republic (Criminal Appeal E026 of 2024)
[2025] KEHC 7500 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E026 OF 2024**

DK KEMEL, J

MAY 30, 2025

BETWEEN

GABRIEL ODUOR OYUGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. L. Simiyu
(SPM) dated 16/5/2024 in Siaya PMCR S.O. NO. 1 of 2020)*

JUDGMENT

1. The Appellant herein, GOO was charged at the lower court with the offense of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that 27th December 2019 at Siaya Sub County within Siaya County willfully and intentionally caused his penis to penetrate the vagina of CVO, a child aged 8 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 27th December 2019 at Siaya Sub County within Siaya County willfully and intentionally touched the vagina of CVO, a child aged 8 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 Petition of Appeal dated 6th May 2024, wherein he raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and in fact by failing to observe that the prosecution's case was shoddily investigated.



- ii. That the trial magistrate failed to observe that no first report was made in respect of the said offence.
 - iii. The trial magistrate erred in law and fact by convicting the appellant for the offense of defilement yet the doctor's evidence indicated that the minor was not defiled.
 - iv. The trial magistrate failed to appreciate that the prosecution's case was made up of a single evidence.
 - v. That the trial magistrate failed to appreciate that the evidence lacked corroboration to support the conviction.
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 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.
6. The prosecution called a total of six witnesses in support of its case.
7. AAO (PW1) testified that on 29/12/2019 she received a call from her mother (J) to whom she had taken her children for the holidays and who informed her that her young daughter had been crying incessantly and wanted to go home and join her mother. That she sent bus fare and that her young brother K brought them home. That she went to meet them and that the complainant (C) could not stop crying. That two days later the complainant was still moody and crying. That on 31st 12/2019 the complainant opened up to her and informed her that while they had gone to carry a small baby at their grandmother's neighbor, Mama G (mother to Appellant) directed her to go and sleep in G's house. That there was nobody in the house. That suddenly G came, removed her under pant and defiled her. That she then called the minor's grandmother and narrated the ordeal and who advised her to take the minor to hospital then to the police. That she took her to hospital on 1st January 2020 where she was referred to Jaramogi Oginga Odinga Hospital where she went on 2nd January 2020 where the doctor confirmed that there had been an attempted defilement and that she was referred to Siaya County Referral Hospital on 3rd/01/2020 where a P3 form was issued.
- She further stated that the Appellant is well known to her children because she takes her children home every holiday and that the Appellant is their favorite uncle. That their home (at the minor's grandmother) is about 500 meters from that of the Appellant.
- On cross examination, she stated that the offence could have occurred on 27th December 2019 because she was called on the night of 27th/12/2019. That the minor's grandmother was away at the farm when the offence occurred and that the only people who could hear were from the Appellant's family. That C was with her younger brother but Mama G singled out the complainant to go and sleep at the Appellant's house. That she and the Appellant have been very close cousins. That she and the Appellant were not raised together and therefore she could not vouch for the behavior of the Appellant.
8. CVO (PW2) (the minor/victim) gave a sworn statement. She stated that she stays with her parents and her brothers A and A. That during school holidays they visit their grandmother. That one day, she continued, she had gone to carry S's baby when Mama G directed her to go to Uncle G's house. That her brother A followed her but Mama G chased him away. That she did not find anybody in that house. That later Uncle Gabby arrived and went inside the house and removed her panty and her dress, then he removed his trouser, panty and shirt and lay on her. That he threatened to stab her with a knife if she ever revealed what had taken place to anybody. That when the Appellant was done, he got off her



and left. That she also left and went to her grandmother's house. That she did not tell her grandmother because the Appellant had threatened her not to.

On cross examination, she stated that the mother of the Appellant followed her into the Appellant's house and placed her on the bed on the Appellant and that the Appellant was in his house. That when she returned to her grandmother's house she was still in the farm. That when grandmother returned, she informed her that she wanted to go to her mother.

9. JOO (PW3) testified that she the grandmother to the complainant. That PW1 brought her children to visit her where she stayed with them for over one month. That one evening she noticed that the complainant looked sick and was clutching her abdomen. That she thought that she had over eaten because of the festivities but she also noticed that the minor sat and stood up with difficulties. That upon her enquiring from her what had happened and that the child broke down and cried while claiming that she wanted to go to her mother. That she then called the child's mother. That on 29/12/2019 she organized her son K to return the children to their mother in Kisumu. That on 31st 12/2019 PW1 called her and asked her why she had left her child to be defiled by G. She stated further that G was her nephew and that their home was less than 10 meters from hers.

On cross examination, she stated that she did not confront the Appellant because she was shocked and asked PW1 to take the minor to the hospital. That the whole night of 28/12/2019 the child was in pain and who kept clutching her abdomen.

10. AGO (PW4) a minor testified on oath after a voire dire examination by the trial magistrate. He stated that he was 9 years old. That he knew CV(PW2) as her sister aged 10 years. He stated further that on 27th Dec 2019, they were at Ngiya at their maternal grandmother. While there, they went to carry S's baby. That Mama G directed C to go and sleep in G's house. It was about 2.00 PM in the afternoon. That when he tried to follow S, Mama G directed him to go back to his grandmother's house. That S wen ck to her grandmother's house late and that she was crying while claiming that she wanted to see her grandmother. When their grandmother returned from the farm, S cried and insisted that she wanted to go back to her mother in Kisumu. That he later recorded his statement with the police.

On cross examination, he reiterated and affirmed his evidence tendered on examination in chief.

11. Isaac Imbwaga (PW5) registration number 18196 testified that he is a clinical officer from Siaya County Referral Hospital. That he had a P3 form, PRC form and treatment card for the complainant (PW2). That the PRC form had been filled at Jaramogi Oginga Odinga Referral Hospital. He produced the P3 form on behalf of Dr. Opiyo Kennedy. That the P3 was filled in favor of SV aged 8 years. That the complainant was registered at Siaya hospital with medical number 00XXX9/2020. That the examination of the minor revealed persistent back ache with change of gait. That on examination of the genitalia, it revealed a partially torn hymen, inflamed and tender vaginal walls which were swollen. That both labias were swollen and that whitish discharge was seen. That yeast cells were seen and that HIV, Syphilis and hepatitis tests turned negative. That it was concluded that there was overwhelming evidence of partial forceful penetration with a blunt object. That the P3 form was produced as P Exhibit 2, patient card as exhibit 4 while the receipt as P exhibit 5.

12. No. 237925 PC James Maina (PW6) testified that he took over the file from the former investigation officer who was on transfer. That upon reading the file, he found out that on 22/1/2020 a report was made to the effect that on 28th December 2019 PW2 CV was at her grandmothers place in Ngiya when the Appellant Gabriel Oyugi defiled her. That the Appellant threatened that he would stab the child if she told anyone about the ordeal. That the child who had gone to her grandmother for the Christmas holidays demanded to be taken back to her mother in Kisumu. That on 29th December 2019, she was taken to her mother where she confided in her and was taken to hospital where defilement



- was confirmed and the child treated and discharged on 2nd January 2020. That the report was made at Ngiya patrol base and that a P3 form was issued and later filled and signed. That the Appellant was arrested and charged accordingly. That the Complainant was 8 years old at the time of defilement. He produced her birth certificate as P exhibit 1. That the Complainant and her mother identified the Appellant as he was their relative.
13. That marked the close of the prosecution's case. The court later ruled that the Appellant had a case to answer and subsequently placed him on his defense. He opted to tender a sworn statement and called three witnesses.
 14. GOO (DW1) testified on oath that on 3/01/2020 as he was going to Ngiya with his sister, he was arrested. That he was not informed of the reason for his arrest until her sister and her child went into the vehicle. That he was detained that night and taken to court on Monday but however there was no charge sheet and so he was detained until on Tuesday when he took plea. On cross examination, he stated that the Complainant is his niece and that she knew him very well. That his father and PW1's father are brothers. That on the day of the alleged offence, he was not at home as he had gone to Ndori to fix the floor of Milton Ndolo.
 15. SA (DW2) testified that she was mother to the Appellant. That on the alleged day of the offence, the Appellant was not at home as he had gone to do mining at the home of Otieno Were. That she did not take the Complainant to the Appellant's house and that the charges were framed up.
 16. EOO (DW3) stated that she is a sister to the Appellant and that PW2 is their niece. That on 29/12/2019 she went home to visit her mother where she stayed till 25/12/2019. That when she returned to her place at Lwanda on 3/01/2020 she was informed that G had been arrested and that she went back to her mother's home at Ngiya. On cross examination, she stated that she knew that the Complainant used to spend nights at her uncle's house, where other uncles were. That there's a possibility that other uncles defiled her but not G. That the Complainant was always very friendly to G and always called him uncle. That she was certain that the child did not know the name of G. That she could not say that there was a reason the child implicated the Appellant.
 17. SAO (DW4) testified that she had delivered a baby and that the allegation by the complainant that they had come to carry the baby was not true. That the Appellant had left home early and returned at 6.00 Pm. On cross-examination, she stated inter alia; that she is a younger sister to the Appellant; that she had delivered a baby on 27/12/2019 and was then recuperating at home; that she saw the Appellant leaving for his work; that she did not spend the whole day with the Appellant.
 18. The appeal was canvassed by way of written submissions. Both parties duly complied.
 19. The Appellant submitted that the trial magistrate erred in law and in fact by failing to inform him of his right to legal representation, going against the tenets of fair trial envisaged under Article 49(1)(i) and Article 50 (2) (g) & (h) of the Constitution. He submitted that the charges against him should be quashed or a re-trial be ordered.
 20. The Respondent on its part submitted that it had proved all the ingredients of the offence of defilement beyond any reasonable doubt. It submitted that the Honorable court should uphold the conviction and affirm the sentence if not enhance the same.
 21. 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.



22. It is noted that the Appellant was charged under section 8(1) as read with section 8 (2) 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.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

23. The essential ingredients that must be proved in a defilement case are, age of the complainant/victim, penetration and the identity of the perpetrator.

24. 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 31st January 2011 thus, she was about 8 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 8 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 Respondent beyond reasonable doubt.

25. As regards the aspect of penetration, PW2 stated; ‘Then Uncle Gabby went inside, he removed her panty and her dress, then he removed his trouser, panty and shirt and lay on her. He threatened to stab her with a knife. When the Appellant was done, he got off her and left.’

The clinical officer (PW5) stated that ‘On examination of the genitalia it revealed a partially torn hymen, inflamed and tender vaginal walls which were swollen. Both labias were swollen, whitish discharge was seen. That yeast cells were seen and that HIV, Syphilis and hepatitis tests turned negative. The doctor concluded that there was overwhelming evidence of partial forceful penetration with a blunt object. That the P3 form was produced as P Exhibit 2, patient card as exhibit 4 and the receipt as P exhibit 5.’

I am satisfied that the element of penetration was articulately explained by PW5 whose evidence corroborated that of the complainant (PW2). Indeed, the complainant’s behaviour changed as soon as she left the Appellant’s house as she kept crying and clutching her stomach and that she was later examined and found to have been defiled. I find that the ingredient of penetration was proved by the Respondent beyond reasonable doubt.

26. As regards the aspect of identification, the complainant recognized the Appellant as Uncle G and a relative and a person well known to her before. In fact, it was the evidence of the Appellant (DW 1) on cross examination that ‘the Complainant is his niece and she knew him very well.’ DW3 also stated that ‘the Complainant was always very friendly to G and always called him uncle.’

I find that this was a case of recognition because he was a person well known to the complainant. There was therefore absolutely no reason the complainant could frame up her favourite uncle. I am therefore satisfied that the perpetrator was properly identified by the witnesses. The Appellant was placed at the scene of crime. I find that it is highly unlikely that the parents of the complainant could use their vulnerable daughter as a victim of defilement so as to frame up the Appellant over perceived family differences. In fact the complainant’s mother confirmed that she used to get along so well with the Appellant as they had been in good terms prior to the incident. The Appellant’s defense evidence



did not cast doubt upon that of the prosecution which was overwhelming against him. I find this ingredient was proved beyond reasonable.

27. In his grounds of appeal, it stood out that the Appellant contested that he the trial magistrate erred in law and in fact by not informing the Appellant of his right to legal representation as envisaged under Article 50(2)(g)(h). I note from the record that the magistrate forgot to inform the Appellant of this right. However, the Appellant who was a 27 year old had the opportunity to cross examine witnesses and I find that he did it quite well. The omission of the magistrate was therefore not fatal as to warrant a retrial. I find that the Appellant did not suffer any prejudice.
28. 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 must be upheld.
29. As regards the sentence, it is noted that the Appellant in his petition of appeal has not challenged the aspect of the sentence since all the grounds appear geared towards the conviction only. However, I am 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(2) of the *Sexual Offences Act*, a person convicted thereby warrants a sentence of life imprisonment. The trial court received the Appellant's mitigation as well as the fact that he was a first offender. The action of the Appellant has psychologically scarred the Complainant who was so fond of him as her uncle. The Appellant was expected to protect young and vulnerable children but not to prey on them. The sentence imposed, in my view was neither harsh nor excessive but in fact quite lenient. I am guided by the Supreme Court's decision in Petition No. 18 of 2023 R. *Vs Stephen 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. It is noted that the Respondent has suggested enhancement of sentence in its submissions but did not file a notice to that effect. It would be an ambush upon the Appellant to consider the Respondent's suggestion for enhancement of sentence. Hence, I will not proceed to enhance the sentence to life imprisonment. It is also noted that the Appellant posted bail soon after taking plea and thus was not in custody throughout the trial and hence the application of section 333(2) of the *Criminal Procedure Code* does not arise. The sentence therefore shall commence from the date of conviction.
30. In view of the foregoing observations, it is my finding that the appeal is devoid of any merit. The same is dismissed. The conviction and sentence by the trial court is hereby upheld.

Orders accordingly.

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

D. KEMEI

JUDGE

In the presence of:

Gabriel Oduor Oyuga.....Appellant

M/s Kauma.....for Respondent

Okumu.....Court Assistant

