



REPUBLIC OF KENYA



**Ogola v Republic (Criminal Appeal E014 of 2024)  
[2025] KEHC 7193 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7193 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E014 OF 2024**

**JN KAMAU, J**

**MAY 28, 2025**

**BETWEEN**

**KENNEDY OGOLA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon S.O Onger (SPM) delivered at Vihiga in the Senior Principal Magistrate's Court in Sexual Offence Case No E055 of 2022 on 13th October 2023)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. The Learned Trial Magistrate, Hon S. O. Onger (SPM) convicted him on the main charge of defilement. Hon. B. Omollo subsequently took over the matter and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His Petition of Appeal was dated 15<sup>th</sup> February 2024 and filed on 21<sup>st</sup> February 2024. He set out four (4) grounds of appeal.
4. His Written Submissions were dated 18<sup>th</sup> September 2024 and filed on 20<sup>th</sup> September 2024 while those of the Respondent were dated 10<sup>th</sup> December 2024 and filed on 11<sup>th</sup> December 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Trial Court conducted a voir dire examination and if not, if the same rendered the trial a nullity;
  - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

### I. Voir Dire

9. Ground of Appeal No (1) of the Petition of Appeal was dealt with under this head.
10. The Appellant placed reliance on the case of *John Otieno Oloo vs Republic* [2009]eKLR where it was held that before swearing a child of tender years, the Trial Court should out of caution form an opinion on voir dire examination failing which it would cause a miscarriage of justice. He also cited the case of *Maripett Loonkomok vs Republic*[2016]eKLR where it was held that although voir dire examination of children of tender years had to be conducted but that such failure did not vitiate the entire prosecution case, an accused person could not be convicted on such evidence.
11. On its part, the Respondent submitted that the Trial Court's failure to conduct a voir dire was not fatal to the Prosecution's case as the Complainant, MK (hereinafter referred to as "PW 1") did not qualify to be of tender age as she was twelve (12) years at the time of the incident. It invoked Section 124 of the [Evidence Act](#) and contended that the Trial Court believed her testimony pursuant to the said Section.
12. Section 19 of the [Oaths and Statutory Declarations Act](#) Cap 15 (Laws of Kenya) stipulates as follows:-

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in



accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”

13. In addressing what age would be appropriate for a trial court to conduct a voir dire examination, this court had due regard to the case of *Maripett Loonkomok vs Republic* (Supra) where the Court of Appeal found and held that children under the age of fourteen (14) ought to be taken through a voir dire examination. It rendered itself as follows:-

“...the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that; “In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

14. Notably, the age at which a voir dire examination ought to be conducted depends on the circumstances of a particular case and was not cast on stone. Indeed, a court was obligated to enquire into the mental incapacity of a child irrespective of his or her age with a view to conducting a voir dire examination to determine if he or she should adduce sworn or unsworn evidence. Indeed, a child could be aged seventeen (17) years but have the mental capacity of a two (2) year old child due to many health complications.
15. The ascertainment of whether such a witness understood the meaning of taking an oath could not therefore be taken lightly as an accused person could be convicted on the basis of sworn evidence of such a witness.
16. Bearing in mind the holding in the case of *Maripett Loonkomok vs Republic* (Supra), this court found and held that the Trial Court could not be faulted for not having conducted a voir dire examination for the reason that the same was not prejudicial to the Appellant’s case as PW 1 was aged twelve (12) years at the material time and appeared to have understood the meaning of taking an oath. She gave a sworn statement and the Appellant cross-examined her subjecting her evidence to scrutiny.
17. In the premises foregoing, Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

## II. Proof Of Prosecution’s Case

18. Grounds of Appeal No (2), (3) and (4) of the Petition of Appeal were dealt with under this head as they were all related.
19. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
20. It is now settled that the ingredients of the offence of defilement are proof of complainant’s age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.



## A. Age

21. The Appellant did not submit on this issue. On its part, the Respondent submitted that PW 1 testified that she was born on 3<sup>rd</sup> February 2010 and that No 234036 PC George Kemboi (hereinafter referred to as “PW 6”) produced her Birth Certificate as an exhibit which confirmed that she was aged twelve (12) years at the material time.
22. Notably, the Birth Certificate that PW 6 tendered in evidence showed that PW 1 was born on 3<sup>rd</sup> February 2010. The incident was said to have occurred on diverse dates between 13<sup>th</sup> July, 30<sup>th</sup> August and 31<sup>st</sup> August 2022. She was therefore about twelve (12) years and four (4) months at the material time.
23. As the Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1’s age was proven beyond reasonable doubt and that she was a child at all material times.

## B. Identification

24. The Appellant submitted that PW 1 was the only witness who identified him as the perpetrator and that no one saw him defile her. He pointed out that circumstantial evidence was weak and with errors. In this regard, he relied on the case of Abanga Alias Onyango vs Republic Criminal Appeal No 32 of 1990 (eKLR citation not given) without highlighting the holding that he relied upon.
25. He further relied on the case of Koome vs Republic (2005) 1 KLR 575 where it was held that an order for retrial was only to be made where the interest of justice was required and that it was not to be ordered where it was likely to cause an injustice to the accused person. In the premises, he asserted that a retrial could not suffice in this case.
26. He invoked Section 124 of the *Evidence Act* and placed reliance on the cases of AML vs Republic [2012]eKLR and Kassim Ali vs Republic Mombasa Criminal Appeal 84 of 2005 (eKLR citation not given) wherein he stated that the principle laid out in the said cases was that corroboration was not decisive in sexual offences. He urged this court to acquit him on that limb.
27. On its part, the Respondent submitted that PW 1 testified that the Appellant defiled her and that the Trial Court was right in finding that she was aware of the person who defiled her and was able to identify him during trial as Josiah.
28. A perusal of the proceedings showed that PW 1 testified that on 13<sup>th</sup> July 2022, at around 2.00p.m, the Appellant called her but nothing sinister happened. On 31<sup>st</sup> August 2022, he called her as she was going to school after lunch but she declined. Her evidence was that he held her hands and escorted her to his house, removed her dress and biker (sic), removed his clothes and lay on her. She said that he put his urinating part of the body between her thighs, she felt pain and screamed.
29. She further said that Ogola’s mother (sic) telephoned Violet Safina Mukulima (hereinafter referred to as “PW 2”). She put on her clothes and went to school at 3.00p.m. She said that she knew the Appellant’s house and she went to his house with PW 2 but they did not find him.
  1. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.



2. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis).”

32. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person’s word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.
33. The incident took place at day time. PW 1 said that knew the Appellant and knew his house and that they had met more than once. She identified him by pointing at him in the dock during trial. This court was not certain that even if they both knew each other, the other ingredient of defilement was proven. This court therefore left the conclusion of his identification hanging in view of the findings it made hereunder.

### C. Penetration

34. The Appellant cited the case of *John Mutua Munyoki vs Republic (2017)* (eKLR citation was not given) where it was held that lack of hymen could not be attributed to the appellant therein and there was therefore no evidence of penetration. He submitted that the two (2) Clinical Officers, Boaz Midna and Wilkins Mauti (hereinafter referred to as “PW 4” and “PW 5” respectively) did not express any opinion that PW 1 had been defiled. He added that there was nothing to verify that the missing hymen was as a result of sexual intercourse between him and PW 1. He pointed out that courts should note that hymens could be broken through many other activities other than sexual intercourse.
35. He further asserted that PW 1’s evidence was marred with contradictions and inconsistencies. He argued that whereas the Charge Sheet indicated that she was defiled on diverse dates, she had said that she was not defiled on 13<sup>th</sup> July 2022. He questioned if she was defiled by someone at the Children’s home or some other place. He was emphatic that the said inconsistencies rendered her evidence farfetched and fabricated hence causing suspicion on his part. It was his contention that the Prosecution case was not proved beyond reasonable doubt and must fail. He faulted the Trial Court for disregarding his defence which he believed overwhelmed the Prosecution’s case.
36. On its part, the Respondent submitted that PW 4 corroborated PW 1’s evidence by confirming that the hymen was missing and that penetration had occurred. It added that the Trial Court considered the Appellant’s case and rejected the same. It argued that the Appellant’s defence was a mere denial which did not rebut the Prosecution’s case.



37. PW 4 filled the P3 and PRC Forms and produced the same as exhibits in this case. He testified that PW 1 had been defiled for three (3) days and noted that although her hymen was missing, he did not see any injuries. He explained that PW 1's clothes were not torn. He opined that PW 1 was defiled.
38. PW 5 also confirmed having examined PW 1 and noted that she had no tears and no discharge but the hymen was missing. He stated that she had been defiled four (4) days before. When he was cross-examined, he said that he based his conclusion on the history that she gave him and left it to the court to decide. On being re-examined, he told the Trial Court that she might (emphasis court) have been defiled. He added that had she come early, they could have taken some specimen. He was clear that he did not see any evidence of defilement
39. In his defence, the Appellant denied the charges and denied knowing PW 1. He asserted that PW 2 was his sister-in-law who wished to have him arrested because of land dispute. He pointed out that they (sic) had assaulted him and caused his arrest.
40. A perusal of PW 1's evidence showed that she testified that the Appellant did not defile her on 13<sup>th</sup> July 2022. Later in her evidence, she said that on the 13<sup>th</sup> July 2022, he defiled her the way he defiled her the second time. She also said that he only called her twice on 30<sup>th</sup> and 31<sup>st</sup> August 2022 making this court question which second time she was referring to. PW 2's evidence was that PW 1 told her that the Appellant defiled her on 30<sup>th</sup> and 31<sup>st</sup> August 2022. Sarah Makungu Olang, a Principal at Ideirei School (hereinafter referred to as "PW 3") stated that PW 1 told her that the Appellant defiled her in July 2022.
41. It was not clear what the role of Ogola's mother was because the sentence appeared disjointed. However, when she was cross-examined, PW 1 said that the Appellant's mother was present when he defiled her and that she knew about it. The proceedings showed that the Trial Magistrate indicated that she screamed for help when she was testifying.
42. It was evident that the incident was reported after several days. PW 5 was non-committal as to whether PW 1 was defiled. PW 1 contradicted herself on the days that she was defiled. There was no medical evidence to corroborate that she was defiled. The gaps and inconsistency in her evidence created doubt in the mind of this court as to what really transpired herein. The Appellant may have committed the offence but there was a possibility that he never committed the offence. PW 1 was give evidence that was cogent and consistence.
43. Punishment under *Sexual Offences Act* was very stiff and had the potential of curtailing and/or limiting people's liberties for unusually long periods. A court therefore had to be satisfied that sufficient evidence had been adduced to prove that a person had committed an offence before returning a verdict of "guilty."
44. In the instant case, this court was hesitant to conclude that the Prosecution had proven its case against the Appellant to the required standard, which in criminal cases, was proof beyond reasonable doubt. The Prosecution did not adduce cogent and consistent evidence to prove that the Appellant defiled PW 1 on any of the dates that she had alluded to. The Appellant may very well have defiled PW 1 but the law was the law. A case had to be proven beyond reasonable doubt which was not the case herein.
45. In the premises foregoing, this court found and held that Grounds of Appeal No (2), (3) and (4) of the Petition of Appeal were merited and the same be and are hereby allowed.



### III. Sentencing

46. As this court had found that the Prosecution did not prove its case to the required standard, it did not analyse the submissions that the Appellant and the Respondent herein had filed. Suffice it to state that the Appellant herein was convicted under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* Cap 63A (Laws of Kenya).
47. Notably, 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.”
48. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment which was lower than the twenty (20) years imprisonment that was provided therein. Had this court found him to have been guilty as charged, it would not have reduced the fifteen (15) years imprisonment. Whether the court would have enhanced it would have depended on whether he would have been given a Notice of Enhancement by the Respondent herein so that he could have made an informed decision as to whether to proceed with the Appeal or not. However, as the issue of his sentence was now moot, the court will say no more on this issue.

### Disposition

49. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 15<sup>th</sup> February 2024 and filed on 21<sup>st</sup> February 2024 was merited. The conviction and the sentence be and are hereby set aside and/or vacated as they were both unsafe.
50. It is hereby directed that the Appellant herein be and is hereby released from custody forthwith unless he be otherwise held for any other lawful cause.
51. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 28<sup>TH</sup> DAY OF MAY 2025**

**J. KAMAU**

**JUDGE**

