



**Omeno v Director of Public Prosecution (Criminal Appeal
E053 of 2024) [2025] KEHC 9317 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E053 OF 2024**

S MBUNGI, J

JUNE 30, 2025

BETWEEN

ANDREW AKHAUKA OMENO APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

Introduction

1. The accused person is facing a count of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 5th day of April 2022 at [Particulars Withheld] sub-location Butere sub-county intentionally caused his penis to penetrate the vagina of S. A [name withheld] a child aged 12 years.
2. The accused is also facing an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 5th day of April 2022 at [Particulars Withheld], Butere sub-county within Kakamega county intentionally caused his fingers to touch the vagina of S. A [name withheld] a child aged 12 years.
3. During the trial the prosecution called four witnesses who testified in support of their case. The appellant was put on his defence, and he did not call any other witnesses. The trial magistrate considered all evidence adduced and found the appellant guilty of the offence of defilement and proceeded to sentence him to twenty years imprisonment.

Facts at Trial

4. PW1, Martin Ambitsi Najendo, a clinician at Manyala Sub-County Hospital, testified that on 6th April 2022, he examined the 12-year-old victim who had been brought to the hospital with a history



- of defilement the previous day. He described the victim as terrified and anxious, with reddened and flaccid labia majora and minora, and a vaginal opening wider than normal for her age, indicating injury.
5. Laboratory tests revealed pus cells, epithelial cells, and leucocytes consistent with inflammation and vaginal excitement caused by blunt or sharp objects. The clinician prescribed treatment including HIV prophylaxis, emergency contraceptives, antibiotics, and trauma counselling. He also examined the accused on 7th April 2022 and noted soiled clothing, providing appropriate treatment. The clinician produced treatment notes and official forms as evidence.
 6. PW2 SA (name withheld), informed the court that she is a 12-year-old girl in Grade 6 at [Particulars Withheld]. She recounted that on 5th April 2022, the accused met her and her younger sister at a river. He greeted them and asked if they knew ye Primary School. She recounted that on 5th April 2022, the accused met her and her younger sister at a river. He greeted them and asked if they knew the location of a certain home.
 7. He then led her into a nearby forest under the pretence of retrieving beans he had hidden there. In the forest, he threatened her with a knife not to scream, undressed her, and defiled her by penetrating her vagina with his fingers. When he saw passers-by, he fled, and she ran back to the river and told her sister, who later informed their mother. Sheridan positively identified the accused in court.
 8. PW3, the victim's mother, testified that upon hearing from her daughter and granddaughter about the incident, she interrogated the victim who described the assault in detail, including the accused smearing some substance on her thighs. She reported the matter to the assistant chief and escorted the victim to the hospital. She also witnessed the victim identify the accused when the assistant chief found him wearing the clothes described by the victim. She produced the victim's birth certificate confirming her age as 12 years.
 9. PW4, PC Isaac Obiero, testified that he received the report on 6th April 2022 from the victim's mother. Upon arrival at the scene, he found the accused locked in a room at the shopping centre, surrounded by villagers. He arrested and escorted the accused to the police base, recorded witness statements, and confirmed the victim's age through the birth certificate.
 10. After considering the prosecution evidence, the court found on 29th March 2023 that a prima facie case had been established, warranting the accused to enter his defense. The accused was informed of his rights and chose to give a sworn statement without calling witnesses.

Defense Case

11. DW1, the accused, testified in his defense. He denied involvement in the offense and stated that on 6th April 2020, he was at home watching television when police officers and the assistant chief arrived, arrested him without explanation, and locked him in the chief's office before taking him to the police station. He claimed he had been previously charged in a similar defilement case at Ukwala Law Courts involving a related victim but was acquitted. The accused alleged that the assistant chief was biased due to family relations and ongoing land disputes involving the victim's family. He requested that justice be served fairly.
12. Upon conclusion of the trial, the court noted the accused was a first offender but emphasized the serious nature of sexual violence, which irreparably harms victims. The accused was convicted of defilement under Section 8(1) read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 20 years imprisonment. The accused was granted the right to appeal within 14 days.



The Appeal

13. The appellant being dissatisfied by the conviction and sentence filed this petition of appeal dated 27.05.2024 on the following grounds:
- i. That, the learned trial magistrate erred in both law and in fact presiding over a trial that failed to meet the threshold and standards of fair hearing as stipulated under Article 50(2) (c) (g) (h) & (j) of the Constitution as read with Article 50(4) of the Constitution of Kenya.
 - ii. That, the learned trial magistrate erred in law and in facts by failing to make finding that the case was not proved beyond any reasonable doubt despite glaring contradiction evidence of the prosecution witness.
 - iii. That, the learned trial magistrate erred in both law and in facts by failing to make a finding that the prosecution deliberately avoided to avail some key witnesses and evidence.
 - iv. That, the learned trial magistrate erred in both law and facts by finding penetration, age and identification proved beyond the required standards even in the wake of the flimsy and deliberate inadequate evidence by the prosecution.
 - v. That, the trial leaned magistrate erred in both law and in facts being against the weight of the available defence evidence on records.
 - vi. That, more grounds will be adduced the hearing thereof when supplied with the certified court trial proceedings for I cannot remember everything as per now.

Appellants Submission

14. The appellant contests both the conviction and sentence imposed by the trial court, submitting that the prosecution failed to discharge the burden of proof to the required standard of beyond reasonable doubt. It is contended that the prosecution's case was riddled with material contradictions and inconsistencies, particularly in the testimonies of PW2 and PW3, which undermined the credibility of the evidence.
15. For instance, the complainant (PW2) gave conflicting accounts regarding her movement after the alleged incident, and there were inconsistencies between her account and that of her mother (PW3) regarding the purpose of her journey. The appellant relies on the authority of *Ramkrishna Denkerai Pandya v Republic*, Crim. App. No. 6 of 1990 (EACA 93), where the court held that
- “In the face of contradictory testimony, it becomes difficult to determine who is telling the truth and a conviction cannot be safely based.”
16. The appellant further submits that the prosecution failed to call key witnesses—namely the complainant's younger sister (allegedly present during the incident), the passerby who allegedly interrupted the offence, and the assistant chief who arrested the appellant.
17. The omission, it is argued, prejudiced the defence and weakened the evidential value of the prosecution's case. Citing the authority of *Bukenya v Uganda* (1972) EA 549, the appellant argues that failure to call crucial witnesses entitles the court to draw an adverse inference against the prosecution. This was echoed in *Kingi Ole Yengo v Republic* (1921), where the court held that omission to call material witnesses undermines the integrity of the case.



18. On the element of penetration, age, and identification, it is contended that the evidence tendered fell below the statutory threshold. While the clinical officer (PW1) opined that the vaginal opening was wider than expected, this was not conclusive proof of penetration as defined under Section 2 of the [Sexual Offences Act](#). The appellant draws on *Joseph Machoka Mwambabo v Republic*, HCCRA No. 126 of 2013 (Kisii), where the High Court held that:
- “ A broken hymen is not conclusive evidence of penetration.”
19. It is also submitted that the age of the complainant, said to be 12 years, was based on a birth certificate allegedly seen by the investigating officer (PW4), but no person came to produce or authenticate the document. The appellant invokes Section 77(3) of the [Evidence Act](#) and cites Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko, Civil Appeal No. 203 of 2001 (2007) to support the position that documentary evidence must be proved through foundational testimony.
20. Regarding identification, the appellant submits that no proper identification parade was conducted and that the link between him and the offence was speculative, primarily based on prior suspicion of being a ‘known offender’. It is argued that such circumstantial associations do not meet the legal standard for identification.
21. The appellant cites [Collins Akoyo Okemba & 2 Others v Republic](#) [2014] eKLR, where the court emphasised the need for an appellate court to re-analyse and re-evaluate all the evidence independently.
22. The appellant further claims violations of his constitutional rights under Article 49(1)(a)(i), having allegedly not been informed of the reasons for his arrest, and Article 50(2)(e) for the right to a trial without unreasonable delay. The trial court is faulted for multiple unnecessary adjournments and failing to give sufficient weight to the defence evidence, including the appellant’s assertion of a land dispute and vendetta from the assistant chief.
23. It is submitted that the defence, though possibly weak, was not rebutted by the prosecution and should not have been disregarded. Citing [Victor Mwendwa Mulinge v Republic](#), Crim. App. No.(Court of Appeal, Nakuru) and [Ndung’u Kimanyi v Republic](#) (1979) KLR 282, the appellant reiterates that the burden of proof lies solely with the prosecution and that conviction cannot stand on the weakness of the defence.
24. Finally, the appellant urges the court to quash the conviction and set aside the sentence of twenty (20) years. In the alternative, he prays for a reduction in sentence and that the court be pleased to invoke Section 333(2) of the [Criminal Procedure Code](#), taking into account the period he spent in pre-trial custody.
25. Reliance is placed on *Ahmed Abolfathi Mohammed & Another v Republic* [2018] eKLR, where the court affirmed the need to credit time spent in custody against sentence imposed. The appellant also invokes *Seki Toliko v Uganda* (1969) EA 53, [Waita Mungoki v Republic](#) [2018] eKLR, and [Silas Magongo Onzere alias Fredrick Nameema v Republic](#) [2017] eKLR, arguing that any doubt in the prosecution’s case must be resolved in favour of the accused.
26. In conclusion, the appellant prays that the appeal be allowed, the conviction quashed, sentence set aside, and he be acquitted. Alternatively, the sentence be reviewed and substituted with a non-custodial option or lesser term, taking into account time already served.



Analysis And Determination

27. The role of this court as the first appellate court is well settled. It was held in the case of *Okeno v Republic* (1972) EA 32 and in *Mark Oiruri Mose v R* (2013) eKLR that

“A first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.”

28. In the case of *Republic v Edward Kirui* (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & Another v State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688 where the case of *Bhagwan Singh v State of M. P.* (2002)4 SCC 85 was cited as follows:-

“The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not.”

29. Having gone through the lower court records and the grounds of appeal, I find the following to be the main issues for determination.

- i. Whether the offence of defilement was proved to the required standard.
- ii. Whether the prosecution evidence had contradictions.
- iii. Whether the prosecution failed to adduce key witnesses in the case.
- iv. Whether the trial court sufficiently considered the evidence of the accused.

30. On whether the prosecution proved the offence of defilement to the required standard, it was stated in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 [2015] eKLR as follows:

“The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.”

31. It is important to determine the age of the victim because of two important reasons:

- i. Defilement involves a sexual offence against a child.
- ii. The age of a child is used as a determining factor on what sentence should be imposed on a person found guilty of defilement.

32. In the case of *Hadson Ali Mwachongo v Republic*, the Court of Appeal held that:

“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.”



33. The age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR that:
- “... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”
34. In this case, I note that the victim testified that she is twelve years old. The prosecution produced a birth certificate marked as MF1 which showed that the complainant was born on 4/11/2012. It is my view that this is enough to satisfy the requirement of proving the age of the victim.
35. Penetration is an important element that should be shown in order to prove defilement. In defining penetration, the court stated in *EE v Republic* [2015] eKLR that:
- “An important ingredient of the offence of defilement is that there must have been penetration. Penetration is defined in section 2 of the *Sexual Offences Act* as ‘Penetration’ means the partial or complete insertion of the genital organ of a person in the genital organ of another person. The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement.
36. In *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal no. 35 of 1995, the court stated,
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”
37. In the case at hand, the victim state that the accused person undressed her as she was wearing a trouser and the expressly stated “Alafu aka-ni-najisi” (He raped me). PW1, a clinician testified that the victim reported that the accused had lured her to a nearby forest, threatened her to use a knife and then undressed her and touched her vagina with his fingers and defiled her.
38. He further stated that on examination, the victim’s labia majora and minora were reddened and flaccid. Her vaginal opening was also wider than that of girls of her age therefore suggesting some sort of injuries that had caused the opening to be wider than normal. It is the opinion of PW1 that this is mostly seen in cases where inflammatory reactions have taken place and there was vaginal excitement using a sharp or blunt object.
39. I therefore find that the element of penetration was proved by the victim’s testimony and further corroborated by the medical reports adduced before the court.
40. On the third requirement of positive identification of the assailant, the complainant is the only person who witnessed the accused person commit the crime. The element of recognition of the accused is clearly established in this case through the victim’s consistent and detailed account. During cross-examination, the victim confidently stated, “I recognize you, you are called Andrew,” indicating that she knew the accused by name.
41. She also gave a specific description of the clothes the accused was wearing at the time of the incident, and notably, when the accused was later found, he was wearing the same clothes. Upon arrival at the



accused's home, the victim immediately identified him and remarked, "ni huyu," further affirming her recognition. The incident occurred in the afternoon when there was sufficient natural light, allowing the victim a clear view of the accused during the attack.

42. In *Anjononi and others v Republic*, (1976-1980) KLR 1566 it was held that

"when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."

43. In light of this principle and the favourable conditions under which the recognition occurred daylight and immediate identification the victim's evidence of recognition is both credible and reliable and strongly supports the prosecution's case.

44. On whether the prosecution evidence is contradictory, the appellant cites that on cross examination of the appellant, she stated: "I ran back to the river." A statement she later denied by stating "I just went back to the river I didn't run." The appellant further points out that the third prosecution witness stated, "accused to show him her home." on the other hand, the appellant alleged to be sent to take beans to Imbundu's home. She stated: "...wanted to give me beans to escort to Okello's home."

45. In the case of *Twehangane Alfred v Uganda*, Crim App. No. 139 of 2001, [2003] UGCA, it was stated that:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

46. The duty of the court therefore is to determine whether the contradictions are grave or whether they are minor. In determining what amounts to a minor contradiction, the court in the case of *Joseph Maina Mwangi v Republic* CA No-73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held:-

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

47. It is therefore the view of this court that the contradictions cited by the appellant are not fundamental as to cause prejudice to the case of the appellant. The contradictions cited above do not poke holes in the case of the prosecution. Whether the complainant ran or walked back to the river and whether she was called to deliver beans or give directions for beans to be delivered does not adversely affect the trajectory of this case. Therefore, the contradictions cited herein are minor and were rightly overlooked by the trial magistrate.

48. On whether the prosecution failed to avail key witnesses, in criminal prosecutions the prosecution has the discretion to determine who it will call as its witnesses to support the case. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that;

"No particular number of witnesses shall, in the absence of any provision of law to the contrary be required to the proof of any fact."



49. In *Keter v Republic* [2007] EA 135 the court held that:
- “..... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubts.”
50. As a result, not every witness who witnesses a situation is required to be summoned as a witness. Witnesses are not meant to be called if they are going to repeat what previous witnesses have said, and they may not be called to testify on things that are not in dispute and have already been stated by other witnesses. The prosecution will be criticised if it fails to summon a witness or witnesses with ulterior motives and the evidence is insufficient. In such cases, failing to call critical witnesses is fatal.
51. It is the position of this court that the witnesses availed by the prosecution were enough to prove the case beyond reasonable doubt and therefore to the required standards. I rely on the aforementioned case that the prosecution did not have an obligation to bring other witnesses if they did not have anything substantial to add to the case. With no evidence of the prosecution having ulterior motives in failing to adduce the said witnesses, this ground dismissed for lack of merit.
52. The accused’s defence is based on a claim of fabrication and malice, alleging that the case was orchestrated by the assistant chief due to a personal grudge related to land disputes, and that the complainant, like another minor in the Ukwala case, is a relative of the assistant chief. He further claims that the same doctor testified in both cases, implying manipulation.
53. However, this defence is unsupported by any credible evidence and remains a mere assertion. The accused did not present an alibi, did not challenge the victim’s account or the medical evidence, and failed to show any inconsistency or impropriety in the prosecution’s case. In contrast, the prosecution provided strong, consistent, and corroborated evidence proving the victim’s age, penetration, and positive recognition of the accused. In light of this, the accused’s defence lacks merit and does not raise any reasonable doubt to displace the prosecution’s case.
54. Having carefully re-evaluated the evidence on record, analysed the grounds of appeal, and considered the applicable law and authorities, I find that the prosecution proved all the essential elements of the offence of defilement beyond reasonable doubt. The age of the complainant was satisfactorily established through a birth certificate, penetration was proven through credible and consistent medical and oral evidence, and the positive recognition of the accused by the victim was reliable, having occurred in broad daylight and under favourable conditions.
55. The contradictions cited by the appellant are minor and can be overlooked by the court. The prosecution cannot be faulted in not adducing all the witnesses as the ones they brought before the court were sufficient in proving their case to the required standards and that no ulterior motives were shown in the prosecution not availing other witnesses.
56. On the other hand, the accused's defence amounts to a bare denial and speculative claims of malice and fabrication, which were not supported by any tangible or credible evidence. The alleged personal grudge involving land and claims of collusion were not substantiated and therefore do not raise reasonable doubt.
57. The trial court in sentencing the appellant considered the mitigation advanced and sentenced the appellant to 20 years' imprisonment.
58. The appellant prays that the court quash the conviction and set aside the sentence of twenty (20) years. In the alternative, he prays for a reduction in sentence and that the court be pleased to invoke Section 333(2) of the *Criminal Procedure Code*, taking into account the period he spent in pre-trial custody.



59. In the "*Muruatetu Case*", the Supreme Court various guidelines to be considered in sentencing:

- “(a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

60. Also, we have the judiciary guidelines on sentencing. The victim was aged 12 years. Section 8(3) of the *Sexual Offences Act* states 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.

61. The Supreme Court Petition-No.-E018-of-2023-*Republic-v-Joshua-Gichuki-Mwangi* reiterated the position in the Muruatetu case regarding the unconstitutionality of Sexual Offences sentences and held thus:

“We therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.”

It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent SC Petition No. E018 of 2023 27 with the Constitution.” Therefore the trial court did not error in meting out the minimum sentence as stipulated in the *Sexual Offences Act*.

62. In my considered view, the objectives of sentencing were met in totality by the trial magistrate by imposing the sentence of 20 years given the age of the victim which is the lawful sentence allowed by the law.

63. The court however obliges to grant the appellant leave to have his sentence considered to commence from the time he was arrested

64. For these reasons, I find that the Appeal partially succeeds to the extent that I order that the sentence of 20 years imprisonment shall run from the date of arrest being April 7, 2022 pursuant to section 333 (2) of *CPC*.

65. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF JUNE 2025

S.N MBUNGI



JUDGE

In the presence of:

Court Assistant – Elizabeth Angong'a

