



**Onyango alias ODM v Republic (Criminal Appeal E056 of 2024)  
[2025] KEHC 10726 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10726 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E056 OF 2024  
WM KAGENDO., J  
JUNE 26, 2025**

**BETWEEN**

**RICHARD OKOTH ONYANGO ALIAS ODM ..... APPLICANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

*(Being an Appeal against conviction and sentence in Mombasa Chief Magistrates Courts Criminal Case No. E043 of 2023 delivered on 29/8/2024 by Hon. R. Orora (SRM).)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement of an idiot contrary to section 146 of the [Penal Code](#).
2. The particulars of the offence are that on the 25<sup>th</sup> of June, 2023 at about 1100hrs at [Particulars Withheld] tongwe location in Likoni Sub County within Mombasa County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LK a girl aged 23 years who is known to be of unsound mind.
3. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 6 of 2006, which particulars of the offence are that on the 25<sup>th</sup> of June, 2023 at about 1100hrs at [Particulars Withheld] tongwe location in Likoni Sub County within Mombasa County, the appellant intentionally and unlawfully touched the vagina of LK a girl aged 23 years with his penis.
4. The appellant was after full trial found guilty of the main count upon which the alternative count was deemed spent and thereby sentenced to fourteen (14) years imprisonment.
5. The appellant was aggrieved by the conviction and sentence, and he preferred the present appeal based on grounds that the learned trial magistrate erred in law and fact by failing to appreciate that the



prosecution's case was riddled with massive inconsistencies and discrepancies. He further faulted the trial court for dismissing his defence out-of-hand despite its strength and further imposing a sentence beyond the prescribed sentence in the penal law.

6. As at the time of making this decision, neither of the parties had complied by filing of submissions on record.

### **Determination**

7. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. See the case of David Njuguna Wairimu (2010) eKLR where it was held that:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

### **Whether the prosecution established its case against the defendant beyond reasonable doubt?**

8. Section 146 of the *Penal Code*, Cap 63 under which the appellant was convicted and sentenced provides as follows:-

#### 146. Defilement of idiots or imbeciles

Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.

9. The first element that needs to be established is whether the complainant is an idiot/imbecile as contemplated under Section 146 of the *Penal Code*. (See *Nzioka Kilonzo v Republic* [2017] eKLR and *Patrick Barasa Wawire v Republic* [2016] eKLR).
10. An “Imbecile” is defined in the Black’s Law Dictionary, Tenth Edition at page 865 as “a person afflicted with severe mental retardation.” The rationale in my view, as connoted under Section 2 of the *Sexual Offences Act*, is to establish whether the victim had the mental capacity to reasonably appreciate the nature of the acts and/or consent to them.
11. PW2; L.K’s mother testified that her daughter has a mental problem, which on the material she had taken her to church for prayers. PW4; Mr. Victor Were, a Clinical Officer similarly testified that during the PRC examination, the complainant was mumbling words and was not mentally stable.
12. The trial court ordered that a mental assessment exam be undertaken on the complainant, which PW5, No. 246976 PC Julius Kazungu presented in court. The mental assessment report (pexh6) established that the complainant had a Bipolar Mood Disorder and a Seizure Disorder, which rendered her as per the medical opinion ‘not fit’ to follow the court proceedings. Going by the definition of an ‘imbecile’



- and the evidence on record, I find that PW1 was clinically proven to be mentally retarded, and therefore an imbecile.
13. In equal measure, a fundamental element to suffice the offence of defilement of an imbecile, the appellant herein must have had reasonable knowledge that the complainant was an imbecile, at the time of having or attempting to have carnal knowledge with her.
  14. “Carnal knowledge” is defined in the Black’s Law Dictionary, Tenth Edition at page 256 as “sexual intercourse, especially with an underage female.”
  15. The history of the complainant’s condition as highlighted in the Mental Assessment Report, was that she was involved in a road traffic accident in March, 2023 and sustained a head injury. Since then she has displayed various symptoms including; falling on seizures, aggression, talking and singing a lot, lack of sleep, excessive energy, bizarre behavior and stripping naked. In fact, during mental assessment session it was noted that she had auditory hallucinations and grandiose delusions. I have in length listed the exhibited physical symptoms for the purpose of identifying whether one would reasonably know that complainant suffered from a mental condition.
  16. It is noteworthy that PW3, testified that he, the appellant and the complainant lived in the same neighborhood and were well acquainted with each other. He further testified that he knew that the complainant had mental illness. It would follow that the appellant was similarly well-aware of the complainant’s condition. Needless to add, the appellant in his defence sought to argue that he and the complainant were in a romantic relationship, and at times he would cater for her child’s well-being.
  17. It is clear therefore that the appellant was aware that PW1 was an imbecile and thus any or attempted sexual activity with her fell within the ambit of defilement of an imbecile contrary to Section 146 of the [Penal Code](#), Cap 63, Laws of Kenya. The only question is whether the prosecution’s evidence was sufficient to nail the appellant to the commission of the alleged offence.
  18. It is noteworthy that the complainant was not subjected to a *voir dire* examination, probably because of her age, but she nonetheless gave a sworn testimony. She gave a vivid account of how the appellant took her to his house and cooked ugali. That, he removed her biker, and in the process, it got torn and he inserted his private part in her private part. In her cross- examination she further testified that she screamed at which point neighbors arrived.
  19. PW1s testimony was corroborated by her mother, PW2 and their neighbor and eyewitness PW3, Mr. Gabriel Oroni, that after making their way into the appellant’s house they found him naked, and the complainant had no panties. To corroborate the testimonies, the prosecution produced the torn ‘biker’ as evidence, which PW1 confirmed as her own.
  20. Further, the medical notes, the PRC and P3 Forms as presented by one Victor Were, a Clinical Officer; PW4, exhibited that the complainant had a broken hymen with old scars, her anus had bruises, and she had injuries on her elbow joints.
  21. It is not lost to me that a broken hymen is not absolute certainty of penetration, but the same coupled with the testimony of the victim, leaves no room for doubt that the indeed penetration sufficed.
  22. Simply put, I conclude therefore that indeed the appellant attempted and had carnal knowledge with the complainant in full knowledge that she was an imbecile.
  23. There is nothing on record that appears to impeach the credibility of the testimony of PW1. On reconsideration of the evidence, I find that her testimony was truthful, consistent and firm even during cross-examination by the appellant. The appellant knowingly exploited the complainant’s mental state



to cultivate an unhealthy relationship for his own sexual gratification to the extent of purporting that she was his girlfriend.

24. Having considered the appellant's defence, it is clear that the same fell short in dislodging the prosecutorial evidence. I have no reason to differ from the findings of the trial magistrate who had the opportunity to hear and see the complainant as she testified and weigh the same against the appellant's defence and tested both their demeanor.
25. From the foregoing, I find that the trial court's conviction of the appellant was safe, and I uphold the same.
26. As to the 14 years custodial sentence, imposed on the appellant, it is noteworthy that he neither questioned its legality or lack thereof, nor submit on the same. He contended that his mitigation was not considered, however as per the trial court's proceedings, nothing can be further from the truth. In my view the trial court duly exercised its discretion and proceeded to sentence the appellant as per the statutory penal dictates. I find the same is inherently sound, and there is no need to disturb it.
27. For the above reasons, I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt and that the appellant's defence was a sham, wanting in merit. Accordingly, I uphold the conviction and sentence, and the appeal is hereby dismissed in its entirety.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**W. K. MICHENI JUDGE**

In The Presence Of;

The Appellant(s).....

For The Respondent.....-mr. Sirima.....

Court Assistant.....bebor.....

**SIGNED BY: HON. LADY JUSTICE WENDY MICHENI**

**THE JUDICIARY OF KENYA.**

**MOMBASA HIGH COURT HIGH COURT CRIMINAL DATE: 2025-06-26 20:31:07**

