



REPUBLIC OF KENYA



**Odhiambo v Republic (Criminal Appeal E020 of 2020)  
[2024] KEHC 6502 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6502 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E020 OF 2020  
MS SHARIFF, J  
MAY 31, 2024**

**BETWEEN**

**JOSEPH OGAL ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the original conviction and sentence in  
Winam Principal Magistrate's Court Sexual Offence Case No E051  
of 2021 of Honourable Chrispine Oruo [PM] dated April 13, 2023)*

**JUDGMENT**

1. The Appellant was charged and convicted of the offence of Defilement contrary to section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) of 2006. The particulars of the offence were that on the 23rd July 2021 in Kisumu East subcounty within Kisumu County the accused unlawfully caused his penis to penetrate the vagina of FAO a girl aged 9 years.
2. He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) particulars being that on the 23rd July 2021 in Kisumu East sub-county within Kisumu County, intentionally caused his penis to touch the vagina of FAO a girl aged 9 years.
3. The Appellant pleaded not guilty to all the charges and the case went to full trial in which the prosecution called four (4) witnesses. At the close of the prosecution's case, the court found that the Appellant had a case to answer and put him on his defense under section 210 of the [Criminal Procedure Code](#). The Appellant testified and called no witnesses.
4. By judgment delivered 13th April 2023 the appellant was convicted on the main charge and sentenced to serve life imprisonment.



5. Being dissatisfied with the said judgement the appellant lodged an appeal on grounds summarized as follows:-
- i. The Learned Magistrate erred in law and fact by placing reliance on the sole testimony of a child witness contrary to the test under section 124 of the *Evidence Act* in light of the testimony of PW3 suggesting that the complainant had omitted crucial facts relevant and significant to the investigations thereby contradicting the complainant therefore could not be considered a credible witness.
  - ii. There are glaring inconsistencies in the proceedings and therefore the accuracy of the same is questionable thereby infringing on the Appellants right to a fair and impartial trial:
  - iii. The Learned Magistrate erred in law and fact by failing to consider the glaring inconsistency in the testimony of PW2 as to the date when she allegedly sent PW1 to the shop.
  - iv. The Learned Magistrate erred in law by relying on the inconsistent testimonies of PW1, PW2 and PC Leach Adhiambo as to the age of PW1 and made glaring mistakes on the calculation of the apparent age of the complainant thereby questioning the accuracy of the proceedings.
  - v. The Learned Magistrate erred in law and fact by introducing facts not testified upon by the witnesses by stating that the Appellant person pulled the complainant to the bush yet no witness testified to such a fact, thereby infringing on the Appellants right to a fair trial.
  - vi. The Learned Magistrate erred in law and fact by failing to consider the fact that the Chief who allegedly arrested the accused person did not testify as to the identity of the accused person and as to whether the accused person is the same person referred to the complainant and her mother as "O."
  - vii. The learned trial Magistrate erred in law and fact by convicting the Appellant without taking into consideration the fact that the offence was alleged to have been committed on July 23, 2022 at 7 pm and was never reported until July 26, 2023 at 1 pm.
  - viii. The Learned Magistrate erred in law and fact by believing that PW2 had sent PW1 to the shop at 7 pm without considering that there was a Government imposed COVID 19 curfew in 2021 at the time of the alleged commission of the offence and that no investigations or arrest were carried out by police
6. The Appeal was canvassed through written submissions. The Appellant's submissions are dated 21<sup>st</sup> August 2023 while the Respondent's submissions are dated 17th October 2023.

### **The Appellant's Submissions**

7. The appellant submits that PW1 was not a credible witness since there were inconsistencies with the testimony she provided. That the trial court fell short of the requirements of the voir dire procedure and the questions asked during voir dire do not appear in the proceedings.
8. He also submitted that there were no investigations, the witnesses gave contradictory evidence and the learned magistrate introduced facts not testified to and failing to consider that the crucial witnesses were not called. Therefore, infringing on the appellant's right to fair and impartial trial.

### **The Respondent's submissions**

9. The respondents submitted as follows: The prosecution proved the case against the appellant beyond reasonable doubt. There were no inconsistencies in the prosecution's case. That all the ingredients of



defilement contrary to Section 8(1) and (2) of the [Sexual Offences Act](#) No. 3 of 2006. This being a first appeal it is the court's duty to re-evaluate the evidence and make its own conclusion.

### **Issues for Consideration**

10. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:
  - (i) Whether the witness PW1's testimony was credible.
  - (ii) Whether the offence was proved to the required standard.

### **Analysis and determination**

11. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses.

See *Okeno vs. Republic* [1972] E.A

#### **i) Whether the witness PW1's testimony was credible**

12. On the issue of voir dire, the record of the proceedings confirms that the same was conducted however it was improperly done by the trial court. The trial court indicated on record that the minor was intelligent and understood the meaning of oath to enable her to be sworn.
13. However from the preceding it seems that the minor did not understand the meaning of a sworn statement. It is not quite clear whether the minor meant that if she gave false testimony she's liable to imprisonment or whether she meant that if she gave false testimony the Appellant will be convicted.
14. The purpose of voir dire was explained in [Johnson Muiruri vs Republic](#) [1983] KLR 445 as follows:

“Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.”

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.



5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”
15. Since no further questions were put on record to show that PW1 understood the meaning of sworn statement, I find that the trial court relied on PW1 testimony contrary to Section 19(1) of the [Oaths and Statutory Declaration Act](#) and Section 125 of the [Evidence Act](#).
- ii) Whether the offence was proved to the required standard.
16. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. (See *Pandya vs. Republic* (1957) EA 336).
17. 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 issue. (see *George Opondo Olunga vs. Republic* [2016] eKLR.)
18. The first element is age. The Court of Appeal in [Edwin Nyambogo Onsongo vs. Republic](#) (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
- “... 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.” (emphasis added).
19. In the present case, a copy of a birth certificate marked P exhibit 1 was produced. It indicated that she was born on 25th August, 2013. The alleged offence occurred on 23rd July, 2021. She was therefore 9 years old at the time of the offence. This dispenses with the first ingredient as adequately proven.
20. The second ingredient is penetration. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as follows:
- “The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
21. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a post rape care form marked P exhibit 2 and medical examination report marked P exhibit 3 which show lacerations, broken hymen, whitish discharge and numerous epithelial cells.
22. The Last ingredient is proper identification of the perpetrator. The witnesses provided contradictory testimonies during the course of proceedings. The mother alleges that she sent the minor to the shop in August while PW1 testified that she was sent in July, it appears that the alleged offence took place on July 23,2021 at 7pm what was reported on July 26 2021 at 1p.m.



23. In the record PW1 told the clinical officer that it is the grandmother who had sent her to the shop which differs from the testimony given in court. The PRC form also states that PW1 informed the attending Clinician court that the person who allegedly defiled her was a frequent drunkard at the neighbor's home while in court she said that Okoth used to drink at PW1's home.
24. Furthermore, PW3 states that she investigated the report but does not give the Court any finding. In fact, she states that the Appellant was arrested by the area chief. PW3 does not tell us the link between the Appellant and the name "Okoth" and whether Okoth is an alias by which the Appellant is called. It is also instructive to note that PW2 states that the Appellant is her cousin yet she does not even know his name.
25. It is also noteworthy to point out that the information in the Charge sheet states that the incident occurred in Kasule village. No specific place has been named to tell the lower court exactly where this Kasule village is or any landmark near the area of the alleged incident.
26. In the evidence set out there were no investigations conducted and the accused was never examined to directly link him to the offence. I find that the case against their appellant was either made up or the appellant was not the right person to be placed on the dock for the offenses he was charged with.

### **Conclusion**

27. Premised upon the above findings I make the following orders:-
  - i) The appeal herein is hereby allowed and the Appellant's conviction by the lower court is hereby set aside.
  - ii) The Appellant is hereby set free unless otherwise lawfully held.

It is hereby so ordered.

**DATED, SIGNED AND DELIVERED AT KISUMU ON THIS 31<sup>ST</sup> DAY OF MAY 2024**

**M. S. SHARIFF**

**JUDGE**

