



**Alwanda v Republic (Criminal Appeal E030 of 2024)
[2024] KEHC 13132 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E030 OF 2024
KW KIARIE, J
OCTOBER 30, 2024**

BETWEEN

PETER OTIENO ALWANDA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No.23 of 2020 of the Principal Magistrate's Court at Oyugis by Hon. B.O Omwansa–Senior Principal Magistrate)

JUDGMENT

1. Peter Otiemo Alwanda, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No.3 of 2006 after pleading guilty to the offence.
2. The particulars of the offence were that on the night of the 19th day of June 2020 at Kokeel location, Rachuonyo South Sub-County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of LAO a child aged fifteen years.
3. The appellant was sentenced to serve fifteen years imprisonment. He has appealed against both conviction and sentence. He raised grounds of appeal as follows:
 - a. The offence of defilement was not proven to meet the required standard.
 - b. The trial court failed to comply with Article 50(2)(g) and (h) of [the Constitution](#).
 - c. The sentence was harsh and excessive.
4. The state opposed the appeal and contended that it lacked merits.



5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh and drawn my conclusions, bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator and
 - c. The victim must be below eighteen years old.
7. This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine... first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.
8. Therefore, I will endeavour to establish whether the prosecution met the required standards.
9. The complainant, LAO (PW1), testified that she was fifteen years old. Her mother (PW4) testified that she was born on April 20, 2005. A copy of the Certificate of Birth was produced (Exhibit 3). I am satisfied that her age was proven.
10. Section 8(3) of the *Sexual Offences Act* provides:

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.
11. According to LAO's (PW1) evidence, the appellant asked her to help him and the bassist tend to a tree nursery. She complied. While in the home, he instructed her to remove some seedlings from the house, and she entered; he followed her there. He ordered her into the bedroom, but when she declined, he armed himself with a machete. He defiled her forcefully.
12. When the complainant was examined on the 20th day of June 2020, it was noted that she had bruises on her vagina, the hymen was broken, and the presence of epithelial and puss cells was noted. The evidence from Philip Otieno (PW3), a clinical officer, was that epithelial cells indicated friction.
13. The medical evidence confirmed that the complainant had been defiled.
14. The proviso to section 124 of the *Evidence Act* states:

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.
15. After analysing the evidence on record, I find that there was sufficient evidence to identify the appellant as the perpetrator. I have no reason to doubt the complainant.
16. The appellant contended that the learned trial court breached the provisions of Article 50 (2)(g) and (h) of *the Constitution* of Kenya. The Article states:
 - (2) Every accused person has the right to a fair trial, which includes the right—



- (g) g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
17. Although the appellant was not informed of his right to be represented by an advocate, and though this is the desirable procedure, the trial was conducted fairly. I also find that this failure occasioned no prejudice.
 18. The sentence of fifteen years cannot be termed harsh and excessive.
 19. The upshot of the analysis of the evidence on record is that the appeal lacks merit, and the same is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE

