



**Otieno v Republic (Criminal Appeal E031 of 2024)  
[2024] KEHC 13131 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E031 OF 2024  
KW KIARIE, J  
OCTOBER 30, 2024**

**BETWEEN**

**CLINTON OTIENO OTIENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case No. E007 of 2021 of the Senior Principal Magistrate's Court at Oyugis by Hon. B.O. Omwansa–Senior Principal Magistrate)*

**JUDGMENT**

1. Clinton Otieno Otieno, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of the offence were that on the 25<sup>th</sup> day of February 2021, at the Sino Kagola sub-location in Rachuonyo South Sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of M.A.O., a child aged 11 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised grounds of appeal as follows:
  - a. That defilement before the court resulted from a domestic feud between the girl and his family.
  - b. That the learned trial magistrate erred both in law and facts by convicting and sentencing the appellant to 20 years without any credible evidence from the doctor's evidence.
  - c. That the learned trial magistrate erred both in law and facts by convicting and sentencing the appellant based on shaky police investigation.



- d. That the learned trial magistrate erred in both law and facts by basing conviction out on a defective charge sheet.
  - e. That the learned trial magistrate erred in both law and fact by not considering the appellant was not represented by a lawyer.
  - f. That the learned trial magistrate erred in both law and fact, failing to notice that the doctor's evidence never proved the case beyond a reasonable doubt to base a conviction.
  - g. That the magistrate further erred in both law and facts to have relied on non-factual evidence with any tangible or concrete supporting proof from the police or the witness who testified against him.
  - h. That the learned trial magistrate erred in law and, in fact, in finding that the prosecution proved its case beyond reasonable doubt.
  - i. That the learned trial magistrate erred in law and, in fact, by giving punitive and harsh sentence without scrutinizing the prosecution case as required by law.
5. The state opposed the appeal for want of merits.
6. This is a first appellate court. As expected, I have thoroughly analyzed and evaluated all the evidence presented before the lower court and have drawn my own conclusions, keeping in mind that I neither saw nor heard any of the witnesses. I will be guided by the well-known case of *Okeno vs Republic* [1972] E.A 32. EA 32.
7. Though the appellant contended that the charge was defective, I find nothing to support this claim.
8. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:
- A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- An offence of defilement, therefore, 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.
- This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR when Joel Ngugi J. said:
- Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The 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.
- These are the ingredients that the prosecution must prove against an accused person.
9. MAO (PW1) testified that while she was fetching water from a well, the appellant called her to him, but she declined. While she was going home, he held her and pulled her into N's farm. He had a machete and a radio. While on the farm, he pulled her pair of knickers and, in the process, tore them. He defiled her. She did not raise an alarm, for he threatened to cut her. The following day, when her mother noticed that she could not sit properly, she informed her of what had happened to her.



10. The complainant's mother testified that she noticed the complainant was not sitting correctly and appeared in pain. This was when her daughter informed her that the appellant had defiled her. She took her to the hospital after seeking permission from the school.
11. Otieno Philip (PW3) is a clinical officer who examined the complainant. The examination revealed bruises on the vulva with blood stains. Numerous epithelial cells were seen. He, therefore, concluded the girl was defiled.
12. There was, therefore, evidence to prove penetration of the complainant's genitalia.
13. According to the complainant, the appellant defiled her. This is what she informed her mother. However, the appellant denied the offence and pleaded an alibi. The Court of Appeal in the case of *Kiarie vs Republic* [1984] KLR, held:

An alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, thereby assume any burden of proving that answer, and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

This defence did not displace the prosecution's evidence.
14. In sexual offences, rarely do we have eyewitnesses. This is due to the nature of the act. 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. Nothing in the evidence suggests that the complainant was not telling the truth.
16. Section 8 (2) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The sentence meted out to the appellant cannot be said to be harsh.
17. After reviewing the evidence on record, I conclude that the appeal is without merit and is, therefore, dismissed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30<sup>TH</sup> DAY OF OCTOBER 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

