



**FOS v Republic (Criminal Appeal E012 of 2024)
[2024] KEHC 15145 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E012 OF 2024
KW KIARIE, J
NOVEMBER 28, 2024**

BETWEEN

FOS APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case NO. E023 of 2022 of the Principal Magistrate's Court at Ndhiwa by Hon. B.W. Murangasia-Resident Magistrate)

JUDGMENT

1. FOS, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that in August 2021, in [Particulars Withheld] within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of V.A.M, a child aged thirteen years
3. The appellant was sentenced to serve twenty-five years' imprisonment. He was aggrieved and filed this appeal against conviction and sentence.
4. Nancy Nyarige represented the appellant advocate. He raised grounds of appeal as follows:
 - a. The learned trial magistrate misdirected himself in several matters of law and fact.
 - b. The learned trial magistrate erred in law, convicting the appellant for the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*, which was not proved beyond reasonable doubt by the evidence adduced by the complainant and the prosecution.



- c. The learned trial magistrate erred in the law of evidence by failing to note the demeanour of the prosecution witnesses and the fact that they were all adducing rehearsed evidence to sustain the appellant's continued detention and subsequent conviction.
 - d. The learned trial magistrate misdirected himself on the law of evidence by failing to take cognizance of the evidence adduced by prosecution witnesses on cross-examination or note the contradictions arising from such cross-examination.
 - e. The learned trial magistrate erred in the law of evidence and thus arrived at an erroneous decision in that;
 - i. He failed to take into consideration the fact that the child indicated that she was never defiled in the year 2022, yet she was pregnant.
 - ii. He failed to consider that someone other than the appellant might have defiled the child.
 - iii. He failed to note that it was only the child who was tested, and no indication was made as to the age of the pregnancy, figuring that the child stated that she was not defiled in 2022.
 - iv. The child's evidence was not corroborated to confirm beyond reasonable doubt that the appellant was indeed the one who defiled the child.
 - f. The learned trial magistrate erred in the law of evidence when deciding the case against the weight of evidence.
 - g. The learned trial magistrate erred in law by failing to consider Section 8(4) of the *Sexual Offences Act*, thus issuing a high sentence under the circumstances.
5. The state opposed the appeal but did not file any submissions.
 6. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
 7. 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.

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. I will determine if the prosecution proved these ingredients to the required standards.
 9. M.A.O (PW1), the complainant, testified that she was fourteen years old at the time of the trial. This was on the 22nd day of September 2022. The clinical officer (PW2), who examined her on the 3rd day of



November 2021, said at the time, she was thirteen years old. A copy of her certificate of birth produced by PC Habiba (PW6) as prosecution exhibit 7 indicates her date of birth as the 5th day of January 2009.

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.

The complainant's age was therefore proved as required.

11. The complainant testified that she was living with her aunt. In August 2021, when her aunt went to Ulanda, the appellant called her into his bedroom and asked her to undress. He then asked her to lie facing open and open her thighs. He proceeded to defile her. After this incident, whenever her aunt was not present, he would take advantage and defile her. The defilements resulted in pregnancy.

12. When her aunt learned that she was expectant and by whom, she took her to a hospital at Nelepek, where abortion was procured, albeit incomplete.

13. Neto Atieno Akoth (PW2) is the assistant chief of the Wanjala-Raphedhi sub-location. Her evidence was that on the 4th day of November 2021, she was called to Ralang Primary School and informed that the complainant was expectant. They arranged for her counselling. On the following day, she was alerted that the girl was bleeding profusely. She was taken to hospital, where it was confirmed that an abortion had been carried out.

14. V.A.M(PW1) told the court that when her aunt learned that she was pregnant, she took her to Nelepek Hospital, where she was given some medicine. After taking the medicine, she bled profusely.

15. Clinical officer Erick Oyani (PW4) examined the complainant. The findings were that she had been taken to a private facility where some oral and vaginal tablets were given. This is when she started bleeding. At the time of his examination, the abortion was incomplete. The evidence on record proved to the required standards that there was penetration of the complainant's genitalia.

16. The complainant's narration identified the appellant as her defiler. The appellant denied any involvement. In most sexual offences, there are no eyewitnesses. This is why the proviso to section 124 of the *Evidence Act* was enacted. It 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.

After perusing the evidence on record, I have concluded that the learned trial magistrate had no reason to disbelieve the minor.

17. The upshot of the foregoing analysis of the evidence on record is that the appeal is dismissed.

DELIVERED AND SIGNED AT HOMA BAY ON THIS 28TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

