



REPUBLIC OF KENYA



KENYA LAW
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**Nyadimo v Republic (Criminal Appeal E013 of 2022)
[2023] KEHC 2390 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E013 OF 2022**

**KW KIARIE, J
MARCH 28, 2023**

BETWEEN

ELISHA ODHIAMBO NYADIMO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case NO. 21 of 2019 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Senior Resident Magistrate)

JUDGMENT

1. Elisha Odhiambo Elisha, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between April and September 8, 2019 at Rachuonyo sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of CAO, a child aged 16 years.
3. The appellant was sentenced to 20 years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was in person and raised grounds of appeal as follows:
 - a. That the trial magistrate erred in both law and facts by failure to analyze that mandatory minimum sentence of 20 years imprisonment meted out to the appellant is unconstitutional and amounts to unfair trial and hearing.
 - b. That the learned trial magistrate erred in both law and facts by failure to analyze that the appellant's fundamental rights and freedoms were denied and violated.
 - c. That the appellant was detained in police custody for unreasonably too long without cogent reason contrary to section 77(1) [sic] of [the Constitution](#).



- d. That the learned trial magistrate erred in both law and facts by failure to analyse that the prosecution failed to prove the case to the required standard and that it lacked probative values.
 - e. That the learned trial magistrate erred in both law and facts by failure to analyse that the appellant was convicted and sentenced over defective charge sheet that was not amended amounting to unfair trial.
 - f. The learned trial magistrate erred in both law and facts by failure to analyze that there was no DNA tests to prove between the two accused who committed the offence thus renders prejudice.
 - g. That the learned trial magistrate erred in both law and facts by failure to analyze that bad blood existed among neighbours.
4. The appeal was opposed by the state through Mr. Ochengo, learned counsel on grounds that:
- a. That paternity test was not necessary.
 - b. That the issue of arrest of the appellant was not an issue in the trial court.
 - c. That the prosecution proved its case to the required standards.
 - d. That the sentence and the conviction were proper.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while 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. It was contended by the appellant that he was detained in police custody for unreasonably too long without cogent reason contrary to section 77(1) of *the Constitution*. Certainly this is under the repealed Constitution. The equivalent is found under Article 49 (1) (f) (i) & (ii) of the current *Constitution of Kenya*. It provides:
1. An arrested person has the right—
 - ...
 - ...
 - (f) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) twenty-four hours after being arrested; or
 - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
7. The Court of Appeal in *Julius Kamau Mbugua vs. Republic* [2010] eKLR while addressing such a breach under the repealed Constitution stated:

Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably



the case, then, the only appropriate remedy under section 84 (1) would be an order for compensation for such breach.

In the instant case the appellant if aggrieved can seek redress in a civil court. The appeal cannot therefore turn on this ground.

8. Section 8 (4) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

9. 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 age of the victim must be below eighteen years.

This position was echoed in the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR.

10. The complainant testified that she was 16 years old. Her mother Pw1 gave her date of birth as June 13, 2003. This was confirmed by the copy of her certificate of birth that was produced by PC Willy Ogot (PW5). This would mean that at the time of the alleged offence, she was between fifteen and sixteen years old. The age of the complainant was therefore established.

11. In her evidence CAO (PW2) testified that the appellant asked her to fetch for him some drinking water from his house. When she went to fetch water, the daughter of the appellant went to pick something from grandmother's house which was nearby. The appellant followed her in the house and lured her with cash if they had sex. He therefore proceeded to defile her but reneged on his promise to pay cash. Since then, they had sex severally until when her pregnancy was discovered.

12. When Fredrick Odhiambo Oya (PW3) a clinical officer examined the complainant, he made the following findings inter alia:

- a. Hymen was ruptured but the rupture was old.
- b. She was 24 weeks pregnant.
- c. She had sexually transmitted infection.

He therefore concluded that there was defilement.

13. From her evidence CAO (PW2, that of NAO (PW1) the complainant's mother, George Odhiambo Ondieki (PW3) and that of PC Willy Ogot (PW4) the complainant was having a sexual relationship with the appellant and another man. These witnesses attributed this information to the complainant.

14. In this case just like many other sexual offences cases, there were no eye-witnesses. The proviso to section 124 of the *Evidence Act* provides:

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.



Though the trial court said she believed the complainant, this was her word against that of the appellant. The same trial magistrate tried this case and S.O.A No. 22 of 2019. This ought to have raised a red flag for almost the same script was repeated by the complainant as to how she was defiled by each accused in both cases.

15. In this case she testified as follows:

Accused Elisha called and told me to go and fetch him drinking water in his house. It was in April this year. I don't recall the date. It was April 2019, we are immediate neighbours. He called me as I was playing in his homestead. I play with his daughter in his home. She's my age mate and my friend. I was playing he asked me to fetch drinking water in his house. I went to his house and he followed me there. As I went to fetch water my friend who is his daughter left and went to her grandmother's house nearby to pick something. As I entered the house, accused followed me inside. The house is 2 roomed. He told me to have sex with him and he'd give me cash.

We had sex but he did not pay me as he had promised. I entered the sitting and he led me to the bedroom. He held my hand and took me to his bed. He started touching my body. He caressed my breasts, buttocks and vagina. He lifted my dress and removed my pant. He laid me on the bed facing up with legs apart with my skirt lifted and pushed towards the chest. He removed his trouser and inner pants and came to lie on top of me. He inserted his penis inside my vagina and had sex with me. He finished and he dressed up. He refused to pay me. Since then after one week he again took me to his bedroom and had sex with me. Thereafter he again called after 2 weeks and he did it again. Since then he would call me any time he wanted sex. We continued doing that till September when it was discovered I was pregnant by my mother. We had sex with accused severally. I have lost count. He was arrested by police when I mentioned him to my mother and police area chief. My mother had reported the issue to chief and police.

16. Whereas in SOA case NO. 22 of 2019 she testified:

Accused saw me and told me to go and sweep his house for him. I went to his house. I started sweeping inside the house. It is a 2 roomed house.

He sleeps in the inner room. The other room is the sitting room. I was sweeping the sitting room when he approached me and asked me to touch his body, he had removed his shirt so I touched his chest and he suddenly grabbed me and carried me to his bed in the bedroom.

He laid me on the bed and removed my biker and pant. He also removed his trouser and inner wear and laid on top of me and inserted his penis inside my vagina and had sex with me. He did not use a condom. He finished doing it and asked me to dress up. He then told me to go home.

I went home. After that day, he used to call me on different days to have sex with me whenever he saw me. We could have sex twice every week until 6/9/2019 when my mother realized I was pregnant.

17. Whereas it is possible for the two incidents to be almost similar, the coincidence required some logical explanation. In this case, it was not explained how she knew that the appellant's daughter had gone to pick something from her grandmother's house which was nearby. There was no explanation as to how long she took in her grandmother's house for the defilement to take place. This to me, was unconvincing and sounds like fiction.



18. The prosecution conducted part of this case after the complainant's child was born. Unlike in S.O.A No. 22 of 2019 where the prosecution on 21st January 2020 applied for an adjournment to allow a DNA test to be conducted on the baby of the complainant who was born on 24th December 2019, there was no such attempt in this case. The prosecution thereafter went silent on the issue of DNA.
19. In view of the fact that there was an allegation of multiple partners, DNA test was very necessary and the report whether adverse to the prosecution case or not ought to have been tendered in evidence. The Court of Appeal in the case of *Bukenya vs. Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.
20. Since the prosecution did not explain to the court why the DNA report was not produced in court S.O.A No. 22 of 2019 and in this case, one can only infer that this evidence would have been adverse to the prosecution case. Given the circumstances of this case, this would have been very material evidence for it could have either implicated the appellant or exonerated him.
21. I therefore find that the prosecution did not prove that the penetration of the complainant's genitalia was by the appellant.
22. The prosecution did not prove its case against the appellant to the required standards. I accordingly quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

