



**Odhiambo v Republic (Criminal Appeal E033 of 2022)  
[2023] KEHC 2403 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2403 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E033 OF 2022  
KW KIARIE, J  
MARCH 28, 2023**

**BETWEEN**

**CALVIN OUMA ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case NO.36 of 2020 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)*

**JUDGMENT**

1. Calvin Ouma Odhiambo, 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 on diverse dates between 28<sup>th</sup> June, 2020 and 19<sup>th</sup> July 2020 in Rachuonyo South sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of SAA, a child aged fourteen (14) years.
3. The appellant was sentenced to twenty (20) years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant was in person. He raised grounds of appeal as follows:
  - a. That the sentence of 20 years imprisonment imposed by the trial magistrate is harsh and excessive as it violated the right to benefit from the least severe punishment under article 50(2) (p) of the *constitution*.
  - b. That the trial magistrate erred in law and facts by relying on medical evidence that was not sufficient enough to prove penetration as one of the ingredients of defilement.



- c. That the trial magistrate erred in law and facts by relying on prosecution's evidence that was marred with contradictions and inconsistencies.
  - d. That the trial magistrate erred in law and facts by not considering that the age of the complainant was not proved beyond reasonable doubt to be below 18 years.
  - e. That the trial magistrate erred in law and facts by not considering the period spent in remand custody while passing the sentence of 20 years.
  - f. That the trial magistrate erred in law and facts by not finding out that the complainant was forced and coerced to give incriminating evidence against the appellant by the police officers.
5. The appeal was opposed by the state but no grounds of opposition or submissions were filed.
  6. 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.
  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 age of the victim must be below eighteen years.

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

8. At the time of the offence SAA (PW1) testified that she was 14 years old and at the time of hearing she said she was 17 years old. According to the charge sheet, the offence was committed on diverse dates between 28th June, 2020 and 19th July 2020. She testified on 11th May 2022. This discrepancy on the age of the complainant was resolved by the copy of her Certificate of Birth which indicated that she was born on 6th July 2006. Her age was established to be 14 years at the time of the offence.
9. This case revolved around the testimony of the complainant and some circumstantial evidence. 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.

I will therefore endeavour to establish if the learned trial magistrate arrived at the right conclusion in believing the minor.

10. The complainant's evidence was that the two were staying together as husband and wife and that they severally engaged in sexual liaison during the period complained of. The evidence on record indicate that the complainant was a willing participant. She however did not have the capacity to consent to such sexual liaison. In the case of *Mohamed & 3 Others vs. Republic* [2005] 1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence



of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

11. The evidence of PC Masii Kithuku (PW7) was that when he went to where the chief of Kachien South was, he found the appellant and the complainant under arrest. Together with other police officers they went to the house of the appellant where the complainant identified her personal belongings.
12. Although Calvince Oluoch (PW5) did not identify the complainant in court, his evidence was when he was sent to call the appellant by the area chief, he found him with a female minor and that both were smearing a house with mud.
13. The evidence of Florence Akinyi Ochieng (PW6) is that the appellant was arrested together with the female minor and she escorted both to the police.
14. The evidence of the minor was therefore corroborated by these witnesses that she was cohabiting with the appellant.
15. Onyango Wycliffe Ochieng (PW1) testified and produced the P3 form on behalf of his colleague Kibet Serem, a clinical officer. The medical examination established the following:
  - a. Presence of epithelial cells an indication of vaginal candidiasis;
  - b. Pus cells in urine; and
  - c. She was pregnant.The conclusion was that she had been defiled.
16. I therefore find that the evidence on record proved beyond any reasonable doubt that the complainant was defiled by the appellant.
17. Section 8(3) of the *Sexual offences Act* provides:
  - (3) 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.
18. The sentence meted on the appellant cannot be described as harsh and excessive. This was a legal sentence as prescribed in the *Sexual offences Act*. There is a need however for parliament and all stakeholders to relook the Act so as to address some cases where some victims are willing participants especially those approaching the age of majority, in order for justice to prevail.
19. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit and the same is dismissed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28<sup>TH</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

