



REPUBLIC OF KENYA



KENYA LAW
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**Ooko v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 2405 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E025 OF 2022**

KW KIARIE, J

MARCH 28, 2023

BETWEEN

CHARLES OMONDI OOKO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case No.15 of 2018 of the Principal Magistrate's Court at Ndhiwa by Hon. E.M. Onzere –Principal Magistrate)

JUDGMENT

1. Charles Omondi Ooko, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (2) [sic] of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence were that on the October 3, 2018 at South Kanyamwa location in Ndhiwa sub county of Homa Bay county intentionally and unlawfully caused his penis to penetrate the vagina of MAO, a child aged 8 years.
3. The appellant was sentenced to serve life imprisonment. He has appealed against both conviction and sentence.
4. The appellant, at the time of filing the appeal, was represented by the firm of Aluoch Odera & Advocates. He raised grounds of appeal as follows:
 - a. That the honourable trial magistrate misdirected herself on several matters of law and evidence.
 - b. That the honourable trial magistrate erred in law and fact by relying on evidence which otherwise needed corroboration.
 - c. That the honourable trial magistrate convicted the appellant under a wrong provision of the law.



- d. That the honourable trial meted out excessive sentence that failed to appreciate the prevailing legal authorities and/or the circumstances of the case.
5. The appeal was opposed by the state, through Ochengo Justus who submitted that all the ingredients of the offence were proved and that the sentence was proper.
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 v Republic* [1972] EA 32.
7. Section 8 (1) (2) of the *Sexual Offences Act* does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* ...

8. Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the *Criminal Procedure Code*.
9. 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 age of the complainant was below eighteen years.

These ingredients were restated in *Fappyton Mutuku Ngui v Republic* [2012] eKLR as follows:

Going by this definition of defilement, I agree with Mr Mwenda on the issues which 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.

10. At the trial the appellant pleaded an *alibi*. He contended that he was away in Mfangano where he went on September 30, 2018 and returned home on October 8, 2018. He was arrested upon his return. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR the Court of Appeal rendered itself thus:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of *alibi* lies on the prosecution; see *Karanja v R*, [1983] KLR 501 ... this court held that in a proper case, a trial court may, in testing a defence of *alibi* and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of *alibi* at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

While analyzing the evidence herein, I will have in mind that he had no burden to prove his *alibi*.



11. MAO (PW1) testified that the appellant who was riding a motor cycle behind her stopped. She was at the time going home for lunch. The appellant gave her a sweet and then pulled her to a thicket. He ordered her to kneel down and then knelt behind her. He proceeded to defile her. After he had left her, she walked home while bleeding.
12. The grandmother of the complainant is called RO (PW2). Her evidence was that when MAO returned home on October 3, 2018, she saw blood flowing down her legs. When she lifted her dress, she saw blood coming from her buttocks.
13. When the child was undergoing treatment, her father (PW3) testified that she said it was Omondi who had defiled her.
14. The complainant was examined by Dr Odingo and the P3 form was produced on his behalf by Benard Otieno (PW4) a clinical officer. His evidence was that when she was examined her head and neck was full of dust. She had bruises on the labia minora and majora, clear injuries on the vulva with obvious bleeding, she had a bloody vaginal discharge. He concluded that she had been defiled.
15. When the same doctor examined the appellant, his penis had bruises and lacerations.
16. I find that it was proved to the required standards that the MAO was defiled.
17. 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.

The complainant's evidence was not only believable, but was corroborated by other evidence on record in material aspects. The appellant, according to the evidence on record is a cousin of the complainant. The appellant was therefore identified as the culprit. His *alibi* defence was displaced by the prosecution evidence.

18. When the complainant was taken for age assessment, her age was assessed at 8 years and 3 months. The issue of age was therefore proved.
19. 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.
20. The sentence meted out was not only lawful but was the only prescribed one.
21. The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merit and I accordingly dismiss it in its entirety.

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

KIARIE WAWERU KIARIE

JUDGE

