



REPUBLIC OF KENYA



**Marwa v Republic (Criminal Appeal E028 of 2021)  
[2023] KEHC 2330 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2330 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E028 OF 2021**

**KW KIARIE, J**

**MARCH 27, 2023**

**BETWEEN**

**CHACHA MWITA MARWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case No. 32  
of 2019 of the Principal Magistrate's Court at Oyugis (Kendu  
Bay Mobile Court) by Hon. C.A. Okore–Principal Magistrate)*

**JUDGMENT**

1. Chacha Mwita Marwa, 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 are that on December 29, 2019 at Rachuonyo North sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of MNA, a child aged 5 years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant was in person. He raised eight grounds of appeal as follows:
  - a. That the sentence of life imprisonment imposed by the trial magistrate is harsh excessive as it violated the right to benefit from the less 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 by not considering defence evidence of grudge.
  - d. That the trial magistrate erred in law and facts by relying on prosecution's evidence that was marred with contradictions and inconsistencies.
  - e. That the trial magistrate erred in law and facts by failing to consider that crucial witnesses and evidence were not adduced in court.
5. The appeal was opposed by the state through Mr. Samuel Mwangi Thuo, learned counsel on grounds that:
- a. This was a case of recognition.
  - b. There was sufficient evidence to prove the offence.
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 decision in the celebrated case of *Okeno v 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 Ngui v Republic* [2012] eKLR.
8. According to the complainant at the time of she gave evidence on January 28, 2020 she was 5 years old. Her mother PW3 testified that she was born on December 5, 2014 and supported her evidence with a copy of Certificate of Birth. The age of the complainant was therefore established.
9. The complainant was examined by Diero Harun (PW5), a clinical officer. His findings were as follows:
- a. Hymen was broken;
  - b. Semen-like discharge; and
  - c. Vaginal entry was bruised.
- He was of the opinion that the child had been defiled.
10. Both the complainant and her sister (PW2) aged 10 years identified the appellant as the defiler. They testified that the appellant was known to them. On the material day in the evening, he was with them as they cooked. He went away but later returned and knocked at the door and called PW2 by name. She went to open for him.
11. Before she opened the door, she put on the lights. Since they used to interact, she allowed him inside the house. He told her that he wanted to sleep with the complainant and gave Kshs. 50/= to each of them. He went and slept with the complainant where he defiled her. This is what the complainant testified to.



12. The evidence against the appellant was by the two minors. 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.

13. The mother (PW3) of these two minors testified that she had attended a funeral and had left the two minors at home. This is what the two minors had testified to. She further corroborated their evidence that the appellant was well known to the two. I therefore find that the trial magistrate was justified from the evidence to believe the two minors as to who was the culprit. The evidence on record proved beyond any reasonable doubts that the appellant defiled the complainant.

14. Section 8(2) of the *Sexual Offences Act* provides:

- (2) 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.

When the accused contends that the sentence of life imprisonment imposed by the trial magistrate was harsh and excessive, is not true. This is the only available sentence for the offence he was convicted of.

15. I therefore find that the appeal lacks merit and the same is dismissed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 27<sup>TH</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

