



REPUBLIC OF KENYA



KENYA LAW
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**Dume v Republic (Criminal Appeal E019 of 2022)
[2023] KEHC 24343 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E019 OF 2022
KW KIARIE, J
OCTOBER 24, 2023**

BETWEEN

ALI ATHMAN DUME APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.E005 of 2021 of the Senior Principal Magistrate's Court at Kaloleni by Hon. L.N. Wasige (Mrs) – Principal Magistrate)

JUDGMENT

1. Ali Athman Dume, 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 22nd January 2021 in Rabai Sub County within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of MM, a child aged 9 years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant raised grounds of appeal as follows:
 - a. That the learned magistrate erred in law and in fact in by convicting the appellant on charges that were not proved beyond reasonable doubt.
 - b. That learned magistrate erred in law and in facts by disregarding the defence of the appellant and testimonies of the defence witnesses.
 - c. The learned magistrate erred in law and in fact by relying on contradictory evidence of the prosecution witnesses.



- d. The learned magistrate erred in law and in fact by relying on uncorroborated evidence of the complainant.
- e. The learned magistrate erred in law and in fact by relying on questionable medical evidence.
5. The appeal was opposed by the state through M/S Alice Ochola, learned counsel. She contended that the prosecution proved their case to the required standards.
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. 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 vs. 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.

8. Section 2 of the *Sexual Offences Act* defines Penetration as follows:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
9. The evidence of the complainant was that the appellant inserted his fingers into her genitalia. This is what she testified:

I was coming from school. Ali came. I know him. He is a shamba boy at home. I was on the road heading home. It was in the afternoon. Ali came and grabbed me. He closed my mouth. He dragged me to a bush. He removed my panty. He then inserted his fingers into my vagina. I use my vagina to (susu) urinate. No one came to help me. I however freed myself and ran home. I did not tell anyone.
10. From the narration of the complainant there was no penetration. The charge that the prosecution ought to have charged the appellant with is that of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. They indeed charged him with the offence as an alternative charge. The particulars thereof however were at variance with the complainant's evidence. The particular thereof alleged that the appellant touched the genitalia of the complainant with his penis.



11. When the particulars of the offence are at variance with the evidence, the accused is entitled to an acquittal. This was held in the case of John Brown Shilenje vs. R. High Court (NBI) Criminal Appeal No 181 of 1981 (unreported). The rationale is very simple. The draftsman in respect of the charge is ordinarily informed by the evidence on record. In the instant case, it would mean that the contents of the charge must have emanated from the complainant or his witnesses. This was a material contradiction in the prosecution case that raised doubts of credibility.
12. The Court of Appeal in the case of Ndungu Kimanyi vs. Republic [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
13. I therefore find that the conviction of the appellant was unsafe. I accordingly quash the conviction and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF OCTOBER 2023

KIARIE WAWERU KIARIE

JUDGE

