



REPUBLIC OF KENYA



KENYA LAW
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**Okeyo v Republic (Criminal Appeal E028 of 2023)
[2023] KEHC 26639 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E028 OF 2023
KW KIARIE, J
DECEMBER 20, 2023**

BETWEEN

GORDON OTIENO OKEYO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO. E035 of 2021 of the Principal Magistrate's Court at Mbita by Hon. N.N Moseti–Principal Magistrate)

JUDGMENT

1. Gordon Otieno Okeyo, 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 the 9th day of November 2021 in Mbita sub-county within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of VAO, a child aged seventeen (17) years.
3. The appellant was sentenced to fifteen (15) 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 learned trial magistrate erred in law and facts by failing to observe that the prosecution evidence was not credible and watertight to link the appellant to the alleged offence.
 - b. That the learned trial magistrate erred in law and facts by failing to consider that the prosecution failed to call a crucial witness who allegedly claimed to have taken the complainant to the appellant.



- c. That the learned trial magistrate erred in law and facts by failing to consider the appellant's sworn defence which was not shaken by the prosecution.
 - d. That the learned trial magistrate erred in law and facts by failing to observe that the mandatory minimum sentence of 15 years in prison is harsh and against the principles of Article 28 of the *Constitution*.
 - e. That the learned trial magistrate erred in law and facts by failing to observe the provisions of section 333(2) of *CPC* for the appellant's period in remand.
5. The appeal was opposed by the state through Mr. David Ndege, prosecution counsel who contended that the case was proved to the required standards 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 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. 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 Nguv v Republic* [2012] eKLR.
 8. The prosecution produced a copy of the Certificate of Birth (exhibit 3) in respect of the complainant. The certificate was issued on the 8th day of April 2015. It indicates that the complainant was born on the 23rd day of July 2004. This supported the complainant's evidence of her age. This means that at the time of the complained offence, the complainant was 17 years and 4 months old. Her age was established to the required standards.
 9. On the issue of penetration, the complainant testified that the appellant had sexual intercourse with her. This was after a disagreement arose between him and his wife and the latter left the house. Her evidence was that the appellant seduced her and claimed that he was sex-starved for two years.
 10. The medical evidence was adduced by Herbert Ochieng Ouma (PW4). His evidence was that the fourchette was bruised and had lacerations. The labia minora was bruised and the hymen was also missing. These injuries were consistent with defilement.
 11. The prosecution therefore proved penetration to the required standards.
 12. According to the complainant, the person who defiled her was the appellant.
 13. Peter Otieno (PW1) testified that he was at Arili Beach on the 10th day of November 2021. He saw the complainant with a jumper that had inscriptions of a school. The girl told him that she came from [Particulars Withheld] but declined to give him her mother's contact. He, therefore, reported the matter to the area assistant chief.
 14. The evidence of Charles Gura Odongo (PW3) is that after he was informed on the phone that there was a person who was found with a child, He went to the Beach Management Office where he found the complainant herein and the appellant. He took the duo to the police.



15. In his defence the appellant contended that he was called from his house to go to the Beach Management Office. At the Beach Management office, the assistant chief ordered that he be taken to the police station. It was at the Police station that he saw the complainant for the first time.

16. The only direct evidence against the appellant is that of the complainant. 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.

17. The evidence that links the appellant to the offence is circumstantial. In the case of *Mohamed & 3 others v 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.

18. Had the prosecution called Mr. Ochieng who purportedly took the complainant to the appellant, the chain of events would have gone unbroken. The Court of Appeal for Eastern Africa in the case of *Bukenya v 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.

There was no explanation why this witness referred to as Mr. Ochieng was not called. Given the defence the appellant tendered, the omission of this witness whom the complainant said took her to the appellant and was also present at the Beach Management Office was fatal to the prosecution case.

19. Where an accused person tenders a defence, like in this case, the onus of proving that the defence is not true is on the prosecution.

20. The medical evidence indicated that when the complainant was examined on the 11th day of November 2021, the injuries were not fresh. This raises doubts about the credibility of the complainant. In her evidence, she was taken to hospital the following day after the alleged defilement. How then was it possible that the injuries were not fresh?

21. The Court of Appeal in the case of *Ndungu Kimanyi v 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.



22. I find that without any other evidence to corroborate that of the complainant, it was unsafe to rely on the complainant's evidence.
23. The upshot of the foregoing analysis of the evidence on record is that the appellant's conviction was unsafe. It is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2023.

KIARIE WAWERU KIARIE

JUDGE

