



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**CRIMINAL APPEAL NO. E029 OF 2021**  
**ERICK OMONDI OYOO.....APPELLANT**  
**VERSUS**  
**REPUBLIC..... RESPONDENT**

(From the original conviction and sentence in S.O.A case No.E006 of 2021 of the Principal Magistrate's Court at Mbita by Hon. Japheth C. Bii--Senior Resident Magistrate)

**JUDGMENT**

1. Erick Omondi Oyoo, the appellant herein, was convicted for 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 were that on 14<sup>th</sup> day of October, 2020 in Mbita Sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of MAO, a child aged 9 years.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence. He raised ten grounds of appeal which I have summarised as follows:
  - a. That the trial magistrate erred in law and in fact by failing to consider that the case was brought due to a grudge with PW2 & PW3.
  - b. That the trial magistrate erred in law and in fact by failing to appreciate that this case was instigated due to tribal considerations.
  - c. That the trial magistrate erred in law and in fact by failing to appreciate that the age of the complainant was not proved.
  - d. That the trial magistrate erred in law and in fact by relying on evidence that did not prove the case.
  - e. That the trial magistrate erred in law and in fact by not considering the defence tendered.
  - f. That the trial magistrate erred in law and in fact by meting out a sentence that was excessive and unconstitutional.
4. The appeal was opposed by the state through Mr. Ochengo, learned counsel.
5. 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**.
6. When Elisha Odiwuor Orwa (PW2) and Fredrick Juma Wanyende (PW3) testified, the appellant cross examined them but did not raise the allegation of grudge with them. The learned trial magistrate had no evidence of grudge before him to consider. This issue has been brought for the first time on appeal. This is clearly an afterthought.
7. I have perused the record and the tribal issue raised as a ground for appeal did not feature anywhere and the learned magistrate had no such evidence before him for consideration.
8. 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 victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

**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.**

9. The complainant was examined by Herbert Ochieng Ouma (PW4) a clinical officer. He estimated her age to be 9 years. In the trial court this evidence on her age was not disputed. This is a trained officer and who routinely deals with patients some of whom he has to estimate their age. Though no documented evidence on the minor's age was produced, I find that her age was proved.

10. The appellant denied defiling the complainant. In her evidence, MAO (PW1) testified that at the time of the alleged defilement, the appellant was with his wife, Akoth. She testified that Akoth held her leg and told her to persevere as the appellant defiled her. 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 learned trial magistrate was convinced that the complainant was truthful. In her evidence she said that Akoth attempted to commit suicide. This was testified to by Elisha Odiwuor Orwa (PW2). The evidence of Fredrick Juma Wanyende (PW3) was that when they went to arrest the appellant, they found him in the house with the child.

11. When Herbert Ochieng Ouma (PW4) examined the complainant on the same day, he observed freshly bleeding labia minora which was bruised and a freshly torn hymen.

12. I am therefore satisfied that the child was defiled as complained and her defiler was identified as the appellant herein.

13. The appellant contended that the sentence meted was excessive and unconstitutional. This argument in my view is based on incorrect interpretation of the law. Section 8 (2) of the Sexual Offences Act provides:

**A person who commits an offence of defilement with a child aged eleven or less shall upon conviction be sentenced to imprisonment for life.**

The learned trial magistrate therefore meted out the only legal sentence available. There was nothing unconstitutional about it.

14. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit and I accordingly dismiss it.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30<sup>TH</sup> DAY OF MARCH, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**