



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. E006 OF 2021**

**TYSON MARTIN ANURO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case NO.5 of 2016 of the*

*Principal Magistrate's Court at Mbita by Hon. Nicodemus N. Moseti*

*—Senior Resident Magistrate)*

**JUDGMENT**

1. Tyson Martin Anuro, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on 2<sup>nd</sup> day of February, 2016 at Kigoto village, Gwasssi East Location in Suba Sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the anus of E.B.O, a child aged 13 years.
3. The appellant was sentenced to fifteen years 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 meting out a sentence that was based on a defective charge.
  - b) That the trial magistrate erred in law and in fact by failing to appreciate that the trial took unduly long time to be concluded.
  - c) That the trial magistrate erred in law and in fact by failing to consider that the case was brought due to a grudge between him and the complainant's family.
  - d) That the trial magistrate erred in law and in fact by relying on contradictory evidence.
  - e) That the trial magistrate erred in law and in fact by relying on insufficient evidence.
  - f) That the trial magistrate erred in law and in fact by not considering the defence tendered.
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. My perusal of the charge does not disclose any defect as alleged by the appellant. This ground is therefore baseless.
7. The appellant was charged in court on 4<sup>th</sup> February, 2016 and the case was concluded on 16th February, 2021 when he was sentenced. This was a period of five years. Though the appellant raised the delay to conclude the case, I find that both the prosecution and the defence

contributed to the delay complained of. At one point the appellant disappeared after the prosecution had closed their case on 24<sup>th</sup> January, 2017. When he resurfaced, he said he was remanded in a Migori case. After this instance, he again disappeared though the record does not indicate where to. The prosecution subsequently applied to reopen the case and the same was allowed for there was no objection. The appellant absconded again when he was placed on his defence. The delay cannot be blamed on the prosecution alone.

8. Unless courts are conscious, some sexual offences cases have been brought up to settle some existing scores. The alleged victims' genitalia are manipulated in such cases. However a majority of cases are genuine complaints. In this case the appellant contended in his defence that his grandmother warned him of consequences he would regret when she found him ploughing some land. In the course of the proceedings he accused Seline Awino Osodhi (PW1), his grandmother, of framing him up over a land issue. This was denied. There was therefore no sufficient evidence on which the trial court could have made a finding on this issue. I therefore dismiss it as baseless.

9. Section 8(1) of the Sexual Offences defines defilement as follows:

**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.

This was confirmed in the case of Fappyton **Mutuku Ngui vs. Republic [2012] eKLR** where 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.**

In the instant case, I will therefore endeavour to establish if these ingredients were satisfied.

10. E.B.O (PW3) the complainant, testified that the appellant defiled him per anus. He felt pain and cried aloud. James and his mother went to rescue him.

11. The evidence of Seline Awino Osodhi (PW1), the mother of the complainant was present when the complainant and James left the kitchen in company of other children to go and sleep. The appellant who had visited left with them. When she was going to sleep in the main house, James called and informed her that the appellant was defiling the complainant. He went and found the appellant in the act in a thicket. The appellant apologised to her and said he was possessed of Satan.

12. James Otieno was called as PW3 in the previous proceedings. Unfortunately he was not recalled when the case started afresh. His evidence was that the appellant followed them to the house they were going to sleep with the complainant. The appellant took the complainant out. After a while he followed them out. He found the appellant lying on the complainant from behind. He called his grandmother. (PW1). When she arrived at the scene, the appellant asked for forgiveness and blamed the devil.

13. A copy of birth certificate of the complainant was produced and it indicates that he was born on 3<sup>rd</sup> December, 2002. At the time of the offence he was 13 years old. His age was therefore established.

14. Richard Ojuok (PW2) a clinical officer, testified on behalf of May Olela his colleague who had examined complainant. In the previous proceedings May Olela was PW4. The findings were that the complainant had a swelling on the anal surface with a mild profuse and with a mild stain of semen. His clothes were smeared with a fluid which had the characteristic smell of semen.

15. Though the appellant denied defiling the complainant and alleged false implication, I find that the evidence on record confirmed that the complainant was defiled and he was the perpetrator.

16. Section 8 (3) of the Sexual Offences Act provides:

**A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

The learned trial magistrate therefore meted out a sentence that was illegal. Since I was not asked to interfere with the same, I will leave it as it is.

17. 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 29<sup>th</sup> Day of March, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**