



**Olela v Republic (Criminal Appeal E004 of 2020)  
[2022] KEHC 10437 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10437 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E004 OF 2020**

**KW KIARIE, J  
JUNE 28, 2022**

**BETWEEN**

**TIGEN OLELA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case NO. 21 of 2019 of the Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Senior Resident Magistrate)*

**JUDGMENT**

1. Tigen Olela, 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 28<sup>th</sup> April, 2019 at Kamuma Sub location, Rachuonyo South sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of P.A., a child aged 11 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. The trial magistrate misdirected herself in law when she found and held that the appellant had not tabled medical evidence to challenge those produced by the complainant.
  - b. The trial magistrate erred in law and fact when in the face of clear evidence that the complainant was defiled by six people at different places, she failed to analyse the entire evidence in this context and thus arrived at a wrong conclusion.



- c. The trial magistrate was casual and contemporaneous in her analysis of evidence and failed to consider glaring gaps and loop holes in the prosecution case.
  - d. The conviction went against the weight of evidence.
  - e. The conviction was based on insufficient and inconclusive evidence.
  - f. The trial magistrate exhibited bias against the appellant when she disregarded his defence without a basis in law.
  - g. The sentence was severe and harsh in all the circumstances of this case and of the accused.
5. The appeal was opposed by the state through Mr. Justus Ochengo who contended that the prosecution proved its 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.

This was emphasised in *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR when 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.

These are the ingredients that the prosecution must prove against an accused person.

8. The complainant's mother testified that she went missing from on 25<sup>th</sup> April, 2019. She was taken to the police station on 1<sup>st</sup> May, 2019 at about 7p.m. by the appellant. Earlier on 27<sup>th</sup> April, 2019 a neighbor had informed her that the complainant had been seen at Makmud's house.
9. On her part, the complainant testified that on 28<sup>th</sup> April 2019 the appellant in company of Ian picked her from Makmud's house. She did not explain what she was doing in Makmud's house since 25<sup>th</sup> April, 2019. Neither did she tell court where the appellant purported to take her. This is when the appellant went and defiled her.
10. The complainant was not candid in all aspects. She was very cagey in her evidence and did not account for the days she was away from home and apparently with her friend Makmud. She probably did not



want to appear to have had an affair with other men. However, since she was a minor this cannot be taken against her.

11. The appellant contended that his role was to ferry the complainant on his motor bike. However, during mitigation, he conceded that he slept with the complainant for he loved her. The medical report revealed that the complainant was defiled. His appeal therefore lacks merit. I accordingly dismiss it.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28<sup>TH</sup> DAY OF JUNE, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

