



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ogayo v Republic (Criminal Appeal E013 of 2020)
[2022] KEHC 10502 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E013 OF 2020**

**KW KIARIE, J
JUNE 21, 2022**

BETWEEN

KEVIN ODHIAMBO OGAYO APPELLANT

AND

REPUBLIC RESPONDENT

*((From the original conviction and sentence in Criminal case No.34 of 2020 of the
Principal Magistrate's Court at Ndhiwa by Hon. V. Kiplagat –Resident Magistrate))*

JUDGMENT

1. Kevin Odhiambo Ogayo the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (2) [sic] of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of the offence were that on the 8th day of June, 2020 at South Kabuoch location in Ndhiwa Sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of WOA., a child aged 8 years.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised grounds of appeal as follows:
 - a) That the sentence of life imprisonment imposed by the trial magistrate is harsh and excessive as it violated the right to benefit from the least severe punishment under article 50 (2) (p) of [the constitution](#).
 - b) That the trial magistrate erred in law and facts by not according him a fair trial as envisaged under article 50 (2) of [the constitution](#) as he was denied the opportunity to avail defence witnesses despite the fact that he had asked for the same.



- c) That the trial magistrate erred in law and facts by not considering that there existed a grudge between him and the parents of PW1 as he had disclosed their bad habits in the society.
 - d) That the present case was instigated against him as a cover up of the grievous harm they had done to me for the fear that he would lodge a criminal case against them.
 - e) That the trial magistrate erred in law and facts by not considering that there was no investigation carried out at all to establish the truth as the alleged scene of crime was not visited but instead the investigating officer relied on the coached evidence of prosecution witnesses.
 - f) That the trial magistrate erred in law and facts by not considering that the age of the complainant was not proved beyond reasonable doubts to be below 11 years.
 - g) That the trial magistrate erred in law and facts by relying on medical evidence that was not sufficient enough to prove penetration as one of the ingredients of defilement.
 - h) That the trial magistrate erred in law and facts by relying on prosecution's evidence that was marred with contradictions and inconsistencies.
 - i) That the trial magistrate erred in law and facts by not considering defence evidence
5. The appeal was opposed by the state, through Ochengo Justus who submitted that all the ingredients of the offence were proved.
 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 v Republic* [1972] EA 32.
 7. Section 8 (1) (2) of the [Sexual Offences Act](#) does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) ...

8. Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the [Criminal Procedure Code](#).
9. 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 Nguji 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.

10. The appellant was arrested on June 8, 2020 and was taken to court on June 16, 2020 for plea. His argument is that this was a breach of his fundamental rights. He contended that the prosecution did not explain the delay. He therefore claimed that he was entitled to an acquittal. He cited the decision *Albanus Mwasia Mutua vs. Republic* [2006] eKLR where the Court of appeal delivered itself as follows:

The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of *the Constitution* also amounted to a violation of his rights under section 77(1) of *the Constitution* which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone.

This position is no longer good law. The Court of Appeal in *Julius Kamau Mbugua vs. Republic* [2010] eKLR reversed this decision and stated:

Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under Section 84 (1) would be an order for compensation for such breach.

Although the decision was based on the previous Constitution, the same position obtains today. If the appellant contends that his rights were violated, then his redress is to seek for compensation for such breach. This appeal cannot turn on this ground.

11. Though the appellant contended that he was framed up due to an existing grudge no witness was asked about the alleged grudge. The trial court had no issue of a grudge to decide on.
A copy of Certificate of Birth of the Complainant was produced. It indicated that she was born on November 16, 2012. At the time of the alleged offence she was 7 years and 7 months. Her age was therefore proved.
12. WAO (PW1), the complainant testified that the appellant asked her for some water. He then sent away the other children who were with her to buy biscuits. When they went away, he defiled her. He was found in the act by mama Steph. This is what Vollen Lydia Otieno (PW2) testified to. Her evidence was that he ran into some sugarcane plantation. This is where members of public arrested him.
13. The complainant was examined by Kerario Stephen (PW6), a clinical officer. The vagina was lacerated and had scratches and the hymen was ruptured. He therefore formed an opinion that she had been defiled.
14. I therefore find that the offence of defilement was proved against the appellant to the required standards.



15. Section 8 (2) of the *Sexual Offences Act* provides:

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

The appellant was sentenced to serve the prescribed sentence. This cannot be termed as harsh.

16. The upshot of the foregoing analysis of the evidence on record, the appeal lacks merit and is accordingly dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

