



**Odoyo v Republic (Criminal Appeal E012 of 2022)
[2022] KEHC 14328 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E012 OF 2022
KW KIARIE, J
OCTOBER 27, 2022**

BETWEEN

EVANCE OMONDI ODOYO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case NO. 22 of 2020 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore-Principal Magistrate)

JUDGMENT

1. Evance Omondi Odoyo, the appellant herein, was convicted of 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 are that on 16th June, 2020 at Ramba location, Rachuonyo East sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of SAO, a child aged 13 years.
3. The appellant was sentenced to 20 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 trial magistrate erred in law and facts by failing to observe that the medical report could not ascertain if truly the alleged penetration did occur as the evidence was conflicting.
 - b. That the trial magistrate erred in law by failing to consider the inconsistency of the complainant's evidence.
 - c. That the trial magistrate erred in law and facts by imposing a harsh and excessive sentence without considering the appellant's mitigation



- d. That the trial magistrate erred in law and facts by failing to consider the appellant's defence which was consistent and corroborated.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel on grounds that:
 - a. All ingredients of the offence were proved.
 - b. The prosecution adduced sufficient evidence.
 - c. The sentence was the minimum provided for.
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. 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 Ngui v Republic* [2012] eKLR.

8. SAO (PW2) testified that when he was fetching firewood with other children, the appellant enquired where the other children in her company were. After telling him they were on the other side of the fence, he covered her mouth with his hands and carried her. He took her to some maize plantation and defiled her. The appellant left her when her friend BA (PW3) shouted her name. The appellant dressed up and ran away. Her skirt was muddy at the back.
9. The evidence of BA (PW3) is that when they wanted to go home, they called the complainant out but she did not respond. She emerged from some maize plantation and the appellant also emerged from the same in a hurry. The complainant was crying and told them that the appellant had defiled her. The skirt of the complainant was dirty and muddy.
10. The appellant pleaded an alibi and called some two witnesses who testified to the same effect.
11. Nancy Kerubo Orina (PW1) examined the complainant on June 17, 2020. She saw lacerations at the entry of the complainant's vagina. The hymen was recently broken for part of the membrane could still be seen.
12. From the evidence by the prosecution witnesses, the alibi defence was displaced. It was established that the complainant had been defiled and the appellant was identified as the perpetrator.
13. The certificate of birth of SAO, the complainant herein, indicated that she was born on December 5, 2006. At the time of the offence she was 13 years and 6 months. The age of the complainant was therefore was proved beyond any reasonable doubts.
14. Section 8(3) of the *Sexual offences Act* provides:
 - (3) 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.Though the appellant contended that the sentence was harsh, I find that the sentence meted out is was lawful.



15. I therefore find that the appeal lacks merit and I accordingly dismiss it in its entirety.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF OCTOBER, 2022

KIARIE WAWERU KIARIE

JUDGE

