



**Oima v Republic (Criminal Appeal E034 of 2021)
[2022] KEHC 14415 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E034 OF 2021
KW KIARIE, J
OCTOBER 27, 2022**

BETWEEN

KENNETH OOKO OIMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No.E001 of 2020 of the Senior Principal Magistrate's Court at Oyugis by Hon.C.A Okore–Principal Magistrate)

JUDGMENT

1. Kenneth Ooko Oima, 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 were that on 17th day of October 2020 at Kanyaluo location, Rachuonyo North Sub-County within Homa Bay County being a male person caused his penis to penetrate the vagina of RA, a child aged 13 years.
3. The appellant was sentenced to serve 15 years imprisonment. The appellant was represented by the firm of Odondi Awino & Company Advocates. He has appealed against both conviction and sentence. He raised the following grounds of appeal:
 - a. That the trial magistrate erred in law and facts by failing to appreciate that medical evidence contained in the P3 found no spermatozoa and an old broken hymen, hence no corroboration.
 - b. That the trial magistrate erred by failing to appreciate that there was no evidence of penetration.
 - c. That the trial magistrate erred in law and facts by failing to conduct voir dire examination on a child of 13 years to establish whether the child was competent to give evidence.



4. The appeal was opposed by the state through Mr. Ochengo, learned counsel on grounds that:
 - a. The conviction was based on the evidence on record.
 - b. The sentence was proper.
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 v Republic* [1972] EA 32.
6. The complainant herein was a child of tender years. On 4th March, 2021 when she testified, the trial magistrate did not conduct a voir dire. This therefore amounted to a mistrial. I therefore quash the conviction and set aside the sentence.
7. The appellant to be produced at Oyugis SPM's court within 7 days of this judgment for retrial before any other magistrate of competent jurisdiction other than Hon CA Okore. Should the appellant be found guilty after the retrial, the served sentence shall be factored in the sentence.

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

KIARIE WAWERU KIARIE

JUDGE

