



**Abonyo v Republic (Criminal Appeal E008 of 2022)
[2022] KEHC 16670 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E008 OF 2022**

KW KIARIE, J

DECEMBER 20, 2022

BETWEEN

PHILIP OCHOLA ABONYO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No.137 of 2016 of the Principal Magistrate's Court at Ndhiwa by Hon. E.M. Onzere –Principal Magistrate)

JUDGMENT

1. Philip Ochola Abonyo, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (3) [sic] of the [Sexual Offences Act](#) no 3 of 2006.
2. The particulars of the offence were that on the May 2, 2016 at [Particulars withheld] market in [Particulars withheld] District of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of SHO, a child aged 15 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by the firm of Ongoso & Company Advocates. He raised grounds of appeal as follows:
 - a. The honourable learned principal resident magistrate erred in fact and law in misdirecting herself that as per the dictates of the law and pertaining to the evidence adduced and especially on the confession and rebutted by the complainant who categorically stated that she was not defiled by the accused and that the accused was actually wasting her time and brought him to court because he hates him and was wasting her time and the learned trial magistrate overlooked the motive of malice against he accused person and therefore went against the dictates that



pertains to the constitutional fundamentals of the said accused. In as far as the said charges were illegal.

- b. The learned principal magistrate erred in fact and in law when she totally overlooked the fact that the complainant and the accused age difference was only two years and as such meted a harsh sentence on the accused person despite the well-known dictates appertaining to sentencing of such persons. And she totally failed to evaluate and bring herself to the fact that the said charges were flawed in the circumstance against the accused.
 - c. The honourable learned principal magistrate erred in fact and in law when she totally failed to link the accused person herein based on any documentary proof/exhibit proof to tie up the accused person with the numerous offence.
 - d. The honourable learned principal magistrate erred in fact and in law when she failed to look at the time discrepancies and time span of the alleged offence to link the accused person with the said offence and even during her judgment herself she noted that upon medical examination of the complainant she had been take too late hence vaginal swabs could not be taken for examination and that the equally noted the complainant was a person who was sexually active and there was a very high likely hood of her not getting any bruises or injuries to the genitalia in the course of sexual intercourse and equally overlooked the fact that in her judgment that even though the complaint did not go to hospital immediately after the sexual intercourse (17 days later). She entered a harsh judgement without giving a benefit of doubt to the accused person and of which even as the after the doctors finding it was difficult to tell since a lot of time had passed and as such the trial magistrate never questioned herself in entering a very prejudicial sentence against the accused person.
 - e. The honourable learned principal magistrate erred in fact and in law by entering a judgment on sentencing on presumptions which are not found in law and especially never questioned herself that even though it was suggested that the complainant had sexually transmitted infections, the accused person herein no documentary evidence was adduces to show that he was having any sexual infections that he could have transmitted to the accused person of have gotten it from the accused person who it was being claimed that they were constantly having sex and as such her ruling that is unconstitutional and illegal in nature and the statutes which are against the natural course of justice.
 - f. That the ruling of the learned trial magistrate goes against the rules of natural justice consequently the said judgment and sentencing are nullity in law.
5. The appeal was opposed by the state, through Ochengo Justus who submitted that all the ingredients of the offence were proved and that the sentence was proper.
 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) (3) 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 (3) 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.

These ingredients were restated in *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR as follows:

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. According to the evidence of SHO (PW1), she had consensual sexual liaison with the appellant. Her evidence was from May 1, 2016 she slept in the appellant's house for two nights when the two had sexual congress. When Nelson Waka (PW3) examined her, he found evidence of defilement.

11. I therefore find that the learned trial magistrate cannot be faulted on this finding. It was supported by the evidence that was adduced.

12. Did the appellant defile the complainant? According to the complainant he did it and it was consensual. The appellant denied any involvement and said he did not know the complainant. However, after perusing the evidence of the complainant, I find her truthful. She owned up in court that the intercourse was mutual and her mother's evidence confirmed that she was a girlfriend of the appellant. I therefore have nothing on record to doubt her evidence as to the identity of her defiler.

13. SHO (PW1) testified that she was born on July 17, 2000. The complained of offence was committed on May 2, 2016. At the time she was aged 15 years.

14. 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.

For the purpose of this section therefore, her age was proved.

15. I have agonized on the issue of the sentence. At the time of the offence the appellant was 20 years old. Though the sentence meted was the prescribed one, I am persuaded to interfere with the same. These two were almost age mates save for the fact that the appellant crossed the age of majority Rubicon earlier. I therefore set aside the sentence meted by the trial magistrate and substitute with 3 years' probation. To that extent only does the appeal has succeeded.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022

KIARIE WAWERU KIARIE



JUDGE

