



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 23 OF 2018**

**VICTOR ONYANGO OYUGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.11 of 2017 of the Senior Principal Magistrate's Court at Mbita by Hon. Japheth Bii-Senior Resident Magistrate)*

**JUDGMENT**

1. Victor Onyango Oyugi, the appellant herein, was convicted for 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 the night of 9<sup>th</sup> day of August, 2017 at [particulars withheld] Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of VAN a child aged 13 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. His petition of appeal is missing from the record of appeal but from the response I have picked the following grounds:
  - a. That there was no evidence of penetration.
  - b. That the offence was not proved against him.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel.
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 victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** 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 I will endeavour to find if the prosecution proved against the appellant.

8. The complainant in her evidence testified that she was 13 years of age. A copy of her birth certificate indicated that she was born on 29<sup>th</sup> July, 2004. This therefore established her age as 13 years at the time she complained she was defiled.

9. VAN (PW1) testified that the appellant was known to her before. At about 9 a.m. as she was going to the shop, he called and pulled her to a bush. He ordered her to undress and hit her on the forehead with a machete. She complied. The appellant defiled her and then released her with a warning not to tell anybody. When she returned home she reported to her mother.

10. When MOO (PW2) received a report that his daughter had been defiled, he went to look for the culprit. He testified that he had not known the appellant but was pointed out by his daughter VAN. He traced him to a neighbour's home. He was armed with a machete and he started a fight. When he stood his ground, the appellant asked for forgiveness. In order to cool him, he lured him by asking to be paid Kshs.2000/=. This is when he managed to arrest and tied him.

11. Dr. Stephen Omondi (PW3) examined the complainant and confirmed that indeed there was defilement. He found laceration and blood on the wall of the vagina.

12. From the foregoing recapitulation of evidence, I am satisfied that the prosecution proved the element of penetration and the appellant was the culprit.

13. Section 8 (3) of the Sexual Offences Act states:

**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.**

The prosecution having proved all the ingredients of the offence, the learned trial magistrate meted out the prescribed sentence.

14. The appeal lacks merit and I accordingly dismiss it.

**DELIVERED and SIGNED at Homa Bay this 23<sup>rd</sup> Day of June, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**