



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. 34 OF 2018**

**VICTOR OCHIENG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case No. 24 of 2017 of the*

*Principal Magistrate's Court at Oyugis by Hon. J.S. Wesonga–Senior Resident Magistrate)*

**JUDGMENT**

1. Victor Ochieng, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that on 10<sup>th</sup> November, 2017 at Kowidi sub location, Rachuonyo East sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of DA, a child aged 17 years.
3. The appellant was sentenced to serve fifteen years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant raised six grounds of appeal which can be summarized as follows:
  - a) That the trial magistrate erred in convicting him without sufficient evidence.
  - b) That the learned trial magistrate erred in disregarding his alibi defence.
  - c) That the sentence meted out was very harsh.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel, on grounds that there was sufficient evidence and that the sentence was legal.
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. In order to sustain a conviction for defilement, the prosecution has to prove the following ingredients:
  - a) Whether there was penetration;
  - b) Evidence must show that the accused is 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 they were proved.

8. DA (PW1) testified that as she was going to seek refuge at her friend's home, she met with the appellant whom she knew by appearance. The appellant held her by the neck and pulled her into a maize plantation where he defiled her. After the defilement, the appellant called another person to give him a house. He ordered her to follow him and on the way they met with Bonny who rescued her. In the process of the defilement she said she bled and carried her panty in her hand.

9. The evidence of Bonface Owiti Awiro (PW3) was that the appellant who was his friend called him at about 11 p.m. and later he met him with the complainant. The complainant was carrying her panty in her hands and complained that the appellant had defiled her. She was limping. He took the complainant and gave her a place to sleep. The appellant followed him and complained that he wanted a place to sleep with the complainant.

10. When Jacqueline Anyango Abuto (PW5) saw the complainant on 11<sup>th</sup> November, 2017 she found her external genitalia with lacerations. Her panty was blood stained. She was bleeding from the cervix and high vaginal swab revealed presence of sperms.

11. The copy of the Certificate of Birth indicate that the complainant was born on 20<sup>th</sup> February, 2000. At the time of the alleged offence she was therefore 17 years of age.

12. In his defence the appellant contended that he was arrested because of a land dispute.

13. The learned trial magistrate was justified to dismiss the defence of the appellant for it was clearly an afterthought. The evidence adduced by the prosecution was overwhelmingly against him. The offence of defilement was proved against him to the required standards.

14. Section 8 (4) of the Sexual Offences Act provides:

**A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

The appellant was therefore sentenced to the minimum period provided by the law. He cannot be heard to say the sentence was harsh.

15. In a nutshell, the appeal is therefore dismissed for lack of merits.

**DELIVERED and SIGNED at HOMA BAY this 26<sup>th</sup> Day of July, 2021.**

**KIARIE WAWERU KIARIE**

**JUDGE**