



**Awoo v Republic (Criminal Appeal E050 of 2023)
[2024] KEHC 23 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 23 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E050 OF 2023
KW KIARIE, J
JANUARY 12, 2024**

BETWEEN

DAVID AWOO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO. E0118 of 2021 of the Chief Magistrate’s Court at Mombasa by Hon. M. Mutuku–Chief Magistrate)

JUDGMENT

1. David Awoo, the appellant herein, was convicted of 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 diverse dates between 1st April 2021 and 31st August 2021, in Jomvu sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of RN, a child aged 17 years.
3. The appellant was sentenced to fifteen years’ imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant without establishing the age of the complainant.
 - b. That the learned trial magistrate erred in law and fact by failing to see that the charge was defective.
 - c. That the learned trial magistrate erred in law and fact by failing to see that voir dire examination was not conducted.



- d. That the learned trial magistrate erred in law and fact by imposing a sentence that did not take into account my mitigation.
4. The appeal was opposed by the state through Mr. Ngiri Wangui learned counsel. He contended that the prosecution proved the offense's ingredients to the required standards.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my 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.
6. Though the appellant contended that the charge was defective, this assertion is not true.
7. The Court of Appeal explained the purpose of conducting a voir dire examination in the case of *Japheth Mwambire Mbitha vs. Republic* [2019] eKLR.

Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth.

8. The voir dire examination is meant to satisfy the *Oaths and Statutory Declarations Act* for children of tender age. The Court of Appeal in the case of *Kibageny Arap Kolil v R* (1959) EA 82 the Court of Appeal for Eastern Africa held that:

... for the purpose of section 19 of the *Oaths and Statutory Declarations Act*, the phrase "a child of tender years" means a child under the age of 14 years.

In the instant case, the complainant was 17 years old at the time of the offence. There was no legal requirement for the voir dire examination.

9. To sustain a conviction for the offense of 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 the case of *Fappyton Mutuku Ngugi 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 are proven.

10. RN, (PW1) testified that she became friends with the appellant from April 2021 until August 2021 when she returned home late and her mother confronted her to know where she was. When she disclosed the details, the matter was reported to the police, and the appellant was arrested. Her evidence was that they had had consensual sexual intercourse severally.
11. The complainant was examined by Said on 1st, September 2021, whose report was produced by Dr. Benjamin Kabara. It was observed that she had old scars of the hymen.
12. The appellant in his defence the appellant contended that the complainant's mother (PW2) implicated him falsely over a love affair gone sour between the two. He said she aborted his child. He equally



blamed PW3 for instigating this case due to their differences over some work he had done for her. This defence was an afterthought. He never confronted these two witnesses with these facts during cross-examination. The learned trial magistrate was therefore justified to dismiss it.

13. The proviso to section 124 of the *Evidence Act* provides:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

My perusal of the entire evidence on record did not elicit any reason for me to conclude that the complainant did not tell the truth.

14. A copy of the birth certificate of RN was produced as an exhibit. It indicates that she was born on the 7th day of October 2004. At the time of the offence, she was seventeen years old. 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 prosecution therefore proved the age of the complainant.

15. The sentence meted out was appropriate.

16. Section 333 (2) of the Criminal Procedure Code provides:

Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

The learned trial magistrate ought to have ordered the sentence to run on September 4th, 2021, when he was arrested, but did not. I make an order that the sentence meted out by the learned trial magistrate to run from September 4th, 2021.

17. Except when the sentence ought to run, the appeal is dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 12TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

