



**Juma v Republic (Criminal Appeal E049 of 2023)
[2024] KEHC 248 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E049 OF 2023
KW KIARIE, J
JANUARY 23, 2024**

BETWEEN

FREDRICK OKOTH JUMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case No.20 of 2018 of the Chief Magistrate's Court at Homa Bay by Hon. L. Simiyu–Principal Magistrate)

JUDGMENT

1. FOJ, the appellant herein, was convicted on two counts. In count one, he was convicted of the offence of incest contrary to section 20 (1) as read with section 20 (3) of the *Sexual Offences Act* No.3 of 2006, and the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*.
2. The particulars of the offence in count one was that on the 30th day of July 2018 at [particulars withheld] village, in Homa Bay District within Homa Bay County, wilfully and unlawfully caused his penis to penetrate the vagina of L.A.O a girl aged 14 years.
3. In count two, the particulars were that on the 30th day of July 2018 at [particulars withheld] village, in Homa Bay District within Homa Bay County, wilfully and unlawfully assaulted L.A.O using a stick, occasioning her actual bodily harm.
4. The appellant was sentenced to serve forty (40) years imprisonment in count one and two (2) years in count two. The sentences were ordered to run consecutively. He was aggrieved and filed this appeal against both conviction and sentence.
5. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and facts by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.



- b. That the learned trial magistrate erred in law and fact by not considering that his defence was cogent and believable.
 - c. That the age of the complainant was not proved beyond reasonable doubt.
 - d. That the identity of the culprit was not proved beyond reasonable doubt.
 - e. That penetration was not proved.
6. The state opposed the appeal for want of merits and prayed for its dismissal.
7. This is the first appellate court. As expected, I have analysed and evaluated all the evidence introduced before the lower court afresh. I have drawn my conclusions, considering 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.
8. Section 20 (1) of the *Sexual Offences Act* provides:
- Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest. She is liable to imprisonment for a term of not less than ten years:
9. Flowing from provisions of this section, the ingredients for incest are as follows:
- a. The accused must be a male;
 - b. The victim must be a female;
 - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
 - d. He must know the relationship; and
 - e. There must be penetration.
10. The evidence of L.A.O (PW1) was that the appellant is her stepfather. Her evidence was that her father assaulted her, and she went to her neighbour's home, where she spent the night. At the time, her mother was not at home. When she returned home, the appellant grabbed her hand and held her mouth. He pulled down his pair of trousers, had sex with her, and left for work. She went and reported to the neighbour, but he was not there. When she went to fetch some firewood, the appellant again grabbed her and assaulted her. An old man witnessed the incident. She identified him as Baba Agal. The matter was reported to the police, and the appellant was arrested. She further said that the appellant had defied her on another occasion when she was in class six. During cross-examination, she stated she did not complain of defilement after he had physically assaulted her.
11. Abong'o Onyango Godfrey (PW3) is the clinical officer who examined the complainant. His evidence was that when he examined her genitalia, he found a mild laceration on the labia minora, which was suggestive of forceful penetration.
12. The proviso to section 124 of the *Evidence Act* states:
- 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.



13. In the instant case, the trial magistrate indicated that the complainant answered questions without hesitation and was unwavering. I am, however, of a contrary opinion. The flow of the complainant's evidence suggests that her complaint was battery. She talks of the defilement issue as if it is an afterthought. This is the common trend in the evidence of Abong'o Onyango Godfrey (PW3), the clinical officer. This is what he said: 14 years old minor in class six at Majiwa Primary School in Imbo escorted by two police officers. History of assault by stepfather at 5 p.m. at rented premises. Reason of assault not known by the minor. She reported defilement by the same stepfather. That neighbours had left for work. That the assailant covered her mouth and defiled her. That at 8 p.m. that same day, the stepdad saw her standing with a male fellow pupil. He grabbed her by hand, dragged her home, and started caning her.
14. At the time of cross-examination, Fredrick Odhiambo (PW2) testified that the report made to him was of assault and that after the child was rescued, she complained of defilement. Since the report was made to him on the date of the alleged defilement, one wonders why she did not disclose this information to the chief. It is also instructive that she informed the clinical officer that two months before this incident, she had had consensual sex.
15. I am equally disturbed by her description of the defilement. It appears so casual, as if nothing happened.
16. From the preceding evidence, I find it unsafe to convict the appellant of defilement without any other material evidence. The conviction thereof is accordingly quashed, and the sentence set aside.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JANUARY 2024

KIARIE WAWERU KIARIE

JUDGE

