



**KOO v Republic (Criminal Appeal E047 of 2023)
[2024] KEHC 247 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E047 OF 2023
KW KIARIE, J
JANUARY 23, 2024**

BETWEEN

KOO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No.12 of 2020 of the Principal Magistrate's Court at Oyugis by Hon. B.O Omwansa–Senior Principal Magistrate)

JUDGMENT

1. KOO, the appellant herein, was convicted of 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 diverse dates between June 2020 and October 2020 at the North Kamagak location, Rachuonyo South Sub-County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of MAO a child aged 15 years.
3. The appellant was sentenced to serve ten years imprisonment. He has appealed against both conviction and sentence. He was in person and raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and facts by failing to warn herself against the danger of convicting the appellant on uncorroborated evidence of the complainant
 - b. That penetration as an ingredient of defilement was never proved.
 - c. That the actual age of the complainant was not proved to the required lawful standard.
 - d. That my identity was doubtful.
 - e. That the prosecution case was not proved beyond reasonable doubt.



- f. That PW1's evidence was incredible when put to the test and full of inconsistencies, glaring, and discrepancies.
 - g. That the appellant was not accorded a fair trial as enshrined in article 50(2) of the constitution, hence miscarriage of justice and violation of the appellant's right to a fair trial.
4. The state opposed the appeal. It was contended that the offence was proved to the required standards and that the sentence was proper.
 5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced 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.
 6. An offence of defilement 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.

This position was echoed in the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...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, therefore, are the issues I will endeavour to establish whether the prosecution proved to the required standards.

7. The complainant, MAO (PW1), testified that she was fifteen years old. A copy of the Certificate of Birth that was produced as prosecution exhibit 1 indicates that she was born on the 6th day of February 2005. She was, therefore, fifteen years and seven months at the time of the alleged offence. Her age, for section 8(3) of the Sexual Offences Act, was therefore proved.
8. 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.
9. The appellant was in a relationship with the complainant's mother after her husband had passed away. On the 15th day of September 2020, the appellant differed with her mother. He went to his home. He returned and found the complainant's mother having gone to the farm. The other children were asleep. The appellant seduced her for sexual intercourse, and she gave in. When her mother discovered the illicit affair, he stopped seeing her. When she was taken to the hospital, she was found pregnant. The pregnancy was aborted.
10. Otieno Phillip (PW2) testified that when he examined the complainant, she had active bleeding from her genitalia. She was pregnant, and the pregnancy terminated at seven weeks.
11. There was, therefore, proof to the required standards that there was penetration into the complainant's genitalia.



12. GA (PW3) is the complainant's mother. Her evidence was that she had gone to her farm on the 15th day of September 2020 at 3.30 a.m. She returned home at about 5.30 a.m. and found the complainant and the appellant having sex. She raised an alarm, and George responded. This was confirmed by GOO (PW5).
13. I, therefore, find that the prosecution proved beyond any reasonable doubt that the appellant defiled the complainant.
14. The appeal is dismissed.

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

KIARIE WAWERU KIARIE

JUDGE

