



**Ngumbao Alias Fadhili v Republic (Criminal Appeal E080 of 2022)  
[2024] KEHC 32 (KLR) (10 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 32 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E080 OF 2022  
KW KIARIE, J  
JANUARY 10, 2024**

**BETWEEN**

**EZEKIEL NGUMBAO ALIAS FADHILI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O case No. 84 of 2020 of the Chief Magistrate's Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)*

**JUDGMENT**

1. Ezekiel Ngumbao alias Fadhili, 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 are that on the 12<sup>th</sup> day of August 2020 in the [particulars withheld], Jomvu sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of E.W., a child aged 14 years.
3. The appellant was sentenced to fifteen (15) 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 him without observing that the offence was not proved to the required standards.
  - b. That the learned trial magistrate erred in law and fact by failing to note that the identification of the interloper at the scene of the crime was not proved.
  - c. That the magistrate erred in law and fact as there was no corroboration to the allegation of the victim.



- d. That the learned trial magistrate erred in law and fact by failing to note that the age of the child was not proved beyond reasonable doubt.
4. The appeal was opposed by the state through M/s. H. Mburu, learned counsel. She raised the following grounds of opposition:
    - a. That the prosecution proved the case to the required standards.
    - b. That the sentence ought to be enhanced.
  5. 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 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 v. Republic* [1972] EA 32.
  6. 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 Ngui v. 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 proven.

7. E.W. (PW1) gave a history of how her relationship with the appellant started. Initially, it appeared like he cared for her when he saw her with a boy talking but later she used that as an entry point to a relationship with her. On the 12<sup>th</sup> day of August 2020, the appellant sent for her. He asked her to go and pack her clothes for he was to take her to his aunt. She, therefore went and did as instructed.
8. The two embarked on a journey to Malindi and he instructed her to introduce herself as his second wife. In Malindi, they went to the home of the appellant's uncle where they were given a room to sleep in. This was where the appellant defiled her. In the night the appellant was called on the phone and asked to return home for the matter had been reported to the police. When they were returning, he asked her to lie to the police that he had taken her custody because her parents were mistreating her.
9. In his defence the appellant contended that the complainant followed him because she wanted his assistance. The complainant's mother decided to report this matter to the police. This was an afterthought. He never confronted the complainant and her mother with these facts during cross-examination. The learned trial magistrate was therefore justified to dismiss it.
10. Said Dhadho Saumu (PW3) produced a medical report on behalf of his colleague, John King'ori. The findings were that the labia majora and minora were inflamed and the hymen was broken. The conclusion was that the complainant had been defiled. This therefore corroborated the assertion of the complainant.



11. A copy of the birth certificate of E.W. was produced by her mother (PW2). It indicates that the complainant was born on the 21<sup>st</sup> day of December 2006. At the time of the offence, she was thirteen years and eight months old. 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.

12. The prosecution therefore proved the age of the complainant.
13. From the evidence on record I find that the prosecution proved its case to the required standards. The conviction was safe.
14. The appellant was sentenced to a sentence below the minimum period provided by the law. The prosecution has submitted that the sentence ought to be enhanced to the minimum prescribed. They, however, did not issue a notice of the intended enhancement. The Court of Appeal in *J.J.W. v. Republic* [2013] eKLR held as follows on enhancement of a sentence by the High Court:

It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.

15. Although the sentence handed down was illegal, it was incumbent upon the prosecution to put the appellant on notice of the intended application for enhancement. I cannot enhance the same without contravening the law and the rights of the appellant.
16. The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

**DELIVERED AND SIGNED AT MOMBASA THIS 10<sup>TH</sup> DAY OF JANUARY, 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

