



**SA v Republic (Criminal Appeal E014 of 2023)  
[2024] KEHC 20 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 20 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E014 OF 2023  
KW KIARIE, J  
JANUARY 12, 2024**

**BETWEEN**

**SA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O case NO.50 of 2019 of the Senior Principal Magistrate’s Court at Shanzu by Hon. David Odhiambo–Senior Resident Magistrate)*

**JUDGMENT**

1. S. A., 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 6<sup>th</sup> day of April 2019, in the Junda area, Kisauni sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of C.W., a child aged 12 years.
3. The appellant was sentenced to twenty years’ imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was represented by Mr. C. M., Advocate. He raised grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and fact for not appreciating that the prosecution case was not proved beyond reasonable doubt.
  - b. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution party failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt.
  - c. That the learned trial magistrate erred in law and fact for not noticing that the medical evidence was not established to corroborate the complainant’s evidence.



- d. That the learned trial magistrate erred in law and fact for not considering that a crucial witness was not summoned in court.
  - e. That the learned trial magistrate erred in law and fact by dismissing my defence without any legal basis.
4. The state did not file any grounds of opposition or submissions.
  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. 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 Nguu 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 proven.

1. The complainant (C.W) was roused from her sleep by some pain. She woke up and found the appellant, who was her uncle, defiling her. His penis was inside her vagina. He threatened her with dire consequences if she reported.
  2. When she was examined by Dr. Nafifa Seif, she complained that she had been penetrated by her uncle per anus. The findings made were that she had lacerations around the anal orifice.
  3. These are two contradicting versions by the complainant. The Court of Appeal in the case of *Ndungu Kimanyi vs. Republic* [1976-80] I KLR 1442 said:

The witness is a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
10. It was unsafe to rely on this witness. The conviction was unsafe. The same is quashed and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT MOMBASA THIS 12<sup>TH</sup> DAY OF JANUARY, 2024**

**KIARIE WAWERU KIARIE**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed



**DEPUTY REGISTRAR**

