



**Soita v Republic (Criminal Appeal E055 of 2023)  
[2024] KEHC 29 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 29 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E055 OF 2023  
KW KIARIE, J  
JANUARY 12, 2024**

**BETWEEN**

**DAVID WAMALWA SOITA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O case NO. 89 of 2017 of the Chief Magistrate's Court at Mombasa by Hon. C.A. Ogwenó–Resident Magistrate)*

**JUDGMENT**

1. David Wamalwa Soita, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 11<sup>th</sup> day of January 2017, in Jomvu sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of A.M., a child aged 4 years.
3. The appellant was sentenced to life 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 to serve life imprisonment without considering that identification being an essential element of defilement was not proved beyond a reasonable doubt.
  - b. That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment without considering that I the appellant was denied a right to a fair trial under Article 50(2)(p) of the [Constitution](#).
  - c. That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment without considering that the sentence meted on me was harsh and excessive.



- d. That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment without considering the period spent in remand custody before conviction and sentence.
  - e. That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment without considering my reasonable defence.
4. The appeal was opposed by the state through Mr. Hilary Isiaho 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 v Republic* [1972] EA 32.
  6. Though the appellant claimed that he was not given a fair trial, he did not indicate in which way this was so. My perusal of the record did not elicit any instance.
  7. 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 are proven.

8. The mother of the complainant is called MWN (PW1). Her evidence was that on the 11<sup>th</sup> day of January 2017, she left the complainant to go and play with other children. Later, when she went to look for her, she did not find her until at about 8 p.m. She noticed that the child looked dirty and was not walking properly. When she was preparing to bathe her, she noticed blood on her panty. She took her to the hospital and later reported the matter to the police. While at the police station, she saw the appellant being escorted there by members of the public.
9. In her evidence the complainant testified that while she was playing with another child, the appellant beckoned them to go where he was. He lied to them that he was going to buy mandazi for them. He then told her to lie down. She complied and he defiled her. He hurt her on the neck and at her genitalia. She could not remember how she got home.
10. George Lawrence Muguda (PW3) conducted a DNA test on the panty and the skirt of the complainant. He established that the two had mixed DNA from the complainant and an unknown male.
11. The complainant was examined by Dr. Fatima Zahre Kassim (PW5) and was found with healing broken hymen with abrasions around the vagina. This was eleven 11 months after the act.

The prosecution, therefore, proved penetration.



12. The appellant in his defence contended that the village elder who arrested him had asked him to go and live with her but when he declined, she harboured a grudge. This defence was however displaced by the evidence of the child that identified him as the perpetrator.

13. A copy of the birth certificate of A.M. was produced as an exhibit. It indicates that she was born on the 29<sup>th</sup> day of March 2012. At the time of the offence, she was four years old. Section 8 (2) of the [Sexual Offences Act](#) provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The prosecution therefore proved the age of the complainant.

14. 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 12<sup>TH</sup> DAY OF JANUARY, 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

