



**Titus v Republic (Criminal Appeal E057 of 2022)
[2024] KEHC 24 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 24 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E057 OF 2022
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

RAPHAEL TITUS ALIAS RAPH APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO. E109 of 2021 of the Chief Magistrate’s Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. Raphael Titus alias Raph, 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 9th and the 10th day of August 2021, in Jomvu sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of ZM, 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 failing to conduct a voir dire examination.
 - b. That the learned trial magistrate erred in law and fact by failing to consider that the expert’s report did not prove the case of defilement.
 - c. That the magistrate erred in law and fact by failing to consider that the ingredients of the offence of defilement were not proved.



- d. That the learned trial magistrate erred in law and fact by failing to note that the prosecution case was rife with contradictions.
4. The appeal was opposed by the state through M/s. Keya Ombele learned counsel. She contended that the prosecution proved all the ingredients of the offence 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 vs. Republic* [1972] EA 32.
6. The Court of Appeal explained the purpose of conducting a voir dire examination in the case of *Japheth Mwambire Mbitha vs. Republic* [2019] eKLR.

Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth.

7. The voir dire examination is meant to satisfy the *Oaths and Statutory Declarations Act* for children of tender age. The Court of Appeal in the case of *Kibageny Arap Kolil v R* (1959) EA 82 the Court of Appeal for Eastern Africa held that:

... for the purpose of section 19 of the *Oaths and Statutory Declarations Act*, the phrase “a child of tender years” means a child under the age of 14 years.

In the instant case, the complainant was 14 years old at the time of the offence. There was no legal requirement for the voir dire examination.

8. 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 Nguni 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.

9. ZM (PW1) testified that the appellant invited her to his house on the 9th day of August 2021 and they had consensual sexual intercourse and the same was repeated on the following day. This is when her father discovered and reported the matter.
10. When she was examined by John King’ori, a clinical officer, he established that there was penetration due to the broken hymen and a whitish discharge from her vagina.
11. In his defence the appellant contended that the complainant was having an affair with one Said Joseph who relocated. When he went to clear his name with the complainant’s father, he found a group of people who compelled the complainant to implicate him despite her telling them that Joseph was the



culprit. This defence was an afterthought. He never confronted the complainant and her father with these facts during cross-examination. The learned trial magistrate was therefore justified to dismiss it.

12. A copy of the birth certificate of ZM was produced as an exhibit. It indicates that she was born on the 30th day of May 2007. At the time of the offence, she was fourteen years and three 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.

The prosecution therefore proved the age of the complainant.

13. Though the appellant contended that there were material contradictions, the contradiction on the age of the complaint as testified by herself and her father was resolved by the production of a certificate of birth.
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 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

