



**Obonyo v Republic (Criminal Appeal E027 of 2021)
[2024] KEHC 2491 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E027 OF 2021**

**KW KIARIE, J
MARCH 12, 2024**

BETWEEN

VICTOR OUMA OBONYO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.19 of 2019 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)

JUDGMENT

1. Victor Ouma Obonyo, 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 diverse dates between March and September 2019 in Rachuonyo North sub-County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of AAO, a child aged fifteen years.
3. The appellant was sentenced to twenty (20) years' imprisonment. He was aggrieved and filed this appeal against the conviction and the sentence.
4. The appellant was in person. He raised grounds of appeal as follows:
 - a. That the three ingredients of the prescribed offence were not proved beyond doubt.
 - b. The prosecution case was not proven to meet the required lawful standard.
 - c. The prosecution case was marred with contradictions, discrepancies, inconsistencies and glaring gaps.
 - d. That PW1 was an incredible and untrustworthy witness.



- e. That missing hymen is not proof of defilement.
 - f. That there was no penetration identified of the appellant, not proved, and no age assessment was conducted on the complainant to ascertain her exact age.
 - g. That there was no exact date or time of the commission of the alleged offence.
 - h. That vital witnesses were not produced in court to testify.
 - i. That the appellant was not provided with all the documents the prosecution was to rely on before the onset of the case.
5. The state opposed the appeal. I was urged to dismiss the appeal for lack of merits.
 6. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
 7. On September 11, 2019, the prosecutor informed the court that he had supplied the appellant with copies of statements, a charge sheet, treatment notes, and the birth certificate. The appellant confirmed this. He cannot turn around in this court and claim that he was not supplied. This ground is baseless.
 8. 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 victim must be below eighteen years old.
 9. This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR.
These, therefore, are the issues I will endeavour to establish whether the prosecution proved to the required standards.
 10. In her evidence, AAO (PW1) testified that she was fifteen. A copy of the Certificate of Birth that was produced as prosecution exhibit 1 indicates that she was born on the 9th day of November 2004. As of March 2019, she was fourteen years and four months old. Her age, for Section 8(3) of the *Sexual Offences Act*, was therefore proved. 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.
 11. AAO (PW1) The complainant testified that she met the appellant in December 2018 and became his girlfriend after he approached her. In March 2019, they spent the night together. In April and May 2019, they had sex in the appellant's house. As a result of the sexual liaison with the appellant, she became pregnant and gave birth to a baby girl. The medical examination by Fredrick Oyaa, whose report was produced by Diero Harun Ajwang (PW2), his colleague, confirmed that she was pregnant on the 10th day of September 2019.
 12. Penetration was, therefore, proved.



13. In this case, as in most sexual offences cases, the complainant's evidence is the only one that directly implicated the appellant. The proviso to section 124 of the *Evidence Act* states:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

14. The prosecution always has the onus of proof in a criminal case. At the case's onset, the complainant's grandmother was remanded in custody. This was after the prosecution successfully applied for arrest warrants against all the prosecution witnesses, including the complainant. When the prosecutor made this application, he did not explain what prompted his action.

15. On the 10th day of November 2020, the complainant's grandmother attended court and informed the learned trial magistrate that she did not know the complainant's whereabouts. This was when the court ordered her to be remanded. In my view, this, without proof that she had a hand in the complainant's disappearance, was unfair and not based on any known law.

16. When the complainant surfaced and testified, she said the chief encouraged her to run away to "kill" the case. She went on to say that the appellant's parents bribed the chief so that he could facilitate her escape. However, George Odhiambo Amba Ondiek (PW4), the assistant chief of the Wagwe North sublocation, denied this.

17. The prosecution introduced issues that created doubts in their case. One such issue was what was the role, if any, of the complainant's grandmother in her disappearance. Secondly, why was the complainant reluctant to testify? When she testified in court on the 1st day of December 2020, she said:

In March 2019, while on half term, I recall, I had met the accused herein one, Victor Ouma Obonyo, in December 2018 and became his girlfriend.

He approached me and asked me to be his girlfriend and I accepted. So, in March 2019, while on half term, I don't recall anything else in this case.

18. Her reluctance was apparent, but the prosecutor did not elicit why she was unwilling to testify. Was there a possibility that she had been threatened, or was she aware that she was not telling the truth against the appellant? We may not know this. Having implicated the area assistant chief with taking a bribe to facilitate her disappearance to obstruct justice and the same having not been established raises credibility on her part. The court of appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller, and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in 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.

19. At the commencement of the hearing, the complainant had already delivered. The DNA examination would have assisted in resolving the doubts created in the case. Unfortunately, it was not conducted to the detriment of the prosecution case.

20. The analysis of the evidence on record shows that the appellant's conviction was unsafe. I quash the conviction and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.



DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE

