



**Okwama v Republic (Criminal Appeal E032 of 2023)
[2024] KEHC 6617 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E032 OF 2023**

KW KIARIE, J

JUNE 5, 2024

BETWEEN

JOHN NGESO OKWAMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.18 of 2022 of the Senior Principal Magistrate's Court at Oyugis by Hon. Celesa A. Okore-Principal Magistrate)

JUDGMENT

1. John Ngeso Okwama, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 2nd day of June 2022, within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of EA, a child aged seventeen years.
3. The appellant was sentenced to fifteen years imprisonment. He was aggrieved and filed this appeal against the sentence. He was in person. He raised grounds of appeal as follows:
 - a. That the trial magistrate court erred in law and facts by failing to observe that the prosecution evidence of the alleged offence did not implicate the appellant.
 - b. The trial magistrate court erred in law and fact by failing to consider that the harsh mandatory minimum sentence of 15 years in prison is against the principle of Article 28 of [the Constitution](#).
 - c. The trial magistrate court erred in law and facts by failing to observe the provision of Section 333(2) of the CPC but instated consider the sentence to rule from 17/5/2023 when the sentence was pronounced.



- d. That the trial magistrate court erred in law and facts by failing to consider the appellant's mitigation.
4. The state opposed the appeal and prayed for dismissal for lack of merits.
5. 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.
6. 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.

These are the ingredients the prosecution must prove beyond any reasonable doubt before the trial court.

7. The complainant (PW5) testified that the appellant had sexual intercourse with her on the 2nd day of June 2022. Though she wanted it to appear that she was forced, if anything happened between the two, all evidence points to an agreement. The complainant, however, being a minor, could not give consent. She testified that the appellant had promised her Kshs. 100.00, but he was arrested before he could give her the money.
8. Elphas Onyango (PW6) was strolling inside his maize plantation when he was attracted by some noise of a man and a woman talking. When he moved closer, he found the appellant and the accused engaging in sexual intercourse. He restrained the appellant and alerted the area assistant chief.
9. PW2, the area assistant chief, confirmed that the incident was reported to him. When he rushed to the scene, he found both the complainant and the appellant and escorted them to the police station.
10. When Nancy Kerubo Orina (PW1) examined the complainant on the same day, she testified that the complainant had no lacerations or urinary tract infections but had an absent hymen. However, she did not specify when the hymen was broken. It was clear that the hymen was not breached on the day in question, which PW1 should have noted. A broken hymen alone cannot be used as proof of penetration. This was also the view of the Court of Appeal in the case of *P. K.W vs Republic* [2012] eKLR. The court observed as follows:

“ 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified” Is hymen only ruptured by sexual intercourse.

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any



object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen vs Manuel Vincent Quintanila* [1999] AB QB 769.”

11. There was, therefore, no sufficient evidence to prove penetration. There is a possibility that Elphas Onyango (PW6) interrupted them before he could penetrate her genitalia.
12. In view of insufficient evidence of penetration, the conviction was unsafe. I quash the conviction and set aside the sentence. The appellant is at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF JUNE 2024

KIARIE WAWERU KIARIE

JUDGE

