



REPUBLIC OF KENYA



KENYA LAW
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**Adega v Republic (Criminal Appeal E030 of 2021)
[2023] KEHC 2231 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E030 OF 2021**

KW KIARIE, J

MARCH 20, 2023

BETWEEN

NELSON MANDELA ADEGA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No.E024 of 2021 of the Principal Magistrate's Court at Ndhiwa by Hon. E.M. Onzere –Principal Magistrate)

JUDGMENT

1. Nelson Mandela Adega, 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 were that on diverse dates between the 25th day of July, 2021 and July 30, 2021 in Ndhiwa sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of SAO, a child aged 16 years.
3. The appellant was sentenced to serve 15 years imprisonment. He was aggrieved and appealed against both conviction and sentence.
4. The appellant was in person. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and facts by basing conviction on uncorroborated evidence of PW1.
 - b. That the ingredients for offence of defilement were never proved to the required lawful standard.



- c. That the learned trial magistrate erred in law and facts by failing to realize that the prosecution witness evidence was marred with contradiction, inconsistencies, discrepancies and glaring gaps.
 - d. That the details in medical evidence ie, P3 form, PRC form and treatment notes did not support the complainant's contentions.
 - e. That the prosecution case was not proved beyond reasonable doubt.
 - f. That the arrest was improper.
 - g. That the appellant was not accorded fair trial as stipulated in article 50(2) of the Constitution hence miscarriage of justice.
 - h. That the complainant's evidence was incredible.
5. The appeal was opposed by the state, through Ochengo Justus who submitted that all the ingredients of the offence were proved and that the sentence was proper.
 6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own 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.
 7. Article 50 (2) of the Constitution provides as follows:
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (a) to be presumed innocent until the contrary is proved;
 - (b) to be informed of the charge, with sufficient detail to answer it;
 - (c) to have adequate time and facilities to prepare a defence;
 - (d) to a public trial before a court established under this Constitution;
 - (e) to have the trial begin and conclude without unreasonable delay;
 - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (i) to remain silent, and not to testify during the proceedings;
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
 - (k) to adduce and challenge evidence;
 - (l) to refuse to give self-incriminating evidence;
 - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;



- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

8. The appellant contended that he was not supplied with the investigation diary. Investigation diary was not a document that the prosecution relied upon. It could only be an issue had he requested to be supplied with the same to advance his defence and it was not. There is no indication on record that the appellant made such an application. The appeal will not therefore turn on this ground.

9. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement therefore, 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 age of the complainant was below eighteen years.

These ingredients were restated in *Fappyton Mutuku Ngui v Republic* [2012] eKLR as follows:

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 that the prosecution must prove against an accused person.

10. SAO (PW1) testified that she was 16 years old. Her birth certificate indicated her date of birth as April 25, 2005. At the time of the complained of offence she was 16 years and 3 months old. The prosecution therefore proved the age of the complainant to the required standards.

11. When the complainant was examined by Lazarus Okumu (PW5) on August 3, 2021 he made the following findings:

- a. Freshly torn hymen which was bleeding and tender to touch;
- b. Swollen cervix which was tender to touch;
- c. Whitish foul smelling discharge from the vagina; and



- d. Multiple pus cells and yeast cells in the urine which was an indication of infection.
He concluded that she had been defiled.
12. The medical evidence gave credence to the evidence of SAO that she had been defiled.
13. According to SAO she was defiled by the appellant. Her evidence was that after she greeted him, she became stupefied and went with him to his home where he defiled her for five days. When he took her to her uncle's home, she screamed when they were near. The appellant left after she had disembarked.
14. GO (PW2), her uncle, confirmed the same. When they used the contact he had been given by SAO's mother, the appellant was arrested.
15. SAO's mother testified that the phone number she gave to PW2 had been used by SAO to call her who had asked her to pray for her for she was in a bad place.
16. In her evidence, the complainant said while at the home of the appellant she heard his relatives calling him Mandela.
17. From the evidence on record, I am satisfied that the appellant was identified as the culprit.
18. 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.
19. The appellant ought to have been charged under section 8 (4) of the *Sexual Offences Act* which provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
20. The learned trial magistrate was alive to this fact and said as much in her judgment.
21. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit and I accordingly dismiss it.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

