



REPUBLIC OF KENYA



**Japolo v Republic (Criminal Appeal E029 of 2022)
[2023] KEHC 2036 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E029 OF 2022
KW KIARIE, J
MARCH 20, 2023**

BETWEEN

**KEVIN ODHIAMBO OMOGI ALIAS ELTON OTIENO JAPOLO ALIAS
EVEREST NYARENGO JAPOLO APPELLANT**

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in S.O.A case No.E015 of 2020 of the
Principal Magistrate's Court at Ndhiwa by Hon. E.M. Onzere –Principal Magistrate)*

JUDGMENT

1. Kevin Odhiambo Omogi alias Elton Otieno Japolo alias Everest Nyarengo Japolo, 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 the 7th day of November, 2019 at Kasirime Kawanga sub location in Ndhiwa Sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of NAO , a child aged 13 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has 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 convicting me on defective charge sheet and a non-existent charge that doesn't prescribe the sentence.
 - b. That penetration was not proved.
 - c. That identification was doubtful



- d. That the age of the complainant was not proved.
 - e. That the trial magistrate erred in law and facts by basing conviction on prosecution evidence marred with contradiction, inconsistencies, discrepancies and glaring gaps.
 - f. That PW3 was un-credible witness.
 - g. That the appellant did not defile the appellant hence this is framed up case against the appellant.
 - h. That the medical evidence in PRC form. P3 form and treatment note form did not support the PW3's contentions.
 - i. That vital witnesses whose testimony could have secured my acquittal were not brought to court by the prosecution to adduce their evidences hence a prejudice to me.
 - j. That the appellant was not supplied with all the documentary evidence e.g. the investigation diary hence total violation of article 50(2) of *the Constitution*.
 - k. That torn hymen is not proof for penetration nor defilement.
 - l. That the appellant's arrest was because of violating curfew which he was never charged with.
 - m. That the occurrence book details are different and do not corroborate the present matter.
 - n. That shoddy investigations were conducted in the present matter by the investigating officer hence miscarriage of justice.
 - o. That this was a case of harboured grudge.
 - p. That the appellant was arrested prior to this incident/prior to the present offence.
 - q. That the identification parade was conducted because of the names hence jeopardizing the whole process as unlawful.
 - r. That the evidence of the complainant uncorroborated, hence not safe to secure a conviction.
 - s. That the appellant was not given the benefit of doubt after the prosecution failed to produce the exhibit mentioned by the complainant in court.
 - t. That the trial magistrate was biased and prejudicial against the appellant as a result the appellant was not accorded a fair trial.
 - u. That the prosecution case was not proved beyond reasonable doubt.
 - v. That the trial magistrate erred in law and facts by failing to believe DW1's evidence and dismissing the defence of the appellant as unreliable.
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 vs. Republic* [1972] EA 32.



7. 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 vs. 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.

8. The alleged offence of defilement occurred at about 2 am when some two men entered into the house the complainant was sleeping. She said she identified the two as Japolo, whom she said was the appellant and Omondi Ongo who was not arrested.
9. According to NAO (PW3) she was woken up by something hitting and knocking her buttocks. She lit her torch and recognised the appellant. She said she directed her spotlight to the iron sheet roof and was able to see and recognize the appellant. During re-examination she said she identified Omondi by the help of moonlight.
10. When circumstances are not favourable for positive identification care must be taken in order miscarriage of justice does not occur. Lord Widgery CJ in in *R v Turnbull and Others* [1976] 3 All ER 549 issued the following caution:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

...

Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

11. The complainant had just been roused from sleep and purporting to recognize the appellant by deflection of light is not to be relied upon unless it is buttressed by some material evidence. She must have seen her assailant in a matter of few seconds in unfriendly circumstances.



12. SAO (PW5) said her other two children who were in the same house with the complainant said that they saw the appellant. These were said to be 11 and 6 years old. They were not called as witnesses. Had they been called, the issue of the perpetrator could have been resolved. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549, (Lutta Ag Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

13. In the instant case, I am persuaded to infer that had these two been called, their evidence would have been adverse to the prosecution case.
14. The purported recognition was not satisfactory. Without any other evidence to connect the appellant to the offence, I find that the conviction was unsafe. I quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE

