



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Republic (Criminal Appeal E014 of 2022)
[2023] KEHC 2041 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E014 OF 2022
KW KIARIE, J
MARCH 20, 2023**

BETWEEN

GEORGE OCHIENG ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

((From the original conviction and sentence in S.O.A case No.E021 of 2020 of the Chief Magistrate's Court at Homa Bay` by Hon .J.S Wesonga–Principal Magistrate)

JUDGMENT

1. George Ochieng Onyango, 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 18th day of April 2021 and 27th April 2021 at Kalanya Kanyango location within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of GAO, a child aged 12 years.
3. The appellant was sentenced to serve 20 years imprisonment. The appellant was represented by the firm of Odondi Awino & Company Advocates. He was in person and raised the following grounds of appeal:
 - a. That the sentence of 20 years imprisonment imposed by the trial magistrate is harsh and excessive as it violated the right to benefit from the least severe punishment under article 50 (2) (p) of *the Constitution*.
 - b. That the trial magistrate erred in law and facts by relying on medical evidence that was not sufficient enough to prove penetration as one of the ingredients of defilement.



- c. That the trial magistrate erred in law and facts by convicting and sentencing the appellant without putting into consideration that there was no any cogent direct evidence to link the appellant to the said offence.
 - d. That the trial magistrate erred in law and facts by relying on prosecution's evidence which was obtained by collusion hence did not meet the required threshold under Article 50 (4) of *the Constitution* for admissibility in a court of law.
 - e. That the trial magistrate erred in law by not considering defence evidence which was cogent enough to award me an acquittal that the trial magistrate erred in law and facts by relying on prosecution's evidence that was marred with contradictions and inconsistencies.
 - f. That the trial magistrate erred in law and facts by considering the evidence of the complainant who was not trustworthy in her evidence as to where she had spent the night but opted to mention the appellant as a scapegoat.
4. The appeal was opposed by the state through Mr. Ochengo, learned counsel on grounds that:
 - a. The conviction was based on the evidence on record.
 - b. The sentence was legal.
 5. 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.
 6. 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.
 7. 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.
 8. 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.

 1. G.A.O (PW1) testified that she was aged 12 years. Her baptismal card which was produced as an exhibit indicate that she was born on 26th September 2009. Her father (PW4) gave her age as 12 years. Her age was therefore established.
 2. Tobias Ochieng Okech (PW5) is a clinical officer at Marindi. His evidence was that on 29th April 2021 he examined the complainant herein. His findings were



that there was no laceration on the labia, the cervix was closed but bruised and slightly swollen. The hymen was torn. He concluded that she had been defiled.

3. The evidence of the complainant's father as to how she left home contradicted her version. According to the evidence of PW4, she left their house between 5 a.m. and 6 a.m. on 11th April 2021. In her testimony, she had alleged that the appellant went to their home where she was minding her brother and forced her to accompany him. It would appear she went to the house where she was rescued from willingly for Samuel Ouma Odhiambo (PW5) testified that when they broke the door the complainant initially said she was living with her father.
4. G.A.O (PW1) testified that the appellant defiled her severally when he held her captive for a period of 2¹/₂ weeks.
5. After failing to get the appellant, on 28th April 2021 the village elder was alerted that he had returned. When he went there in company of other village elders, they found the appellant who refused to open the door and were forced to break the window to gain access to the house. The complainant was in the house. They arrested and took him to the police. This evidence therefore linked the appellant to the house where the complainant was found.
6. The evidence of defilement against the appellant was circumstantial. In the case of *Mohamed & 3 Others Vs. Republic* [2005]1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

15. In the instant case, though the appellant contended that he did not defile the complainant, the irresistible inference to make is that he indeed defiled her. It matters not that she could have been a willing participant for she had no capacity to give consent.
16. The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merit. I accordingly dismiss the same.

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

KIARIE WAWERU KIARIE

JUDGE

