



REPUBLIC OF KENYA



**Obambo v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 1826 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E024 OF 2022
KW KIARIE, J
MARCH 15, 2023**

BETWEEN

DAVID OTIENO OBAMBO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in SOA case No E004 of 2020 of the
Principal Magistrate's Court at Ndhiwa by Hon EM Onzere –Principal Magistrate)*

JUDGMENT

1. David Otieno Obambo, the appellant herein, was convicted of two offences of defilement contrary to section 8 (1) (1) [sic] of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence in count one were that on the October 14, 2020 at [Particulars Withheld] sub location, in Ndhiwa sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of EAO , a child aged 10 years.
3. In count two the particulars were that on the October 14, 2020 at [Particulars Withheld] sub location, in Ndhiwa sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of LAO, a child aged 9 years.
4. The appellant was sentenced to serve life imprisonment on each count. He was aggrieved and filed this appeal. He raised grounds of appeal as follows:
 - a. That the charge sheet was defective since it contained two allegations in one charge sheet.
 - b. That the complainants did not appear in court to testify but instead the prosecution department allowed their parents to appear on their behalf.
 - c. That the doctor's report was uncorroborated according to the P3 form.



- d. That during cross examination the appellant became ill and was unable to take the plea accordingly.
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 appeal lacks merit.
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. Section 8 (1) (1) of the *Sexual Offences Act* does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* ...

8. Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the *Criminal Procedure Code*.
9. A charge sheet may contain several counts. What the law prohibits is a charge containing several complaints for this would make the charge duplex. The charges as framed were not duplex.
10. PW1 & PW2 were the complainants in this case. This is contrary to the contention by the appellant that they were not called to testify. I find this ground of appeal as baseless.
11. When the prosecution called their witnesses, the appellant at all the instances told the court that he was ready for hearing. At no time did he indicate that he was unwell. His contention that he was unable to cross examine witnesses due to ill health is not borne out by the record. This ground has no merit.
12. 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.

13. Benard Otieno (PW3) is a clinical officer. His evidence was that on October 15, 2020, he examined LAO and made observations as follows:
 - a. Swollen hyperaemic labia;
 - b. Torn hymen;



- c. Tender vaginal walls; and
- d. Presence of pus cells indicating a healing wound.

He was therefore of the opinion that the girl had been defiled.

- 14. On her part, LAO (PW1), testified that it was the appellant who defiled her after accusing her and EAO (PW1) of destroying his fence. Her evidence was that he ordered them to lie down and defiled them in turns. He then ordered them to go and bathe in a nearby river as he watched them do so. There was evidence of defilement and who the perpetrator was.
- 15. EAO (PW2) gave similar evidence as that of LAO (PW1). She identified the appellant as the culprit. In his evidence Benard Otieno (PW3) testified that when he examined the EAO, he made the following observations:
 - a. Blood stains on the inner walls of the vagina;
 - b. Freshly torn hymen with pain; and
 - c. Presence of epithelial cells.

He therefore formed an opinion that she was defiled.

- 16. I therefore find that the learned trial magistrate cannot be faulted on her finding that the appellant defiled the two minors.
- 17. The Certificate of Birth in respect of LAO (PW1) indicate that she was born on February 21, 2012. At the time of the offence, she was 8 years and 8 months.
- 18. EAO was born on March 4, 2012 according to her copy of Certificate of Birth. She was therefore 8 years and 7 months at the time of the offence.
- 19. Section 8 (2) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- 20. The sentence that was meted out was proper and legal. I therefore find that the appeal lacks merits. The same is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

