



REPUBLIC OF KENYA



KENYA LAW
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**Ouma v Republic (Criminal Appeal E013 of 2023)
[2023] KEHC 20719 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E013 OF 2023**

KW KIARIE, J

JULY 20, 2023

BETWEEN

OMONDI SAMWEL OUMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No.E002 of 2021 of the Senior Principal Magistrate's Court at Ndhiwa by Hon. B.W.Murangasia– Resident Magistrate)

JUDGMENT

1. Omondi Samwel Ouma, the appellant herein, was convicted after pleading guilty to the offence of defilement contrary to section 8 (1) (4) [sic] of the *Sexual Offences Act* no 3 of 2006.
2. The particulars of the offence are that on 1st day of October 2019 at Ndhiwa sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of EAO, a child aged 16 years.
3. The appellant was sentenced to fifteen (15) years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant raised grounds of appeal as follows:
 - a. That the learned magistrate erred in both law and facts by failing to observe that the prosecution did not prove their case beyond reasonable doubt.
 - b. That the trial magistrate erred in both law and facts by failing to consider the glaring inconsistency and contradiction of the protection witnesses.



- c. That the trial learned magistrate erred in law and fact by believing the testimony of the complainant to be trustworthy to be relied upon without considering that her evidence was not corroborated
 - d. The learned magistrate erred in law and fact by failing to observe section 214 [CPC](#) when the third magistrate took over from the first and second magistrate.
 - e. The learned magistrate erred in law and fact by failing to consider the defence evidence which was consistent and corroborated by DW2.
 - f. That I do humbly pray to be provided by the trial proceedings to adduce more grounds as I cannot recall everything transpired during the trial proceeding.
5. The appeal was opposed by the state. He raised the following grounds of opposition:
- a. That the offence was proved to the required standards.
 - b. That the charge was not defective.
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) (4) 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 (4) of the [Sexual Offences Act](#) ...
- 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](#).
8. The evidence of PW1 and PW2 was adduced before Hon MA Ochieng, Principal magistrate. When Hon Murangasia took over the hearing of the matter, he did not comply with section 200 (3) of the [Criminal Procedure Code](#). The section provides:
- Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
9. This section has been a subject of numerous decisions. The Court of Appeal in the case of [Henry Kailutha Nkarichia & another v Republic](#) [2015] eKLR stated as follows:
- The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial. We need do no more than reiterate what we recently stated in *David Kimani Njuguna v Republic*, Nakuru Criminal Appeal no 294 of 2010 after a review of several decisions of this Court on the subject;
10. In the instant case, this failure to comply with the section, vitiates the entire trial. I therefore quash the conviction and set aside the sentence. The appellant to be produced before Ndhiwa SPM's Court on July 27, 2023 for retrial before any other magistrate with jurisdiction other than Hon BW Murangasia. Should he be convicted after the retrial, the period already served should be factored in the sentence.



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

KIARIE WAWERU KIARIE

JUDGE

