



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oyaya v Republic (Criminal Appeal E041 of 2022)  
[2023] KEHC 20812 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20812 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E041 OF 2022**

**KW KIARIE, J  
JULY 20, 2023**

**BETWEEN**

**MICHAEL OMOLO OYAYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.19 of 2018 of the  
Principal Magistrate's Court at Ndhiwa by Hon. E.M. Onzere –Principal Magistrate)*

**JUDGMENT**

1. Michael Omolo Oyaya, the appellant herein, was convicted of an offence of defilement contrary to section 8 (1) (2) [sic] of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence in count one were that on November 10, 2017 in Ndhiwa sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of JAO., a child aged 10 years.
3. The appellant was sentenced to serve 20 years' imprisonment. He was aggrieved and filed this appeal. He raised grounds of appeal as follows:
  - a. That the trial magistrate erred both in law and fact in convicting without considering that the evidence on record was not only malicious but was fabricated, farfetched and meant to implicate the appellant falsely.
  - b. That the key witness, PW1, was denied chance to give her evidence rendering the evidence on record hearsays and innuendos.[sic]
  - c. That the trial magistrate did not consider that the medical doctor could have been compromised to implicate appellant in this offence.



- d. That the trial court did not consider that the appellant was not medically tested to confirm if he committed the said offence.
  - e. That the trial court did not consider that the investigating officer did not come to court to testify and be cross examined.
  - f. That the trial court did not consider the alibi defence which exonerated the appellant from any wrongdoing.
4. The appeal was opposed by the state. It was contended that all the ingredients of the offence were proved and that the appeal lacks merit.
  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) (2) 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* ...

7. 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. 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.

9. According to the complainant's mother's evidence, she was born on April 7, 2007 and produced a copy of certificate of birth. As at November 10, 2017 the complainant was 10 years and 7 months old.
10. JAO (PW2) testified that when she went to pick her mother's cell phone from the house of the accused where it had been taken for charging, the accused pinned her against the wall and defiled her. When he released her, she ran home to report to her mother. The accused followed her there.



11. The evidence of PW3 who is the complainant's mother was that JAO returned home running and crying. The accused was in hot pursuit and he told her not to listen to JAO. The complainant informed her that the accused had defiled her.
12. When the complainant was taken to hospital she was examined by Permanus Okoth Odero (PW1), a clinical officer who established that she had indeed been defiled.
13. Though the accused contended that PW1 was not availed for cross examination, he was given a chance to cross examine all the witnesses who were availed, including PW1.
14. Failure to call the investigating officer in this matter was not fatal to the prosecution case.
15. Other than the direct evidence of the complainant that it was the accused who defiled her, there was circumstantial evidence from the complainant's mother who testified that the accused followed the complainant to their home and told her (PW3) not to listen to the complainant. . 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.
16. In the instant case I find that the circumstantial evidence to exclude every hypothesis but that one of guilt.
17. 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.
18. The sentence that was meted out was illegal. However, since the state did not seek for an enhancement, and issue to the appellant with a notice of this intention, I will not interfere with it the illegality notwithstanding. I find that the appeal lacks merits. The same is dismissed.

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

**KIARIE WAWERU KIARIE**

**JUDGE**

