



**VOY v Republic (Criminal Appeal E038 of 2022)
[2023] KEHC 20721 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E038 OF 2022**

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

BETWEEN

VOY APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in S.O.A case NO.5 of 2021 of the
Principal Magistrate’s Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)*

JUDGMENT

1. VOY, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence in count one are that on 5th February 2021 in Rachuonyo South sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of STAO, a child aged 8 years.
3. In count two he was convicted of the offence of attempted defilement contrary to section 9 (2) of the [Sexual Offences Act](#). The particulars thereof are that on 9th April 2021 at the same place he attempted to cause his penis to penetrate the vagina of STAO, a child aged 8 years.
4. The appellant was sentenced to forty (40) years’ imprisonment in count one and thirty (30) thirty years’ imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
5. The appellant was by Quinter Adoyo & Company Advocates. He raised grounds of appeal as follows:
 - a. The appellants rights under Article 50 and 49 of the [constitution](#) of Kenya were infringed on when he was denied bond allegedly because the minor needed to be safe, but he ended up being denied he same throughout.



- b. The appellant went through the proceedings as VOY (an adult), because the police had intimidated and instructed him to respond to that name despite telling them that he was VOY (minor).
 - c. Despite being a minor and a school going child, the appellant was left to go through the grueling proceedings unrepresented.
 - d. Every effort the appellant made to tell court his true identity either by himself or through his father were ignored, and as now revealed in the proceedings, were not even put on record.
 - e. The honorable trial court erred in law and fact in trying and convicting the appellant as an adult when in fact he is a school going minor.
 - f. Having been shut down so many times the minor now attaches the documents he did not know how to produce during the trial process as part of the appeal.
 - g. The honorable trial court erred in law and in fact in convicting and proceeding to sentence on the basis of insufficient contradictory evidence.
 - h. The honorable trial court erred in law and fact in committing the appellant in custody/remand and now in imprisonment with adult convicts.
6. The appeal was conceded by the state through Mr. David Ndege, learned counsel. He prayed for a retrial.
 7. 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.
 8. When the charge against the appellant was presented before the court, his age was indicated on the charge sheet to be 21 years. Probably this may have influenced the trial court to assume she was dealing with an adult. It has however emerged that he was 16 years at the time of the commission of the offence and at the time of the trial. This has been borne out by a copy of his certificate of birth which was issued on 30th June 2017. It is indicated thereon that he was born on 25th October 2005. A copy of his student card issued by [Particulars Withheld] School confirm his birth date. A letter from the school indicate that he was admitted in form one on 28th January 2019.
 9. I am therefore satisfied that the appellant was a minor at the time of the commission of the offence and during his trial. He ought therefore to have been tried in a children's court as provided for under the provisions of the *Children Act*, 2001(repealed). This explains why the state conceded to the appeal.
 10. After perusing the evidence on record I am satisfied that the offence against the appellant was proved to the required standards. Section 73 (d) (iv) *Children Act*, 2001(repealed) provides:

where any conviction or sentence made or passed by a court other than a Children's Court is appealed against or is brought before the High Court for confirmation or revision and it appears that the person convicted was at the time of the commission of the offence under eighteen years of age, the High Court shall have power to substitute for the conviction a finding of guilty in accordance with section 196 and substitute for the sentence an order under section 125(2) of this Act.



11. I therefore quash the conviction and substitute it with a finding of guilty. Equally I set aside the sentences. In view of the fact that the appellant was remanded for the entire trial period and that he was committed to prison with adults, I substitute the sentence with a probation order of three years.
12. A word of caution to trial courts; always take a few minutes to assess an accused person before you to avoid trying a child as an adult. Where in doubts, it is wise to involve experts for age assessment.

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

KIARIE WAWERU KIARIE

JUDGE

