



**Omiti v Republic (Criminal Appeal E040 of 2023)
[2024] KEHC 8101 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 8101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E040 OF 2023
KW KIARIE, J
MARCH 19, 2024**

BETWEEN

GEORGE ODHIAMBO OMITI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No. E003 of 2020 of the Principal Magistrate's Court at Oyugis by Hon. B.O Omwansa—Senior Principal Magistrate)

JUDGMENT

1. George Odhiambo Omiti, 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 between the night of the 4th day of October 2020 and the 5th day of October 2020 at [particulars withheld] village, Rachuonyo South Sub-County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of J.A.O a child aged 12 years.
3. The appellant was sentenced to serve twenty years imprisonment. He has appealed against both conviction and sentence. He was in person and raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and, in fact, in not appreciating the evidence of PW2, which, apart from materially contradicting that of the complainant, established a prior relationship between the complainant and the appellant.
 - b. The learned trial magistrate erred in law and fact when she placed reliance on the exculpatory contents of the medical examination report.



- c. Regarding the complainant's untruthful testimony about the nature of her relationship with the appellant, the provisions of section 124 of the *Evidence Act* were not applicable in so far as the believability of her evidence was concerned.
 - d. The learned trial magistrate erred in law and ignored the emerging jurisprudence on sentencing in the so-called "mandatory minimum sentences" by imposing a sentence of 15 years imprisonment.
 - e. The learned trial magistrate erred in law and, in fact, in ignoring the totality of the evidence, which pointed to the fact that the complainant held herself out as 18 years old or older.
4. The state opposed the appeal. It was contended that the offence was proved to the required standards and that the sentence was proper.
 5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. An offence of defilement 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 victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...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, therefore, are the issues I will endeavour to establish whether the prosecution proved to the required standards.

7. The complainant, J.A.O (PW1), testified that she was thirteen years old. A copy of the Certificate of Birth produced as prosecution exhibit 1 indicates that she was born on the 14th day of October 2008. Therefore, she was eleven years, eleven months and ten days old at the time of the alleged offence. Her age, for Section 8(3) of the *Sexual Offences Act*, was therefore proved.
8. Section 8(3) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
9. The evidence on record revealed that the appellant's family and the complainant's family were friends. This friendship was, however, marred by an allegation that the appellant had given some alcohol to the complainant and that he had subsequently defiled her. The appellant denied both allegations.
10. Let us start from the beginning. The complainant told the court that on the 4th day of October 2020, at about 5 p.m., she met the appellant at Riat Trading Centre. He had some alcohol known as Blue Moon. He gave it to her, and she drank it. She added that she was aware that it was alcohol. Later that



evening, when she was going to the toilet, she met the appellant, who informed her that he was going to beat her father unless she went to his home. She, therefore, complied.

11. Upon her arrival at the appellant's house, he gave her more alcohol. She slept on the chair, and the following morning, she found herself still on the chair but naked. When she asked the appellant about her clothes, he went for them in his bedroom. She went back home, and when her mother asked her where she slept, she informed her. At 2 p.m., she was taken to the hospital for examination.
12. The version of the complainant's father (PW2) differed from that of the complainant. His evidence was that when he returned home at about 7 p.m., he learned that the appellant had given some alcohol to the complainant. He went to the home of the appellant, who denied the allegation after he asked him about it. The two went to the complainant's house, and the children confirmed the allegation. The two held each other. His (PW2's) wife raised the alarm, and neighbours went and separated them. The following day, he learned that the complainant did not sleep at home.
13. In his defence, the appellant testified that the complainant found him at Riat. She took some alcohol from where he had placed it but did not see her drink it. She was in the company of two other children. Later, at 7 p.m., the complainant's father went to his house and told him that he wanted some alcohol his daughter told him that he had. After he had given him some Ken Extra alcohol, he asked him whether that was the alcohol he had given to his daughter. He said she was in a long slumber. He asked him to accompany him to his home. The complainant's father started fighting him when they arrived home. His (PW2's) children intervened.
14. There are glaring contradictions about the events between the father's evidence and the complainant. These contradictions are also featured in the evidence of the investigating officer, PC Meshack Thuku (PW4). His evidence was that the complainant told him that she sneaked and went to the house of the appellant, where they had sex throughout the night. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
15. Many contradictions were attributed to the complainant, and the other prosecution witnesses dent their credibility. For instance, it was not explained how the appellant defiled the complainant in his house, yet the evidence of L.A.O (PW3) was that the appellant was staying with his wife and children.
16. The issue of alcohol was a very serious one when it involved a child of about twelve years. Since she alleged that the appellant gave her alcohol when she went to his house at night, the investigating officer ought to have subjected her to an examination to confirm whether the allegation was true.
17. When the complainant contended that she was given alcohol by the appellant at Riat Trading Centre, she said she was in the company of another child. This child was not called as a witness, and no explanation was given for the failure.
18. The clinical officer found that the complainant's hymen was missing. However, the complainant conceded during the cross-examination that she previously had sex with her boyfriend. The breaching of the hymen cannot be attributed to the alleged defilement by the appellant.
19. Kibet Serem (PW5), the clinical officer, testified that the complainant was found to be pregnant. She was tested on the 5th day of October 2020. The pregnancy age was not indicated to confirm the



allegation against the appellant. I became curious to know how soon a pregnancy can be detected after unprotected sex. This is what I came across from the internet:

If you think you may be pregnant or recently had unprotected sex, it's common to want to test for pregnancy to learn about your status. You will get the most reliable test results after you miss your period. Your body does not make enough hCG (the hormone pregnancy tests detect) until 10-14 days after conception. If you don't want to wait until you have missed your period, experts advise you to wait roughly two weeks after unprotected sex to test for pregnancy.

20. If this is the correct position, then the appellant was not responsible if we assume he had sex, as complained by PW1.
21. After analyzing the evidence, I find that the appellant's conviction was unsafe. I quash the conviction and set aside the sentence. He is set at liberty unless, if otherwise, lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE

