



**Nyonje v Republic (Criminal Appeal E008 of 2024)  
[2024] KEHC 17040 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E008 OF 2024**

**KW KIARIE, J**

**APRIL 30, 2024**

**BETWEEN**

**REUBEN OLUOCH NYONJE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. case NO.36 of 2019 of the Senior Principal Magistrate's Court at Kendu Bay by Hon. Celesa A. Okore-Principal Magistrate)*

**JUDGMENT**

1. Reuben Oluoch Nyonje, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between the 26<sup>th</sup> day and the 31<sup>st</sup> day of August 2019 at [Particulars Withheld] within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of L.A.A., a child aged fifteen years.
3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and filed this appeal against the conviction and the sentence. He was in person. He raised grounds of appeal as follows:
  - a. That the trial magistrate erred in both law and fact by convicting the appellant despite the glaring contradictions, thus making his conviction unsafe.
  - b. That the learned trial magistrate erred in both law and facts by convicting the appellant using a shady and shoddy investigation report, thus making his conviction problematic.
  - c. That the sentence of fifteen years was harsh and excessive considering the appellant's age since he was and is a young man.



4. The state opposed the appeal through Mr. David Ndege, learned counsel, but did not file their submissions.
5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs 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.

These are the ingredients the prosecution must prove beyond any reasonable doubt before the trial court.

7. According to F.A.A. (PW1) evidence, her mother, the complainant, went missing from her home on August 26, 2019. The police were notified the following day. On August 31, 2019, the complainant was arrested and taken to the police.
8. PC Jane Wangui (PW4) testified that the complainant was taken to the police station by members of the community policing.
9. L.A.A (PW3) testified that the appellant called her on the phone on the 26th of August 2019 and informed her that he would pick her which he did. He took her to a house in an estate known as Virgin Lake. On that night, they had sexual intercourse and on the subsequent days of her stay until the 31<sup>st</sup> day of August 2019. She said the appellant was her boyfriend.
10. In his defence, the appellant contended that the complainant's brother, J, falsely implicated him. He did not raise this issue with the complainant or her mother. This defence was an afterthought and was dismissed as it ought to be.
11. In her evidence, the complainant testified that she was fifteen years old at the time of the offence. A copy of her birth certificate was produced as an exhibit. It indicates that she was born on June 11, 2003. At the time of the incident complained of, she was sixteen years and two months old. For the purposes of section 8 (4) of the *Sexual Offences Act*, her age was proved to the required standards.
12. Jacob Ogutu (PW2), a clinical officer at Nyangiela Sub County Hospital, adduced the medical evidence. His evidence was that when the complainant was examined on the 3<sup>rd</sup> day of September 2019, her external genitalia were expected, but her hymen was absent. He, therefore, concluded that there was defilement. The Court of Appeal in the case of *P. K.W vs Republic* [2012] eKLR observed as follows:
  - “ 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is the hymen only ruptured by sexual intercourse?”
  16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been



defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen vs Manuel Vincent Quintanila* [1999] AB QB 769.”

There must be some other evidence to support the allegation of defilement.

13. The complainant contended that it was the appellant who defiled her. When the only evidence that tends to incriminate an accused person is that of the complainant, the trial court must adhere to the proviso of section 124 of the *Evidence Act*. It provides:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

In analysing the evidence on record, I will bear this proviso in mind.

14. The medical evidence did not assist the court much. Was the absence of the hymen due to sexual intercourse? If it was, given the proximity of the examination to the period complained of, then it ought to have indicated whether it was recently breached or not. To state that the hymen was absent was insufficient to conclude that the complainant was defiled. Considering what the court said in *P. K.W vs Republic* (supra), the prosecution did not prove the penetration element to the required standards.
15. The conclusion I come to is that the appellant's conviction was unsafe. I quash the conviction and set aside the sentence. He is set at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30<sup>TH</sup> DAY OF APRIL 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

