



REPUBLIC OF KENYA



KENYA LAW
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**Adei v Republic (Criminal Appeal E040 of 2022)
[2024] KEHC 4360 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E040 OF 2022**

KW KIARIE, J

APRIL 25, 2024

BETWEEN

JOSEPHAT ODHIAMBO ADEI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.19 of 2021 of the Senior Principal Magistrate's Court at Kendu Bay by Hon. Celesa A. Okore-Principal Magistrate)

JUDGMENT

1. Josephat Odhiambo Adei, 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 November 2019 and the 10th day of September 2021 within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.A.O., a child aged seventeen years.
3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and filed this appeal against the sentence. He was in person. He raised grounds of appeal as follows:
 - a. That the word "unlawfully" was added in the primary and alternative charges in the charge sheet without countersigning. This was unlawful and should have been amended or substituted according to the law.
 - b. That penetration was not proved.
 - c. That broken hymen is not proof of penetration or defilement.
 - d. That my alibi defence was unlawfully and wrongfully dismissed.



- e. That the burden of proof was shifted to the appellant.
 - f. That the medical evidence shows that no defilement occurred.
4. The state opposed the appeal through the prosecution counsel, who contended that all ingredients of the offence were proved.
 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 v Republic* [1972] EA 32.
 6. Although it is desirable to countersign for any correction in the charge, failure to do so in the instant case did not prejudice the appellant in any way. This ground of appeal has no basis.
 7. 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.

8. A keen security guard at School noticed the complainant sleeping in the appellant's house. He reported to the school authorities, which led to the complainant's arrest in the appellant's house. The appellant was later arrested. Peter Otieno (PW4) testified that he noticed the complainant entering the house of the complaint on the 10th of September 2021. His evidence was that the appellant's house was near the school and that he knew the appellant well.
9. M.A.O. (PW2), the complainant, testified that she was seventeen and was in form two at Secondary School. She informed the court that she had a love relationship with the appellant, had slept in his house severally, and had sexual intercourse with him since 2019. On the 10th day of September 2021, when she slept in the house of the appellant, they had sexual intercourse.
10. in his defence, the appellant contended that he did not know Secondary School. He was arrested, he said, at Mawego, where he was with his wife. He claimed that he was arrested because an unknown man was having an affair with his wife.
11. A copy of the complainant's birth certificate was produced as an exhibit. It indicates that she was born on September 16th, 2005. As of September 10th 2021, the time of the incident complained of, she was six days shy of her sixteenth birthday. For the purposes of section 8 (4) of the [Sexual Offences Act](#), her age was proved to the required standards.
12. Ernest Omollo (PW1), a Kendu Bay sub-county Hospital clinical officer, adduced the medical evidence. His evidence was that when he examined the complainant, she had an old, broken hymen. He concluded that she was sexually active. This corroborated the evidence of the complainant that she engaged in sexual liaison with the appellant severally. It also explains why no fresh injury on her genitalia could have been detected.

I, therefore, find that the complainant was defiled.



13. The complainant contended that it was the appellant who defiled her. This evidence was supported by some circumstantial evidence from Peter Otieno (PW4). In the case of *Republic v Kipkering arap Koskei & Another* 16 EACA 135, the Court of Appeal held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

This witness testified that the complainant entered the appellant's house on September 10, 2021, and left on September 11, 2021. This evidence was corroborated by that of PW3, the complainant's mother, who testified that she did not sleep at home and that she was arrested on September 11, 2021.

14. Sergeant Linet Ombogo (PW5) testified that when she received a report from the head teacher Secondary School of a man who was cohabiting with a female student near the school, she went and found the complainant in the house of the complainant. She arrested her but did not find the appellant in the house. This evidence further corroborates the complainant's evidence as to the identity of her defiler. 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 this case, the complainant's evidence was corroborated by other independent evidence that the appellant defiled her.

15. The appellant, in his defence, pleaded an alibi. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie v. Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

The appellant's contention that he was at a different place and did not know the evidence adduced by the prosecution displaced Secondary School.

16. I, therefore, find that the prosecution proved beyond reasonable doubt that the appellant defiled the complainant.

17. Section 8 (4) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The sentence meted out to the appellant was the prescribed under the section.

18. The appellant was arrested on the 12th day of September 2021 and sentenced on the 15th day of November 2022. The proviso to section 333 (2) of the Criminal Procedure Code states:

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

19. The appellant's sentence will run from September 12, 2021, and his appeal succeeds only to that extent.

Delivered and signed at Homa Bay this 25th day of April 2024

KIARIE WAWERU KIARIE



JUDGE

