



REPUBLIC OF KENYA



KENYA LAW
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**Adoko v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 4014 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E007 OF 2023**

KW KIARIE, J

APRIL 25, 2024

BETWEEN

MACDAN ODHIAMBO ADOKO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.16 of 2019 of the Senior Principal Magistrate's Court at Kendu Bay by Hon. Celesa A. Okore-Principal Magistrate)

JUDGMENT

1. Macdan Odhiambo Adoko, 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 28th and the 30th day of July 2019 at Rachuonyo North sub-county within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of C.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 learned trial magistrate erred in law and facts by failing to realize that the prosecution case was insufficient, fabricated, speculative, unconstitutional, and lacked probative values to warrant the court's decision.
 - b. That the prosecution case was not proved beyond reasonable doubt.
 - c. That PW1's evidence was incredible.
 - d. That the ingredients of defilement as an offence were not proved.



- e. That the appellant's arrest was improper.
 - f. That the appellant's right to a fair trial was violated under Article 50(2) of the *Constitution* as it was not supplied with witnesses' statements, a list of exhibits, and other documents the prosecution was to rely upon in the case.
4. The state opposed the appeal through the prosecution counsel, who contended that it lacked merit.
 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. On the 27th day of July 2019, the prosecutor informed the court that he had supplied each accused with copies of the statements of six witnesses. The appellant did not dispute the information to the court. He cannot be heard to claim that his right to a fair trial was breached.
 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. When the complainant returned home late, her mother ordered her to return to where she had come from. This is how she found herself with K, her cousin who wanted her to be a lover of his friend, the appellant herein. The trio went to the home where the appellant stayed with his grandmother. On the first night, she slept on a chair in the house of the appellant's grandmother. The appellant and K went away for the night. They returned on the following day. She was woken up from the house of the appellant's grandmother and taken to the appellant's house.
9. The complainant testified that the appellant had two guns in a bag. It was in this house that the appellant had sex with her. When police officers went to the home, the appellant managed to escape.
10. In her evidence, the complainant testified that she was born on the 10th day of April 2003. A copy of her birth certificate was produced as an exhibit. It confirmed her date of birth. 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 age of the complainant was proved to be the required standard.

11. The medical evidence was adduced by Adan Omuye (PW4), a Kendu Bay sub-county Hospital clinical officer. He testified that he was attached to Kendu Bay sub-county hospital. His evidence was that when the complainant was examined on the 30th day of July 2019, she had a bruised vagina and broken hymen. Her pants were blood-stained. He, therefore, concluded that there was defilement. There must be some other evidence to support the allegation of defilement.



12. The trial court's finding that the complainant was defiled was supported by the evidence on record. I, therefore, find that the prosecution proved that the complainant was defiled.
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.

14. In his defence, the appellant contended that he gave the complainant a place to sleep. He denied having defiled her and that the blood in her pants was from periods. When the clinical officer testified, he was not challenged about the source of the blood he claimed was from menstruation. The medical evidence corroborated the allegation of the complainant that she was defiled.
15. I, therefore, find that the prosecution proved beyond reasonable doubt that the appellant defiled the complainant.
16. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] EA 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. Rex*(1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v. Shersbewsity*(1912) CCA 28 TLR 364.

17. The minimum sentence under section 8 (4) of the *Sexual Offences Act* is fifteen years. No sufficient reasons have been adduced to show that the learned trial magistrate acted upon some wrong principle or overlooked some material factor. The sentence meted out to the appellant was the minimum prescribed under the section.
18. The appeal is, therefore, dismissed for want of merits.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

