



**Omondi v Republic (Criminal Appeal E056 of 2023)  
[2024] KEHC 4015 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4015 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E056 OF 2023**

**KW KIARIE, J**

**APRIL 24, 2024**

**BETWEEN**

**STEPHEN OUMA OMONDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. case NO.22 of 2021 of the Senior Principal Magistrate's Court at Kendu Bay by Hon. Celesa A. Okore-Principal Magistrate)*

**JUDGMENT**

1. Stephen Ouma Omondi, 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 16<sup>th</sup> day of March 2020 and the 4<sup>th</sup> day of April 2021 at Komuoyo sublocation, Rachuonyo North sub-county within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.A., a child aged fifteen 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 charge as indicated on the charge sheet; section 8(2) (4) of the [SOA](#) does not specify the prescribed sentence.
  - b. That the three ingredients of the present offence were never established against the appellant.
  - c. That PW1, the complainant, consented to the alleged offence.
  - d. That PW1 is an untrustworthy and incredible witness, and her narration of the alleged event is not cunning.



- e. That the appellant was not found with the complainant.
  - f. The prosecution witness evidence was marred with contradictions and glaring gaps.
  - g. That suspicions, however strong, cannot form the basis of conviction.
  - h. That the appellant was not accorded a fair trial as enshrined in Article 50(2) of *the Constitution*.
  - i. No DNA test was satisfactorily brought in the court report. There is no proof that the appellant impregnated the complainant.
  - j. That the mandatory nature of the sentence imposed against the appellant is unconstitutional and lacks court discretion.
4. The state opposed the appeal through Mr. David Ndege, learned counsel, who contended that the conviction was safe and the sentence was proper.
  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 the complainant, her relationship with the appellant started in the year 2020, and she had several consensual sexual encounters. Their first sexual liaison was on the 16<sup>th</sup> day of March 2020, and the third time was on the 4<sup>th</sup> day of April 2021. This was a secret affair, but the lid was lifted when she became expectant. She gave birth on the 15<sup>th</sup> day of December 2021.
  8. In his defence, the appellant admitted that he had sexual intercourse with the complainant and that he knew she was below the age of eighteen.
  9. 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.
  10. A copy of the complainant's birth certificate was produced as an exhibit. It indicates that she was born on August 2<sup>nd</sup> 2004. At the time of the incident that gave rise to this case, she was between fifteen years and seven months and sixteen years and six months. For the purposes of section 8 (4) of the *Sexual Offences Act*, her age was proved to the required standards.
  11. Ernest Omollo (PW5), a Kendu Bay sub-county Hospital clinical officer, adduced the medical evidence. His evidence was that when the complainant was examined on September 30, 2021, she had a broken hymen and was expectant. Therefore, he concluded that there was defilement.



12. PC Dorca Okeyo (PW4) produced a DNA analysis report that established that the appellant was the biological father of the complainant's child.

I, therefore, find that the appellant defiled the complainant.

13. I have perused the record but found no reason for the appellant to claim that he was not accorded a fair hearing.

14. The appellant contended that the sentence was unconstitutional. 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 vs. Republic [1970] E.A. 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 Vs. 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 Vs. Shershewcity (1912) C.CA 28 T.LR 364.

15. I am aware of the school of thought that a minimum sentence takes away the court's discretion in sentencing. I agree. However, this holding will remain aspirational until the law is amended to remove the minimum sentence. In the instant case, nothing shows that the trial court acted upon some wrong principle or overlooked some material factor. The sentence is legal.

16. The upshot of the preceding analysis of the evidence on record is that the appeal lacks merit. I accordingly dismiss it.

**DELIVERED AND SIGNED AT HOMA BAY THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**KIARIE WAWERU KIARIE**

**JUDGE**

