



**Opiyo v Republic (Criminal Appeal E003 of 2024)
[2024] KEHC 4013 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E003 OF 2024**

KW KIARIE, J

APRIL 24, 2024

BETWEEN

JOSEPH OTIENO OPIYO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.16 of 2022 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)

JUDGMENT

1. Joseph Otieno Opiyo, 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 are that on the 15th day of May 2022 at Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of S.A., a child aged thirteen years.
3. The appellant was sentenced to twenty (20) years' imprisonment. He was aggrieved and filed this appeal against the conviction and the sentence.
4. The appellant was in person. He raised grounds of appeal as follows:
 - a. That the offence of defilement was not proved to the required standard.
 - b. That the learned trial magistrate erred in both law and fact by convicting the appellant to 20 years without withstanding that the appellant was a minor aged 17 but misdirected herself by saying that the appellant was an adult.
 - c. That the trial court failed to comply with Article 50(2)(g) and (h) of the [Constitution](#).
 - d. That the sentence was harsh and excessive.



- e. That learned trial magistrate erred in law and fact in convicting him on evidence which did not meet the required standard.
 - f. That the learned trial magistrate erred in law and fact by depending on evidence based on theory and conspiracy and that the prosecution witnesses did not prove the offence beyond a reasonable doubt.
5. The state opposed the appeal. It was contended that the appeal lacked merits.
 6. 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.
 7. The appellant contended that Article 50(2)(g) and (h) of the [Constitution](#) was not complied with. It provides:
 - Every accused person has the right to a fair trial, which includes the right—
 - (g) to choose and be represented by an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 8. Before the case hearing commenced, on the 17th day of May 2022, the appellant was informed of his right to be represented by an advocate of his choice. He cannot complain that his right to information was breached. This court takes judicial notice that the state has not been able to assign advocates to accused persons, for payment has been challenges even in cases where such provisions of advocates are mandatory.
 9. The appellant has contended that he was treated as an adult, and yet he was seventeen years old. He may have contributed to the confusion, for he informed the court twice that he was twenty-two. This was on the 17th day of May 2022, and while testifying in his defence on the 19th day of December 2022. Without explaining why, he informed the court he was twenty-two years old, and it would be difficult to reconcile the information in the copy of the Certificate of Birth, he attached and his averment on his age. A copy of the certificate indicates that he was born on October 20th, 2005. This would mean he was seventeen at the time of the alleged offence.
 10. 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.
 11. This position was echoed in the case of *Fappyton Mutuku Nguni v Republic* [2012] eKLR. Therefore, I will endeavour to establish whether the prosecution met the required standards.
 12. In her evidence, S.A. (PW4) testified that she was thirteen. A copy of the Certificate of Birth that was produced as prosecution exhibit 1 indicates that she was born on the 5th day of September 2009. As of



the 15th day of May 2022, she was twelve and eight months old. Her age, for Section 8(3) of the *Sexual Offences Act*, was therefore proved. 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.

13. The complainant testified that the appellant, her boyfriend, requested her to go to his house on the 15th day of May 2022. When she went there, he forcefully had sexual intercourse with her. He threatened to beat her, and she complied. They had intercourse once, and while they were caressing, they heard a knock at the door. When the door was opened, her father entered. Both were arrested.
14. Dr. Samuel Juma examined the complainant the following day. He found no visible injuries. However, the hymen was not intact. A broken hymen without any other evidence cannot be the basis of proof of penetration. The Court of Appeal was of the same view in the case of *P. K.W v Republic* [2012] eKLR. It was 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 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 v Manuel Vincent Quintanilla* [1999] AB QB 769.”

15. Without a positive finding on the genitalia, I find that the prosecution did not prove penetration on the 15th day of May 2022.
16. The mode of taking the evidence of an accused person is verbatim. The trial court in the instant case appeared to have elicited the evidence by asking questions which may be prejudicial to the appellant. Whereas a trial court can ask questions to seek clarification, it is improper to appear to cross-examine an accused.
17. After analyzing the evidence on record, I find that the appellant’s conviction was unsafe. I quash the conviction and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

