



**Olukuru v Republic (Criminal Appeal E005 of 2024)
[2024] KEHC 7700 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E005 OF 2024**

**KW KIARIE, J
JUNE 27, 2024**

BETWEEN

KEVIN MANGWANA OLUKURU APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO.5 of 2021 of the Principal Magistrate's Court at Kendu Bay by Hon. Celesa A. Okore-Principal Magistrate)

JUDGMENT

1. Kevin Mangwana Olukuru, 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 25th day of March 2021, at Rachuonyo North sub-county within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of AAO, a child aged fifteen years.
3. The appellant was sentenced to twenty 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 trial court erred in law and facts by convicting the appellant on prosecution evidence which did not prove the offence of defilement, that is, penetration.
 - b. That the trial court erred in law and facts by failing to observe that the trustworthiness of the complainant was not proved as required by the provision of section 124 of the [Evidence Act](#).
 - c. That the trial court erred in law and facts by failing to consider that the complainant and the appellant were taken to the police station at the same time and only the complainant took a medical examination, which was prejudicial to the appellant's access to justice for the truth to be known.



- d. That the trial court erred in law and facts by pronouncing a harsh and excessive mandatory minimum sentence of twenty years without considering the appellant's mitigation.
4. The state opposed the appeal on the following grounds:
 - a. The complainant's evidence was corroborated by PW4, the clinical officer who gave evidence on behalf of the medical officer who examined PW1 and filled out a P3 form for her.
 - b. This was a case of recognition.
5. The allegation that mitigation was not considered is a blatant lie and an afterthought. This is the 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. 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. The evidence of the complainant (PW1) was that the appellant was her boyfriend. She gave her age as fifteen years. Her certificate of birth was produced as an exhibit. Her date of birth is indicated as 23rd March 2006. On the 25th day of March 2021, she went to his house at about 5 p.m. They had sexual intercourse and went back home at about 7 p.m. Her parents traced her to the appellant's house. Both were arrested and taken to Rakwaro Police Station.
8. NOO (PW2) testified that when he failed to find her daughter at home, he made enquiries from her friend. She led him to the appellant's house, where they found the two in a locked house. It was the complainant who opened the door for them after knocking on the door. He (PW2) summoned the village elder, who assisted him in taking the two to Rakwaro Police Station. Barack Oduor (PW3), the village elder, confirmed that he assisted in arresting the complainant and the appellant.
9. The prosecution evidence established the complainant's age to the required standards and that she was found in the appellant's house.
10. When AAO was examined on the alleged offence date, her labia minora and labia majora were normal. There was a white discharge, and no spermatozoa were seen. The only positive finding was a broken hymen, which was not recent. A broken hymen alone cannot be used as proof of penetration. This was also the view of the Court of Appeal in the case of *P. K.W v Republic* [2012] eKLR. The court 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 Quintanila [1999] AB QB 769.*”
11. The only evidence of the alleged penetration was that of the complainant. The proviso to section 124 of the *Evidence Act* 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.
12. The evidence of PW2 and PW3 contradicted the complainant's claim about how she was arrested. Her evidence is that she went home at about 7 p.m. and was traced to the appellant's house. Her father and the village elder's evidence was that the two were found in the appellant's house. If she could lie about a simple thing as her arrest, can she be trusted to tell the truth about the alleged defilement? Is there a possibility for her to claim defilement to appease her father? The Court of Appeal in the case of *Ndungu Kimanyi v Republic [1979] KLR 283* (Madan, Miller and Potter JJA) held:
- The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
13. The complainant cannot be trusted to tell the truth about penetration by the appellant. There being no other evidence to support her claim on penetration, I find that the conviction was unsafe.
14. I quash the conviction and set aside the sentence. The appellant is at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY ON THIS 27TH DAY OF JUNE 2024

KIARIE WAWERU KIARIE

JUDGE

