Case Number:	Criminal Appeal E010 of 2020
Date Delivered:	31 Mar 2022
Case Class:	Criminal
Court:	High Court at Homabay
Case Action:	Judgment
Judge:	Kiarie Waweru Kiarie
Citation:	Clinton Onyango Mohamed v Republic [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	C.A Okorem–mSRM
County:	Homa Bay
Docket Number:	-
History Docket Number:	S.O.A Case No.15 of 2019
Case Outcome:	-
History County:	Homa Bay
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. E010 OF 2020

CLINTON ONYANGO MOHAMED.....APPELLANT

VERSUS

REPUBL.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.15 of 2019 of the

Senior Principal Magistrate's Court at Oyugis by Hon. C.A Okore

–Senior Resident Magistrate)

JUDGMENT

1. Clinton Onyango Mohamed, 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 were that on diverse dates between 28th day of June and 15th day of July, 2019 at [Particulars Withheld] sub location, Rachuonyo North Sub County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of BZA, a child aged 17 years.

3. The appellant was sentenced to serve 15 years imprisonment. He has appealed against both conviction and sentence.

4. He raised the following grounds of appeal:

a) That the sentence of 15 years imprisonment imposed by the trial magistrate is harsh and excessive as it violated the right to benefit from the least severe punishment under article 50(2) (p) of the constitution.

b) That the trial magistrate erred in law and facts by relying on medical evidence that was not sufficient enough to prove penetration as one of the ingredients of defilement.

c) That the trial magistrate erred in law and fact by relying on prosecution's evidence that was marred with contradictions and inconsistencies.

d) That the trial magistrate erred in law and facts by not considering that the age of the complainant was not proved beyond reasonable doubt to be below 18 years.

e) That the trial magistrate erred in law and facts by not considering the period spent in remand custody while passing the sentence of 15 years.

f) That the trial magistrate erred in law and facts by not considering that there was no sufficient evidence adduced in court to link the appellant to the house in which the complainant was found.

g) That the trial magistrate erred in law and facts by not finding out that the complainant was forced and coerced to give incriminating evidence against the appellant by the police officers who arrested him.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel who contended that the conviction was supported by evidence on record and that the sentence was lawful.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. For the prosecution to establish the offence of defilement, the following ingredients must be proved beyond any reasonable doubts:

a) Whether there was penetration;

b) Evidence must show that the accused is the perpetrator; and

c) The age of the victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

8. The evidence of B.Z.A (PW1) was that between 28th June, 2019 and 15th July, 2019 she had sexual intercourse with the appellant every night. When she was examined on 16th July, 2019 by Fidel Omwoyo, he found her genitalia normal except that her hymen was broken, but this was not recently.

9. The loss of hymen cannot be taken as the sole conclusion of defilement. The Court of appeal in the case of **P. K.W vs. Republic [2012] eKLR** on the issue of broken hymen observed as follows:

15. …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 vs Manuel Vincent Quintanila [1999] AB QB 769.

10. The medical evidence did not support the complainant that she had sexual intercourse every night that between 28th June, 2019 and 15th July, 2019. This being the case, the trial court was left with the complainant's evidence on penetration.

11. The proviso to section 124 of the Evidence Act states:

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. In the instant case, the complainant painted a picture of herself as untruthful. At the opening of her evidence, she contended that when she disagreed with her parents, she went away and spent a night in the home of her friend Valary. She however changed and said that she went to the house of the appellant when the prosecutor pointed that that was not what she had recorded in her statement with the police. There was no attempt to reconcile these two contradicting statements and an explanation why she gave the two versions was not sought.

13. When her mother, Rose Atieno (PW2) testified, she never told the court that she and her husband had disagreed with the complainant as she had informed the court. The only thing she said was that the complainant told her that she left home for she was angry with her.

14. The court of Appeal in the case of of **Ndungu Kimanyi vs. 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 makes it unsafe to accept his evidence.

It was unsafe to rely on the evidence of the complainant.

15. The upshot of the foregoing is that the conviction was not safe. The same is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at Homa Bay this 31st Day of March, 2022

KIARIE WAWERU KIARIE

JUDGE