



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL APPEAL NO. 12 OF 2018**  
**CORAM R.E.OUGO.J**  
**(FORMERLY KISII 1628 “B” OF 2016)**

**BETWEEN**

**JARED ORENGE ASIAGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case no. 1628 ‘B’ of 2016*

*at Principal Magistrate’s Court at Kilgoris, Hon. R.M.Oanda dated the 3<sup>rd</sup> November 2017)*

**JUDGMENT**

1. The appellant Jared Orege Asiago was convicted of the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that, on the night of 20<sup>th</sup> day of December 2016 in the Transmara West Sub County within Narok County intentionally cause his penis to penetrate the vagina of MJ, a girl aged twelve (12) years. The appellant also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that, on the night of 20<sup>th</sup> day of December 2016 at around 1030hours in Transmara West District within Narok County intentionally and unlawfully touched the vagina and breasts of MO, a girl of twelve (12) years.

2. The appellant’s appeal is against the conviction and sentence. He filed a petition stating his grounds of appeal. He challenges his conviction on the following grounds; that the prosecution case was not proved beyond reasonable doubt, the age of the complainant’s was not proved, that the trial magistrate contravened Article 49 (i) (f) (i) 25 (a) (c) 50 2 (g) (h) (j) and his rights were adversely affected and that his defence was rejected without a concrete reason.

3. As a first appellant court am required to evaluate the evidence and reach my own conclusion and findings bearing in mind that I did not see or hear the witnesses.( **Okeno vs. Republic [1972] EA 32**)

4. The prosecution case called six witnesses. PW1 was a minor 12 years old after voire dire examination testified as follows. On the night of 20/12/2016 she was in the house. The appellant entered their house and told her not to talk. He removed her clothes and had sex with her. He penetrated her. She bled her inner pant had blood stains. The lights were on. He was known to her he was her neighbour. Neighbours rescued her and took her to hospital.

5. PW2 testified that PW1 is her child. On the night of 20/12/2016 she left her children studying. Ongoing back to her house she heard screams she found PW1 had been defiled there was blood on her bed. The appellant is her neighbour. The appellant ran away. He was arrested. He was also blood stained. She took PW1 to hospital. The appellant had ran away.

6. PW3 AO a minor 11 years after voire direexamination testified that on the night of 20/12/2016 she was home with PW1. The lights were on. The appellant entered their house and threw PW1on the ground removed her pant and did bad things to her. They screamed and people came. The appellant ran out and entered the maize plantation.

7. PW4 Festus Kurgat a clinical officer testified that he filled a P3 form on the 22/12/2016. PW1had history of being defiled on 201/12/2016.

Her pant and skirt were blood stained. Her hymen was broken. Her labia minora was hypermic (reddish) and the lab tests showed pus cells. She was 12 years old.

8. PW5 CPL David Otieno recalled how he received the report from PW2 who was with PW1. He arrested the appellant and he was later charged.

9. PW6 No. 73726 the investigating officer recalled how he investigated the matter after the report was made. He produced the PW1's pant and appellant's pant as exhibits.

10. When put on his defence the appellant gave a sworn statement as follow; He is a water vendor. He stays at Ennosaen Kiambi Miwa. He has stayed there for 10 years. He worked the whole day. He usually collects money in the evening. He went to a club and ordered a drink. He was waiting to be paid. A lady called Janet Moraa drunk his drink. He informed the waiter and Janet started to abuse him. He was given another drink. He was paid his dues and he left. Later police officer David Otieno arrested him and he was taken to hospital

11. The issue raised by the appellant is whether the prosecution proved its case. To prove an offence of defilement under section 8(1) of the Sexual Offences Act the prosecution must prove that the appellant caused an act of penetration.

12. The testimony of PW1 was that the appellant entered their house he removed her clothes and he had sex with her he penetrated her, she bled. Her evidence was corroborated by the evidence of PW3 who was in the same house. She saw the appellant enter, the appellant got hold of PW1threw her on the ground and did bad things to her, "*kamfanyia tabia mbaya*". The evidence of PW1 was further corroborated by the medical evidence. She was examined by PW4 and found to have a broken hymen though not fresh, lad tests showed pus cells and it was concluded by PW4 the clinical officer who examined PW1 that there was defilement. This medical evidence confirms that there was penetration. The age assessment form confirmed that PW1 was 12 years.

13. On identification of the appellant. PW1 and PW3 testified that the lights were on. They saw the appellant enter. The appellant was known to them he was a neighbour. I find that the appellant was identified by PW1 and PW3 as the person who defiled PW1.

14. The appellant defence was that the PW2 was with him at the club and that she took her drink and she abused him when he informed the waiter. The trial court considered his defence and found it an afterthought. I note that when PW2 was cross-examined she admitted being at the club. The appellant did not ask her about a drink she took from him. I am constrained to agree with the trial court that the defence raised was an afterthought. The accused was accorded a fair hearing. He was informed of the charge and allowed to cross-examine the witnesses. From the proceedings he participated and cross-examined the witnesses, he was nor prejudiced. I also note that he gave detailed submission at the close of the trial. In my view his rights were not infringed.

15. I am satisfied that the prosecution proved that the appellant defiled the complainant. The witnesses called gave adequate evidence to support the prosecution case.

16. Section 8 (3) of the Act provides 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 not less than 20 years imprisonment. The sentence was a lawful sentence as provided in law. I therefore affirm the conviction and sentence. The appeal is dismissed.

**Dated, signed and delivered at Kisii this 10<sup>th</sup> day of April 2019**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Appellant                      In person**

**Mr. Otieno                      Senior Prosecution Counsel Office of the DPP**

**Rael                              Court clerk**