



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**CRIMINAL APPEAL NO.17 OF 2016**

**HUSSEIN ABDULLAHI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*( From the original conviction and sentence in criminal case No.41 of 2016 of the Senior Resident Magistrate's Court at Moyale by Hon. Gathogo Sogomo – Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **HUSSEIN ABDULLAHI**, was convicted for the offence of defilement contrary to section 8(1) (2) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 3<sup>rd</sup> February 2016 in Moyale sub County of Marsabit County, he knowingly and intentionally caused his penis to penetrate the vagina of **YI**, a child aged 9 years.

He was sentenced to serve twenty five years imprisonment with hard labour. He has appealed against both conviction and sentence.

The appellant was represented by Mr. Mung'ata learned counsel. He raised the following grounds of appeal:

- 1.That the learned trial magistrate erred in law and in fact by convicting the appellant on a defective charge.
2. That the learned trial magistrate erred in law and in fact by convicting the appellant without evidence of penetration.
3. That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of doubtful and inconsistent evidence while relying on uncorroborated evidence.
- 4.That the learned trial magistrate erred in law and in fact by convicting the appellant contrary to the law.
5. That the learned trial magistrate erred in law and in fact by meting out an illegal sentence.

The state partially opposed the appeal through Mr. Chirchir, the learned counsel.

The facts of the prosecution case were briefly as follows:

While the appellant was standing behind a house, he beckoned at the complainant. When she went to where he was, he told her that he wanted to give her **plumbynut** (described as a supplement for malnourished children). She therefore followed him to his parents' house. The appellant took her to a room with a bed and proceeded to defile her. When she bled, the appellant cleaned her genitalia with water. The appellant gave her the **plumbynut**. She went back home and reported to her mother.

The appellant denied any involvement in the offence. He contended that he had differed with the girl's family after they failed to pay him for some water he was selling.

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**.

I do agree with the submission that the substantive charge was erroneously drafted. The learned state counsel conceded as much. He however argued that the defect is curable under section 382 of the Criminal Procedure Code.

The charge ought to have read:

***contrary to section 9 (1) as read with section 9(2) of the Sexual Offences Act***

I have previously observed that the trial court has a duty to ensure that the charge is correct in all aspects. After perusing the record, I am satisfied that the appellant understood the charge against him and he fully participated in the trial. He was therefore not prejudiced in any way. The defect is accordingly cured under section 382 of the Criminal Procedure Code.

**YI** (P.W 1) testified that the appellant penetrated into her genitalia with his "**thing**" and that she felt a lot of pain. She bled and he wiped the blood with some water. Her mother F D G (P.W3) testified that when she examined the complainant, after the latter had reported to her of her ordeal, she found her bleeding from the vagina. According to the complainant and her mother there was penetration. It has been argued for the appellant that there was no penetration. Though the state conceded this argument, the findings of Dr. Khalumi who examined the complainant were as follows:

***Labia majora normal, labia minora mutilated severely (F.G.M). There are two small lacerations on the upper and the lower parts of the introitus, associated with pain prior to the utilization of anaesthesia.***

***No visible discharge from the introitus. The hymeneal membrane is intact but there is mild inflammation on the vaginal mucosa proximal to it. This suggests penetration but the penetration had not gone beyond the hymeneal membrane.***

The **online Medical Dictionary** defines **vaginal introitus** as follows:

***Vaginal introitus: The vaginal opening is called the introitus of the vagina.***

The finding of Dr. Khalumi is that the vaginal opening had two minor lacerations and the same was tender. He also made a finding that there was penetration that did not go beyond the hymeneal membrane.

Penetration under the Sexual Offences Act is defined as:

***the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

In the instant case I find that there was penetration.

I agree with the submissions made on behalf of the appellant on contradictory evidence. I however find the contradiction in the evidence of the recovery of the **plumbynut**. according to the evidence of P.C **Nixon Talam** (P.W 5) he recovered the same from the house of the appellant. However, the complainant and her mother testified that the complainant left the house of the appellant with the **plumbynut** in issue. In my view this is not a material contradiction. It does not go to the core of the credibility of the witnesses.

For an offence of defilement to be proved, three ingredients must be proved beyond reasonable doubts. In the case of **FAPPYTON MUTUKU NGUI vs. REPUBLIC [2012] eKLR** the court enumerated them in the following terms:

***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. (emphasis mine)***

*In the instant case there is ample evidence to show that the three ingredients were proved beyond reasonable doubts.*

*There is evidence that the appellant at the time of the trial was a minor. He ought not to have been convicted nor sentenced to imprisonment. Section 189 of the Children Act provides as follows:*

***The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Children's Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.***

It was illegal for the trial magistrate to "convict" and to "sentence" the appellant.

Section 8 (2) of the sexual Offences Act provides as follows:

***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

The section does not provide for hard labour. The sentence by the learned trial magistrate was therefore illegal.

Section 191 of the Children Act provide for ways of dealing with children offenders. In instant case, I quash the conviction and set aside the sentence. I substitute the conviction thereof with the finding of guilty and make an order that the appellant be under the supervision of the probation office, Moyale for a period of three years. To that extent his appeal succeed.

**DATED at Marsabit this 19<sup>th</sup> day of April, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**