



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL APPEAL NO. 7 OF 2014**

**BETWEEN**

**CALEB OCHIENG OLOO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. J. Ong'ondo, SRM dated 21<sup>st</sup> November 2013 at Senior Principal Magistrate's Court at Maseno in Criminal Case No. 1292 of 2012)*

**JUDGMENT**

1. The appellant, **CALEB OCHIENG OLOO** was charged, tried and convicted on one count of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act*. It was alleged that on 17<sup>th</sup> November 2012 at East Othany Sub-location of Kisumu West District, he intentionally caused his penis to penetrate the vagina of JM, a child aged 8 years.
2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence based on petition of appeal and supplementary grounds of appeal. He contends that he was convicted without any exhibits being produced and that the prosecution failed to call vital witnesses. He accused the prosecution of carrying out shoddy investigations. In the amended grounds of appeal focused mainly on the sentence. The appellant stated that the life sentence imposed on him was harsh and denied him his rights under **Article 19(2)** of the Constitution and that in view of his age to a more lenient one would be in line with **Article 24(2)** of the Constitution.
3. The respondent's counsel supported the conviction and sentence and submitted that the prosecution had proved all the elements of the offence of defilement. Counsel submitted that the sentence was in accordance with the *Sexual Offences Act*.
4. As this is a first appeal, the duty of the appellate court is to review all the evidence and reach an independent conclusion as to whether to uphold the conviction and sentence. In doing so, the court must make an allowance for the fact that it did not hear or see the witnesses testify to assess their demeanour (see *Okeno v Republic* [1972] EA 32).
5. After a *voir dire*, JM, gave sworn testimony. She told the court that she was 9 years old and was in Class 3. She recalled that on 17<sup>th</sup> November 2012, she was at the market fetching moulding clay when the appellant, whom she knew as Daddy, called her to his kiosk. When she went to the kiosk, the appellant removed Kshs. 20/- and showed it to her. As she was going to get it, he pulled her into the kiosk, placed her on a bed in another room and covered her mouth so that she could not scream. He removed her

underpants, petticoat and skirt and proceeded to sexually assault her after removing his trousers. After completing the act, he dressed her and offered her Kshs. 20/- which she refused to take. As she was leaving she met, PW 3 and explained to him what had happened to her.

6. PW 3 recalled that on 17<sup>th</sup> November 2012 at about 12.30pm, he was at the market when he saw PW 1 enter the appellant's shop after being called by the appellant. When she emerged from the kiosk after about 30 minutes, PW 3 noticed that she was limping. He later met PW 1 who told her what had transpired after he promised not to inform her father. PW 3 told PW 1's father, PW 4, what happened. PW 4 told the court that he met PW 3 and they went to confront the appellant at his kiosk but he ran away. He took PW 1 to Kombewa Hospital.

7. An administration police officer, PW 5, told the court that after PW 4 complained to the police station, she was given an arrest order. PW 4 called her and informed her that he was bringing the appellant to the police station whereupon she re-arrested him. An administration police officer, PW 6, told the court that he arrested the appellant on 19<sup>th</sup> November 2012 after he had run away on 17<sup>th</sup> November 2012.

8. PW 2, a clinical officer, examined PW 1 on 17<sup>th</sup> November 2012. He observed that there were blood stains when inserted his finger in her genitalia and noted bruises on the labia minora. Based on the evidence, he concluded that there was penetration. He also examined the appellant and observed that his head and neck were swollen.

9. The investigating officer, PW 6, recalled that on 17<sup>th</sup> November 2012, PW 1 came to the police station with PW 4 and reported that PW 1 had been defiled. She issued the P3 form and recorded statements of the witnesses and caused the appellant to be charged.

10. In his sworn testimony, the appellant denied the charge against him. He stated that he owned a shop at the market and that on 19<sup>th</sup> November at about 5.00pm, he saw 3 people, including PW 4, coming to his shop. He testified that PW 4 wanted to take over the shop. They assaulted him and took him to the administration police officers.

11. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. Having reviewed the evidence, I am satisfied that the testimony of PW 1 was clear and consistent and was sufficient to establish the fact of penetration. Her testimony was corroborated by PW 5 who saw her get in the appellant's shop and leave in a distressed state. The veracity of her testimony is confirmed by the fact that she told PW 3 what happened to her immediately after the incident. In addition, the evidence of PW 2 provided additional corroboration of the fact of penetration. I therefore find and hold that penetration was proved.

13. The next issue is whether the appellant was the perpetrator. The appellant was admitted that he owned a shop at the market. PW 1, PW 3 and PW 4 knew the appellant while PW 3 saw PW 1 go into the shop in broad daylight hence the chance of mistaken identity was diminished. The appellant, in his defence, said nothing of the events of 17<sup>th</sup> November 2012. His allegation that there was a grudge is ruse to cover the fact of his arrest. In short, his defence was a sham.

14. The final ingredient of the offence of defilement is the age of the child. Proof of age is a question of fact and there is overwhelming evidence that the child was born on 2<sup>nd</sup> October 2004 as shown baptismal certificate produced by PW 4. She was thus aged 8 years. She was below the age of 11 years which, under **section 8(2)** of the **Sexual Offences Act**, attracts a life sentence.

15. The conviction and sentence are affirmed. The appeal is dismissed.

**DATED and DELIVERED at KISUMU this 10<sup>th</sup> day of April 2017.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.