



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL APPEAL NO. 7 OF 2013**

**BETWEEN**

**GEORGE OMWANDA MUMBE .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon.H.Adika, SRM dated 17<sup>th</sup> January 2013 at Chief Magistrate's Court at Kisumu in Criminal Case No. 15 of 2012)*

**JUDGMENT**

1. The appellant, **GEORGE OMWAMBA MUMBE** was charged with the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act*. The particulars were that the appellant on diverse dates between August and 21<sup>st</sup> September 2012 at [particulars withheld] Estate within Kisumu District on Nyanza Province intentionally caused his genital organ to penetrate the genital organ of YA, a child aged 8 years. After considering the prosecution and defence, the learned trial magistrate convicted and sentenced the appellant to life imprisonment. Aggrieved by that decision, the appellant has filed this appeal.
2. In his petition, the appellant faults the trial magistrate for convicting him on the basis of insufficient medical evidence and for failure to find that **section 36(1) and (2)** of the *Sexual Offences Act* were not complied with. The appellant also complains that the sentence meted was harsh and excessive in the circumstances.
3. The appellant filed submissions in support of the appeal and highlighted them at the hearing. The respondent, through Ms Barasa, opposed the appeal and submitted that the offence was proved beyond reasonable doubt and the sentence meted was lawful.
4. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced so as to reach its own independent conclusion as to whether or not to uphold the appellant's conviction bearing in mind that it neither heard nor saw the witnesses testify (see *Njoroge v Republic [1987] KLR 19*).
5. The evidence adduced before the trial court was as follows. Y A (PW 1), was a neighbour of the appellant at [particulars withheld], Kisumu. She testified that the appellant called her to his house on several occasions to assist him in cleaning utensils and doing other household chores and it is during these visits that the appellant sexually assaulted her.
6. On 22<sup>nd</sup> September 2012, Y A's aunt (PW 2) was in the house resting on the couch and when Y A

walked in, she noticed that she walked with her legs apart and she seemed to be in pain. She decided to inspect Y A's private parts and observed that they were swollen and oozing a discharge. She informed Y A's mother and later went to get some medicine. On the next day she asked Y A what had actually happened to her and Y A opened up to her and informed her that the appellant had sexually assaulted her when she went to wash utensils on the promise that he would give her Kshs. 5/-. PW 1 and Y A's mother called the appellant and asked him about it but he denied sexually assaulting Y A but gave them Kshs. 300/- to take Y A to hospital. PW 2 and Y A's mother took her to hospital and later reported the matter to the police.

7. PW 3, a clinical officer at Kisumu District Hospital, testified that he examined Y A. He found out that Y A had lower abdominal pains, her hymen was broken and she had lacerations on her private parts and a yellowish discharge. After further examination, he established that the child was infected with urinary tract infection. He concluded that Y A had been defiled. The investigating officer (PW 4) recorded the witness statements and later arrested and charged the appellant with defilement.

8. When the appellant was put on his defence, he gave an unsworn statement denying the charge and did not call any witness.

9. In order to prove defilement, the prosecution must show that the accused 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.*"

10. I have evaluated the evidence presented before the subordinate court and find that the prosecution proved the elements of defilement. PW 1 narrated of how she was on several occasions lured by the appellant to his house. She described how the appellant removed her clothes, lay on her and inserted his penis into her vagina. This evidence was corroborated by the evidence of PW 3 who testified that her hymen was broken and she had lacerations on her private parts. She was also infected with a bacterial infection which the appellant was also found to be suffering from.

11. As to whether the appellant was the person who committed the offence, the evidence is clear that Y A and the appellant were neighbours and that Y A had been to his house on several occasions. As stated by Y A, the incidences of sexual assault were repeated and done during the day hence lessening the possibility of mistaken identity.

12. The appellant submitted that the trial court should have directed that body samples be taken from him to carry out DNA to establish his culpability in accordance with **section 36** of the **Sexual Offences Act**. According to him the offence was not scientifically proved, as DNA testing was not done to connect him to the crime. It is now trite law that DNA testing is only one of the strands of evidence for proving defilement as any other available evidence can prove penetration. In **Geoffrey Kionji v Republic Criminal Appeal No. 270 of 2010 [2010]eKLR**, the Court of Appeal applied this principle earlier stated in **Kassim Ali v Republic MSA CA Criminal Appeal 84 of 2005 MSA** where it held that:

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that the defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief. What the Court of Appeal had stated in **Kassim v Republic** is that, "[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."*

13. In this case, Y A's testimony was solid and unchallenged. She described how the appellant perpetrated the felonious act and the medical evidence was corroborated her testimony.

14. The final ingredient of the offence of defilement is the age of the child. Proof of age is a question of fact. Although the child gave unsworn testimony, she was stated that her age at the time the offence was committed was 8 year and she was in primary school. She The child health card produced showed that she was born on 11<sup>th</sup> November 2003. Thus there is overwhelming evidence that the child was aged 8 years. As she was clearly below 11 years old, **section 8(2)** of the ***Sexual Offences Act*** attracts a life sentence. The sentence, being mandatory, was neither harsh nor excessive.

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.