



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 22 OF 2017**

**BETWEEN**

**E S .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from the Judgment and decision of Hon. M.L.Nabibya Ag SRM delivered on 31<sup>st</sup> January 2017 in the Senior Resident Magistrate's Court at Butali in Criminal Case No. 166 of 2016)**

**J U D G M E N T**

1. E S, the appellant, was charged, tried, convicted and sentenced to life imprisonment as a result of being charged with the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act. The particulars of the offence were that on 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> February, 2016 within Kakamega District, he intentionally caused his penis to penetrate the vagina of TJ a child aged 8 years.

2. In his petition of appeal, the appellant stated he was convicted without the doctor's report about the age of the complainant, that his mitigation was ignored and that the sentence was harsh. He submitted that the evidence was insufficient to sustain a conviction. Mr Ng'etich, counsel for the respondent, opposed the appeal as he was of the view that the prosecution proved its case.

3. In her unsworn testimony, the child (PW 1), told the court that on each of the days stated in the charge, she was alone with the appellant, who was her father, as her mother was in hospital. She described what happened to her as follows:

*My dad slept on me while on his bed. My dad removed my skirts and pants. He also removed his trouser and underwear. It was at night, his thing that is used while passing short call is what penetrated into my vagina. I felt pain. I had never had such an experience before. He told me not to disclose to anybody that he had inserted his penis into my vagina.*

4. The child's grandmother, PW 2, recalled that on 11<sup>th</sup> February, 2016, she saw PW 1 who was looking sick and was smelling. She examined PW 1's private parts at night and noted that pus was coming out of the vagina. PW 1 narrated her ordeal to her. She took the child to the hospital where the child was examined and treated.

5. PW5, a Clinical Officer at Lumakanda County Hospital, filled in the P3 form on 11<sup>th</sup> February 2016. She examined PW 1's private parts and noted that there were bruises and the hymen was broken. The urinalysis revealed pus and epithelial cells. She concluded that there was penetration.

6. Although the testimony of PW1 was unsworn, it was direct and clear and was adequately corroborated. PW1 told PW2 what took place between her and the appellant. Her mother PW 3 testified that she had left the children with the appellant as she had been admitted to hospital for 8 days. I also find that the appellant was not a stranger to her and was indeed her father. I therefore find and hold that penetration by the appellant, who was the child's father, was proved.

7. As regards the child's age, PW 3 produced her birth certificate to confirm that she was 8 years old. Although in his submissions the appellant contended that he should have been charged with incest contrary to section 20 of the Sexual Offence Act, no prejudice was occasioned to him as the elements of the offence and the penalty provided are the same save that in the offence of incest the relationship between the parties is material.

8. The appeal lacks merit and is dismissed.

Delivered, dated and signed at Kakamega this 30<sup>th</sup> day of August, 2017

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Officer of the Director of Public Prosecutions for the respondent.