



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 129 OF 2015**

**BETWEEN**

**G S S ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from original conviction and sentence of Hon. T.K. Kwambai, RM dated 11<sup>th</sup> November, 2015 at the Senior Resident Magistrate Court at Butali in Criminal Case No. 287 of 2015)**

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

1. The appellant G S S was charged with defilement contrary to section 8(1) and 8(2) of the Sexual Offences Act. The particulars were that on 18<sup>th</sup> April, 2-15 at [particulars withheld] area, Matsakha sub-location of Kakamega North Sub-County within Kakamega County he intentionally and unlawfully caused his penis to penetrate the vagina of ABM, a child aged 8 years. He was tried, convicted and sentenced to life imprisonment.
2. He now appeals against conviction and sentence. The thrust of his appeal is that the charge against him was not proved. The respondent contended that the prosecution proved all the elements of the offence of defilement.
3. In order to prove the offence of defilement, the prosecution must prove penetration of a child. Under Section 2 of the Sexual Offences Act, “Penetration” means. “*partial or complete insertion of the genital organs of a person into the genital organs of another person.*”
4. The complaint (PW 1) gave evidence on oath after a *voire dire*. She told the court that on 12<sup>th</sup> April, 2015 at about 8.00am, after taking her breakfast, the appellant told her he wanted to rape her. He pulled, her placed her on a bed, removed her underpants and proceeded to have sexual intercourse with her. Her aunt, PW 3, who had gone out of the briefly, called PW1’s name and when she responded, she went back into the house and found the appellant sexually assaulting PW 1. The appellant ran away. PW 3 examined the child and took her to hospital where she was also examined and treated. PW 3 told the court that the appellant was working at the homestead and was a cousin to PW 1.
5. PW 1 was examined on the same day at Malava County Hospital. PW6, a Clinical Officer told the court that PW 1 stated that this was the second time she had been sexually assaulted by the appellant.

Physical examination revealed normal genitalia but the hymen was absent and scarred. Laboratory results from the high vaginal swab detected spermatozoa and epithelial cells. She concluded that there was penetration.

6. The appellant was arrested by members of the public and taken to the police station by PW 4, an administration police officer, on the same day. The investigating officer, PW 5, testified that PW 1 was brought to the police station on 12<sup>th</sup> May 2015.

7. In his sworn defence, the appellant testified that he was being framed by PW2 because he was asking to be paid his money.

8. The evidence of PW 1 and PW 2 is clear that sexual intercourse took place on the material morning. The appellant, who was well known to PW 1, lured her to the bedroom and proceeded to sexually assault her until he was caught in the act by PW 2 whereupon he ran away.

9. PW 1's testimony was clear and consistent and leaves no doubt about the appellant's act. It was also corroborated by the testimony of PW 2 and the medical evidence. I therefore find and held that penetration by the appellant was proved beyond reasonable doubt.

10. Likewise, the age of the child was duly established. First for purposes of the offence. It was not in doubt that she was a child. Her own believable testimony was that she was in class 3 and this was unchallenged. Since she was 8 years old, the sentence provided by law of is life imprisonment.

11. The appeal is dismissed.

Dated and delivered 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 Office of the Director of Public Prosecutions.