



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. 68 OF 2016**

**BETWEEN**

**KEVIN OTIENO ONYANGO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence of Hon. R. M. Oanda, SRM dated 8<sup>th</sup> July 2016 in Ukwala Senior Resident Magistrates' Court Criminal Case No. 99 of 2015)***

**JUDGMENT**

1. The appellant **KEVIN OTIENO ONYANGO** was charged with the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act***. He is alleged to have caused his penis to intentionally penetrate the vagina of DAO, a child aged 14 years. He was convicted and sentenced to 20 years' imprisonment.

2. The evidence against him was that the child (PW 1) had been missing from home from 5<sup>th</sup> to 8<sup>th</sup> March 2015 according to her mother PW 2. She reported the same to Ugenya Police Station according to PW 3. Together with another officer, they went to the home of the appellant where they found him with the child. PW 1 testified that she had stayed with him over the two days and that they had had sexual intercourse once. The Clinical Officer who examined PW 1 on 7<sup>th</sup> March 2015 stated that the child's genitalia were normal. The appellant denied the offence in his sworn defence although he admitted that PW 1 was at their home but came to see someone else.

3. I have reviewed the evidence and I am satisfied that the prosecution proved the offence as the testimony of PW 1 was sufficient and truthful and corroborated by the fact that the appellant was found with the child in his house.

4. What is my concern though, is that the appellant could have been below 18 years old when the offence took place. Although an age assessment was done to show that he was 18 years old, he has a birth certificate showing he was born on 10<sup>th</sup> April 1993 meaning that he was 17 years old. Any doubt as to his age must be resolved in his favour.

5. I affirm the conviction and since he must be treated as a child, I quash the sentence of imprisonment. I order that he shall serve probation for a period of 2 years.

6. Orders accordingly.

**DATED AND SIGNED AT SIAYA THIS 22ND DAY OF DECEMBER 2017.**

**D. S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: L. Odhiambo and L. Atika