



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 188 OF 2013**  
**JOSEPH MUIA NDAMBUKI.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**(From original Conviction and Sentence in Criminal Case No. 1286 of 2011 of the  
Senior Principal Magistrate's Court at Kwale – Hon. Usui Macharia - SPM)**

**JUDGMENT**

The appellant was Convicted and Sentenced to life imprisonment for the offence of defilement of a boy contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that:-

***“On the 17th day of November, 2011 at [particulars withheld] Hills sub location Kwale County he unlawfully and intentionally committed an act which caused his penis to penetrate into the anus of M J a child aged six years”.***

Being aggrieved of the decision of the learned trial magistrate on Conviction and Sentence the appellant lodged this appeal.

The ingredients of the charge of defilement are in the main

1. Age assessment
2. Penetration
3. Corroboration

**Age assessment**

The Complainant in his evidence in chief testified to be seven (7) years old. PW 2 J P W testified that the complainant was aged six (6) years at the time of the alleged incident.

The mother PW 4 testified that the Complainant was born on 7th January, 2007. An immunization Heath card was produced as exhibit No. 1 which showed the Complainant date of birth as 7th January, 2002.

The learned trial magistrate in his Judgment did observe this anomaly. Going by the date given in the card, the age of the Complainant would be nine (9) years at the time of the commission of the offence but he was of the view that the charge was properly within the ambit of section 8(1) and 8(2) of the Sexual Offences Act which I agree as the ceiling is the age of eleven (11) years or less.

### **Penetration**

The complainants evidence is that the appellant locked him in a store at the Hospital and had sexual intercourse with him on the night in question four (4) times and released him the following morning and warned him of dire consequences if he told anybody of what had taken place.

PW 3 Philip Chebet clinical officer examined the complainant and found a fresh bruise on the lower part of the anus 33 cm which was not actively bleeding.

There was fresh blood around anal region. I am satisfied that penetration was proved to the required standards.

### **Corroboration**

The appellant was working as a watchman at [particulars withheld] Hills Hospital which was barely 50 meters from the complainants home. The Complainant had gone to the hospital compound to collect mangoes from a mango tree therein. The complainant testified to have known him before. He further told the Court of how the appellant took him to some house which had no windows and they present the night there and was sodomized four (4) times before he was set free in the morning and he went and reported the matter to his parents and the appellant was arrested.

PW 2 and PW 4 the parents of the complainant did testify of how their child went missing during the day and they commenced a search the whole day and night, only to see him soundering home in the wee hours of the morning the following day.

It is in evidence that the complainant had initially refused to tell his parents where he had been the previous night but he did later mention the appellant as the person who sodomized him that night and told him not to mention his name. His fears appear genuine on account of threats made to him by the appellant. There are no serious allegations of the existence of a grudge between the complainants parents and the appellant.

The Conviction was safe and the Sentence lawful. I find no good reason to disturb them. They are upheld.

Judgment delivered, dated and signed this **21st** day of **September, 2015**.

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**M. MUYA**

**JUDGE**

**21ST SEPTEMBER, 2015**

**In open Court and in the presence of:-**

Learned Counsel for the prosecution Mr. Wangila

The appellant present

Court Assistant Musundi

**M. MUYA – JUDGE**