



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 24 OF 2013**

**JAMES OOKO ELKANA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[From original conviction and sentence in the Principal Magistrate's Court at Bondo Criminal Case No. 351 of 2012 Before Hon. D. Wangeci -RM]*

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

The appellant was charged with the offence of defilement contrary to section 8 (1) (33) of the Sexual Offences Act. The particulars are that on diverse dates between 10th January 2012 and 15th January 2012 at [particulars withheld] sub location in Bondo district within Siaya county intentionally and unlawfully caused his penis to penetrate the vagina of **BA O** a child aged 14 years.

There was also an alternative count of committing Indecent Act with a child contrary to section 11 (1) of the Sexual Offence Act.

When this matter came up for hearing of the appeal the appellant raised a new but subtotal issue regarding the age of the complainant. His argument was that according to him the complainant with whom they now have one child was aged 21 years as at the time of the incident.

On perusal of the proceedings the charge sheet reads 14 years whereas the evidence of the shows that the complainant was 16 years.

This court is of the opinion that this is fundamental issue which the trial court ought to have determined at the onset. **PW5, Sammy Ombaso Okumu** made an assumption that the complainant was 14 years yet her mother talked otherwise.

This issue of the appellant age is critical in terms of determining the relevant section in which the charge ought to have been brought and therefore the proper sentence. Section 8 (3) of the Sexual Offences Act for instance requires that where the defilement is against a child aged between 12 and 15 years the conviction is for a term not less than 20 years.

On the other hand section 8 (4) of the same Act provides for a term of not less than 15 years where the child is aged between 16 and 18 years.

In this regard there is therefore need to have a determined age of the complainant as at the date of the event. This therefore calls for adduction of additional evidence. Section 358 of the Criminal Procedure Code to seek further evidence. I think this is a case where the afore stated clauses needs to be invoked.

The conviction to the extent that the complainant's age was undetermined was unsafe. Equally, it would be unsafe to allow this appeal based on the appellant's submissions.

In **Mbaria -VS- Republic [2008] KLR at 159** the Court of Appeal held that:

**“Even then the rule allowed the court to exercise its discretion and to do so only if sufficient reasons were a raised in moving the court to take or direct to be taken additional evidence. It must be shown that the additional evidence sought to be admitted could not have been obtained by reasonable diligence before and during the hearing and that the new evidence would have been likely to have affected the results of the suit”.**

In light of the above observation this court issues the following orders:

- a. **An age assessment of the complainant be undertaken forthwith under the provisions of section 358 (2) of the Criminal Procedure Code chapter 75 Laws of Kenya.**
- b. **The above exercise should be undertaken within the next 60 days from the delivery of this judgment.**
- c. **After the results are out this matter shall be fixed for mention for further directions by the court.**
- d. **The appellant meanwhile shall be released on a bond of Kshs. 100,000/= with a surety of similar amount.**

**Dated, signed and delivered at Kisumu this 20th day of January, 2014.**

**H.K.  
JUDGE**

**CHEMETEI**