



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 278 OF 2010**

**JOHN KITHOME KIETI ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original Conviction and Sentence in Criminal Case No.377 of 2009 of the Senior Resident Magistrate's Court at Taveta – Hon. Ndegwa - SRM)**

**JUDGMENT**

The Appellant was Convicted and Sentenced to life imprisonment for the offence of defilement of a girl aged under eleven (11) years contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006.

The particulars being that on the 18th day of November, 2007 at about 6:00 p.m. at [Particulars withheld] in Taveta County he had unlawful knowledge of M M a girl under the age of eleven (11) years.

The brief facts for the prosecution case is that on the day and time in question the Complainant was sent to go and buy vegetables from the Appellant who was a neighbour.

It was her evidence that upon arrival at the Accused farm she started harvesting the vegetables and it was at that juncture that the Accused went to where she was held her by the hand and took her to some bushes near a river a distance of twenty metres away from the farm. He proceeded to undress her after telling her not to shout or scream for help. He also undressed and laid her on the ground upwards and had sexual intercourse with her. She cried in pain. He ejaculated on her dressed up and told her not to report the incident to her mother. He started going away meanwhile her mother appeared at the scene and she narrated to her of what had taken place. The mother confronted the Accused who had emerged from the bushes and demanded to know why he had defiled her daughter. During the scuffle her neighbour M N (PW 4) and J K (PW 3) arrived. The Complainant showed them the spot where she was defiled in the bush. They also observed that the pair of shorts worn by the Accused were stained with mud as it had rained that day.

The Doctor who examined the Complainant found that she had bruises on the labias. There is no indication however, as to whether the hymen was broken or not.

There are two issues which the trial magistrate was to satisfy himself that they had been proved by the prosecution. The age of the child and whether there was penetration.

Age. It is the Complainants evidence that she was aged six (6) years going to seven(7) at the time. She did not give the year of her birth. Her mother (PW 2) did not testify at all on the age of her daughter nor were any questions directed to her on that crucial issue.

The Doctor did not conduct an age assessment test on the Complainant and the P3 form merely shows the approximate age as six (6) years from the above it is clear that the prosecution did not sufficiently prove that the age of the Complainant was below eleven (11) years as per the charge sheet. It is trite law that proof of the age of the Complainant is very crucial in sexual offences and in particular defilement. Age of the child defines the regime of punishment.

The second issue is that of penetration.

Section 2 of the sexual offences Act defines penetration thus,

**“ Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.**

The Complainant did testify that the Accused did penetrate her vagina with his penis after undressing her and laying her down on the ground in the bushes near his farm. Her mother who had send the Complainant to buy vegetables from the Accused did proceed to look for her after she delayed and found her in the bushes where the Accused also emerged.

The Complainant did show her mother (PW 2) and neighbours PW 3 and PW 4 the spot where she had been defiled. It was also observed that the Accused pair of shorts were stained with mud.

The Doctor who examined the Complainant did find that she had bruises on her vaginal walls.

I do find that the issue of penetration was proved by the prosecution.

Though the issue of age has not been proved by the prosecution. Having carefully analysed the evidence on record, I am satisfied that a sexual offence was committed.

I therefore find that the lesser offence of sexual assault contrary to section 5 of the sexual offences Act was proved beyond reasonable doubt.

The Sentence of life imprisonment is varied and or reduced to that of fifteen (15) years imprisonment. This appeal succeeds to that extent only.

Judgment delivered dated and signed this **27th** day of **February, 2014**.

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**M. MUYA**

**JUDGE**

**27TH FEBRUARY, 2014**

**In the presence of:-**

Learned State Counsel Miss Fundi

The appellant present in person

Court clerk Musundi