



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 253 OF 2011**

**JOHN GATOKA NGAO ..... APPELLANT.**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original Conviction and Sentence in Criminal Case No. 204 of 2010 of the Senior Resident Magistrate's Court at Mariakani – Hon. D.M. Machage - SRM)**

**JUDGMENT**

The Appellant herein was Convicted and Sentenced to ten (10) years imprisonment for the offence of indecent act contrary to section 11(1) of the Sexual offences Act No. 3 of 2006.

The particulars are that:-

***“On the 20th day of December, 2009 at [particulars withheld] Vilage, [particulars withheld] Location–Kwale County, he unlawfully and intentionally committed an indecent act with a child namely F.N.S by touching her private parts namely Vagina.*”**

The grounds for the Appeal are;

- 1. That there was insufficient evidence to the effect that he is the one who impregnated the Complainant.**
- 2. Her complainants age was not assessed.**
- 3. There was no evidence of arrest.**
- 4. The appellants defence was not considered by the learned trial magistrate.**
- 5. That the Conviction was against weight of evidence.**

In the lower court, the prosecution called four(4) Witnesses in support of their case and the Defence called one.

The Appellant had been charged with defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars being that:-

***“On the 20th day of December, 2009 at [particulars withheld] Village [particulars withheld]–Kwale County he unlawfully and intentionally committed an act which caused penetration of his male genital*”**

***organ namely penis into the female genital organ namely Vagina of F.N.S a child aged fourteen (14) years”.***

This case went to full hearing and determination. The learned trial magistrate found the Appellant guilty on the alternative Count of indecent act contrary to section 11(1) of the Sexual offences Act and Convicted him accordingly.

Being the first appellate Court it is my duty to re-evaluate and analyze the evidence that was adduced before the lower court so as to come to my own conclusions without overlooking those of the trial Court which had the opportunity to hear and observe the demeanor of the Witnesses.

I have perused the Judgment delivered by the learned trial magistrate and find that he has not given any reason why he did not find the Appellant guilty of the offence of defilement but instead found him guilty on the alternative count of indecent Act.

**Age Assessment.**

The Complainant gave her age as fifteen (15) years old. Her father **PW 2** also gave the age of his daughter (**PW 1**) as fifteen (15) years old. The P3 form which was produced in Court as exhibit No. 1 shows the date of birth as 11th July, 1995. I am satisfied that age assessment was properly done.

The Complainant in her evidence did testify to have engaged in sexual intercourse with the Appellant on the 20th and 21st day of December, 2009 while at her grand parents home in a nearby bush and at night. She had consented to the Sexual act after she succumbed to his overtures. She did not report the incident to her parents till they found out after she fell sick and was taken to Hospital where upon examination she was found to be pregnant and she mentioned the Appellant as the man who had impregnated her and he was arrested and charged.

The P3 form which was filed on 7th February, 2010 showed that upon examination the Complainant was found to have a mass at her uterus which was six weeks old (pregnancy). This does corroborate Complainants evidence in which she testified to have had sexual intercourse with the Appellant on the 20th day of December, 2009. From 20th December, 2009 to 7th February, 2010 is a duration of six weeks. Upon a careful evaluation of the evidence on record I am satisfied that the Conviction was safe and was not prejudicial to the appellant as if found guilty on the main count he would have been Sentenced to an imprisonment term of not less than twenty (20) years. The appeal has no merit and its disallowed.

Judgment delivered dated and signed in open Court this **16th** day of **September, 2014.**

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**M. MUYA**

**JUDGE**

**16TH SEPTEMBER, 2014**

**In the presence of:-**

Mr. Jami learned State Counsel

The Appellant present

Court clerk Musundi