



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 49 OF 2014**

**S O O.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the original conviction and sentence in Criminal Case No. 232 of 2014 in the Principal Magistrate's court at Bondo)***

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

1). The appellant was charged with the offence of attempted incest by male person contrary to section 20 (2) of the Sexual Offence Act No. 3 of 2006.

The particulars of the offences are that on the 12th day of March 2014 at around 9 p.m at *[particulars withheld]* in Bondo District within Siaya County being a male person attempted to cause his penis to penetrate the anus of N O a child aged 8 years who was to his knowledge his son.

After hearing the entire case the trial court convicted the appellant and sentenced him to serve 10 years imprisonment hence this appeal.

2). Briefly, the appellant is the stepfather to the minor. On the material day the appellant had been left behind with the children. Due to some disagreement with the mother PW2 she did not come back that evening. PW1 the minor told the court that at around 9 p.m the appellant told them to prepare to sleep. He then told the minor to lie on his stomach and he proceeded to sodomise him. When PW2, the mother came the following morning she was informed where she reported to her in laws and later to Usenge police station. The minor was then taken to Got Agulu sub district hospital.

3). The P3 which was filled by PW3 Sammy Ombaso, the clinical officer showed that there were bruises on the anal region. He concluded that there might have been penetration.

4). In his defence the appellant denied the charge. He claims that he had disagreement with his wife on the material day and she left till the following day. He further told the court that he had had other previous convictions.

5). Having heard the appellant as well the learned state counsel, the duty of this court is to reevaluate the proceedings afresh and come up with an independent findings (**See Okeno -VS- Republic [1972] EA 32**).

6). What is not in dispute is the relationship between the minor and the appellant. He did not deny that he was the stepfather. Secondly, what is admitted by PW2 and the appellant is that their relationship as husband and wife were strained and infact on the material day there was an issue of a telephone which had caused the wife (PW2) not to spend the day at home. Thirdly and most important is that on that particular night it was the appellant who had the custody of the children and in particular the minor.

7). The appellant in one of his grounds of appeal has argued that the age of the minor had not been determined as the baptismal card produced was not sufficient. Respectfully I do not think this holds water. The appellant had sufficient time to question the same during trial. In any case it was produced by the wife and if he had any objection to the same he would have raised.

8). But did the prosecution prove the case of attempted sodomy against the appellant? As earlier alluded it was the appellant who was left in charge of the minor. He did not deny that the minor was not under his care on that particular night. The minor testified graphically on what happened on the fateful night. Was there any reason for the minor to lie or to fix the stepfather? Granted, there was some difference between the parents. But there was no sufficient evidence to suggest that it had spilled over to the children and in particular the complainant herein and therefore the best way for him to seek revenge was to implicate the stepfather.

9). Section 124 of the Evidence Act Chapter 80 on evidence of children states as hereunder on the provisal:

**“.....provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.**

10). From the foregoing, I do not find any reason to doubt that the complainant implicated the appellant unfairly. There is no any other explanation or hypothesis on how the minor sustained the injuries. In any case the minor notified the mother the following day who proceeded to take the steps that she did.

11). In the premises I do not buy the idea that the issue was a spill over from the domestic dispute between the appellant and PW2 his wife. In any case that should not have caused the appellant to attempt to sodomise the complainant.

For the forgoing reasons the appeal is dismissed.

**Dated, signed and delivered at Kisumu this 27th day of November, 2014.**

**H.K.  
JUDGE**

**CHEMITEI**