



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL APPEAL NO. 81 OF 2014**  
**(FORMERLY KISII HCCRA 47 OF 2011)**

**BETWEEN**

**MARCUS ONDIEGE NDOGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case No. 939 of 2010 at the Chief Magistrates Court at Homa Bay, Hon. O.J. ONG'ONDO RM, dated 15<sup>th</sup> November 2010)***

**JUDGMENT**

1. The appellant, **MARCUS ONDIEGE NDOGE** appeals against a conviction and sentence of 50 years imprisonment for the offence of defilement contrary to **section 8(3)** of the ***Sexual Offences Act***. The particulars of the charge against him were that on diverse dates between 23<sup>rd</sup> April 2010 and 30<sup>th</sup> April 2010 in [Particulars Withheld] within Homa Bay District he unlawfully and intentionally caused his penis to penetrate the vagina of SAO, a child aged 12 years. He also faced an alternative charge based on the same facts.
2. He now appeals against the conviction and sentence on the grounds set out in his petition of appeal which may be summarized as follows; That the learned magistrate failed to appreciate the nature and ingredients of the charge and consequently erred in convicting him; That there was insufficient and contradictory evidence in convicting him; That the learned magistrate failed to consider his defence and that the sentence was harsh and excessive.
3. Mr Oluoch, learned counsel for the State opposed the appeal on the ground that there was sufficient evidence and that the prosecution proved all the ingredients of the offence.
4. The evidence before the court was that the appellant went to the home of the complainant's mother (PW 2) on 23<sup>rd</sup> April 2010 and told her that the complainant (PW 1), her grandchild, was having mental problems and that he could pray for her for 3 days. He was wearing a cross and was from a well-known religious sect. She allowed him to take PW 1 and gave him Kshs 40.00 to buy candles. PW 1 stayed with him for 7 days till the day she escaped and came back home. When she returned, PW 2 testified that she was walking in pain. She told PW 2 that she had been defiled throughout that period by the appellant. PW 2 reported to the chief, clan elder and at Rangwe Police Station.

5. After the *voire dire*, PW 1 testified that she was a 12 years primary school pupil. She recalled that the appellant came home and took her to his place to pray for her. In her testimony she gave a graphic account of how she was defiled and physically assaulted over that period. After she went back home she told PW 2 what had happened. She went to Rangwe Police Station and was taken to hospital.
6. PW 3, the head teacher at PW 1's school, testified that PW 1 was a student in his school and that he received a report from the counselling teacher, PW 4, that PW 1 could not walk properly. When he interrogated PW 1, she told him of the ordeal at the hands of the appellant. He reported the matter to the area chief and followed up the complaint with the police. PW 4 testified that she made a report to PW 3 that PW 1 was having difficulties walking. PW 5, the chief confirmed that he received a report from PW 4 about the sexual assault. PW 6, a police officer, investigated the matter, recorded statements and issued the P3 form.
7. PW 7, a clinical officer at Rangwe, examined PW 1 on 7<sup>th</sup> May 2010. He found that PW 1 had a swelling and tender vagina with pus discharge and laceration towards the anus. Laboratory tests confirmed an infection and spermatozoa. The appellant was also examined and was found to be suffering from syphilis and was HIV positive.
8. In his defence, the accused gave sworn testimony, in which he denied the offence. He stated that he was walking home and upon reaching the Chief's Camp at Asumbi he was arrested and taken to Rangwe Police Station where he was informed that he defiled a child.
9. The issue in this appeal is whether the prosecution established that the appellant committed defilement as alleged in the charge. In considering the matter, I must bear in mind that this is a first appeal and that the court is required to assess and evaluate the evidence on record and reach an independent conclusion whether or not to uphold the conviction and sentence making an allowance for the fact that it neither heard nor saw the witnesses testify.
10. In order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child. "*Penetration*" under **section 2** of the ***Act*** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"
11. The evidence points to the fact that it is the appellant who committed the act. PW 3 gave clear testimony how the appellant came and took PW 1 from her home to pray for her. PW 2 was at the appellant's home for 7 days where she was repeatedly defiled. Under such circumstances, there is no possibility of mistaken identity
12. PW 1's testimony on how she was defiled was clear, precise and consistent and was unshaken on cross examination. Although **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** does not require her testimony to be corroborated, her testimony was corroborated by that of PW 2, PW 3 and PW 4 who all saw her walking in a manner consistent with the fact that she had been defiled. The medical examination carried out by PW 7 leaves no doubt that PW 1 was defiled. His defence that he knew nothing about PW 1 cannot be believed in light of the overwhelming prosecution evidence.
13. Finally, the age of the complainant is a question of fact. PW 1 testified that she was 12 years old, her mother confirmed as much while PW 6 produced a clinic card showing that she was 12 years old. I therefore find that her age was proved.
14. In the totality of evidence, I find that the prosecution proved all the elements of the offence of defilement. I therefore affirm the conviction.
15. Under **section 8(3)** of the ***Sexual Offences Act***, the minimum sentence for a person who defiles a child who is between 12 and 15 years is 20 years imprisonment. The appellant was sentenced to

50 years imprisonment. The learned magistrate did not give any cogent reasons why it was necessary to double the minimum sentence. In the circumstances, I reduce it to 20 years imprisonment.

16. Save to the extent of the sentence, the appeal is dismissed.

**DATED** and **DELIVERED** at **HOMA BAY** this 15<sup>th</sup> day of **December** 2014.

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.