



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 375 OF 2010**

**DAVIS MASUMBUO BORON ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original Conviction and Sentence in Criminal Case No. 412 of 2009 of the Senior Resident Magistrate's Court at Taveta – Hon. Ndegwa - SRM)**

**JUDGMENT**

**DAVIS MASUMBUO** hereinafter referred to as the Appellant was Convicted and Sentenced to thirty (30) years imprisonment for the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars are that on the 6th day of August, 2009 at about 11:00 am at [Particulars withheld] Village in Taveta County he had carnal knowledge of P J Wilson a girl under age of eleven years.

The Accused/Appellant was a neighbour to the Complainant who on the 6th day of August, 2009 was at her grandmothers house playing with a child called V.

The appellant lured her to his house with a promise of being given sweets but while in his house he proceeded to remove her clothes and his and proceeded to insert his penis into her vagina. She cried in pain and he decided to dis engage and she got a chance to run out and reported the matter to her grandmother and later her mother and father.

Later he was arrested by police and charged with this offence.

**Voire dire examination.**

The trial magistrate did conduct a Voire dire examination on the complainant and he was satisfied that she was intelligent and understood the meaning of an oath.

This fact is born out by the evidence she adduced in Court which appears cogent and consistent.

**Age**

The complainant testified to the effect that she was aged five(5) years old. This was corroborated by her mother who testified that her daughter was aged about five(5) years old.

**Penetration**

The complainant testified that the appellant undressed her and proceeded to insert his penis into her vagina and had sexual intercourse with her but decided to stop when she screamed in pain.

Doctor Sangolo (PW 3) testified that he examined the child who was aged five(5) years and found that the hymen was perforated and there was laceration on the vaginal walls. The Accused was examined and his urine was found to contain pus cells. Pus cells were also noted in the vaginal swab taken from the complainant. His conclusion was that there was forceful entry into the complainants vagina.

His evidence corroborates that of the complainant.

This incident took place at 11:00 am which was in broad daylight as a neighbour and a relative as he used to call him “**Kaka**”. I am satisfied that the Conviction was safe and there is no need to disturb it.

The appeal has no merit and it is dismissed.

**Judgment delivered dated and signed this 15th day of November, 2013.**

.....

**M. MUYA**

**JUDGE**

**15TH NOVEMBER, 2013**

**In the presence of:-**

**Learned State Counsel Mr. Jami**

**Applicant present**

**Court clerk Musundi**