



**ABUBAKAR JILLO MOMBASA.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

### **JUDGEMENT**

1. The appellant, ABUBAKAR JILLO was charged, tried and convicted on a charge of Defilement contrary to section 8 (3) of the Sexual Offences Act. On 7/8/09 he was sentenced to 20 years imprisonment. He now appeals to this court against both conviction and sentence. He cites 6 grounds of appeal which can be summarised into 3 as follows;-

**1. The charge sheet was defective.**

**2.The trial magistrate had no jurisdiction to impose a 20 year sentence of imprisonment.**

**3.The conviction of evidence adduced at the trial.**

2. The state opposed the appeal. As a first court of appeal, this court is obligated to appraise the evidence of the trial afresh in order to make its own conclusions.

3. The prosecution evidence was that in 2008 the complainant (Pw 1) KA was aged 12 years and resided at M[...]. She was a standard 1 student at M[...] Primary School. On 23/11/08 KA and her siblings remained at home while her parents went out at 10.00am on their daily routines. Presently, the appellant arrived at the home and forcefully carried off KA to a thicket where he defiled her and left. Her brother, KA II(Pw 2) sensing danger herded his other siblings and hid them in a bush before seeking help of a neighbour who took KA from the bush on a bicycle as she could not walk. The matter was reported to their father AK, when he got home and later to Chief. The appellant was arrested on the same night. When KA was examined, it was found she had tearing and bruises on her genitalia.

4. In his defence, the appellant gave a sworn statement narrating the event of his arrest from his home by a big crowd. He said nobody informed him the reason for this arrest. In ground 5 of his memo of appeal the appellant has suggested that there was a grudge existing between him and KA`s family. This however was not stated at the trial during the defence.

5. Concerning the issue of penetration, the evidence of the clinical officer(Pw 6) and all the witnesses who saw the victim on the material day, leaves no doubt. KA could not move according to her brother (Pw 2) and she was evidently in pain (Pw 3) KA herself narrated the events of the fateful day with clarity.

6. Secondly, the appellant and all the witnesses were residents of the same village hence familiar with one another. The incident occurred during the day so the two children KA and KAI had ample opportunity to identify the assailant. The appellant has attacked the evidence of the two minors KA and her brother KA II alleging that no voire dire examination was conducted. Indeed a voire dire examination was carried out in respect of both minors. Whereas the same was not in the ideal question – and – answer format, the trial magistrate directed that the minors be affirmed rather than sworn. She indicated that they understood the

“essence of telling the truth”.

7. The trial magistrate upon reviewing the testimony of the two minors was impressed with it and believed them. She also took into account the medical evidence available. The appellant canvassed a half-hearted defence that there was a land dispute involving him and KA`S family initially. The same was however not sustained and in his defence he did not give any details of the said dispute. He said in effect that he was arrested without being told the reason.

8. In the circumstances of this case, the trial magistrate was entitled to act on the evidence of KA alone if she believed her (**See Section 124 Evidence Act**). In this case however she correctly observed that KA`s evidence was consistent with that of her brother KAI and the medical evidence. It is not believable that all the prosecution witnesses without cause gave false evidence against the appellant. The trial court properly rejected the scanty defence raised.

9. Questions relating to the injuries sustained by KA and her age were not raised at the trial notwithstanding the contents of the P3 form confirming her age as 11 years in January 2009 and tear, bruising and swelling on her vagina. The appellant cannot raise these issues at this stage.

10. As regards the charges, the fact that the statement of offence did not cite section 8 (1) of the Sexual Offences Act does not render the charge defective. The appellant did not object to the charges during the trial. He appears, from the record to have understood the charges facing him. The charges as drawn satisfy the requirement of section 134 of the Criminal Procedure Code.

11. Finally, the trial Magistrate was empowered under section 7 (2) of the Criminal Procedure Code to impose the sentence of 20 years imprisonment and objections on that ground have no merit. The minimum sentence provided for an offence under section 8 (3) of the Sexual Offences Act is 20 years imprisonment hence the sentence is lawful.

In conclusion, I have found no merit in this appeal and will dismiss it in its entirety.

**Delivered and signed at Malindi this 18<sup>th</sup> day of June, 2012 in the presence of Mr Naulikha – State, Appellant present, c/c-Evans/Leah.**

**C.W.MEOLI**  
**JUDGE**