



**V.O.A .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original conviction and sentence in Criminal Case number 279 of 2011 of the Senior Principal Magistrate’s Court at Nyando – Mrs. D Chepkwony )**

**JUDGMENT**

The appellant was charged with the offence of Defilement contrary to Section 8 (1) (2) of the Sexual Offence Act Number 3 of 2004.

The particulars are that on the 2<sup>nd</sup> day of April 2011 at E K S location in Nyakach District of the Nyanza Province intentionally caused his penis to penetrate the vagina of **A A A** a child aged nine (9) years.

The second count was compelling an indecent Act contrary to Section 6 (a) of the Sexual Offences Act Number 3 of 2006.

The particulars are that on 2<sup>nd</sup> April 2011 at East Kadianga Sub Location in Nyakach Division of the Nyanza province intentionally and unlawfully compelled **A A A** to touch her vagina with his penis against her will an act which was indecent.

The appellant was convicted and sentence to life imprisonment. The proceedings on record clearly showed that the appellant admitted the facts as read out.

His petition of appeal dated 4<sup>th</sup> May 2011 gravitates around the fact that he admitted the offence with the hope that he was going to escape the torture at the police station and that he was asking for another chance. He also complained of the age assessment report produced in court.

When this matter came up for hearing the appellant said that he had prove which given time would show that he was not twenty (20) years as envisaged by the medical assessment.

With concurrence of the respondent I ordered that the appellant to avail such proof. Indeed a certificate of Birth number 1548553 was produced which shows that the appellant was born on 2<sup>nd</sup> March 1994 and thus at the time when he committed the crime he was below the age of majority.

The learned State Counsel conceded that this court should consider the age shown in the said birth certificate to be appropriate and not that used by the trial court.

I am satisfied though that the proceedings at the court below did not render any injustice to the appellant save for his age. The trial court was right in demanding that age assessment be undertaken before the appellant was sentenced.

I have considered the probation report dated 20<sup>th</sup> April 2012 which by and large is favourable to the appellant. The only issue I take with the same is that the officer failed to consider getting a report or opinion from the complainant or her family. Even if the victim is far, which I doubt, there was no urgency for the officer not to seek her views. I am unable therefore to rely on the same.

Nonetheless by virtue of the age of the appellant at the time of commission of the offence, which was 17 years old I shall set aside the sentence of life imprisonment and order that he be held at a borstal institution pursuant to the provisions of Section 191 (1) (g) of the Children's Act Chapter 141 Laws of Kenya for a period of ten (10) years from the date herein with the hope that the appellant shall have learnt his lesson and to come out as a responsible citizen.

**Dated, signed and delivered at Kisumu this 26<sup>th</sup> day of July 2012**

**H. K. CHEMITEI**  
**JUDGE**

**In the presence of:**

Mr. Gumo State Counsel

In person Appellant

*HKC/aao*