



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 128 OF 2009**

*(Appeal from conviction and sentence of the Senior Resident Magistrate's Court  
at Hamisi in Criminal Case No. 206 of 2007 [P. A. OLENGO, RM])*

**WYCLIFF**

**ASHIUNDU .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

1. The Appellant had been charged with the offence of defilement contrary to S.8 (1) and (2) of the Sexual Offences Act. It was alleged that on the night of 7.6.2007, he had carnal knowledge of J.A., a 12 year old child. He denied the offence and upon conviction was sentenced to serve 30 years imprisonment. The appeal is against conviction and sentence and in the Petition of Appeal, the complaint made is that the case had not been proved beyond reasonable doubt and that the sentence was too harsh in the circumstances of the case.

2. According to the record, on the material night PW1, J.A. aforesaid and the Appellant allegedly slept in the same bed at J.A.'s home and according to J.A., that night, the Appellant allegedly removed his short trousers and made him "his wife". That the next day, he informed his teacher because he had difficulties sitting and later he also informed his mother, PW3, H.A who took him to hospital.

3. PW4, **Solomon Kamau**, a doctor at Kaimosi Hospital examined PW1 and found that the boy's anal area was swollen and was also watery. He concluded that the patient had been defiled and on the same day, he also examined the Appellant who had no injury in his private parts and he produced the P3 forms in respect of both the alleged victim and also the offender.

4. PW5, **PC Roseline Aula**, re-arrested the Appellant and later charged him with the offence of defilement.
5. When placed on his defence, the Appellant denied the offence and stated that he was arrested while at work and later charged.
6. For my part, I see no reason to tamper with the conviction and sentence imposed. I say so because S.2 of the Sexual Offences Act defines penetration and provides as follows;

***“act which causes penetration” means an act contemplated under this Act.”***

7. S.8 (1) of the Act then defines penetration of a child as defilement. In this case, the evidence of PW1 was unchallenged and was amply corroborated by PW4 who found evidence of sexual assault in the anal area of PW1's body. PW2, mother of PW1 received the complaint the next day as PW1 was unable to sit properly at school. That evidence was watertight and cannot be faulted. The defence tendered by the Appellant was a sham and I dismiss it as such.
8. In the end, and reading S. 8 (2) of the Sexual offences Act, the sentence meted out to the Appellant was fair.
9. The Appeal has no merit and is dismissed.
10. Orders accordingly.

***Delivered, dated and signed at Kakamega this 2<sup>nd</sup> day of February, 2011.***

**ISAAC LENAOLA**

**J U D G E**