



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT BUNGOMA**  
**CRA NO.88 OF 2009**

*(Appeal arising from WBY SRM CR. NO.1471 of 2007)*

**KENNEDY ABDALLA SIMIYU.....APPELLANT**

**VRS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was charged and convicted by SRM Webuye on the offence of defilement contrary to section 8 of the Sexual Offences Act, 2006 and sentenced to 20 years imprisonment. He appealed against both on conviction and sentence. In his petition the Appellant relies on two grounds:

- 1. That the conviction was based on insufficient evidence**
- 2. That his defence and mitigation were ignored.**

The State conceded to the appeal on grounds that the age of the complainant was not established and that section 200 of the Criminal Procedure Code was not complied with.

I have perused the proceedings in this case and made some observations. The statement of offence was referred to as: ***“defilement of a girl under 18 years contrary to section 8(3) of the Sexual Offences Act 2006”***. The offence contrary to section 8 of the Act is called ***“defilement”***. It was wrong for the prosecution to frame the charge with the wrong statement of the offence. I note that the particulars of the charge are correct.

For age assessment, the trial magistrate relied on a treatment book of the complainant which showed that she was aged 15 years. The prosecution did not produce any age assessment report or the birth certificate of the complainant in order to establish the age of the complainant.

A treatment book or note only gives the age that the complainant or her parents may have given the doctor when giving her history before treatment. The only document to establish age of the complainant would have been an age assessment report by a competent doctor or a birth certificate. I therefore agree with the learned state counsel that the age of the complainant was not established. The sentences provided for by section 8 of the Act depend on the age of the complainant. Without establishing age, the court is likely to give the wrong sentence. In the case before me, it is not clear on what basis the trial magistrate imposed the 20 years imprisonment sentence. For these reasons the conviction and the sentence are hereby set aside.

The State Counsel applied for a re-trial to which the Appellant was not opposed to. It is clear on the court record that the case was registered on 10/9/2007 and finalized on the 16/6/2009. This appeal has taken about six months to be finalized. This case is therefore suitable for re-trial. The Appellant is not likely to suffer any prejudice by holding the re-trial. I hereby order a retrial to be held within 7 days before the PM Webuye.

**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered this 18<sup>th</sup> day of May 2011 in the presence of the Appellant and the State Counsel Mr. Ogoti.

**F. N. MUCHEMI**  
**JUDGE**