

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 322 of 2009

*From original conviction and sentence in Criminal Case No. 81 of 2009
of the Chief Magistrate's Court at Nakuru - E. Tanui (R.M.) dated 24th
November, 2009)*

D.M.K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act (No. 3 of 2006). The particulars were that the Appellant on diverse dates between 24th to 28th day of March 2009 in Nakuru District of the Rift Valley Province unlawfully caused penetration with his genital organ namely penis into genital organ namely anus of B.N.M aged 3 years.

The Appellant pleaded not guilty and evidence was led by the prosecution ending in his conviction and sentence to life imprisonment as required by Section 8(2) of the Sexual Offences Act.

The Appellant has appealed to this court on five grounds which may be summarized into one ground, that there was no evidence to convict him. It is the duty of the appellate court to examine the evidence before the lower court and make its own findings and conclusions. The evidence is irrefutable the appellant sodomised his own three year old son. The evidence of PW1 the mother who made a complaint is very clear. On the 29th of March 2009 the complainant had diarrhea, that she washed his clothes and then started washing him. On washing his buttocks the complainant started screaming. ***"I told him to bend and inside his anus I saw that he had bruises. It was reddish in colour. The complainant told me his dad (the appellant) put there his stick"***

The evidence of the Clinical Officer Tabitha Ngugi PW3 was equally clear. She testified that the child was brought by the grand mother (PW2) to the clinic. Duration of the injuries was three days. ***"I found the tissue at the anal canal had cracks. There was also redness and the anal canal was widened. I also found watery discharge along the anal opening. Lab investigations were negative."***

When cross-examined by the appellant PW3 testified that the child's anus was wet. It is possible for the child to be sodomised especially if the mother is not diligent. She testified that a blunt object is anything not sharp. It could even be a penis. So the evidence is very clear. It was adequate to found the conviction and to sentence the appellant as by law provided.

The essential ingredient in sexual offences is the act of penetration, as the Court of Appeal held in the case of **REPUBLIC VS. OYIER [1985] KLR 353**. There is no doubt in this case that the appellant committed that act as stated in Section 8(1) of the Sexual Offences Act. The punishment for the offence is life imprisonment under section 8(2) of the Act. Having considered all the appellant's submissions and the evidence on record, there is absolutely no merit in this appeal. I confirm sentence of the lower court, and dismiss the appeal.

There shall be orders of the court.

Dated signed and delivered at Nakuru this 30th day of April, 2010

M. J. ANYARA EMUKULE

JUDGE

