



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 55 OF 2009**

**(Being an appeal from original conviction and sentence of the SRM's court at Keroka**

**in criminal case No. 990 of 2008 – Were, SRM)**

**BETWEEN**

**CHARLES NYAKOE ONJANGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with defilement of a child contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the offence were that on the 7<sup>th</sup> day of November 2008 in Masaba District within Nyanza Province he unlawfully and intentionally committed an act which caused penetration to S.K., a girl aged 14 years. The appellant denied the charge and after a full trial he was convicted and sentenced to 20 years' imprisonment.

Being aggrieved by the said conviction and sentence the appellant preferred an appeal to this court. In his petition of appeal, the appellant stated, *inter alia*, that the learned trial magistrate failed to carefully analyze the evidence that was tendered and thereby arrived at a wrong conclusion. He also lamented that the sentence that was imposed upon him was harsh and excessive.

A first appellate court is under an obligation to consider afresh all the evidence that was adduced before the trial court, evaluate the same and reach its own conclusion as to whether the conviction should be upheld or not. I will therefore proceed to summarize the evidence that was laid before the trial court.

The complainant told the court that she was 14 years old. On 7<sup>th</sup> of November 2008 at about 8.00 p.m. she was at their home with her younger sister known as **M**. Her mother had travelled. The appellant, who is the complainant's step father and therefore well known to her, called from outside the house and asked for a basin. She responded that the basin was outside the house. The appellant then asked for a match box. The complainant passed it over through a gap in the door. The appellant further requested for a certain metal bar which was in the house and the complainant opened the door. The appellant got in and he grabbed the complainant on the head and tied her hands. He pward pushed

her on to a bed where he proceeded to defile her. After that he left the house. In the morning the complainant reported the incident to the Area Assistant Chief. The Assistant Chief called the complainant's uncles and they reported the matter to Keroka police station. The complainant was taken to a hospital where she was examined and treated.

In cross examination, the complainant said that when the appellant was defiling her the other children were asleep. The appellant had threatened to kill her.

**Jackson Murauni, PW4**, was a Clinical Officer at Kisii Level 5 Hospital. He examined the complainant and filled her P3 form. His examination showed that she had contracted a sexually transmitted disease.

**Police Constable Regina Chage, PW5**, who was the investigating officer, was handed over the complainant's torn under pant which was produced before the trial court as an exhibit. She further testified that according to her investigations the appellant was well known to the complainant since he is married to the complainant's mother.

In his defence, the appellant said that on 27<sup>th</sup> November 2008 he met an officer in civilian clothes and he was asked to identify himself. When he did so he was arrested and taken to Keroka police station. On the following day he was taken to court and charged with defilement. He denied having committed the offence.

The appellant chose to rely on his written submissions which he handed over to the court. A perusal of the same reveals that his main complaint was that if indeed he had defiled the complainant as alleged, the children who were staying with her in the house ought to have been called as witnesses. His contention was that it was unlikely that they would have been asleep as early as 8.00 p.m. However, the complainant's evidence was that the children were asleep and she was unable to scream when the appellant was defiling her because he was holding her neck and had also threatened to kill her. She only screamed after the incident.

From the totality of the evidence on record, I have no reason to doubt the complainant's evidence. I am satisfied that the appellant's conviction was well founded in law and dismiss the appeal against conviction.

As regards the appeal against sentence, **section 8 (3)** of the **Sexual Offences Act** provides a mandatory sentence of not less than 20 years for anyone who commits an offence of defilement with a child aged between 12 and 15 years. The complainant said that she was 14 years old and PW4 also assessed her age to be 14 years. The sentence that was passed was therefore lawful.

Consequently, I dismiss this appeal in its entirety.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JULY, 2010.**

**D. MUSINGA**

**JUDGE.**

**28/7/2010**

Before D. Musinga, J.

Mobisa – cc  
Mr. Gitonga for the State  
Appellant present

**Court:** Judgment delivered in open court on 28<sup>th</sup> July, 2010.

**D. MUSINGA**

**JUDGE.**