



(Appeal arising from BGM CMC CRC NO.2039/09)

JOB EWONO OTEBA :::::::::::::::::::::: **APPELLANT**

VERSUS

REPUBLIC :::::::::::::::::::::: **RESPONDENT**

J U D G M E N T

The appellant was convicted of the offence of defilement of a child contrary to section 8(1) of the Sexual Offences Act and sentenced to serve twenty (20) years imprisonment with hard labour.

Being dissatisfied with the conviction and sentence of Bungoma Resident Magistrate the accused lodged this appeal.

Mr. Ocharo argued the appeal which raises two pertinent issues. Firstly, that the age of the complainant was not assessed and that the evidence was riddled with contradictions. The appeal was opposed by the state who argued that the P3 form gave the age of the complainant and that there were no contradictions in the evidence.

PW6 is the clinical officer who examined the complainant and produced the P3 form. The witness did not assess the age of the complainant. Part 1 of the P3 form was filled by the Officer Commanding Malaba Police Station (O.C.S) being the request for examination of the complainant. It is in this part that the age of the complainant was indicated as fourteen (14) years. The O.C.S is not a qualified medical practitioner and cannot assess the age of a person. In an offence of defilement of a child, the sentence is determined by the age of the victim. If the age is not assessed, the court cannot impose sentence. Before conviction, the court must be satisfied that the complainant is a child. In the absence of age assessment the conviction and sentence cannot be sustained. The father of the complainant did not produce a birth certificate of the child which would have come in handy where the age was not assessed.

I find that with the existing flaws in the trial, the conviction and sentence must be set aside and I hereby so order. The trial took less than one and a half (1 ½) years and a retrial would not cause injustice to the appellant. I order that a retrial be held within seven (7) days.

The appellant shall be detained in custody pending plea before the Chief Magistrate, Bungoma.

**F.N. MUCHEMI
JUDGE**

Judgment dated and delivered on the 19th day of October, 2010 in the presence of the appellant, his counsel Mr. Ocharo and the State Counsel Mrs. Leting.

**F.N. MUCHEMI
JUDGE**