



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

**Criminal Appeal 96 of 2007**

*(An appeal from the judgment/sentence of the SRM's Court  
at Keroka criminal case No. 155 of 2007 – Wahome, SRM)*

**ERICK MOSE alias JONES ABERE ONSONGO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT:**

The appellant was charged with “**defilement of a girl as read in Section 8 (I) of Sexual offences Act No. 3 of 2006.**”

The particulars of the offence were that on the 6<sup>th</sup> day of March 2007 at M[particulars withheld] location in Nyamira District within Nyanza Province (the appellant) committed an act which caused penetration on E.M. a girl of the age of 14 years.”

The appellant was tried, convicted and sentenced to 20 years’ imprisonment. He was aggrieved by the said conviction and sentence and preferred an appeal to this court. In his petition of appeal he raised 10 grounds which are as follows:

- “1. The learned trial magistrate erred in law and fact in convicting the appellant on a defective charge which did not disclose an offence.**
- 2. The learned trial magistrate erred in law and fact in sentencing the appellant on a charge and/or a section which did not have a penalty.**
- 3. The learned trial magistrate erred in law and fact in not analyzing properly both the prosecution and defence evidence before him and thus arriving at a wrong decision.**
- 4. The learned trial magistrate erred in law and fact in swiftng the burden of proof to the appellant.**
- 5. The learned trial magistrate erred in law and fact in wrongly convicting the appellant without enough evidence of identification and/or corroboration.**
- 6. The learned trial magistrate erred in law and fact in relying on the evidence of the clinic officer who did not produce the treatment books as exhibits which books enabled him to fill the P3 Form**

## Exhibit 1.

7. **the learned trial magistrate was very wrong in estimating the age of the complainant as he was not an expert.**
8. **The learned trial magistrate was wrong in law in rejecting the appellant's defence without assigning reason or reasons thereto as required by law.**
9. **the learned trial magistrate erred in law and fact in convicting the appellant on a piece of evidence which was contradictory in its material particulars.**
10. **The judgment of the learned trial magistrate was against the weight of evidence."**

The prosecution evidence can be summarized as hereunder:

The complainant, PW2, told the court that she was 14 years old and was in standard 6. She knew the appellant well as he is married to her aunt and they used to stay in the same house. She stated that on 6<sup>th</sup> March, 2007 at about 9.00 p.m. she was alone in her parent's house. She did her school work and later went to bed. There was a lantern lamp that was on as she slept.

Shortly after going to bed, the appellant went to the room where the complainant was sleeping, held her by the mouth, removed her panties and proceeded to defile her. After the ordeal the appellant left and the complainant started screaming. One of their neighbours went to the complainant's aid but the appellant had disappeared. When the complainant's father came, they looked for the appellant, got him and took him to Keroka police station.

The complainant's mother, **PW3**, testified that she arrived at her home at about 9.30 p.m. She found the complainant crying and upon asking her why she was crying, the complainant said that she had been defiled by the appellant. PW3 examined her daughter and realized that her panties were wet and had some mucous substance.

PW3 and her husband started looking for the appellant and when they got him they took him to Keroka Police station.

The complainant was taken to Keroka sub-district hospital where she was examined by PW1, a medical officer on 8<sup>th</sup> March, 2007. PW1 said that the complainant was 14 years old. At the time of examination, the complainant had already taken a bath. PW1 examined the treatment notes which indicated that the complainant's hymen was intact but bruised and there were sperms around the vulva. A vaginal swab that was done on 7<sup>th</sup> March, 2007 revealed that there were pus cells and had been infected with gonorrhoea.

PW1 formed the opinion that the complainant's genitals had been penetrated. PW1 signed a P3 form that was produced as an exhibit.

In his unsworn defence, the appellant stated that on the material night when he got home where they were staying with the complainant and her parents, he found the complainant alone. He alleged that she refused to give him his change after the complainant had given him chang'aa. He alleged that he slapped the complainant and she went to look for her father.

Mr. Okenye for the appellant made submissions in support of the aforesaid grounds of appeal.

Mr. Kemo, Principal state counsel, submitted that though the charge did not cite the penalty section of the alleged offence, that was not prejudicial to the appellant and neither did it occasion a miscarriage of justice. It was an error that was curable by the provisions of **Section 382** of the **Criminal Procedure Code**.

Regarding the complainant's age, Mr. Kemo submitted that PW1 estimated her age to be 14 years and that was sufficient. That age was not challenged by the appellant.

I have considered the submissions on record. It is not in dispute that the charge did not refer to the penalty section but that **per se** did not make it defective. The appellant was not in any way prejudiced by that omission. That error is curable by the provisions of **Section 382** of the **Criminal Procedure Code**.

As regards the prosecution evidence, the complainant testified how she was defiled by the appellant who was a close relative. She knew him well and the issue of identification that was raised in ground 5 of the petition of appeal is immaterial. The appellant did not deny that he was with the complainant on the material night. He said that he slapped her but denied that he defiled her.

The learned magistrate properly analysed the prosecution evidence and concluded that the offence had been proved beyond reasonable doubt.

As regards the age of the complainant, PW1 assessed the same as 14 years. The law allows a medical officer who is filling a P3 form to estimate the age of a complainant. The complainant herself testified that she was aged 14 years. The learned trial magistrate did not doubt that. The appellant did not dispute the stated age of the complainant. I find ground 7 of the petition of appeal baseless.

The learned trial magistrate considered the appellant's defence and rightly rejected the same and, in my view, rightly so.

All in all I find no merit in this appeal and dismiss the same in its entirety.

**DATED, SIGNED AND DELIVERED AT KISII THIS 11 DAY OF JUNE 2009.**

**D. MUSINGA**

**JUDGE.**

**11/6/2009**

Before D . Musinga .J.

C.c Mobisa

Appellant – Present

**Court-** Judgment delivered in open court on 11<sup>th</sup> June, 2009

**D. MUSINGA .J**

**KISII.**