

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 4 OF 2018

JUSTUS ABUGA ONDIEKI.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence of Hon. A.C Towett – RM dated 21st September 2017 at the Chief Magistrate’s Court at Nyamira in Criminal Case No. 4 of 2016)

JUDGMENT

1. The appellant, JUSTUS ABUGA ONDIEKI, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act. It was alleged that on 23rd May 2015 at [particulars withheld], Manga Sub-District within Nyamira County he intentionally and unlawfully caused his penis to penetrate the vagina of AKM, a child aged 5 years.
2. Counsel for the respondent conceded the appeal on the grounds that when Hon. Towett, took over the proceedings from Hon. Kitangwa RM, she did not comply with section 200(3) of the Criminal Procedure Code. I agree with this concession.
3. As to whether I should order a retrial, I have looked at the testimony of the child (PW 1), it is inconsistent and when viewed in light of the other evidence, it may not sustain a conviction. I shall not order a retrial.
4. This appeal is allowed. The appellant is set free unless otherwise lawfully held on a separate warrant.

Dated and delivered at Kisii this 5th day of April 2019.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Ndege, advocate for the appellant.