



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT SIAYA**  
**CRIMINAL APPEAL NO. 32 Of 2018**  
**(CORAM: R.E. ABURILI – J)**

**JOHN OTIENO alias MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal against both the conviction and sentence in Bondo PM***

***Sexual Offence Case No 631 of 2016 by Hon M. O. Obiero – P.M on 17/7/2018)***

**JUDGMENT**

1. The Appellant John Otieno alias Mohamed 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 2018.**
2. The particulars of the offence are that on the 4<sup>th</sup> day of January 2018 at [particulars withheld] Village in Bondo sub-County within Siaya County he intentionally caused his penis to penetrate the vagina of A.A.O. a Child aged 11 years.
3. He also faced the alternative Court of committing an **Indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.** The particulars are that the appellant, on the 4<sup>th</sup> day of January 2018 at [particulars withheld] Village in Bondo Sub-County within Siaya County, he intentionally touched the buttocks, breast and vagina of A.A.O. a Child aged 11 years with his penis.
4. The appellant pleaded not guilty to all the charges and the Prosecution called 6 witnesses to prove its case. PW1 was the Complainant who stated how the Appellant met her on her way from school at 7.00 p.m. She was alone. She ran when she noticed footsteps behind her. The person ran after her caught her and took her to the bush and defiled her. He threatened to cut her with a panga as she screamed in pain on being defiled. She went home and later informed her mother who took action. She was taken to the hospital and a report was made to the Police. The victim knew the Appellant who was their neighbour's herdsman. She knew him as 'Jangwero' and identified her in Court. A P.3. Form was filled showing the victim was defiled. The Prosecution also produced a birth certificate showing that the victim was born on 7.9.2006.
5. PW6 a Clinical Officer who examined PW1 confirmed that the child was defiled. She had a tear on the left **labia majora.** In his defence the Appellant denied committing the offence. In his judgment

delivered on 17.7.2018 the trial Court (Hon. M. Obiero) found that the Prosecution had proved its case against the Appellant beyond reasonable doubt. He convicted the Appellant and the Appellant stated that he had no mitigations. Life sentence was imposed.

6. On 20.7.2018 the Appellant filed this appeal but today he stated to the Court that he wished to appeal against the conviction and challenge only sentence.

7. The Court allowed the Appellant's application and also asked him to mitigate which he did. The Appellant states that he is the sole breadwinner. That he has a wife and 5 children who depend on him and that he is 45 years old.

8. The Prosecution led by Mr. Okachi Senior Principal Prosecution Counsel left it to the Court and urged the Court to look at the circumstances of the case and age of the victim.

9. I have considered the mitigation by the Appellant and the fact that he has saved this Court the trouble to examine the merits or demerits of his appeal by withdrawing the appeal against conviction.

10. I have also considered the age of the victim who was 11 years old. The offence of defilement of a minor is serious and that is why the legislature provided for life sentence where the minor is aged 11 years and below. The sentence imposed is lawful. The offence of defilement of children in this region is prevalent and traumatizing to the young victims.

11. The Appellant has a wife and 5 Children. This Court does not understand why he preyed on the innocent soul. He is indeed a sex pest who deserved to be kept out of the society to protect the innocent children.

12. However, as the life sentence is not a mandatory sentence, this Court has the power to consider any other lawful sentence. On the authority of **Jared Koita Injiri v Republic (CA) Kisumu Criminal Appeal No. 93 of 2014 [2019] eKLR** I would consider the mitigations by the Appellant and the fact that he was a first offender. He however committed a heinous offence that is traumatizing to the young children.

13. Invoking the above decision citing **Francis Karioko Muruatetu and Another, SC Pet. No. 16 of 2015**, I would set aside the life imprisonment and substitute it with a prison term of 30 years from the date of sentence by the trial Court on 17.7.2018.

14. Orders accordingly. File Closed.

**Dated, Signed and Delivered at Siaya this 12<sup>th</sup> day of June 2019.**

**R. E. ABURILI**

**JUDGE**

**In the presence of:**

Appellant in [person

Mr. Okachi SPPC for the state

CA: Brenda and Modestar