

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL NO. 67 OF 2016

BETWEEN

DANIEL OWINO OCHIEL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence

dated 12th July 2016 in Criminal Case No. 95 of 2015

in Ukwala Law Courts before Hon. G.A. Adhiambo, SRM)

JUDGMENT

1. The appellant, **DANIEL OWINO OCHIEL**, was charged with the defilement of **LAO**, a child aged 13 years contrary to **section 8(1) and (3)** of the **Sexual Offences Act**. The offence took place on 1st March 2015 at [particulars withheld] Sub-location, Ugenya District, Siaya County. The appellant was convicted and sentenced to serve 20 years' imprisonment.
2. The issue in this appeal is whether the prosecution proved the offence beyond reasonable doubt. Defilement under **section 8** of the **Sexual Offences Act** has two elements. First, the act penetration which under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*" Second that the subject of penetration is a child
3. On the issue of penetration, PW 1 told the court that on 1st March 2015, she had gone to visit her friend **P** whose father is the appellant. Since **P** was not at home, the appellant told her to wait. As she was waiting in the house, the appellant closed the door, removed her inner wear, unzipped his trouser and proceeded to insert his penis in her vagina. After the act, he told her to go home.
4. **PW 1** did not tell her mother, **PW 2** immediately. After two days, **PW 2** noticed she was unwell and when he took her to Ambira Sub-County Hospital. The Clinical Officer, who examined her on 4th March 2015, noticed that although the hymen was intact, the vagina had a tender wall. **PW 2** noted that the bleeding was consistent with her menses. It was only after examination the PW 1 told PW 2 what took place. The appellant was later assisted by the Assistant Chief, PW3. In his defence, the accused denied the offence but claimed that there was a grudge between him and PW 1's father.
5. I have no doubt that the element of penetration was not proved. Under **section 124** of the **Evidence Act**, the testimony of PW 1 was sufficient to support a conviction if the child was telling the truth. The trial magistrate did not comment or state why the child was saying the truth. The only testimony even is that of PW 1 who stated what happened and the medical evidence. The P3 form is clear that the bleeding was consistent with menses hence her dull condition could have been as a result thereof.
6. The conviction is unsafe. The appeal is allowed. Conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

SIGNED, DATED and DELIVERED at SIAYA this 2nd day of February 2018

D.S. MAJANJA

JUDGE

Appellant in Person

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: Laban O. Odhiambo, Ishmael Orwa