

REPUBLIC OF KENYA

IN THE HIGH COURT

AT SIAYA

CRIMINAL APPEAL NO. 88 OF 2016

BETWEEN

KEVIN ODHIAMBO OWINO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the original conviction and sentence

dated 5th August 2016 in Criminal Case No. 1029 of 2015

in Bondo Law Courts before Hon. E.N. Wasike, RM)

JUDGMENT

1. The Appellant, **KEVIN ODHIAMBO OWINO**, was charged and convicted of the offence of **attempted defilement** contrary to **section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 18th November 2015, at around 3.30am, at [particulars withheld] location, Bondo district, he unlawfully and intentionally attempted to cause his penis to penetrate the vagina of AA, a child aged 5 years.

2. I have considered the proceedings and the same are fraught with error. The trial magistrate allowed PW 1, the mother of the child to act as the intermediary as the child was aged 5 years. However, PW 1 proceeded to testify on her own behalf. The child was not asked any questions and no question were put to her through PW1 acting as intermediary. Neither was the appellant given an opportunity to cross-examine the child by putting his questions through the intermediary.

3. This is not to say that the Court cannot proceed without calling the child. What is clear is that the trial magistrate assessed the situation and found that the child could testify through the intermediary. By so finding, the trial magistrate ought to have afforded the Child the opportunity to express herself and for the appellant to put forward his questions.

4. The trial was defective therefore the conviction and sentence are quashed. However, the appellant shall be re-tried. He shall remain in custody and be taken for plea at **Bondo, Principal Magistrates Court on 6th February 2018**.

DATED AND SIGNED 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