



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. E015 OF 2021**

**CHARLES OTIENO OBUNGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal against the Judgment and decision of the Principal Magistrate's Court at Tamu***

***(Hon. Onzere E.M. (PM) dated the 25<sup>th</sup> February 2021 in Tamu PMCCR S.O No. 14 of 2020]***

**JUDGMENT**

The Appellant, **CHARLES OTIENO OBUNGE**, was convicted for the offence of **Defilement**. He was then sentenced to Life Imprisonment.

1. The Appellant has submitted that the evidence tendered by the prosecution was full of inconsistencies.
2. For instance, it was not clear where exactly the Complainant was defiled; as one version was that it was inside the offender's house; whilst the other version was that it was inside a shamba.
3. Secondly, the Complainant and her mother had originally indicated that the Complainant sustained injuries when she fell off a tree. Therefore, the Appellant submitted that the change in the story, was simply calculated to frame him, because he hailed from a community which was different from that which the Complainant's mother and other witnesses come from.
4. He believes that he was arrested only because he;

***“.... was a single man, and that he was suspected to have committed the offence because he was not married.”***

5. In any event, the Appellant believes that he cannot be the “*Unknown Person*” who the police were told about, when the Complainant's mother made the first report.

**Medical Evidence**

6. The Appellant was surprised that whilst the Complainant and her mother had told the Clinical Officer at the Muhoroni Sub-county Hospital that the minor had fallen from a guava tree; the said Clinical Officer started carrying out investigations on an alleged sexual encounter.

**Single Identifying Witness**

7. The Appellant submitted that the trial court had failed to warn itself about the dangers of relying on the evidence of a single identifying witness. Therefore, the Appellant was of the view that the truth of the matter did not come out.

**Burden of Proof**

8. The understanding of the Appellant was that the trial court shifted the burden of proof from the prosecution, and saddled him with it.

9. He submitted that the weakness of the defence should not be the basis for conviction.
10. He reasoned that he could not have committed the offence, considering that he had his own 5 children, who were vulnerable.

#### Sentence

11. The Appellant urged this Court to give consideration to his mitigation. In particular, he noted that his 5 “*vulnerable enthusiastic school going kids*” would suffer if the Court were to uphold the Life sentence.
12. Secondly, he described his health as unstable.
13. He believes that because he was a first offender, the sentence of Life Imprisonment was excessive, if the Court were to give consideration to the circumstances in which the offence was committed.

#### Analysis

14. The offence of defilement is committed when a person causes an act which causes penetration with a child.
15. In this case, the mother of the Complainant testified that the Complainant was 6 years old. She also produced the Birth Certificate of the Complainant, which verified the age of the Complainant. Therefore, there is no doubt that the Complainant was a child.
16. **PW1** was the Complainant. She testified that the Appellant did “*bad manners*” to her. As a result of the said “*bad manners*”, **PW1** bled a lot.
17. **PW1** went further to explain that the Appellant put the thing which he uses to urinate into her “*Siri*”, which she uses to urinate. As she was testifying, the Complainant pointed at her “*Siri*”, which made it clear that she was referring to her private parts.
18. It was the evidence of **PW1** that the Appellant committed the act inside his house, and that he thereafter took her out to the farm.
19. **PW2** is the mother of **PW1**. At the time the incident took place, **PW2** was not present, as she had gone to do some casual work. She had left her 3 children under the care of her neighbour, **PW3**.
20. **PW2** rushed back home after she received a message that **PW1** had been injured. **PW2** found **PW1** bleeding from her private parts.
21. It was the evidence of **PW2** that the Appellant advised her to wash the child’s private parts using water and salt.
22. At that time, the child was not talking. It was only after the child had been discharged from the hospital, that she told her mother about what the Appellant had done to her.
23. **PW2** testified as follows, when the Appellant cross-examined her;

***“M regained consciousness when we left [Particulars Withheld]. M was not speaking well at [Particulars Withheld]. M was traumatized and at first, she was not talking. It is after she was discharged that she said she was defiled.”***

24. **PW3** is a neighbour to **PW2**. She confirmed that **PW2** had left her 3 children under her care.
25. After she had fed the children, **PW3** went to wash clothes, at the river.
26. Upon her return home, **PW3** found **PW1** at her farm. **PW3** testified that **PW1** was injured, and she was crying.
27. **PW3** also testified that **PW1** was not talking.
28. When the child’s mother got back home, the Appellant advised **PW2** to give **PW1** a bath. This is what **PW3** said;

***“While in S’s house the accused who is our neighbour came. The accused said his daughter was once injured and they washed her with salty water. The accused advised Sharon to bath M with salty water.”***

29. The Appellant has submitted that his actions, of assisting;

***“..... in washing the complainant’s genitalia after the events of sucheventuality.”***

were a reflection of the human feelings which had been instilled in him.

30. I pause there, and ask myself if the Appellant was helping the Complainant or was helping in washing away evidence.

31. Meanwhile, based on the testimony of the first 3 witnesses, I find that the Complainant was so traumatized that she was not talking when the said witnesses first attended to her. It is therefore unclear where the assertion that the Complainant was injured after she fell-off a tree; came from.
32. But, the medical evidence proved beyond any shadow of doubt that the Complainant was defiled.
33. **PW4**, who a Clinical Officer at Muhoroni Sub-County Hospital examined the Complainant. He noted the following;
- (a) ***Bruises on both labia minora and labia majora;***
  - (b) ***Bruises on the hip;***
  - (c) ***Hymen was broken;***
  - (d) ***Mucus plug on the vaginal walls;***
  - (e) ***Numerous sperm cells on the vaginal swab;***
  - (f) ***Blood in the urine;***
  - (g) ***Yeast cells, which is a form of infection.***
34. The Clinical Officer referred the Complainant to the JOOTRH for further examination and management.
35. As the Clinical Officer said, those injuries and findings were only consistent with defilement. The injuries cannot have been caused by a fall from a tree!
36. **PW7, POLYCARP LUTA KWEYE**, was an Analyst, working at the Government Analyst, Kisumu.
37. He examined a swab sample from the Complainant, and a buccal swab from the Appellant.
38. From the blue dress which the Complainant had worn on the material day, **PW7** found human blood stains and sperms.
39. He generated **DNA** profiles from the various items and found that the blood stains were of the Complainant, whereas the sperms matched the **DNA** profile of the Appellant.
40. From the totality of the evidence, I find that the same was so water-tight, that the Appellant's conviction must be upheld, as I hereby do.
41. As regards the sentence, the record shows that the learned trial magistrate followed the Sentencing Guidelines to the letter.
42. She asked for and obtained a Pre-sentencing Report. She also gave to the Appellant an opportunity for mitigation.
43. Thereafter, the trial Court gave due consideration to both the mitigation and the Probation Officer's Report.
44. Whereas the Appellant had alleged that he had been taking care of his children, because the mother of the children was sickly; the Probation Officer found out that the Appellant's wife had deserted, together with the children.
45. In effect, the trial court took into account all factors which were relevant. And the Appellant did not show any irrelevant factor which the trial court had taken into account.
46. I find that the learned trial magistrate did not err when she sentenced the Appellant to Life Imprisonment. I so find because the circumstances in which the Appellant committed the offence, called for the very sentence which was imposed.
47. I therefore uphold the sentence.
48. In sum total, the appeal is unsuccessful, and is therefore dismissed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH 2022**

**FRED A. OCHIENG**

**JUDGE**