



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 71 OF 2018**

**CHARLES POLO MWAMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Nyando (Hon. B. M. Kimtai SRM) dated the 15<sup>th</sup> May 2015 in Nyando PMCCRC No. 769 of 2014]***

**JUDGMENT**

The Appellant, **CHARLES POLO MWAMU**, was convicted for the offence of **Defilement** Contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**.

1. The Appellant said that his conviction was based on the evidence of recognition, but said that the alleged recognition was doubtful because there was an unexplained delay between the date when the offence was committed and the date of his arrest.
2. It is common ground that the offence was allegedly committed on 17<sup>th</sup> June 2014, whilst the Appellant was arrested on 26<sup>th</sup> June 2014.
3. I understand the Appellant to be suggesting that if he had been recognized, he ought to have been arrested soon after the offence was committed.
4. However, it is clear from the evidence of the Complainant's father that the Appellant;  
  

***“..... disappeared for one week and when he resurfaced he was arrested.”***
5. Even during cross-examination the Complainant's father (**PW3**) reiterated that the Appellant had disappeared for a week.
6. To my mind, therefore, the gap between the date when the offence was committed and when the Appellant was arrested, has been adequately explained.
7. The Appellant also submitted that it was **ROSELYNE ADHIAMBO (PW1)** was the Key Witness for the prosecution.
8. I do not understand why the Appellant feels that it was **PW1** who was the Key Witness, whilst the Complainant also testified.
9. It is correct that **PW1** had been at home together with the Complainant, on the material day.
10. At about 10am on that day, Elizabeth, (who is a neighbour) left her child with **PW1**.
11. After some time, **PW1** left the house, with a view to returning the child to Elizabeth.
12. It was the evidence of **PW1** that she stayed at Elizabeth's house for about 10 minutes.
13. As **PW1** was getting back home, she met the Appellant as he was leaving the house where **PW1** and the Complainant lived.
14. Upon entering the house **PW1** found the Complainant holding up her dress, with her panties down.

15. **PW1** also noticed some spermatozoa on the Complainant's thighs.
16. The evidence given by **PW1** was circumstantial.
17. Thereafter, the Complainant testified as **PW2**. She testified that it is the Appellant who removed her panty, and who then had sex with her.
18. **PW2** talked about some mucus on her thighs, and the fact that when **PW1** was returning to the house, **PW1** met the Appellant as he was leaving the said house.
19. In effect, **PW2's** evidence corroborated the evidence of **PW1**.
20. At this point, it is important to note that the Complainant had difficulty in communicating with other persons.
21. The learned trial magistrate observed that the Complainant was not coherent, and that therefore there was need for an interpreter who understood the sign language of the Complainant.
22. In the circumstances, when the Complainant made reference to "*mucus*" whilst **PW1** called the substance "*spermatozoa*", one can attribute the difference to the interpretation.
23. However, considering that the Complainant said that the Appellant had sex with her, I hold the considered view that the reference to word "*mucus*" on the Complainant's thighs was more akin to spermatozoa or any such fluid as is produced during sex.
24. But then the Appellant reasoned that 10 minutes would have been too brief for him to have committed the alleged offence.
25. The answer to that view is that the offence of defilement is deemed to have been committed when there has been a penetration of a sexual organ of a minor or penetration of a sexual organ by a minor. The said penetration need not complete; even partial penetration is sufficient.
26. There is no need for proof that the act of penetration lasted any particular length of time.
27. In any event, it is a matter of common notoriety about which this court can and does take judicial notice, that an act of penetration can be achieved within seconds.
28. 10 minutes would thus be a very long period of time, within which the offence of defilement can be committed.
29. After the offence was committed, **PW1** notified the father of the Complainant.
30. The father (**PW3**) had gone to work at the time when the offence was committed.
31. When **PW3** returned home, he found the Complainant there, and he took her to the Ahero Police Station to lodge a report.
32. **PW5** was on duty when **PW3** reported the incident. **PW5** referred the victim to hospital.
33. Whilst recording the statements of the witnesses, the victim told the Police Officer that it is the Appellant who had defiled her.
34. That means that it was the Complainant who disclosed the identity of the person who had defiled her. It is not the Complainant's father, as the Appellant has suggested.
35. The Appellant confirmed, when he was giving his defence, that on the material day, he was at the area where the scene of crime is located.
36. He said that he met **PW1**, as he had been sent to find out from her why she did not get married to the Appellant's friend.
37. Through the Appellant's evidence, it is crystal clear that he was not a stranger to **PW1**.
38. He was also not a stranger to the Complainant, as he well knew that the Complainant was a sister to **PW1**.
39. In the circumstances, this was a case of recognition. There was therefore no need for the witnesses to describe to the police how the Appellant looked like.
40. When the Complainant was examined by **PW4**, it was found that her labia minora had exaggerated redness. He also noted the presence of marked whitish discharge on the Complainant's labia minora.
41. The presence of the whitish discharge corroborated the evidence of both the Complainant and **PW1**.

42. And the presence of friction on the vaginal wall was proof of penetration of the Complainant's sexual organ.

43. It therefore follows that the prosecution had adduced sufficient evidence which proved beyond any reasonable doubt, all the ingredients of the offence of defilement.

44. The said evidence was inclusive of the age of the Complainant, which was proved by both the evidence of her father, (who gave her date of birth) but more significantly, through the Baptismal Card.

45. In the final analysis, there is no merit in the appeal. It is therefore dismissed, and I uphold both the conviction and the sentence.

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of March 2019**

**FRED A. OCHIENG**

**JUDGE**