



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**CRIMINAL APPEAL NO. 28 OF 2016**

**WYCLIFFE CHAKUA MCHOKU.....APPELLANT/APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T.**

This is the judgment of the **Criminal Appeal**. The Appellant was charged for defilement contrary to **Section 8(1)** as read with **8 (3) of S.O.A**

The particulars thereof were that, on the **17<sup>th</sup> day of January 2017** at *particulars withheld* within **Nyamira County**, intentionally caused his penis to penetrate the vagina of **D K B, a child aged 15 years**.

He was convicted after due trial and sentenced to 20 (twenty years) imprisonment.

However, being dissatisfied the Appellant filed an Appeal against both the conviction and sentence.

**He set out six (6) grounds of Appeal, namely:**

1. The Learned Trial Magistrate erred in law and fact in convicting and sentencing the appellant against the weight of evidence adduced by the defence witness.
2. The Learned Trial Magistrate erred in law and fact in convicting and sentencing the appellant to 20 years imprisonment in total disregard of the appellant plea of *ilibi* raised during the trial.
3. The Learned Trial Magistrate erred in law and in fact without appreciating that the **P3** form produced by the clinical officer was wanting for non disclosure of the offence of defilement.
4. The Learned Trial Magistrate erred in law and in fact in not taking into the account exhibits which were critical were not produced before court to support the charge.
5. The Learned Magistrate erred in law and in fact in not seeking for an explanation from the investigating officer why the appellant was not produced before court within the required time from **14<sup>th</sup> June, 2014** the date of arrest.
6. The Trial Magistrate erred in law and in fact in convicting and sentencing the appellant in total disregard of the evidence adduced by the defence.

During the hearing the Appellant Counsel, Arumba, relied on the grounds as set out in the memo of

Appeal above.

Ochieng for the Respondent conceded the appeal and gave **several reasons:**

1. Evidence of the manner in which the complaint was reported. Although the offence was allegedly committed on **1<sup>st</sup> January, 2014**, it was reported 4 months later. This is infirmed by evidence of **PW1, PW2 at page 5, line 8.**

The genesis of the report was not from the victim but from the accused person himself. The victim confirms in her testimony that she never reported the offence **P3, line 20.**

2. The manner in which the act was committed was baffling. **PW1**, who was **15 years old girl**, explains in her testimony that she met the accused on the road who convinced her that he would buy her a phone and proceeded to a room where they had sex, she never explains whether there was coercion or whether raised an alarm. This was in my opinion, as adult behaviour the court could have considered her behaviour as defence under **Section 8(5) (b) of S.O.A.**

The Learned Counsel relied on a case of **Martin Charo Vs Republic, High Court in Malindi**, where **Chitembwa J.** said: “where the victim conducts herself in a manner that it could be interpreted that she was an adult, enjoying adult privileges, it would be unfair to convict the accused with a resultant sentence on defilement.”

3. **PW2** – the clinical offence, confirms that the medical evidence adduced in court, was not conclusive evidence of defilement **page 5, line 8** there of the proceedings.

The Trial Court reaffirms the same in its judgement at page 16 thereof by stating that the manner in which the victim lost her virginity cannot be explained from the contents of P3 Form.

4. Lastly, the conviction which resulted to this appeal was purely based on testimony of victim, PW1 and this is rightly so and in accordance with **Section 124** of Evidence Act.

However, the defence that was raised by the Appellant specifically that there was disagreement between him and the girl’s mother which resulted with the accused person reporting to the police of the threats from the mother. This ought to have been looked into by the Trial court.

This is because the narrative cast aspersion on the genuineness of the story. The same is corroborated by the fact that it was the accused person who made the initial report to the police.

### **FINDINGS.**

Accordingly this Appeal be and is hereby allowed and both the conviction and sentence are hereby set-aside, the Appellant is free unless otherwise lawfully held.

Orders Accordingly.

**Dated and delivered at Nyamira this 31<sup>st</sup> day of March, 2017**

**C. B. NAGILLAH**

**JUDGE**

**Bwonwonga hold brief for Nyamwange for Appellant.**

**Ochieng’ for Respondent state.**

**Mercy - Court Clerk.**