



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL APPEAL NO. 116 OF 2012**

**BETWEEN**

**ELIJAH ODONGO NYAWINA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. D.O. Chepkwony, SPM dated 29<sup>th</sup> October 2012 at Principal Magistrate's Court at Nyando in Criminal Case No. 21 of 2012)*

**JUDGMENT**

1. The appellant, **ELIJAH ODONGO NYAWINA** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the *Sexual Offences Act, 2006*. The particulars of the charge were that between the 3<sup>rd</sup> and 5<sup>th</sup> of January, 2012 in Muhoroni District within Kisumu County, the accused intentionally and unlawfully defiled QAO, a child aged 15 years. He was convicted and sentence to 20 years' imprisonment. Aggrieved by the conviction and sentence, the appellant has now filed this appeal.
2. In his petition of appeal, the appellant avers that the trial magistrate erred in convicting him yet the offence of defilement was not proved. He also complained that the trial magistrate did not consider his defence. The appellant faulted the trial magistrate for failing to consider the ages of both the complainant and himself before convicting him and that the sentence meted out was excessive and cruel. In addition, the appellant relied on written submissions in which he submitted that the prosecution evidence was contradictory and the evidence adduced was not safe to found a conviction. He further submitted that the prosecution did not establish its case beyond reasonable doubt and that the trial magistrate disregarded his defence which showed that there existed a grudge between him the complainant's family.
3. Ms. Osoro, learned counsel for the respondent, opposed the appeal and argued that PW 1 clearly described the appellant as her boyfriend. She submitted that the clinical officer confirmed that there was penetration and that the age of the child was proved by production of her birth certificate. In her view the prosecution established all the elements of the offence of defilement.
4. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the appellant (see *Njoroge v Republic* [1987] KLR 19, 22). In order to carry out this task it is necessary to outline the evidence as it emerged at the trial.
5. The complainant, QAO (PW 1), testified that she was 15 years old. She told the court that on 3<sup>rd</sup>

January 2012, at about 7.00pm, she was sent by her mother (PW 2) to Masogo to buy food. On the way she met the appellant, who was her boyfriend, and went together to his house and engaged in sexual intercourse that night. On the following morning the appellant asked her to go back to her home but she was afraid of her mother and she again spent a second night in his house. At around 3.00 am the following day, police officers came to the appellant's house and arrested them. PW 1 was taken to hospital where she was examined and later recorded her statement.

6. PW2 recalled that when she sent PW 1 to the market, on the material evening, she did not return home. She got worried and on the following morning she went to report the matter to the Village elder (PW 5). PW 5 investigated the whereabouts of PW 1 and found her at the appellant's house. PW 2 also reported the matter to PW 1's teacher who advised her to report the matter at the DO's office. PW 2 testified further that later on PW 1 was found at the appellant's house.

7. On 5<sup>th</sup> January 2012 at about 4.30pm, PW 3, an Administration Police officer attached to Miwani DO's office, testified that he was instructed by his superior to arrest the appellant and the complainant. He proceeded to the appellant's house with his colleagues where they found PW 1 and the appellant, arrested them and handed them over to the police.

8. PW 4, a clinical officer, examined PW 1 on 15<sup>th</sup> January 2012 and formed the opinion that she had been defiled as her labia were bruised and her hymen was not intact. PW 6, the investigating officer, testified that on 5<sup>th</sup> January 2012 at about 7.20pm, PW 2 came to the Police Base and reported to him that PW 1 was missing and that according to her investigations, she being held at the appellant's house. PW 6 directed AP officers to arrest the two whereupon they were arrested at night and handed over to him.

9. When the appellant was put on his defence, he gave sworn testimony. He denied any involvement with PW 1. He stated that the police came to his house at around 4:00am in the morning, beat him for about 30 minutes and arrested him. They later took him back to the house where he found a small girl, whom he did not know, standing by the door.

10. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant did an act that amounted to penetration of a child. "Penetration" 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." On this issue PW 1's testimony was clear that on the first night she slept in the appellant house they had sexual intercourse. Although it would have been more appropriate for PW 1 to clearly state the nature of the sexual intercourse, I do not doubt that there was penetration.

11. Under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated but the proviso to that section make an exception in sexual offences and provides that:

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

12. In light of the provision I have cited, it was not necessary for PW 1's testimony to be corroborated but the evidence of PW 4 established that PW 1's labia were bruised and that her hymen was not intact which is indicative of penetration. I therefore find and hold that the prosecution proved penetration.

13. The identity and person of the appellant as the perpetrator was also established. In her testimony PW 1 testified that she knew the appellant to the extent of referring to him as her boyfriend and the fact that they slept in the same house for two nights diminished any chance that he was a stranger. The appellant's defence that he was not known to PW 1 does not hold any weight because they were both arrested in his house by PW 3 in presence of PW 4. Moreover, there was no reason for PW 1 to accuse the appellant of

having defiled her as no issue of a grudge was suggested to her or PW 2 in cross-examination or in his defence.

14. As regards the age, PW 1 testified that she was 15 years old and produced the birth certificate issued by her church which showed that she was born on 5<sup>th</sup> June 1996. The P3 form estimated that her age was 15 years. I therefore find and hold that this was sufficient evidence to prove that PW 1 was aged 15 years old. Since the age of the child fell within **section 8(3)** of the ***Sexual Offences Act***, the sentence imposed was within the law.

15. The totality of the evidence is that the appellant defiled PW 1. The evidence was consistent and did not admit any material contradictions as urged by the appellant. The prosecution proved all the elements of the offence of defilement.

16. I affirm the conviction and sentence. The appeal is dismissed.

**DATED and DELIVERED at KISUMU this 30<sup>th</sup> day of September 2016.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.