



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CRIMINAL APPEAL NO. 27 OF 2015**

**BETWEEN**

**JARED OCHIENG ORAO ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(In appeal from original conviction and sentence in Criminal Case No. 367 of 2015 (Ndhiwa) decision by B. R. Kipyegon (Resident Magistrate))*

**JUDGMENT**

**JARED OCHIENG ARAO (the appellant)** was convicted on a charge of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. The particulars were that on 25<sup>th</sup> September, 2015 in **NDHIWA** District, he intentionally and unlawfully caused his penis to penetrate the vagina of **B A O** a girl aged 15 years. The appellant denied the charge, and prosecution called five (5) witnesses to prove its case, while appellant was the only defence witness.

**B A O (PW1)** narrated to the trial court that on 19/09/15 she left her parents home at Kachola at about 7:00 p.m for the appellant's house whom she referred to as her husband and that they had serious sexual relations "like a husband and wife." She explained that her mother had chased her from home, so she decided to go to the appellant's home where she lived with his grandmother. For the next two days they just kept each other company but on 23/09/15 they had sex up to midnight. She explained as follows:-

***"We went to bed and Jared started caressing my breasts" He started touching my breasts, I removed my shirt, panty and biker. Jared removed his trouser and inner wear... We had sex that night. He put on a condom on his penis and inserted his penis into my vagina... we had sex up to midnight then we slept."***

She confirmed that they had sex on the night of 25/09/15 and she described the experience as "sweet". Two days later they were arrested. She mentioned that she had known the appellant as they used to fellowship in the same church and: - **"Our relationship flourished to husband and wife"**

Upon re-examination by the prosecution **B A O** insisted that the appellant was her husband and had promised to marry her after she completed school.

**B A O's** father **L O M (PW3)** said his daughter disappeared from home on 29/9/15 at 6:00 p.m He reported to police and says they found **BAO** and the appellant sleeping inside a house. Both were taken to hospital for medical examination and he produced her birth certificate which showed **B A O** was born on 1.1.2000

When **BAO** was examined by **JOSPH ONYANGO OMBEWA (PW3)**, a Clinical Officer he did not find any sperms nor were there any tears and she stated:-

***“On assessment no tear noted, she is a grown up girl from her own evidence penetration was achieved but I could not ascertain this.”***

He also examined the appellant and said:-

***“I was not able to tell if he had engaged in sex in the previous days...”***

**CHIEF ANDREW MIRENG (PW5)** of **SOUTH KANYAMWA LOCATION** got a report on 21/09/15 that **BAO** had disappeared upon home. He was later informed that she had been found **CPL WILSON CHERUIYOT (PW2)** received a report from **LUKAS OTIENO** that his daughter **B A O** was missing from 19/9/15. On 27/9/15 the reportee returned to say he had found where the **“girl was being held.”** **LUKAS** led the police officer to a house where they found the girl sleeping with the appellant on a bed.

The appellant's defence was that **B A O** was not known to him and he had been framed up by a woman whom he had worked for previously and they had disagreed.

The trial magisterial upon analyzing the evidenced found that it adequately proved that at the time of the offence of the girl was 14 years as supported by her birth certificate. He also held that although the Doctor said that there was no evidence of penetration, which is important in proving defilement, the girl's own description of the activities she indulged in with the appellant clearly revealed that they had a sexual relationship because:-

***a)The girl state d that the appellant was her husband with whom she had a sexual relationship – infact she said they had sex on two occasions.***

***b)The girl had disappeared from home and her father as well as Cpl Cheruyoit said they found her and the appellant and another person, sleeping in the house.***

***c)The complainant's demeanour impressed the trial magistrate, as one who was telling the truth because she answered the questions put to her with ease.***

***d)Although the Doctor was unable to make a finding that there had been penetration, the trial magistrate was persuaded that sex did take place, pointing out that it is usually difficult to get an eye witness for such activity.***

These findings were challenged on appeal on grounds that

***a) The charge was defective as the phrase unlawful was omitted in the particulars of the charge.***

***b)The person charged in the alternative charge was not the appellant.***

***c)The appellant was never supplied with witness statements of PW1 and PPW3.***

At the hearing of the appeal, the appellant submitted in writing that the evidence on record did not medically prove penetration and urged the court to consider the evidence of PW4 (the Clinical Officer). He also lamented that no evidence was presented to prove that PW1 was in the age bracket of 12 – 15 years as the birth certificate could not be relied on entirety as it was a photocopy. The appellant also made further submission's saying he was charged using two different charge sheets (an amended one and one not amended) and that each had a different date. He also argued that whereas PW3 told the court that his daughter disappeared on 29/09/15, the complainant said she left home on 19/09/15.

In opposing the appeal, Mr. Oluoch on behalf of the DPP submitted that prosecution only presented one charge sheet to the court, and that is what the appellant was tried on. It was his contention that the

complainant's testimony about having sex with the appellant on two different occasions was never challenged on cross – examination, nor was the evidence by PW3 who said he found the pair in bed.

Mr. Oluoch further argued that the birth certificate clearly indicated the complainant's year of birth and was never rejected by the court. While conceding that the clinical officer did not ascertain defilement, counsel submitted that PW1's evidence showed that they had sex. He urged this court to dismiss the appeal.

Upon re-evaluation and analyzing of the evidence, it is clear that the medical examination carried out could not establish whether defilement had taken place and there was no proof of penetration. The trial magistrate properly noted that for a charge of defilement to be proved, there must be evidence of penetration. Indeed **Section 8 (1)** of the **Sexual Offences Act** defines defilement as an act which causes penetration with a child. Section 2 of the Act defines penetration as:-

***“partial or complete insertion of the genital organs of a person into the genital organs of another person.”***

How is penetration proved? Is it proved by a complainant saying that there was insertion of the male organ into her, or is it proved by medical evidence? This is the point where the trial magistrate after making the referred to observations about the medical findings, then went ahead to find there was sexual intercourse because the complainant said so! Suppose the complainant said this so as to transfer her parents wrath over her **“disappearance”** to the accuse?

I think with the greatest of respect to the trial magistrate, conclusion was not supported by factual evidence, and it was erroneous to make such finding simply on grounds that PW1 appeared to be telling the truth- defying what the clinical officers had stated.

The second issue is that although the trial magistrate attempted to comply with provision of Section 124 of the Evidence Act by recording why she believed the complainant, it is recorded that the complainant answered all the questions put to her with ease whereas that may be so, it does not remove beyond reasonable the doubt in light of:-

**a)the Clinical officer's finding**

**b)the blame game so as to appease an angry father.**

Finally there is the evidence of PW3 that he found his daughter and the appellant and another person sleeping inside a house – he never said he found them **IN BED** – that was an addition by **PW2, CPL CHERUIYOT** (who by the way only received a report from PW3 and did not accompany PW3 to the home. It is on this basis that I must point out that Mr. Oluoch's submission on this limb is misplaced – there was no evidence that the pair were in bed. However even if they were in bed together, that does not prove defilement where until ingredient remains penetration.

As for the charge sheets, I take from the original lower court file, the appellant is referring to the initial charge sheet which was dated 29/9/10 but that one is cancelled and another charge sheet dated 6/10/15 filed and this was in consequence of an amended charge in the alternative which was introduced on 6/10/15, and the trial proceeded on the amended charge sheet.

The upshot is that the appeal has merit and is allowed, the conviction is quashed and sentence set aside. Appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at Homa Bay this 31<sup>st</sup> day of October, 2016**

**H.A. OMONDI**

**JUDGE**