



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.112 OF 2014**

**EDWIN OTIENO ONYANGO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**[Appeal From Original Conviction and Sentence from Ukwala PM's Court: C. N. WANYAMA – RM**

**in Criminal Case No.299 of 2013.]**

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

1. The appellant was charged with the offence of Defilement contrary to Section 8(1)(4) of the Sexual Offences Act No.3/2006. The particulars of the offence were that on the 8th day of July 2013 at *[particulars withheld]* Village, Tingere West Sub-Location in Ugunja District within Siaya County intentionally caused his penis to penetrate the vagina of **M. A. A.** a child aged 17 years.
2. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The prosecution called 4 witnesses to establish their case.
3. PW1 the complainant told the court that she was from church and had gone to collect his school uniform on 8.7.13 when she found the appellant whom they were schooling together in *[particulars withheld]* Primary School. He told her to go to his house but she refused. The appellant then took her sweater which necessitated her to follow. They went to Kisumu where they spent 4 days where the appellant was later arrested and the complainant picked by her parents and taken to hospital for examination.
4. **PW2 M A M** is the father to PW1. He told the trial court that the complainant had gone to collect her uniform from Riwaya but she disappeared for one week. He later after investigation heard that she had gone to Kisumu. He went to pick her from Kisumu after the appellant had been arrested.
5. **PW3 PC Henry Makori Ongera** was the investigating officer who took the witness statement after the appellant had been brought to the station.
6. **PW4 George Mwita** the medical officer at Kisumu District Hospital produced the P3 form which showed that the complainant had been defiled.
7. When put on his defence the appellant gave sworn evidence. He did not deny the offence but he

argued that the complainant told him that she was born in 1993 and therefore had accepted to be his wife. He confirmed that he had sexual intercourse with her once.

8. This being the first appeal, the duty of this court is to analyse the evidence afresh with a view to arriving at a new and independent finding. The state opposed the appeal arguing that there was sufficient evidence to show defilement against the complainant. The learned state counsel argued that the appellant did not take any step to ascertain that the complainant was an adult.

9. The appellant has raised several grounds in his appeal including the fact that he was not subjected to medical examination and that the exhibit such as the complainant's inner-pant was not produced.

10. Having perused the proceedings together with the parties submissions herein, I am of the considered opinion that the question of whether the complainant was defiled or not was well settled both by the appellant himself who admitted, the complainant and PW4, the medical officer. Further the age of the complainant although no certificate of birth was produced, the baptismal card and the school letter remotely suggest her age to be below 18 years.

11. The appellant's defence is what has however attracted my attention. The appellant told the court that the complainant told her that she was born in 1993 and that she agreed to be his wife. The appellant took a further step of informing his parents that he had gotten a wife. It appears that the complainant agreed to come to Kisumu with the appellant who had infact sent her fare. Just as the complainant confirmed, the appellant said that they had sex with her once. The complainant indeed confirmed that she went with the appellant to Kisumu.

12. What is intriguing however is what was the complainant doing in the house of the appellant for 4 days, but according to PW2, her father, one week? Infact she said that on 19/2/13 she went with the appellant and his friends to buy food. A simple computation shows that she had stayed with the appellant for over 12 days.

13. Although the state contended that the appellant did not take any step to confirm that the complainant was not a minor, I do not find that argument plausible. If indeed the complainant stayed for 12 days in the presence of all and sundry, namely the appellant's parents and the friends, what was difficult notifying the appellant's parents that she had been forced to come and cohabit with the appellant? Is it possible that the complainant feared to tell her parents? During cross-examination PW1 told the court that:

**“I never informed your parents you had taken my sweater. I came because of you since you had taken my sweater. I told your parents I was there in the compound because of you after they asked.”**

14. This in my findings corroborates the appellant's defence, namely that for all intent and purposes he took the complainant as his wife.

15. Under the provisions of Section 8(5)(a) and (b) of the Sexual Offences Act it is a defence if:-

**“5(a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**

**(b) The accused thereby believed that the child was over the age of eighteen years;**

**5(b) The belief referred to in section (5)(b) is to be determined having regard to all the instances including any steps the accused person took to ascertain the age of the complainant.”**

**16.** The “ascertainment” of the age of the complainant may not in my opinion be that scientific but it must be such that any defence offered by an accused ought to point out to the fact that he had some reasonable suspicion as to the actual age of the complainant, namely that she may or may not have attained the age of majority.

**17.** In the case at hand the time that the appellant took with the complainant of over 12 days as well as being in the presence of the appellant's parents and friends without any questionable suspicion lends credence to the appellant's defence that he believed the complainant was over 18 years. The complainant was never confined to a house or such an isolated location that she could not seek any assistance.

**18.** In light of the above findings, I do not think that the trial court took enough consideration on the appellant's defence. This defence though not strong enough ought to be considered in light of the circumstances surrounding the commission of the offence. I find that the appellant's explanation that the complainant was above 18 years reasonable and believable. I shall therefore allow the appeal and set the appellant at liberty unless lawfully held.

**Dated, signed and delivered this 28th September, 2015.**

**H. K. CHEMITEI**

**J U D G E**