



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 129 OF 2013**

**NICHOLAS ODUOR OGUTU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant was charged with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the dates between 9th and 11th day of July 2011 at [particulars withheld] Sub location in Siaya County intentionally caused his penis to penetrate the vagina of Q A a child aged 16 years.

The prosecution called 4 witnesses to establish their case. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal.

**Facts**

The complainant PW1 told the court that on 9-7-2011 at around 8 p.m she was from school heading home when she met the appellant who offered to escort her to her home. He then proceeded to go with her through his house where she found two boys who guarded her till the following morning. When the accused came and defiled her. This again occurred the following day but she screamed and one Kevin Otieno Ouma came and rescued her. Her father came and on the way they met the appellant whom they went to the police station with where he was arrested and later charged. The complainant was later taken to Ambira hospital where a P3 form was filled by PW3 who confirmed that there was sexual penetration.

**PW2 J A**, the complainant's father told the court that he rescued the complainant from the appellant's house and went with her to the police station. **PW4 P.C. Allan Chege** received information on 13-7-2014 and after carrying out his investigation he was of the opinion that the appellant had defiled the complainant.

The defendant offered unsworn evidence in his defence. He denied the charge and went further to tell the court that he had a grudge or disagreement with the complainant's family.

**Analysis and Conclusion**

The court has heard both parties oral submissions. The appellant mounted 4 grounds in his petition of

appeal. The same can be summarised as follows:

1. **the age of the complainant was not determined.**
2. **key witness was not called by the prosecution.**
3. **the court failed to analyse the defence evidence.**

In **Okeno -VS- Republic [1972] E.A 32** it was held that the duty of the first appellate court is to review the evidence afresh with a view of arriving at a fresh finding. The court ought also to take cognisance of the fact that it never had the privilege of seeing and hearing the witnesses like the lower court.

The evidence so far presented clearly showed that the parties knew each other. The complainant told the court that the appellant offered to escort her to her home on the material night. There is no evidence that there were other witnesses who saw the two leaving the school gate. On the way however they decided to pass the appellant's home. What is intriguing however is that the complainant did not explain why and where the appellant spent the first night. It is not further explained who the other two boys who guarded her were.

It is not equally explained whether the captors were armed or not. Equally, why didn't she on the first or second day attempt to scream or call for help? What was going on during daytime when the appellant was away? In this homestead, were there other people or it was completely isolated? For the three days that she was held in captivity was she eating? Was she attending to the call of nature? These are questions which I have been unable to answer as I peruse through the proceedings.

Further, when the complainant's father was alerted, whom did he report to first? Was it the police or the assistant chief? He told the court that when he heard that she was at the appellant's house, he went there but did not find her. Where was she yet during her evidences she never suggested that she was taken to another location.

The crucial witness Kevin Otieno who allegedly rescued the complainant was never called. In my opinion this was a critical witness as he would have told the court how and when he heard the complainant screaming and how he rescued her. The prosecution has the liberty of calling whomsoever they deem necessary to prove their case but in this matter Kevin was an essential witness. Infact, no attempt was made by the complainant to implicate the other two boys in the matter and neither did PW4 the investigating officer make any.

On the question of the dates I do find some inconsistency over the same as presented by the witnesses. PW1 talks of 9-7-2011 when the alleged offence occurred whereas PW2 talks of 6-7-2011. Who is telling the truth between the father and daughter?

Of great significance is the P3 form. The same was filled on 20-7-2011 whereas the appellant was brought to court on 13-7-2011. Is it possible that the P3 was filled after several days had lapsed? If this is so what was the basis for charging the appellant on 14-7-2011.

In his submissions the appellant raised this fact and argued that there were two P3 forms which were filled. Although there was no proof of this, the discrepancy between the date of charging the appellant and the filling of the P3 form lends credence to the appellant's argument.

The appellant also raised the question of the complainant's age. He said that apart from the P3 form, there is no other official document to show that the complainant was a minor. This assertion was wished away by the respondent but I do not think the same is far fetched. A P3 form is filled based on the information orally given to the medical personnel. A question of age, which is very critical and essential in a charge such as this, is critical. It is not very difficult to presume that a doctor or medical personnel when filling the P3 form can simply be told orally that the victim is aged so much. Since it is not in dispute at that moment unless requested, there is no reason to doubt the information and naturally such officer shall proceed to fill.

However in this regard, there ought to have been further evidence to establish the age of the complainant for example official documents such as birth certificate or records from the school. None of the prosecution witnesses attempted to prove this. As much as I do agree with the submissions by the respondent that age is necessary during sentencing, it is also necessary when establishing the difference between rape and defilement.

With all the above many loopholes in the prosecution case, this appeal ought to succeed. I find that there was insufficient evidence to prove the case beyond any reasonable doubt. The appeal succeeds, the appellant is hereby released unless lawfully held.

**Dated, signed and delivered at Kisumu this 17th day of November, 2014.**

**H.K.  
JUDGE**

**CHEMITEI**