



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 11 OF 2014**

**C M O.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[From original conviction and sentence in the Principal Magistrate's Court at Ukwala Criminal Case No. 387 of 2011]*

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

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) (3) of the the Sexual Offence Act No. 3 of 2006. The particulars were that on the 25th August 2011 at [*particulars withheld*] Sub location within Ugunja district in Nyanza province, intentionally caused his penis to penetrate the vagina of J A a child aged 15 years.

2). He was equally charged with the alternative count of Indecent Act with a child aged 15 years contrary to section 11 (1) of the Sexual Act No. 3 of 2006. The particulars were that on the night of 25th and 26th August, 2011 at [*particulars withheld*] Sub location in Ugunja District within Nyanza province intentionally committed an indecent act with a child by causing his penis to touch the vagina of J A a child of the age of 15 years.

The appellant after undergoing a full trial was sentenced to 20 years imprisonment hence this appeal.

3). The complainant told the court that on 25-8-2011 at around 3 p.m the appellant came and asked her sister for her clothes. He then took her to his place where he had sexual intercourse that night. The following day her sister came and took her from the appellant's house. She reported the matter at [*particulars withheld*] Police Post. She was then taken to Sigomere health centre and treated.

4). Her sister R A O told the court that when she came home at around 6.30 p.m on the material day she did not find the complainant. The following morning the appellant came to collect the minor's clothes and PW2 decided to follow her and picked the minor. She was advised by the uncle to report the matter to the police which she did. She thereafter took the minor to the hospital where a P3 form was filled.

5). The P3 form was produced by PW4 a clinical officer who confirmed that the minor had been defiled. PW3 did arrest the appellant at his home.

6). When put on his defence the appellant denied the charges arguing that the charges are simply tramped up against him.

7). The duty of this court is to evaluate the evidence on record with a view of coming into an independent findings. See **Okeno -VS- Republic [1972] E.A 32**. This court has heard the parties herein and read their submissions as well as the lower court proceedings. What is not in dispute is that both the complainant and appellant are well known to each other. As a matter of fact the appellant is an in law to the minor.

8). The appellant in his petition of appeal dated 24-12-2013 has raised 5 grounds which has raised three fundamental issues namely:

**a) that the evidence of PW1 and PW2 were inconsistent;**

**b) that he was not taken for medical assessment;**

**c) there was a dispute between the two families.**

9). On the issue of whether there was any contradiction on the evidence of PW1 and PW2 I do not think that there was such fundamental difference to alter the case. PW2 said that when she left for work on the material day, she left PW1 behind and it was the day the appellant came to pick the complainant in the absence of PW2. The next day when the appellant came to collect the complainant's clothes PW2 complained that PW1 is too young to be a wife material. She decided to go and pick her and thereafter reported to her uncle who advised her to go to the police. Infact on cross examination PW2 told the court that the minor was bathing when she picked her from the appellant's place.

10). Was she defiled? The answer is yes. The P3 report produced by PW4 clearly shows that there are injuries in her private parts and the hymen was missing. Did the whether failure to undertake medical assessment upon the appellant occasioned any miscarriage of justice? I do not think so. He was in any event arrested on 13-9-2011 yet the incident occurred on 25-8-2011. I do not think that if any medical examination was undertaken it would have yielded any meaningful results.

11). He also argued that there was a dispute between I suppose his family and that of the complainant. I do not think there was any iota of evidence to suggest such.

12). In the premises I do not think that this appeal is meritorious. There was as found above sufficient proof to show that the appellant took the minor from her sister with the aim of making her a wife and that is why he came for her clothes the following day. There was enough evidence to prove that there was sexual defilement as per the medical documents produced. There was no meaningful defence by the appellant to displace the prosecution case.

The upshot is that this appeal fails and the same is dismissed.

**Dated, signed and delivered at Kisumu this 16th day of December, 2014.**

**H.K.  
JUDGE**

**CHEMITEI**