



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**HIGH COURT CRIMINAL APPEAL NO. 14 OF 2013**

ARISTACO NGESA ODHIAMBO::: APPELLANT

• **VERSUS –**

REPUBLIC ::: ::::::::::RESPONDENT

*(An Appeal arising from the judgment of the Chief Magistrate at  
Siaya in CR Case No. 734 of 2011 delivered on 6th February, 2013)*

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

**INTRODUCTION**

This is an appeal from the judgment of the Chief Magistrate Court at Siaya dated 6/2/2013 by which the appellant was convicted and sentenced to serve 15 years imprisonment for the offence of defilement. The appeal is against both the conviction and sentence. The issue for determination is whether there was sufficient evidence to prove the offence beyond reasonable doubt to warrant the conviction.

**BACKGROUND**

The appellant was charged with the offence of defilement contrary to section 8(i) and (4) of the sexual offences Act No. 3 of 2006. The particulars of the charge was that the appellant defiled the complainant, a girl of 16 years old on 22/6/2011 [particulars withheld] location. In the alternative, he was charged with indecent act with child contrary to section 11(i) of the Sexual Offences Act No. 3 of 2006.

The prosecution called 4 witnesses in support of the charge. M A O ( PW 1) is the complainant. She was in [particulars withheld] Primary School at the material time. On 22/6/2011 around 4 pm while walking from school met the appellant who invited her to his home to pick some items. She obliged to the invitation by visiting the appellant at night in his house in the neighbourhood.

PW 1 found the appellant waiting at the door of his house and he pulled her inside, removed/tore her pants and defiled her in his bedroom. After the event, the appellant released her to go home, her mother flashed her with a torch but she ran to the house. PW 1 went to school the following day and in the evening when her mother asked her why she was running the previous night, she explained her ordeal in the hands of appellant.

PW 1 then ran away from home during the school holiday and later came back home because she was expecting a baby. The matter was reported to the police, a P3 was filled. She maintained that the appellant threatened to kill her after the ordeal. She however confirmed that she did not scream.

A A ( PW 2) is the mother of the PW 1. On 22/6/2011 the PW 1 disappeared from the house where she used to stay with her siblings. She called out the name of the PW 1 but got no response while using a torch, she spotted the PW1 running away towards the bush from the neighbours place.

PW 2 then went to sleep and raised the issue with the PW 1 the following evening after she returned from school. PW 1 confessed the ordeal to PW 2 telling her that she was defiled by the appellant after he threatened her with a panga. PW 2 then reported the matter to the appellant's employer, Alice and the Assistant Chief after one month.

The elders told PW 2 not to pursue the matter. One of the PW 1's teachers told PW 2 to talk to PW 1 but she ran away after a beating by PW 2. When PW 1 returned PW 2 took her to hospital and discovered that she was pregnant. PW 2 reported the matter to the police who later arrested the appellant.

PW 2 however confirmed that the appellant had a wife and children and there was also another person staying with the appellant in the same homestead of their employer.

PW 3 is a clinical officer who produced a P3 for the PW 1. PW 3 stated that PW 1 was seen at Siaya District hospital 3 months after the alleged defilement. Her genitals was normal and she tested positive for pregnancy.

PW 4 is the arresting police officer who also received the report of the defilement on the PW 1 and issued her with a P3. After the close of the prosecution the trial Court found that the appellant had a case to answer and put him to his defence.

The appellant gave a sworn defence. He stated that on the material day, the PW 2 came to his house and inquired whether PW 1 was in his house. He told PW 2 to enter his house and verify whether PW 1 was inside but she refused and remained outside until 6.00 a.m, when he locked the house and went to call his neighbour. The PW 2 however left and found her (PW 1) at her home preparing to go to school.

The appellant accused the PW 2 for frame up after he refused to give in to her advances.

After considering evidence summarised above, the trial magistrate convicted the appellant and sentenced him to 15 years imprisonment.

### **GROUND OF APPEAL**

The appellant was aggrieved by the conviction and brought this appeal based on the following grounds of appeal:

1. The learned trial Magistrate erred in both law and facts when she convicted me after I pleaded not guilty.
2. The learned trial Magistrate erred in both law and fact when she failed to consider the D.N.A test was never carried out for factual evidence and that I was not medically examined as well as the victim for positive result.
3. The learned trial Magistrate erred in both law and facts when she failed to sufficiently consider my defence *alibi*.
4. The learned trial Magistrate erred in both law and fact when she failed to consider deferences on compassion affairs between the mother of the victim and I that motivated the charges against me.

On the day of the hearing of the appeal, the appellant filed written submissions. The upshot of the submissions was that the charge was defective because it was not founded on the law and that there was no sufficient evidence to prove the offence beyond reasonable doubt.

In response, Mr. Magoma, learned counsel for the state conceded to the appeal. He cited 3 grounds for he conceded the appeal. Firstly, he admitted that the offence was reported after one month. Secondly, the appellant was accused of impregnating the PW 1 but no DNA evidence was adduced to prove that he was

indeed the father.

Lastly, the appellant never gave cogent evidence of whether she was from the appellants house on the night when her mother ( PW2) saw her running away towards the bush.

### **ANALYSIS OF SUBMISSIONS AND REVIEW OF JUDGMENT**

I agree with the learned state counsels' submissions that there was no sufficient evidence to sustain conviction. There was no eye witness and the PW 1 did not tell the truth. To me she appears to be a young girl who knew more than she should have known at her age.

She was able to arrange a late night date with persons unknown and sneak out leaving her siblings thinking that she was out to the toilet. She was also able to run away from home during holiday and return at will. The PW 2 is also to blame for not pursuing the PW 1 the same night to find out where she was from and whether she was injured.

The foregoing notwithstanding, the Court finds that neither the medical report ( P3) nor the evidence of PW 1 and PW 2 connect the appellant with defilement and the pregnancy of the PW 1.

The report of the defilement having been made to the police after three months, forensic evidence was necessary to determine whether the appellant indeed impregnated the PW 1. without such, the p3 produced as exhibit could not connect the appellant to the offence charged.

The trial Court therefore erred both in law and fact when she found and held that the prosecution had proved the charge beyond reasonable doubt. The conviction was therefore not safe and it must be reversed based on this ground alone.

### **FINAL ORDER**

Consequently, the appeal has merits and is allowed. The conviction and sentence are quashed and the appellant set at liberty unless otherwise lawfully held.

Signed, Dated and Delivered at Kisumu this **18th** day of **October** 2013

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**O.N. Makau**

**Judge**