



**ORIGINAL**

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 6 OF 2012**

**DAVID OUMA BAYO.....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) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 21st day of February 2010 at [particulars withheld] Kisumu district within Nyanza province, caused penetration to **L A O** a child aged 11 years.

The appellant was equally charged with the offence of indecent assault of a woman contrary to section 141 (1) of the Penal Code.

The particulars are that on the 21st day of February 2010 at [particulars withheld] Kisumu district, within Nyanza province, unlawfully and indecently assaulted **L A O** by touching her private parts.

The appellant filed 9 grounds of appeal in his petition. The summary of them are that the trial magistrate took into consideration extraneous factors in arriving at the judgment, that there was no sufficient proof that the appellant defiled the complainant and that the trial court failed to take into consideration the complainant's age.

The prosecution called several witnesses. The summary of the case is that **PW1 L A O**, the complainant was at home on the material day. The appellant came at around 12 noon and asked for drinking water. The complainant gave her water but he refused to drink. The appellant instead forcefully wrestled her to the ground and defiled her. He covered her mouth so that she was unable to scream for help.

The complainant stated that her mother came and the appellant left. Her mother found her crying while seated on bed. Her underwear was already wet. The mother reported to the village elder and thereafter at the chief's office. She was taken to Kisumu District Hospital where she was treated and the P3 forms and other documents were filled.

**PW2 M A**, the complainant's mother said that she saw the appellant at her home. When she entered the house she found her crying while seated on the bed. She then reported to the village elder and thereafter took the child to the hospital. She told the court that she knew the accused.

During cross examination she said that she saw blood in the underpant of PW1 and that her clothes were torn.

**PW3 Corporal Loikodo** of Kadibo D.O's office assisted in arresting the appellant upon receiving information from PW1.

**PW4 George Mwita** is the clinical officer who filed the P3 form after being requested by the OCS Kisumu. According to his finding the hymen was not intact and there was live spermatozoa. He concluded that there was penetration.

**PW5 Corporal Jackline Kerubo**, of Kisumu police station crime branch rearrested the appellant when he was brought by the AP as well as her mother. She issued them with the P3 form. She further visited the scene.

**PW6 O O P**, is the headmaster [particulars withheld] primary school. He produced the complainant's school report which shows that she was born on [particulars withheld] and that as at that time she was 12 years old.

When put on his defence the appellant gave unsworn evidence. He appellant admitted going to the complainant's home on the material day where she was served with drinking water. He denied defiling her. He further stated that his name is **David Ouma Abayo** and not **David Owino** as it appears from the P3 form.

The appellant was convicted and sentenced to serve 20 years imprisonment. This being the first appeal the court is enjoined to examine the evidence afresh with a view of arriving at an independent finding.

From the evidence on record and going by his own admission the appellant knows the complainant very well. They are both neighbours. Their homes are about 300 meters apart.

Equally, from his own admission the appellant went to the home of PW1 on the material day between 11 a.m – 2 p.m. He was served with drinking water.

It is evident that the complainant was alone when she served the appellant with drinking water. But did he defile her?

From the evidence on record it appears that PW2 arrived either at the nick of time or after PW1 had been defiled. From the moment the whole process took place until the act of taking the complainant for treatment it was a span of two hours. It is not indicated by the appellant that he saw any other person with the complainant when he was being served with drinking water.

There is no evidence that any other person came to PW1's home except PW2 who saw the appellant leaving her home.

Was there any malice on the part of PW1 and PW2? I do not really see any reason why they should frame the appellant. He was a person well known to both of them and a neighbour and during his defence he did not create or establish any malice or bad faith on the part of the complainant as well as her mother.

My finding is that the evidence of defiling the complainant points irresistibly to the appellant as there was no other person who was with her between the period she was defiled.

Moreover the P3 and the treatment notes were done within a record time and indeed it is clear that there was penetration and live spermatozoa.

The argument that the P3 form reads David Owino and David Ouma Abayo holds no water. As earlier indicated the complainant and the appellant knew each other very well and thus there is no case of

mistaken identity.

The age of the complainant was well established by the prosecution. The birth certificate as well as the letter from the school were sufficient to prove the age of the complainant.

In the premises I do not see any merit in the appeal. There is no explanation why the appellant took advantage of the complainant. The whole defilement was clearly pre meditated. He knew the absence of PW2 and he decided to pursue the child. The 20 years sentence is sufficient and not excessive. The appeal is hereby dismissed.

**Dated, signed and delivered at Kisumu this 25th day of November, 2013.**

**H.K.  
JUDGE**

**CHEMITEI**

In the presence of:

.....for the state

.....for the appellant

*HKC/va*