



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CRIMINAL APPEAL NO.49 OF 2011**

*(Being conviction and sentence of Resident Magistrate Hon. P. Achieng in Bungoma court in Cr. Case no.1883 of 2010)*

**S.W.M**

.....

**APPELLANT**

~VRS~

**REPUBLIC**

.....

**RESPONDENT**

**JUDGMENT**

The Appellant was convicted by the Resident Magistrate at Bungoma of defilement of a child contrary to section 8 (1) and (3) of the Sexual Offences Act no.3 of 2006 whose particulars were that on the 4/10/2010 in Bungoma South District within Western Province he unlawfully and intentionally caused his penis to penetrate the vagina of L.N.W (PW1) who was aged 15 years. He was sentenced to serve 20 years in jail. He was aggrieved by the conviction and sentence and preferred this appeal. The appeal was prosecuted on his behalf by Mr. Mukisu. Mrs. Leting for the State conceded the appeal.

The evidence of PW1 was that she was a form one student at *(particulars withheld)* Secondary School, and that on 4/10/2010 at about 9.00 a.m she left home to go to the home of her married sister E.N.W (PW2). She had PW2's cell-phone. On the way, a stranger called and talked to her on the phone while introducing himself as a boda boda cyclist who wanted to meet her. They agreed to meet at the home of PW2. She went to the home and found PW2 who immediately left. The caller came. He was the Appellant. He indicated he wanted to talk to her and she agreed to come with him to a certain home. They entered a house and the Appellant locked the door behind them. He told her that he loved her and wanted to marry her. She told him she was a student preparing for exams. He responded that that was not a problem. He eventually had sexual intercourse with her by force and without using a condom and thereafter locked her in the house. He went and returned at 2.00 p.m and declared that he had married her. She protested and he left her to go back to PW2's home where she reported the incident. PW2 advised her to go home. On the way she met the Appellant again and he persuaded her to come to his home with her. She spent at the home and had sexual intercourse with him that night. She was left locked in the house the whole day. He returned in the night and while the two were in the house PW2, her husband and other people came and rescued her. The evidence of PW2 was that she found the two naked. They were taken to Musikoma Police Patrol Base and PW1 was eventually examined at Bungoma District Hospital.

The evidence of PW2 was that at about 7.30 a.m on 4/10/2010 PW1 came home and wanted money

to go and obtain a birth certificate. PW2 gave her Ksh.100/= and left her at home as she was herself in college. She returned at 1.00 p.m and found PW1 was not there. She was told that the Appellant had taken her to the D.C's office to obtain the birth certificate. She did not return. The next day at 3.00 p.m, she saw her on a motorbike going towards the home of the Appellant. She went to the home with her husband and found the two locked in the Appellant's house. They hit the door open and found the two naked. They arrested them and took them to Musikoma Police Patrol Base. PW1 was taken for examination at Bungoma District Hospital. The medical report (Ex. 1) produced by doctor Isaac Obore (PW4) showed that the girl's hymen was broken.

The Appellant gave unsworn statement in defence. He denied that he defiled PW1. He denied being with her on 4/10/2010 and stated that on 5/10/2011 at 7.00 p.m he returned home and found her in the house of his mother. At 7.30 p.m she came to his house to request that he escorts her home. That is when PW2 and other people came and found them. He denied that they were found naked or that he slept with her. He stated that PW1 is his neighbour and relative.

The trial court considered the evidence and came to the conclusion that the charge of defilement had been proved against the Appellant beyond doubt. It is the responsibility of this court to subject the entire evidence to fresh and exhaustive scrutiny to be able to determine whether the Appellant was properly convicted, while remembering that the court did not have the benefit of seeing or hearing the witnesses. (**Okeno v. Republic [1972] EA 32**).

The medical evidence produced by doctor Isaac Obore (PW4) sought to corroborate the evidence of PW1 that she had been defiled by the Appellant. There are, however, two aspects about the prosecution evidence, and especially that of PW1, that has caused this court anxiety. One is in respect of the age of PW1. Defilement proceeds on the basis that the complainant is below 18. The definition of a "*a child*" for the purposes of the offence can be found in section 2 of the Sexual Offences Act and section 2 of the Children's Act no.8 of 2001. PW1 testified that she was 17 and so said PW2. The mother of PW1 is S.W.W (PW3). She said her daughter was 14. The age assessment in exhibit 2 indicated that the girl was 15. Given this material discrepancy, it is clear that the age of the girl was not certain. The charge sheet indicated that she was 15. That was not proved beyond doubt. One cannot for certain say that the complainant was in fact below 18.

The second issue related to the credibility to the credibility of PW1. PW2 testified that PW1 came to her home to look for money for a birth certificate and that she was given Ksh.100/=. PW3 testified that when PW1 left home she was going to school. She was in uniform and was carrying books. When asked by the defence counsel, she replied that PW1 had no problem with a birth certificate. PW1 stated that she was not on this day going to school because she had not paid fees. PW3 testified that her daughter had no fees arrears. Further, PW1 stated that she was using PW2's phone and this is how the Appellant contacted her. However, PW2 denied that she had given her phone to PW1. She was categorical that PW1 did not have a phone. It is clear that PW1 was not a reliable witness and no amount of evidence could corroborate her story. The trial court therefore fell into error when it found that PW1 was believable, or that the prosecution had established the guilt of the Appellant beyond reasonable doubt.

It is for these reasons that I allow the appeal and quash the conviction. The sentence is set aside and the Appellant is ordered to be at liberty unless he is otherwise being lawfully held.

Dated, signed and delivered at Bungoma this 22<sup>nd</sup> day of March 2012.

**A. O. MUCHELULE**  
**JUDGE**