



**WYCLIFFE MUDOGO SHAMWANA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*{Being an original conviction and sentence of D. M. Ochenja – PM in Criminal Case No. 1242 of 2009 delivered on 6<sup>th</sup> April, 2010 at Kitale.}*

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

The appellant, **Wycliffe Mudogo Shamwana**, appeared before the Resident Magistrate Kitale charged with defilement of a child contrary to Section 8 (1) read with Section 8 (4) of the Sexual Offences Act, in that on 16<sup>th</sup> March, 2009 in Trans-Nzoia West District, unlawfully and intentionally caused penetration by his genital organ into the genital organ of L.N.N aged 16 years.

Alternatively, the appellant was charged with indecent act contrary to Section 11 (1) of the Sexual Offences Act. It was alleged that on the material date, he caused contact between his genital organ and the genital organ of L.N.N.

The appellant pleaded not guilty to both counts. After trial, he was convicted on the main count and sentenced to fifteen (15) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant filed the present appeal on the basis of the grounds contained in his petition of appeal dated 8<sup>th</sup> April, 2010. He represented himself and argued his appeal by way of written submissions.

The respondent opposed the appeal through the Learned Prosecution Counsel, **M/S Bartoo**.

The Learned Prosecution Counsel submitted that the Prosecution case was proved beyond reasonable doubt as the evidence by Pw3 confirmed that there was penetration and the evidence by Pw2 indicated that the appellant was caught in the act.

The Learned Prosecution Counsel further submitted that the appellant was known to both the complainant and Pw 2. His identification was therefore not disputed.

The Learned Prosecution Counsel contended that the defence by the appellant did not water down the Prosecution case and that the sentence imposed by the trial Court was lawful.

Learned Prosecution Counsel urged this Court to dismiss the appeal.

This is a first appeal, the duty of this Court is to reconsider the evidence and arrive at its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Briefly, the Prosecution case was that on the material date at about 1.00pm, the complainant **L.N.N (Pw 1)** proceeded to a roadside hotel to purchase her lunch of mandazi (bun). She met the appellant at the

hotel and handed him Kshs. 10/- for the mandazi. The appellant told her to wait but she could not do so. She went home without her money or mandazi. The appellant followed and took to her one mandazi instead of two which had been paid for.

The complainant refused to accept the one mandazi and at that juncture the appellant indicted that he wanted to sleep with her. He lifted and placed her on top of her brother's bed. She put up resistance but all in vain. The appellant tore her inner wear, covered her mouth and went ahead to defile her.

**C. N (Pw 2)** entered the house and saw the appellant jump off a bed without his trousers while the complainant lay on the bed clad in her school uniform. She (C.N) had previously known the appellant as a neighbour and an employee in a nearby hotel. He did not respond to her question with regard to what he was doing in her house. She locked him and the complainant and went to call the Police at a nearby A.P. Camp. The Police arrived at the scene and arrested the appellant.

**Francis Barichodo (Pw 3)**, a Clinical Officer at Kitale District Hospital, examined the complainant and confirmed that she had indeed been defiled. He produced the necessary P3 form.

**S/Sgt. Zelea Akiru (Pw 4)** of Kitale Police Station investigated the case and thereafter charged the appellant with the present offence.

In his defence, the accused stated that on the 18<sup>th</sup> March, 2009, he was selling mandazi on his bicycle before returning to the hotel where he was employed. While there, a sister of the complainant came to purchase mandazi. She was his customer and he normally gave her mandazi. He denied the offence and contended that he was arrested for no apparent reason. He also contended that he sold mandazi on credit to the complainant's sister who is a neighbour. She was indebted to him and since he declined to sell any more mandazi to her, she felt jealous and framed the present charge against him.

The trial Court considered the evidence in its totality and concluded that the charges against the appellant had been proved beyond reasonable doubt by the Prosecution.

The appellant was therefore convicted and sentenced accordingly.

This Court has also considered the same evidence in the light of the grounds of appeal and the submissions by both the appellant and the respondent.

It is the opinion of this Court that the evidence by complainant (Pw 1) and the Clinical Officer (Pw 2) established and proved that the complainant was indeed defiled.

The evidence by the Clinical Officer placed the age of the complainant at 15 to 16 years.

The evidence by the complainant and to an extent by C.N (Pw 2) confirmed that the appellant was responsible for the unlawful act. He was not a stranger to the two. He jumped off the bed without his trousers when C.N arrived in the house unexpectedly thereby displaying a guilty conscious and confirming that he was responsible for the offence.

In the circumstances, his defence was clearly discredited. His conviction by the learned trial Magistrate was proper and correct. The sentence imposed upon conviction was lawful.

In sum, this appeal lacks merit. It is hereby dismissed.

**[Delivered and signed this 28<sup>th</sup> day of July, 2012]**

**J. R. KARANJA**  
**JUDGE**