



**KAZUNGU CHENGO NGOMBO.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

### **JUDGEMENT**

1. The appellant KAZUNGU CHENGO NGOMBO was charged with Defilement of a girl contrary to section 8 (3) of the Sexual Offences Act. He pleaded not guilty. Following a full trial, he was found guilty, convicted and sentenced to twenty years imprisonment by the Learned Chief Magistrate sitting at Malindi.
2. He has raised 4 amended grounds of appeal against conviction and sentence. The grounds can be summarised into 3 as follows;-
  - a. **The conviction was against the weight of the evidence.**
  - b. **His defence was dismissed without justification.**
  - c. **The charge sheet was defective.**
3. He has made written submissions in support of his grounds. The state opposed the appeal and asserted that the charge sheet was proper and that the charge against the appellant had been proved to the required standard.
4. As held in **OKENO VS R (1972) EA 32** the first appeal court must consider the trial evidence afresh and makes its own conclusions. The prosecution case at the trial was that the complainant (Pw 4) named SK or SSM then a 14 year old girl resides at S with her family. On 25.1.08 she left home to look for firewood, in the company of another girl called K. After collecting enough firewood, they parted each to go to their respective homes. On the way however, the complainant met with the appellant who was riding a bicycle. He confronted her hit her, tore her underwear, lifted her up and forcefully had sex with her while she was standing. He then left the scene.
5. SK went home and reported to her family. Her mother (Pw 3) noted that she had injuries on her private parts and her clothes were blood - stained. She took her to Malindi hospital before reporting the matter at Malindi Police Station. Later the appellant was arrested.
6. In his sworn statement in defence the appellant said that the charges against him were trumped up. That he had been married to a sister of the complainant from whom he was estranged. That the said sister B SA threatened to “fix” him so he could never remarry.
7. Regarding the issue of penetration the medical evidence tendered through Pw 2 and NT the complainant’s mother as well as SK herself, there can be no dispute that the complainant was sexually assaulted on the material date. Secondly, the complainant and her family were people familiar with the appellant as one with marital ties to their family.
8. The sole question for determination in the trial, as the court observed in its judgement is the identity of

the assailant.

9. Although NT only learned about the incident when she returned home at about 7.00Pm, the complainant claimed the time of the attack as 4.00Pm. SK immediately named the appellant as the culprit. At the trial she was questioned at length but she maintained that the appellant defiled her at 4.00Pm. She gave graphic details of the obtaining circumstances including the fact that the appellant had a bicycle and appeared drunk, the clothes he wore it is not possible that she was making it up.

10. The trial magistrate carefully went through her testimony and recalled in detail her observations that though SK was “shy” and even slow in speaking, she expressed herself in a convincing manner. She was impressed with her evidence and believed her. The judgement showed that the learned trial magistrate took care to fully observe the witness and to patiently hear her out. That is truly commendable. The trial magistrate also considered the corroborative evidence via the medical report, even though no corroboration was necessary in line with the provisions of section 124 of the Evidence Act.

11. She also considered the appellant`s defence and concluded that SK had no reason to frame the appellant. I agree. If the appellant had issues with a relative/sister of SK who was estranged from him, that did not involve SK. Secondly, SK had sustained injuries in the attack and was still crying when her mother returned home. It is not clear whether the appellant is suggesting that the estranged wife also arranged for SK to be defiled and injured so as to frame him. Pw 3 quickly admitted there were previous disagreements previously between the appellant and her husband. But she said it had nothing to do with SK`s defilement. Looking at all the relevant evidence I think the trial magistrate was justified in dismissing the appellant`s defence. The same was totally displaced by the prosecution evidence.

12. The P3 form shows that SK was 14 years old. That was not contested at the trial neither was the issue of DNA test raised. It is too late now for the appellant to raise such issues. On the question of the form of the charge sheet, it is correct that the charge should have been laid as being in contravention of “section 8 (1) as read with section 8 (3) of the Sexual offences Act”. The omission of section 8 (1) has not caused any prejudice to the appellant. The record of the trial shows he clearly understood the charges facing him.

13. I find no merit in the appeal and I dismiss it entirely – while confirming both conviction and sentence.

**Delivered and signed at Malindi this 15<sup>th</sup> day of June, 2012 in the presence of Mr Naulikha – State, Appellant present, c/c-Evans/Leah.**

**C.W.MEOLI**  
**JUDGE**