



**D O O.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction in Criminal Case number 17 of 2011 of Resident Magistrate's Court at Tamu)*

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

The appellant herein was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3/2006.

The particulars are that on the 27-10-2010 at Kisumu county, intentionally caused his penis to penetrate the vagina of **L A M** a child aged 15 years.

He was equally charged with an alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act No. 3/2006.

After the full trial the appellant was convicted and sentenced to serve 15 years imprisonment. He has filed this appeal, and the substance of his petition is that the trial court convicted him without any sufficient evidence, the trial court did consider extraneous matters in arriving at its decision and the it failed to consider his defence.

The complainant **PW1 L A M**, told the court that she was on her way to her grandmother's house on the evening of 27-10-2010. On the way she met the appellant who was her uncle. She then went to her house where he defiled her. She was rescued by the village elder at around 9 p.m. The appellant escaped.

Subsequently, the complainant was taken to the Assistant Chief's place and to hospital the following day . Later she was taken to the police station where she recorded her statement.

**PW2 T M**, the complainant's mother told the court that her elder daughter had gone to her grandmother's place. She reported the incident to the assistant chief who told the village elder to go and look at the incident.

According to her the complainant was brought by the village elder to the assistant chief's place at 9.30 p.m.

She went to the hospital and later to the police station with the complainant. She said that the appellant was born in the year 1994.

**PW3 Richard Onyango Bala**, village elder told the court that she was called by the complainant's sister who told her that the complainant was at the house of the appellant. When he reached the appellant's house he refused to open the door and he forcefully gained entry by breaking the door.

He only managed to get the complainant as the appellant had disappeared. He took the complainant to the

assistant chief's place and later to the hospital the following day.

**PW4 Mathew Riagare Oyier**, the assistant chief received the complainant who had been brought by the village elder and the youths to his place alleging that she had been defiled. He told the mother to report to the police station. He looked for the accused and managed to arrest him on 18-1-2011.

**PW5 No. 85003237 Cpl Elphas Bitok**, the police officer attached to the Achego AP post told the court that he arrested the appellant on 18-1-2011 at around 4 p.m.

**PW6 Fredrick Kipkoech**, produced the P3 form on behalf of one Dennis who had filled it and who had been transferred to Bondo District hospital. Of great significance in his finding was that the complainant was clinically normal. He did not do any pregnancy test.

**PW7 Cpl Douglas Nyange** was the investigating officer. He received the complainant on 27-10-2010 of the alleged defilement. He issued the victim with the P3 form and later investigated the case and preferred charges against the complainant.

The appellant when put on his defence denied the charge but said that on 17-9-2010 one **T M** went and built a house on his farm. When he asked him he threatened him with dire consequences.

The issues to be determined here are whether or not the complainant was defiled and whether it was indeed the appellant who did so, was the appellant the cause of the complainant's pregnancy? Did the prosecution prove their case beyond reasonable doubt? Is the appellant related to the complainant?

From the evidence on record, I have no doubt that indeed the complainant was aged 15 years at the time of the alleged incident. The certificate of birth was not challenged. Further, it is conclusive that there is some degree of relationship between the appellant and the complainant. The appellant is an uncle to the complainant. This again was not controverted.

But was the complainant defiled? Evidence on record does not show that she was defiled. The complainant was allegedly defiled on 27-10-2010 and taken to the hospital on 28-10-2010. The P3 was later filled on 1-11-2010, I assume based on the treatment notes of 28-10-2010 which were produced.

However, PW6 told the court that:-

**“The patient was not sickly looking. No treatment given. Nature of offence defilement. Examination of the labia, minora vagina and cervix was normal. No presence of discharge”.**

The trial court equally found for a fact that there was no defilement. This being the case it therefore means that the complainant's evidence that she was defiled on 27-10-2010 was not true. She lied.

The offence of defilement under the Sexual Offences Act envisages that there ought to be penetration. In this regard there was no such penetration. I have further seen the evidence of PW2 and PW3 and do find that the same are contradictory. Whereas PW2 says that she reported the incident to the assistant chief who then reported to the village elder and therefore told him to take the action he took. PW3 the village elder said that he received the information from the complainant's sister. Interestingly the complainant's sister was never called to testify which in my opinion should have cleared any inconsistencies.

I have equally seen the findings by the trial court that it thought that the complainant's stomach was bulging and therefore she must have been pregnant. Infact the complainant's mother said that she was six months pregnant and that she had not been to any clinic.

Whereas the trial court had the advantage of seeing the appellant as well as the witnesses, it would have been appropriate in the circumstances to have the necessary scientific proof in form of medical documents to establish this fact. A ballooning stomach is not enough! It is therefore very difficult for me to find

that the complainant was pregnant.

The court ought to have looked at the appellant's defence. The appellant said that he was around all through. The prosecution witnesses did not tell the court how they had been searching for the appellant for those three months. They did not give a hint of the areas they had searched the appellant and so on.

I have, read the letter from the school produced as exhibit 3. The said letter states that the school had warned the complainant about her relationship with the appellant in the presence of her mother. The mother PW2 seemed to be rightfully distressed.

However, this court cannot go for some wild expeditions as the trial court did. It has not established any proof that the appellant defiled the complainant on the material day. Equally, the trial court by shifting the balance on the appellant in respect to his suspicious disappearance for the three months period after the incident is like asking him to prove his innocence. This as is the rule is the preserve of the prosecution.

I do therefore find this appeal meritorious and further that had the prosecution proved that there was a defilement by the appellant against the complainant I would have considered the element of changing the charge to defilement to incest as requested by the learned state counsel.

Suffice to say that the prosecution did not prove its case beyond the required standard of proof.

I shall grant the appellant the benefit of doubt and allow his appeal. Let him be released forthwith unless lawfully held.

**Dated, signed and delivered at Kisumu this 24<sup>th</sup> day of July, 2012.**

**H.K. CHEMITEI  
JUDGE**

In the presence of:

.....for the state

.....for the appellant

HKC/va