**JOHN KIHONYE GICHOHI.....APPELLANT**

**VERSUS**
**REPUBLIC.....PROSECUTOR**

**[An Appeal from original conviction and sentence in Nyahururu P.M.CR.C..NO.2538/2009**

**by Hon C. K. Obara, Resident Magistrate, dated 18th November, 2010]**

**JUDGMENT**

The State charged the appellant with **defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act No.3 of 2006** and in the alternative with **indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006** in Nyahururu P. M. Criminal Case No.2538 of 2009.

The trial court found that the evidence only disclosed the offence of **attempted defilement** contrary to **Section 9(1)** of the **Sexual Offences Act** and upon convicting the appellant sentenced him to ten (10) years imprisonment.

Being aggrieved, the appellant has brought this appeal challenging the decision on the grounds that:

i) the prosecution evidence was contradictory;

ii) the trial court failed to consider that the appellant was blind and not capable of committing the offence;

iii) the sentence was manifestly harsh and excessive;

iv) the appellant's defence was not considered.

In addition, the appellant in his amended grounds averred that:

i) his constitutional rights were violated by being detained by the police for more than 24 hours;

ii) essential witnesses were not called;

iii) the trial court erred by convicting the appellant of the offence not charge.

Learned counsel for the respondent opposed the appeal and submitted that although the appellant was charged under **Section 8(1)(3), Sub-section (3)** being a penalty section, the defect was minor and curable; that there was sufficient evidence that the appellant attempted to defile the complainant.

The complainant recalled that on 2nd November, 2009 at around 11a.m., she met the appellant who was her neighbour near their plots. The appellant took her to a maize plantation where he proceeded to defile her. She felt a lot of pain before her brother P.W.3 intervened by slapping the appellant with the flat part

of a *panga*. P.W.3 was alerted about the incident by P.W.2 who had heard the appellant calling the complainant. She had seen the appellant take the complainant behind his house in a maize garden. The appellant pushed the complainant to the ground, unzipped his trousers and lay on top of the complainant. It was at this stage that P.W.2 alerted P.W.3. P.W.3 confirmed that he saw the appellant on top of the complainant. He approached them without interrupting them. He slapped the appellant on the buttocks with a flat side of the *panga*. The appellant was arrested by the village elder, P.W.4 who took him to the police station where he was re-arrested by P.W.5.

The complainant was examined by a clinician at Ol Kalou District Hospital (P.W.6) who observed tenderness and bruises on the libia minora/majora. He also noted that the hymen was intact and no spermatozoa was traced. The clinician concluded that the injury on the complainant's private part was an indication that there was only attempted penetration *"without success"*.

In his defence, the appellant told the court that on the day in question, he was informed by his daughter that P.W.2 was stealing maize from his *shamba*. When P.W.2 who was in the company of the complainant realized that she had been noticed, she ran away, leaving the complainant behind. The latter explained to the appellant that P.W.2 had asked her to carry for her pumpkins from the farm. The appellant testified that prior to this date, he had a case with the complainant's father and he wondered what the complainant was doing on his farm. As he talked with the complainant, P.W.2 returned and demanded to know what he was doing with the complainant. She brought people who arrested the appellant.

At the close of the defence case, the trial court directed that the appellant be examined to ascertain the state of his eye sight. According to a report from Ol Kalou District Hospital the appellant was found to be blind. The trial magistrate was persuaded that the complainant was a truthful witness, whose testimony was clear and consistent. The learned magistrate also found that apart from the complainant's evidence, there were eye witnesses (P.W.2 and P.W.3) whose evidence confirmed the commission of the offence by the appellant. In her view, this was sufficient evidence to warrant the appellant's conviction of a lesser charge, thus dismissing the appellant's defence.

This being the first appeal, the court is duty bound to subject the evidence on record to fresh scrutiny in order to arrive at its own independent conclusion bearing in mind that unlike the trial court, this court did not see or hear the witnesses.

It is not in doubt that the appellant and the complainant were not strangers to each other, being neighbours. The complainant's age (of 12 years) is similarly not in doubt. It is further conceded that the complainant was in the appellant's farm.

According to the appellant, the complainant and P.W.2 were stealing maize from his farm while according to the complainant it is the appellant who lured and led her to the farm where he defiled her. In terms of the proviso to **Section 124** of the **Evidence Act**, the trial court can convict on the evidence of the alleged victim of a sexual offence if the court is satisfied that the alleged victim was a truthful witness. Apart from the learned trial magistrate finding that the complainant was a truthful witness, there were two eye witnesses to the sexual assault. Both P.W.2 and P.W. 3 caught the appellant in the act. P.W.4 saw the complainant immediately after the incident and noted that she was in pain while walking. When the matter was reported to the police, the complainant told P.W.5, a police officer, that it was the appellant who defiled her. Similarly, there is medical evidence that the complainant suffered tenderness and bruises to her labia minora.

I am persuaded from the totality of that evidence that the appellant lured the complainant to his maize farm. The defence by the appellant that there was a land dispute between him and the complainant's parents is not persuasive and was displaced by the overwhelming prosecution evidence. There were independent witnesses in support of the prosecution case. Contrary to the appellant's assertion, I find no material contradictions in the prosecution case. Although there was medical evidence that the appellant is blind, that alone is no proof that he was incapable of committing the offence. Perhaps it is due to that condition that he did not notice that P.W.2 and P. W.3 were watching him while he was in the act. P.W.4

infact believed the appellant could see for he had seen him cultivate his farm even as the trial was pending.

The sentence of ten years imprisonment was both lawful and not excessive. I may add that he must consider himself lucky the trial magistrate reduced the charge to attempted defilement from defilement of a child of 12 years which carries 20 years imprisonment. He is lucky because the magistrate was of the view that there was no penetration as the hymen was not perforated.

**Section 2** of the **Sexual Offences Act** defines penetration as:

**"…….the <u>partial</u> or complete insertion of the genital organs of a person into the genital organs of another person**."

(Emphasis supplied)

The injuries noted on the labia minora and labia majora points to a partial insertion.

For the foregoing reasons, I find no merit in this appeal. It is dismissed.

**Dated, Signed and Delivered at Nakuru this 18th day of July, 2012.**

**W. OUKO**
**JUDGE**