



**REPUBLIC OF KENYA**  
**IN THE HGH COURT OF KENYA AT KISII**

**Criminal Appeal 86 of 2011**

**SAMUEL MAJIWA OMACHI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Migori,**

**Hon. Kibet Sambu in Criminal Case No. 462 of 2010 dated 15<sup>th</sup> April, 2011)**

The appellant, **Samuel Majiwa Omachi** was charged with the offence of defilement contrary to section 8 (i) 3 of the **Sexual Offences Act** 2006. According to the particulars on the charge sheet, he committed the offence on the 14<sup>th</sup> day of June, 2010 at Lwanda village, North Kadem location in Nyatike District Nyanza Province. The victim one **N. A** was a child aged 15 years.

The appellant initially pleaded guilty to the charge then changed his plea to not guilty. He was tried, convicted and sentenced to 20 years imprisonment on 15<sup>th</sup> April, 2011 by the Senior Resident Magistrate's court, Migori. He has now appealed to this court against both conviction and sentence.

In his undated petition of appeal filed on 28<sup>th</sup> April, 2011, the appellant has listed the following grounds:

- *That he was not acquainted with the procedure of the court, did not comprehend the translation and was totally confused.*
- *That he was in his house with his wife on the material day.*
- *That the sentence of 20 years is too harsh and that the court should intervene on the same.*

The appeal came before me for hearing on 27<sup>th</sup> March, 2012. The appellant gave written submissions in which he stated that he admitted the offence readily because he was innocent. He submitted that the charge was a frame up by the complainant's relatives who testified as prosecution witnesses. Finally he submitted that the medical evidence was not conclusive.

The appeal was opposed by the state though learned counsel **Mr. Mutai** who submitted that the conviction was safe and that the sentence was lawful. **Mr. Mutai** further submitted that the prosecution evidence was corroborative and cogent.

As a first appellate court am under duty to subject the evidence to a fresh evaluation and arrive at an independent conclusion. It is my duty to ascertain whether the determination of the trial court can stand. This duty was succinctly set out in the often cited case of **Okeno –vs- Republic (1972) E. A 32** which cited **Pandya -vs- Republic (1957) E. A 336**.

Briefly the facts before the trial court were that on the material day the complainant went to school late and fearing to be caned, hid herself in a nearby bush outside the school compound. In the evening she started walking back home. She met the appellant on the way who took her to his house where he had sexual intercourse with her in the presence of another woman who is stated to be his wife. The complainant's adoptive mother traced her to the appellant's house and sought the help of an elder and police who arrested the appellant. The complainant was taken to hospital where she was examined and was found to have been defiled. The appellant was subsequently charged and convicted.

The appellant has stated in his first ground of appeal that he was confused at the time of plea. I take this complaint to imply that his plea was not unequivocal. Looking at the record I find that the appellant was arraigned in court on 17<sup>th</sup> June, 2010. The charge was read and explained in Dholuo language which the appellant understood. He stated "*It is true*". On 18<sup>th</sup> June, 2010 the appellant requested that the charge be read to him again. He changed his plea. Such change means that the appellant had taken time to think through the plea. I therefore find the first ground of appeal baseless. In any case a plea of not guilty ensured that the appellant would subsequently be tried and which he was. On the complaint regarding the language and the translation, the same is also baseless as it is not reflected anywhere in the record that the appellant was not able to follow the proceedings. Indeed he did participate effectively in the trial as he cross examined the witnesses competently.

The second ground states that the appellant was with his wife when he was arrested. This cannot be a ground of appeal but a fact that the appellant should have and indeed did bring up in his defence. It is instructive that he did not call his wife to testify as a defence witness.

In all I find that the prosecution proved the case against the appellant. The complainant PW1 testified that she accompanied the appellant to his house and they had sexual intercourse. The trial court conducted a *voire dire* examination and found that she could testify on oath. Her evidence was corroborated by PW2, her foster mother who testified that together with a village elder they tracked her daughter to the complainant's house. She had earlier been informed by one of her children that the complainant was not at school that day. She had also been informed by her neighbour one **Mama C.** that the complainant had been seen with the fundi (bicycle repairer) meaning the appellant.

A medical report and treatment notes were produced in court by one **Leonard Omweri PW4**, a clinical officer at Karungu sub district hospital. He had examined the complainant and found her to have been defiled. This corroborated the testimony of PW1. I do find that the prosecution evidence taken as a whole proved that an offence was committed and there was direct evidence linking the appellant to the offence.

On sentence, I find that the trial court imposed the only sentence available under the law. Having been convicted of the offence, the appellant could only be sentenced under section 8 (3) of the **Act** which provides a minimum sentence of 20 years imprisonment. Harsh as the sentence might be, it is the only one provided by law.

In sum I find the appeal not merited and dismiss it accordingly.

**Judgment dated, signed and delivered at Kisii this 27<sup>th</sup> day of September, 2012.**

**R. LAGAT-KORIR**  
**JUDGE**

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**In the presence of:**

Samuel Majiwa Omachi :for appellant (present/absent)

..... :counsel for respondent (present/absent)

Edwin Mongare :court clerk

**R. LAGAT-KORIR**  
**JUDGE**