



**OBED OKWEMBA PETER.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case number 952 of 2009 of the Principal Magistrate's Court Maseno)*

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

The appellant herein was charged with the offence of defilement of a girl under the age of 16 years contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3/2006.

The particulars are that on the 2<sup>nd</sup> day of July 2009 at Emuhaya district within Western province unlawfully had carnal knowledge of an imbecile girl namely **J V** aged 15 years. The alternative charge was Indecent Assault of a girl under the age of 16 years contrary to section 11 (1) of the Sexual Offences Act No. 3/2006.

The particulars are that on the 2<sup>nd</sup> day of July 2009 at Wandeché village Muchalya sub location in Emuhaya district within Western province unlawfully assaulted one girl **J V** by touching her private parts namely breasts, buttocks and thighs.

The appellant was convicted and sentenced to serve 20 years imprisonment.

He has filed this appeal as per the petition of appeal dated 19-5-2011. According to the said petition the appellant complained that the trial court convicted him without adequate evidence and that the medical report was not conclusive, that vital witness as were left by the prosecution, the age of the complainant was not ascertained and that his alibi defence was never considered.

The summary of this case is that on 2-7-2009 **PW3 E E A** sent the complainant to buy him a scratch card- safaricom at the local shopping centre called Ebobi. **PW2 J V**, the complainant was a student at the said special school. He gave the complainant Kshs. 50/=.

**PW3** said that the complainant took some time before returning and he sent another pupil called **F N** to go after her. This is **PW4**.

The said **PW4** found the complainant crying at the roadside and she told him that she had been beaten by the appellant who had equally taken the Kshs. 50/= she had been given by **PW3** her teacher.

The two children came to the school and told their teacher **PW3** what had happened. **PW3** called **PW1** the school head teacher. They went to the scene at a maize plantation and found that a struggle had taken place.

The complainant clothes were soaked on the rear part. The complainant told the court that the appellant

forcefully took her to the maize plantation and sexually assaulted her. She said that the appellant had a bicycle and cigarettes.

PW3 told the trial court that the appellant's employer one A had sent the appellant to go and sell cigarettes. He further told the court that the owner of the maize field came to the scene and confirmed that he had seen Obed with the complainant.

**PW5 Tom Tiema**, the clinical officer produced the P3 form and his findings were that the complainant had been sexually assaulted. He said that her private parts were bruised around the vagina and that the hymen was freshly torn with blood oozing.

PW6 arrested the appellant after being pointed out by the teacher. They also recovered the Kshs. 50/= he took from the complainant. **PW7 Sgt Isaac Tenai** was the investigating officer. He took the witnesses statements and charged the appellant.

The appellant when put on his defence denied that he knew the complainant. He claimed that he was arrested by two police officers on the way and taken to Emuhaya chief's camp. He claimed that PW3 was the complainant's father who ordered him arrested.

The points to determine in this appeal is whether or not the complainant was a person who was mentally challenged; whether on the material day she met the appellant and whether the appellant sexually assaulted her; whether the complainant was within the age envisaged by the charge sheet and if indeed the prosecution failed to call critical witnesses.

From the evidence presented at the trial court, I have no doubt that the complainant is a person who is mentally challenged. There is no dispute that she schools in a special school, a fact corroborated by all the witnesses. The court equally found that the complainant was slow in understanding. Finally the P3 form was conclusive on this. She was thus a vulnerable person within the meaning of section 2 (d) of the Sexual Offences Act.

Did the complainant meet the appeal? The only eye witness who saw the appellant with the complainant is the owner of the maize field. He however did not come and testify. His evidence would have been critical.

Circumstantially, though there are several facts which point out to the fact that the complainant was with the appellant.

Although the owner of the maize field did not attend court to testify but his talk with PW3 was very relevant. As a consequence of that PW3 went to the appellant employer one A who took them to where the appellant was.

PW1 told the court that when the complainant saw the appellant she was shocked. Equally, the complainant told the court that the appellant had a bicycle and cigarettes. This testimony of cigarettes was well corroborated by the evidence of PW3 who told the court that A the appellant's employer who apparently was a shop owner had sent the appellant to sell cigarettes.

Time frame within which all these incident took place was within a very short period. Infact, it is within three hours or less.

Further, the appellant was arrested with Kshs. 50/= which it would appear to be the one which PW3 had given to the complainant to buy for him airtime.

The appellant did not object to this piece of evidence by the prosecution. The question of the complainant's age was well covered by the clinical officer PW5.

I do not find this appeal to be meritorious at all. There is ample evidence that the appellant although

not found sexually assaulting the complainant circumstantially, the evidence points towards this fact. There is no evidence that by the time the complainant was being sent to the shop by PW3 she had been defiled. In addition by the time PW3 realized that the complainant had taken a longtime coming back, was about 30 minutes.

Section 124 of the Evidence Act Chapter 80 Laws of Kenya states:-

**“Notwithstanding the provisions of section 9 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.**

I do believe that the complainant though mentally retarded spoke the truth. She confirmed that she had been sent to buy air time by her teacher and was given Kshs. 50/=. She further confirmed that the appellant had sexually defiled her at the maize plantation which scene was visited by the witnesses. She further confirmed that the appellant had a bicycle and cigarettes which the appellant's employer Ainea, confirmed. Finally, the P3 form confirmed that she was sexually assaulted.

I do in the premises dismiss the appellant's appeal and uphold the trial court's conviction and sentencing.

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

**H.K. CHEMITEI  
JUDGE**

in the presence of:

.....for the state

.....for the appellant

*HKC/va*