

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Civil Appeal 6 of 2002

STEPHEN ACHIYA MUSUNGUAPPELLANT

VERSUS

REPUBLICRESPONDENT

**(From the conviction and sentence of A.O. Osodo, Resident Magistrate
in Busia SRM Cr. Case no.574 of 2001)**

J U D G E M E N T

The appellant Stephen Achiya Musungu, was originally charged with the offence of defilement of a girl contrary to section 145 (1) of the Penal Code. He was convicted and sentenced to five (5) years imprisonment. He appealed against the conviction and sentence. The appeal was heard by Mitey, J on 2.10.2003, and judgement was reserved to 6.11.2003 by which date the Judge had left the Bench. The Chief Justice has recently directed me to write and deliver the judgment.

The facts of the case are that the complainant, F.W, a young girl of 9 years, was on 15.4.2001 fetching water at a river near her home in company of her younger sister B.W of 5 years. The appellant who is her uncle and very well known to the two sisters came to the river. He took the hand of F. W and led her to a bush not far from the river, warning her younger sister to wait for her sister at the river.

In the bush, as testified by the complainant, the appellant removed the young girls pants and defiled her. He warned her not to reveal to anybody what he had done. The girl did not dare inform her sister or her parents later when she went home. However she testified that she felt pain when he violated her and continued feeling so, the third or fourth day when she openly complained of stomach pain. On examining her them other realized something was amiss because pus was oozing from her genitals. She took her to hospital and the clinical officer who examined her confirmed that she had been defiled. The girl then shyly revealed that it was the appellant who had defiled her three to four days earlier. Her younger sister B also later confirmed the story as to how the appellant had pulled her to the bush from the river.

The Clinical officer, Hillarious Oyugi, had established that the complainant had been defiled. Discharge came from the child's vagina. Her hymen was perforated. She was in serious pain and could hardly walk. He established that she could have been carrying a sexually transmitted disease. Although he administered treatment a week later he had to admit the child in the ward with suspicion of that she had contracted H.I.V.

The appellant in his unsworn defence merely denied the charge. He said nothing about the child's innocent story about him. He did not deny taking the girl from the river to the bush.

The trial magistrate accepted the two young girls stories about what happened at the river and in the bush. He saw corroboration of the complainants evidence in the findings of the clinical officer who confirmed the defilement. He saw no other reason but the truth in the two girls' evidence that the accused committed the crime.

I have carefully considered the evidence independently. I have come to the conclusion that the trial magistrate was correct and did not err in any way in convicting the appellant. Indeed if it were not for the fact that the appellant has already served the five year sentence which the lower court meted out, this court would consider enhancement.

Be that what it may, I find no reason to disturb the finding of the lower court. I confirm and uphold the conviction and sentence of the lower court. I accordingly dismiss this appeal as having no merit. Orders accordingly.

Dated and delivered at Busia on the 18th day of May 2010.

D.A. ONYANCHA

JUDGE