



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 281 of 2008**

*(From Original Conviction and Sentence in Criminal Case No. 1081 of 2007 of the Principal Magistrate's Court at Voi: P.N. Ndwiga – R.M.)*

**EMMANUEL NYANGE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant herein **EMMANUEL NYANGE**, filed this appeal to contest his conviction and sentence by the learned Resident Magistrate sitting at Voi Law Courts. The Appellant had been arraigned before the lower court on 28<sup>th</sup> September 2007 and was charged with the following offences

**COUNT NO. ONE**

**“DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(3) OF THE SEXUAL OFFENCES ACT”**

**“On the 23<sup>rd</sup> day of September 2007 at K Village in Taita Taveta District within Coast Province had carnal knowledge of S N a child the age of 18 years”**

**ALTERNATIVE CHARGE**

**“INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE”**

**COUNT NO. TWO**

**ESCAPE FROM LAWFUL CUSTODY CONTRARY TO SECTION 123 OF THE PENAL CODE”**

**“On the 26<sup>th</sup> day of September 2007 at Voi location in Taita Taveta District within Coast Province being in a lawful custody at Voi Police Station after arrest for the offence of Defilement and Indecent Assault escaped from such lawful custody”**

Upon the charges being read out to him the Appellant pleaded **“not guilty”** to all three offences. His trial commenced on 1<sup>st</sup> October 2007 where the prosecution led by **INSPECTOR MWANGI** called a total of ten (10) witnesses in support of their case. The brief facts of the case were that the complainant **S N**, a girl of 14 years old and her brother **S J PW2**,

both Ugandan citizens were lured to come to Kenya on the pretext that they would get jobs. This did not work out and the two made their way back to Voi in an attempt to return to Uganda. They had nowhere to stay and effectively became street children sleeping out in the open at various bus parks and stages. They met the Appellant on 23<sup>rd</sup> September 2007 who told them he could put them on a train to go back to Uganda. The Appellant took the two to his home where his mother cooked food and they refreshed themselves. At 8.00 p.m. they were walking back to town when the Appellant produced a knife and ordered **PW2** to go away and leave him with the complainant. He threatened the complainant with the knife and removed her clothes. He lowered his trouser and defiled her twice. As he was defiling her for the third time **PW2** who had run back to the village to seek help, returned to the scene with other villagers. The complainant managed to scream and the crowd caught the Appellant in the very act of defiling her. The Appellant tried to escape but the complainant held onto his T-shirt preventing him from running away. They were taken first to the police station and then later to the hospital. The complainant was examined, treated and discharged. The Appellant who had been badly beaten by the mob was admitted for treatment. It is alleged that whilst in guard at the hospital the Appellant managed to slip off his hand-cuffs and escape. He was later arrested in Maungu and brought back to Voi Police Station where he was charged with all three offences.

At the close of the prosecution case the trial court ruled that the Appellant had a case to answer and he was placed on his defence. The Appellant opted to give a sworn defence in which he denied all the charges he faced. On 8<sup>th</sup> October 2008 the learned trial magistrate delivered his judgement in which he convicted the Appellant on both the main charge of Defilement as well as the second count of unlawful escape from custody. After listening to the Appellant's mitigation the trial court sentenced him to serve twenty (20) years imprisonment on the first count and two (2) years imprisonment on the second count. The sentences were ordered to run consecutively. Being aggrieved by both his convictions and sentences the Appellant filed this present appeal. The Appellant who was unrepresented at the hearing of his appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONDARI**, learned State Counsel who appeared for the Respondent State gave oral submissions opposing the appeal.

This being a court of first appeal I am mindful of the decision of the Court of Appeal in the case of **OKENO –VS- REPUBLIC [1972] EALR 32**, where it was held that

***“It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld”***

I have perused the Appellant's written submissions and note that he raised several grounds for his appeal, the main ones of which were:-

- § Defective charge sheet
- § Failure to conduct Voire Dire Examination
- § Identification
- § Failure by prosecution to prove the charges
- § Contradictions and inconsistencies in the prosecution case

With respect to the first ground the Appellant submits that the charge sheet is fatally defective in that the particulars of Count No. 1 did not include the word **“unlawful”** before the words **“carnal knowledge”**. This submission is with respect mistaken. The term **“unlawful”** was held to be a mandatory prerequisite in charges brought under S. 145 of the Penal Code of Kenya. This section was repealed by the Sexual Offences Act which came into force in July 2006. The

present charges are brought under S. 8 of the Sexual Offences Act which Act outlaws any and all act of sexual intercourse with a person under the age of 18 years. Thus it is not essential to include the word **“unlawful”** in the particulars of the charge. This ground of appeal has no merit and is hereby dismissed.

Secondly the Appellant has raised issue with the fact that no **‘voire dire’** examination was conducted on both complainant and **PW2**. **‘voire dire’** is a latin term which literally translated means **“to speak the truth”**. S. 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya provides that a court conduct an examination on a witness of **“tender years”** to determine whether or not such a witness understands the nature and meaning of an Oath. The term **‘tender years’** has generally been taken to mean a child aged 12 years and below. The complainant gave her age as 14 years whilst **PW2** said that he was 16 years old. None of them could be described as a child of tender years and both would be deemed to be possessed of sufficient intelligence to comprehend the meaning and nature of an oath. In the circumstances there was no need and certainly no legal obligation on the trial magistrate to conduct a **‘voire dire’** examination on either complainant or **PW2**. I find no merit in this ground of the appeal and the same is hereby dismissed.

The complainant in her evidence told the court that the Appellant threatened her with a knife, removed her clothes and proceeded to defile her twice. Her evidence is corroborated by **PW2, PW7 LAWRENT MWANZIGHE** and **PW8 SAIDI MWADILO**, who came to the rescue of the complainant and found the Appellant lying on top of her in the very act of defiling her. The complainant was taken to Voi District Hospital for examination and treatment. **PW10 DR. GABRIEL MONGOLA** testified that the complainant was found to have a foul smelling discharge from her private parts. Her hymen was not intact but no lacerations or bruises were seen on her genitalia. **PW10** stated that there was evidence of penetration. This medical evidence together with the evidence of the eye witnesses corroborates the fact of defilement. Why would an adult man be lying with his lower half exposed on top of a 14 year old girl whose underwear had been removed other than that he was defiling her?

The next issue is that of identification. Both complainant and **PW2** positively identify the Appellant as the man who defiled the complainant. They both spent several hours with the Appellant. He took them to his home where they met his mother. They spent a long time conversing with the Appellant. He pretended to be very concerned about their plight being youngsters stranded in a foreign land and offered to help them make their way back to Uganda. I am satisfied that both witnesses had more than ample time and opportunity to see the Appellant well. The rape incident complained of occurred at 8.00 p.m. No doubt it was dark. The complainant testified that when her rescuers came she held onto the Appellant’s T-shirt to prevent him from escaping. At no time did her assailant slip out of her sight. **PW7** and **PW8** both of whom testify that having been alerted by **PW2** they came out as villagers to search for the complainant. As they searched they heard the complainant call out for help. **PW8** states at page 17 line 7

***“We stopped and the girl got a chance to scream. We went and found the girl naked and accused tried to run away. The girl held him ...”***

Both **PW7** and **PW8** positively identify the Appellant as the man they found in the very act of defiling the complainant. There is no evidence of any pre-existing grudge that would have motivated any witness to fabricate evidence against the Appellant. Even the complainant did not know the Appellant before this incident. In his defence the Appellant claimed that the doctor had been coached to give false evidence against him. Why would a doctor, a professional, who did not know the Appellant or complainant before come to give false evidence. This defence is not believable at all.

From the evidence on record it is clear that at least four witnesses have been able to positively identify the Appellant as the one who defiled the complainant. He was caught pants down in the very act. The complainant held on

to the Appellant to prevent him escaping. The witnesses at no time lost sight of him. I find that there has been a clear positive and reliable identification of this Appellant as the man who raped the complainant. There is in my view no possibility of a mistaken identify.

In offences under the Sexual Offences Act 2006 the age of the victim must be established as this greatly impacts on the penalty provisions. I note that the charge sheet indicates that the complainant was 18 years old. At 18 years she would be legally an adult and defilement only relates to sexual intercourse with a person under the age of 18 years. However in her own evidence the complainant told the court that she was 14 years old. Her P3 form also indicates her age as 14 years old. This is expert evidence from a medical professional who is qualified to assess age. The learned trial magistrate did address this anomaly in his judgement at page 41 line 2 where he stated

***“I have no doubt that the particulars that stated that the complainant is aged 18 years is a simple clerical error. Considering that the complainant’s age was not disputed by the accused even in his defence, I find that this error did not occasion a failure of justice.”***

I am in agreement with the above finding. Notwithstanding what is stated in the charge sheet all the evidence shows that the complainant was actually 14 years of age. As such I am satisfied that the evidence proves that complainant falls within the 12-15 year age group provided for in S.8(3) of the Sexual Offences Act.

The Appellant in his written submissions argued that the prosecution evidence was riddled with inconsistencies and contradictions rendering his conviction unsafe. I have gone through the lower court record with a fine tooth comb. I am unable to find any examples of such inconsistencies. On the contrary I find that the prosecution case was cogent, the witnesses were consistent and all remained unshaken under cross-examination by the Appellant.

The learned trial magistrate did consider the Appellant’s defence but on page 39 dismissed the same. I find that he was quite correct to do so.

Taken in its totality I find that the guilt of the Appellant on this main charge of defilement has been proved beyond a reasonable doubt. I do hereby confirm this conviction.

With respect to the second charge I note that the charge sheet indicates that the Appellant escaped from lawful custody at Voi Police Station. However all the witnesses state that the Appellant escaped from **Voi District Hospital** where he had been admitted for treatment. There is therefore an anomaly between the charge as framed and the evidence adduced in court. No explanation has been given for this anomaly. The prosecution made no application to amend the charge to conform with the evidence on record. For this reason alone I find the conviction in Count No. 2 to have no basis. The facts on record do not support the charge. I therefore quash the Appellant’s conviction on Count No. 2.

With respect to the sentences I do set aside the two (2) year sentence for Count No. 2. The twenty (20) year sentence with respect to Count No. 1 is lawful and indeed is the minimum provided for by S. 8(3) of the Sexual Offences Act. The same is hereby upheld. The upshot is that this appeal fails. The conviction and sentence rendered by the lower court with respect to the first count of Defilement are hereby confirmed and upheld.

**Dated and Delivered in Mombasa this 13<sup>th</sup> day of September 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-  
Appellant in person

Mr. Muteti for State

**M. ODERO**

**JUDGE**

**13/09/2010**