



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 2 OF 2010**

**PHILIP ORIENDO**

**NYAMIMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case number 563 of 2009 of the Senior Resident Magistrate's Court at Kisumu)*

**JUDGMENT**

This appeal arises from the decision and judgment of the Senior Resident Magistrate at Kisumu in CMCC number 563 of 2008 in which the appellant, **Philip Oriendo Nyamima Alias Kapus**, was convicted and sentenced to twenty (20) years imprisonment for the offence of defilement contrary to Section 8 (1) read with Section 8 (3) of the Sexual Offences Act.

The particulars of the charge were that on the 6<sup>th</sup> December 2008 in Kisumu District, the appellant penetrated **S.A**, a girl aged 14 years.

There was an alternative count of Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act. At the trial, the prosecution case was that the complainant **S.A (PW1)**, was at the material time aged 14 years old and a standard eight school pupil. She lived with her grandmother **J.O** at N Estate. On the material date at about 8:00 p.m. she was sent by a lady called **Kame** to go and buy tomatoes and salad. The complainant at times lived with the said lady and was at her house on the material day.

After buying the items, she (complainant) was called by the appellant whom she knew by appearance and

was commonly known as “**Kapus**”. He had a knife when he called her out by saying “**you girl come here**”. He alleged that she usually turned down his offers. He held her right hand and took her to a nearby house where he removed her clothes and placed the knife on a mat. He threatened her with the knife and after removing his clothes, pinned her down and defiled her by inserting his male organ into her vagina about

three times. At about 5:00 a.m. he took her to a nearby house belonging to A where a girl called A opened the door for her. She (complainant) had been abandoned at the gate of the house by the appellant. Later, she went to her grandmother’s house but did not find her grandmother. She kept her blood stained clothes in the house. After a while the lady known as Kame arrived and informed her that the Chief was looking for her. The two went to the Chief’s camp where the appellant and another person were brought. The other person was alleged to have been involved in robberies although the complainant exonerated him in the offence committed against her. As the two people were taken to Kisumu Police Station, the complainant went to Kisumu District Hospital where she was examined by a doctor.

**APC Januarius Konge (PW2)** and **APC John Songok (PW3)** both attached to the Nyabera Chief’s camp Winam Division acting on instruction from the **Assistant Chief David Ouko** traced and arrested the appellant on allegation that he had defiled the complainant. Thereafter, the appellant was taken to the Chief’s camp and then to the Kisumu Police Station.

The Assistant Chief of Nyalenda “A” Sub-location was **David Raporo Ouko (PW4)**. At 6:00 a.m. on the 7<sup>th</sup> December 2008 he received a report that the appellant had defiled a child. A second report to that effect was made to the Chief, **Otieno Kabisai**, who instructed the assistant chief to effect the arrest of the appellant commonly known as “Kapus”. The assistant chief accompanied by two A. Ps (PW2 and PW3) found and arrested the appellant.

**P. C. Florence Koech (PW5)**, of Kisumu Police Station investigation the case and charged the appellant accordingly. A clinical officer at Kisumu District hospital, **Bernard Omollo (PW6)** examined the complainant and compiled the necessary medical report (P3 form).

Upon examination on the 7<sup>th</sup> December 2008, the Clinical officer noted that the complainant had a perforated hymen and blood stains on the external genitalia and thighs. There was no indication of spermatozoa or infection. The evidence of the Clinical Officer culminated the prosecution case against the appellant.

On being placed on his defence, the appellant said that he was a plumber and stayed at Nyalenda. He was in his house on 6<sup>th</sup> December 2008 when the chief and two administration police officers went there and claimed that he had robbed somebody of his phone during the night. A search was carried out and after about 30 minutes a girl arrived.

He had not previously known the girl. He contended that he knew nothing about this case and implied that he was incriminated by the Chief with whom he had a grudge over a girl who was his girl friend but who was impregnated by the Chief. He later offered to leave the girl for the chief and left her after completing his exams.

After considering the evidence placed before her, the learned trial magistrate concluded that the offence of defilement had been proved against the appellant beyond reasonable doubt.

The learned trial magistrate found that the perforation of the complainant’s hymen and the presence of blood stains around her genitalia and thigh confirmed that there was penetration and therefore defilement, the absence of spermatozoa notwithstanding.

The learned trial magistrate also found that the appellant was the person responsible for the defilement. Consequently, the appellant was convicted and sentenced accordingly.

However, being dissatisfied with the conviction and sentence, the appellant preferred this appeal on grounds that the learned trial magistrate erred in law by admitting evidence of identification by a single witness and not taking into consideration that the prosecution case was not proved beyond reasonable doubt since a vital witness who was at the alleged scene of the offence did not testify.

Also, the learned trial magistrate erred by failing to evaluate the strength and weight of the appellant’s defence and ended up rejecting it without cogent reason.

Further to the foregoing, the appellant alleged violation of his rights under Section 72 (3) (b) of the old Constitution and holds the view that the failure to call the ladies known as Kame and A as witnesses was fatal to the prosecution case.

In support of his grounds, the appellant presented and relied on written submissions during the hearing of the appeal.

The respondent, opposed the appeal through the learned Principal State Counsel, **Miss Oundo**.

The learned State Counsel went through the evidence adduced against the appellant and contended that the P3 form confirmed the tearing of the complainant's hymen even though spermatozoa was not seen and that the appellant's conduct of hiding under a bed confirmed his guilt.

It was further contended by the learned State Counsel that the appellant's defence that he had a grudge with the chief was misplaced and that he was rightly convicted by the learned trial magistrate.

On the alleged violation of the appellant's Constitutional rights, the learned State Counsel contended that a delay of one day was not inordinate and did not prejudice the appellant.

Having heard both sides, the duty of this court is to re-examine the evidence afresh and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. To that extent, the evidence adduced before the learned trial magistrate has already been reconsidered hereinabove.

With regard to the offence of defilement, this court agrees with the learned trial magistrate that the vital ingredient of penetration was confirmed and proved. The complainant stated that a male organ was inserted into her female organ more than once.

The medical examination by the clinical officer (PW6) showed that the complainant's hymen was torn and her genital area was stained with blood.

Proof of penetration is proof of the offence of defilement. Therefore, the absence or presence of spermatozoa in the victim's sexual organ is immaterial. The mere act of penetration completes the offence.

Indeed, there was no dispute that the complainant (PW1) was defiled. The defence raised by the appellant was essentially that he was not responsible for the offence. He attributed his predicament to a chief. He alleged that the Chief bore a grudge against him over a girl who was his girl friend. This aspect of the defence was disbelieved by the learned trial magistrate. In any event, the learned trial magistrate noted that even if there was a grudge, it did not extend to the complainant.

This court has no reason to interfere with the findings of the learned trial magistrate in that regard and is of the view that the introduction of a grudge into the case was nothing short of an afterthought.

Although the appellant denied responsibility for the offence, the complainant's evidence implicating him was believable. He was not a stranger to the complainant. She had previously known him even if not by name. They lived in the same neighbourhood. She knew that he went by the name "Kapus". Her evidence showing that he

was the culprit was sufficient and credible on its own. She easily recognized him and indicated that they were together on that material date for a considerable period of time.

There was also indication that he even took her to a funeral on that date and returned her to the scene where he continued with his unlawful act. His conviction by the learned trial magistrate was proper and safe for this court to interfere with. The same is herein sustained.

On sentence, Section 8 (3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment if the victim is aged between twelve and fifteen years. The complainant was aged 14 years at the time. The sentence imposed by the learned trial magistrate was lawful.

On the alleged violation of the appellant's Constitutional right, the respondent conceded that there was a delay of one day but contended that it was not inordinate nor prejudicial to the appellant. This court agrees.

In any event, a breach of Section 72 (3) (b) of the former Constitution entitled the aggrieved person to monetary compensation only and not to an acquittal. (**See, Julius Kamau Mbugua =vs= Republic [2010] e KLR decided on 8<sup>th</sup> October 2010 by the Court of Appeal**).

All in all, this appeal has no merit and is dismissed.

**Dated, signed and delivered at Kisumu this 25<sup>th</sup> day of October 2010.**

**J. R. KARANJA**

**JUDGE**

JRK/ao