



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 9 OF 2019**

**BENSON OKOTH ODUNDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the conviction and sentence of the Senior Resident Magistrate's***

***Court at Maseno. (Hon. S. N. Oruo SRM) dated the 28<sup>th</sup> February 2019 in Maseno CR. SOA No. 3 of 2016)***

**JUDGMENT**

The Appellant, **BENSON OKOTH ODUNDO**, was convicted for the offence of **Defilement** Contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. He was then handed a sentence of Life Imprisonment.

**1. PW1, MERCY ACHIENG JACODUL**, was a Clinical Officer at the Chulaimbo Sub-County Hospital.

**2.** When she examined the Complainant, she found no abnormalities such as tears or lesions on the Complainant's labia. However, the labia minora were red and tender.

**3.** The Clinical Officer came to the conclusion that the Complainant had been defiled.

**4.** One of the reasons which enabled her to reach that conclusion was the fact that the Complainant's hymen was broken and that no hymeneal remnants were seen.

**5.** Although there was no spermatozoa seen, the witness saw pus cells, epithelial cells and some red blood cells.

**6.** During cross-examination, **PW1** said that the missing hymen appeared to have been an old occurrence. He explained that if the hymen had been freshly broken, hymeneal remnants would be visible.

**7.** That evidence corroborated the Complainant's evidence, as she testified that the Appellant had

***“done bad manners to me many times in***

***our house and even his.”***

**8.** The age of the Complainant was proved through the evidence tendered by her mother (**PW3**), as well as by the Birth Certificate which she tendered in evidence.

**9.** The child was 7 years old at the time when she was defiled.

**10.** When he was put to his defence, the Appellant denied having committed the offence.

**11.** He said that on the date when the offence was committed, he was working as an employee of the Complainant's mother.

**12.** He testified that the employer promised to pay his salary later, as she was still cash-strapped due to the fact that she was still servicing a loan.

13. According to the Appellant, his salary remained unpaid for a total of 4 months, leading him to issue a threat that he would quit employment.
14. He said that the Complainant's mother threatened that she would do "*something bad*" if the Appellant quit.
15. The Appellant said that he was arrested at the home of his employer, when he had gone there to collect his wages.
16. During cross-examination, the Appellant said that on the date when the offence was allegedly committed, he did not go to work.
17. I find the defence to be very curious, considering that when the Complainant and her mother testified, the Appellant never challenged their respective testimonies, which had clearly placed him at the scene of crime.
18. In any event, if the Complainant's mother had issued threats about 2 months after the incident in issue; and again 2 months later, those alleged threats cannot have had any bearing on that which had already taken place.
19. The Appellant was arrested on the day after the offence was committed.
20. PC Christine Ndanu testified that the Appellant was detained in custody, after his arrest.
21. After he had been charged in court, the Appellant was granted a personal bond, with one surety. However, it was not until 17<sup>th</sup> November 2016 when the Appellant procured a surety. That implies that between 6<sup>th</sup> September 2016 and 17<sup>th</sup> November 2016, the Appellant was in custody.
22. Accordingly, I find that the line of defence which the Appellant put forward, was definitely untrue. He cannot have been working for the Complainant's mother when he was in custody.
23. The learned trial magistrate was right to have rejected the defence.
24. As regards the sentence, I note that the Appellant was barely an adult when he committed the offence.
25. Although he committed a very serious offence, by defiling a child who was 7 years old, I believe that there might be reason to have a fresh look at the sentence of Life Imprisonment, which was handed down to him.
26. However, I find that before determining on whether or not to review the said sentence, and if so, the degree to which such a review would be justified, there is need for Probation and After Care Report.
27. Accordingly, I direct that the Probation Officer shall provide the court with a comprehensive Report, giving details of the interviews conducted with the families of both the Complainant and the Appellant.
28. The Report should also include details of interviews held with the community where the Appellant hails from.
29. I direct that the Report be filed in court within the next **30** days, to enable the court make the final orders on the issue of the sentence.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF FEBRUARY 2020**

**FRED A. OCHIENG**

**JUDGE**