



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 34 'A' OF 2019**

**GOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the conviction and sentence of the Principal Magistrate's Court at Winam (Hon. F. M. Rashid SRM) dated the 20<sup>th</sup> June 2019 in Winam PMCRC S.O. No. 54 of 2018/**

**JUDGMENT**

The Appellant was convicted for the offence of **Defilement** contrary to **Section 8 (1) (3)** of the **Sexual Offences Act**, and he was then sentenced to 20 years Imprisonment.

1. In his Petition of Appeal the Appellant asserted that the evidence of Identification was unsound.
2. He also said that the evidence adduced by the prosecution was full of contradictions and inconsistencies. In the said circumstances, the Appellant submitted that the witnesses who testified for the prosecution were unreliable, and their evidence ought not to have been relied upon.
3. As regards his defence, the Appellant submitted that it had not been challenged by the prosecution case, yet the trial court is believed to have failed to give it due consideration.
4. The Appellant told this court that he had informed the trial court that the Complainant was his child, whilst the Complainant's mother (**PW2**) was his wife.
5. He added that **PW2** had coached the Complainant to incriminate him;

**“... so that she can get an opportunity to bring other men in my house.”**

6. The Appellant's view was that if the Complainant was taken to hospital immediately after being defiled, the Medical Officer ought to have found spermatozoa when she examined the Complainant.
7. As no spermatozoa was found when the Complainant was examined, the Appellant submitted that there was no proof of defilement.
8. Not only was the Appellant's contention based on the absence of spermatozoa, but also on the fact that the Complainant's labia minora and labia majora were both normal.
9. Being the first Appellate Court, I will re-evaluate all the evidence on record.
10. I am mindful of the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were giving evidence.
11. **PW1, SAO**, testified that the Appellant inserted his penis into her vagina.
12. He threatened to kill her if she screamed.

13. According to **PW1**, her mother arrived back home, where she found the Appellant still defiling her.
14. The girl's mother also testified that she found the Appellant, whilst he was still defiling the Complainant.
15. **PW2** said that she found the Appellant on top of the child. When she asked the daughter about what had happened, the Complainant told **PW2** that the Appellant had defiled her.
16. That information prompted **PW2** to scream, attracting the attention of neighbours.
17. **PW3**, Nicholas Owino, was the Chairman of Community Policing at Meta Meta Unit, in the [particulars withheld] area of Kisumu.
18. When he received news about the incident, he rushed to the scene, where he found many people. He testified that the Complainant was too distressed to talk.
19. As members of the public wanted to lynch the Appellant, **PW3** phoned the Chief and the police officer In-Charge of crime.
20. Police officers arrived at the scene, and assisted by rescuing the Appellant from the members of the public.
21. **PW6**, Cpl Abdul Hussein, is one of the officers who went to the scene and rescued the Appellant.
22. **PW4**, Dr. Joyce Omondi examined the Complainant at the Jaramogi Oginga Odinga Teaching & Referral Hospital, Kisumu.
23. She testified that the Complainant sustained an injury which can be classified as "*harm.*"
24. **PW4** found that the Complainant's labia majora and labia minora were both normal.
25. However, the Complainant's hymen was absent; and no spermatozoa was detected on the Complainant.
26. **PW5**, Winfred Awuor Sibuur was a Clinical Officer at Jaramogi Oginga Odinga Teaching & Referral Hospital, Kisumu. She was the first medical personnel to examine the Complainant.
27. **PW5** testified that the Complainant had normal outer genitalia. However, her hymen was absent.
28. In the **P3** Form, **PW4** indicated that the result of the medical examination of the Complainant was;

**"Possible case of defilement."**

29. On her part, the Clinical Officer (**PW5**) did not make any definitive findings either in the Post Rape Care Form (PRC) or in her oral testimony in court.
30. The absence of spermatozoa or other discharge, on the body of the Complainant, is not, of itself conclusive.
31. I wish to re-emphasize that the offence is committed when there has been complete or partial penetration.
32. There is no requirement that the perpetrator should discharge seminal or any other liquid or substance into or onto the person of the Complainant.
33. In this case the doctor (**PW4**) testified that the Complainant had been defiled before. Perhaps that could explain the absence of the Complainant's hymen.
35. However, the particulars of the charge against the Appellant herein were that he had defiled the Complainant on 19<sup>th</sup> October 2018.
35. And the Complainant did not give evidence about any earlier incident of defilement.
36. I have no doubt that the Appellant was recognized by the Complainant and also by the Complainant's mother.
37. I also find that the age of the Complainant was proved through the Birth Certificate, which showed that she was born on 9<sup>th</sup> April 2006.
38. As the incident took place on 19<sup>th</sup> October 2018, I find that the Complainant was a minor, as at that date. She was less than 15 years old.
39. However, apart from the Complainant's oral testimony, there was no other evidence that proved penetration. At most, the doctor said that there was a possibility that the Complainant was defiled.
40. I find that although the evidence adduced by the prosecution was consistent, it was not sufficient to prove beyond any reasonable doubt

that on 19<sup>th</sup> October 2018, the Appellant defiled the Complainant.

41. I also find that the submissions by the Appellant, contending that the Complainant's mother had incriminated him, so that she could have the opportunity to bring other men into their house; is completely an afterthought. If anything, the Appellant sought to introduce new evidence into the case, at the appellate stage.

42. As the court was never requested to give leave to the Appellant to adduce new evidence during the hearing of his appeal, any attempt to introduce such new evidence was irregular, and thus inadmissible.

43. In the final analysis, this appeal turns on only one thing; the absence of evidence to prove beyond any reasonable doubt, that the Complainant was defiled on 19<sup>th</sup> October 2018.

44. Accordingly, the appeal is allowed: I quash the conviction, set aside the sentence and order that the Appellant be set at liberty forthwith, unless he is otherwise lawfully held.

**DATED, SIGNED and DELIVERED at KISUMU This 5<sup>th</sup> day of February 2020**

**FRED A. OCHIENG**

**JUDGE**