



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO. 13 OF 2015**

**DICKSON OGORO..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being appeal from the conviction and sentence in Kisii CMCCR NO. 1583 of 2014) (Hon. Kaitany SRM.)*

**JUDGMENT**

1. The appellant, **Dickson Ogoro**, was sentenced to fifteen (15) years imprisonment by the Senior Resident Magistrate at Kisii in Criminal Case No. 1583 of 2014, in which he was convicted for the offence of defilement, contrary to **S. 8(4)** of the Sexual Offences Act.

2. It was alleged that on the 25<sup>th</sup> May 2014, at [particulars withheld] Kisii Central within Kisii County, the appellant unlawfully engaged in sexual intercourse with V M, a child aged sixteen (16) years.

There was an alternative count of indecent act, contrary to S.11 (1) of the Sexual Offences Act. However, the appellant was convicted and sentenced on the main count of defilement.

3. Being dissatisfied with the conviction and sentence the appellant filed this appeal on the basis of the grounds contained in the petition of appeal filed herein on 16<sup>th</sup> February 2015.

At the hearing of the appeal, the appellant appeared with Mr. Sagwe as his advocate and presented written submissions which he fully relied on in support of his appeal.

4. The learned Prosecution Counsel, **M/s Mbelete**, appeared for the state/respondent and also filed her written submissions in opposing the appeal.

The rival submissions have duly been considered by this court in the light of the grounds in support of the appeal.

As was held in **Okeno Vs. Republic (1972) EA 32** and **Soki Vs. Rep (2004) 2 KLR 21**, the duty of this court is to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

5. In that regard, the case for the prosecution was briefly that the child complainant, **V M (PW 1)**, was at the material time aged 16 years and a form one student at [particulars withheld] Secondary School. On the material 25<sup>th</sup> May 2014, at about 4.30 pm she met the appellant as she was heading to her grandmother's

home. The two had previously not known to each other but the appellant commenced a conversation with her and decided to follow her from behind towards her grandmother's house.

6. She arrived at her grandmother's house and left shortly thereafter. The appellant was still around along the way but she kept on walking towards her home. He grabbed her hand and pulled her into a house in a secluded area. He locked the house door and later forced her to eat and also to sleep before moving her to another house at about 4.00 a.m. It was in that other house that he sexually assaulted her before releasing her at about 6.00 a.m. He followed her to her home but ran away before she arrived.

7. The appellant was arrested and charged with the present offence after the matter was reported to the police by the complainant's father, **A M (PW 2)**, and after the complainant had been medically examined by a clinical officer, **Daniel Nyameno (PW 5)**, who compiled and signed the necessary P3 form (P.Ex 1).

8. In his defence, the appellant indicated that he was at home on the material date plating trees when he was informed that a man with a panga (machete) was looking for him. The man appeared at the scene and questioned him about this case before assaulting him. He was thereafter taken to the police station and the hospital where he was examined and nothing was detected by the doctor who opined that the alleged offence did not happen.

9. After the conclusion of the trial, the learned trial magistrate took the view that the main count was proved beyond reasonable doubt against the appellant. In so doing, the learned trial magistrate heavily relied on the complainant's evidence which she believed along with that of **Dennis Ogoro (PW 3)**, and held that the appellant had sex with the complainant even though conclusive medical evidence to establish the fact was lacking.

10. In this court's opinion, the basic issue which presented itself for determination was whether the complainant (PW 1) was defiled and if so, whether the appellant was responsible for the offence.

Any person who commits an act which causes penetration with a child is guilty of the offence of defilement.

11. The birth certificate produced herein (P.Ex 2) indicated that the complainant was aged sixteen (16) years at the time of the alleged offence. This fact was thus established without any or substantial dispute.

In her testimony, the complainant implied that she was defiled by a stranger on the material date. She indicated that the stranger had sex with her between 4.00a.m and 6.00a.m and that he was no other person but the appellant.

12. However, evidence led by Dennis (PW 3) showed that the appellant was no stranger to the complainant as the two appeared to know each other very well. He did not say that he saw them having sex but he confirmed that they slept together on the floor while he slept on the bed. He also said that at about 5.00a.m, he heard him (the appellant) telling her to open her legs while hitting her.

13. The brief details of the alleged offence as reflected in the P3 form (P.Ex 1) indicated that the complainant was defiled by a person well know to her. Contrary to what she stated in court, the appellant was not a stranger to her. It would therefore appear that the complainant was not a trustworthy and candid witness such that her evidence that she had sex with the appellant on the material date was not reliable for a sound conviction of the appellant in as much as it was not corroborated by that of Dennis (PW 3) and that of the clinical officer (PW 5).

14. Corroboration is however not necessary in sexual offences by dint of S.124 of the Evidence Act such that a conviction on the basis of the complainant's evidence alone would suffice if the complainant spoke the truth.

As noted hereinabove the complainant (PW 1) did not speak the truth. She hid vital facts such as her familiarity with the appellant and the medical report (P.Ex 1) did not show that she had sexual intercourse

with the appellant on the material date.

**15.** Ironically, the medical report showed that the complainant was not a virgin and had previously engaged in sexual intercourse with men who may or may not have included the appellant. Suffice to say that the complainant was morally loose and the only reason why she disowned the appellant and later implicated him with this offence was that she had to give an explanation to her father of her absence from their home on that material date and night. She was simply a person bent at suppressing the truth to save her own “skin” at the appellant’s expense.

**16.** For all the foregoing reasons this court would find that there was insufficient and reliable evidence to prove beyond reasonable doubt that the alleged offence occurred and if in the unlikely event it occurred, there was no evidence proving that the appellant was responsible.

**17.** Consequently, the conviction of the appellant by the trial court was neither safe nor sound. The same is hereby quashed and the fifteen (15) years imprisonment sentence set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

**[Delivered and signed this 4<sup>th</sup> day of May, 2017].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

State Counsel - Mr. Otieno

CC Mohe/Dorothy

Appellant

Mr. Sagwe for Appellant