



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 133 OF 2013**

**P O N.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 391 of 2012 in the Principal Magistrate's court at Ukwala)*

**J U D G M E N T**

1). The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the night of 2nd and 3rd September 2010 at *[particulars withheld]* Sub location Ugenya District within Siaya County intentionally caused his penis to penetrate the vagina of S A O a child aged 12 years.

2). The alternative charge was committing Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the night of 2nd and 3rd September 2012 at *[particulars withheld]* Sub location, Ugenya District within Siaya County intentionally touched the vagina of S A O a child aged 12 years with your penis.

3). The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The facts were that the complainant herein is a step daughter to the appellant, the latter having inherited her mother under the tenets of Luo customs. On the material day the minor went to spend the night at the appellant's place. Unfortunately he defiled her and promised to give her some money. In her unsworn testimony the minor told the court that the appellant told her to go home where she reported the matter to her mother.

4). On getting the said news **PW2 C A O** the minor's mother informed the minor's grandmother. She noticed that the child was bleeding from her private parts. She took her to Jera hospital as well as reporting the incident at Sega police post. She was issued with a P3 form which was filled at the hospital.

5). **PW3 Susan Mackio**, is the proprietor of an ECD school at Sega. She said that she did not see the complainant on the material day. She was later called by PW2 to her place where she witnessed blood oozing from the minor's private parts.

**6).** **PW4 Jackline Akinyi Oleko**, a clinical officer produced the P3 form which according to her there were bruises on the labia minora and broken hymen and blood discharge from the vagina.

**7).** In his sworn defence the appellant admitted being HIV positive as he used to take drugs from Jera dispensary. Instead of offering any meaningful defence regarding the incident he mainly dwelt on issues regarding PW2 and himself.

**8).** Having read the pleadings herein as well as the written submissions by the appellant it behoves this court to analyse the evidence afresh and arrive at a new independent finding. First of all, the question of whether the minor was defiled, was well settled by the evidence on record as well as the P3 form produced by PW4. Further the issue of the age of the minor was not contested by the appellant and I am equally satisfied that she was 12 years.

**9).** But did the appellant defile the minor? Evidence on record suggest that the minor spend the night at the home of the appellant. In his defence there is no iota of evidence to suggest that the minor was not in his house during the material night. Consequently, in the absence of any contrary evidence I hold that the child spent the night at the appellant's home and further conclude that it must have been him that defiled her. The complainant's mother confirmed that this was not the only time the child would go to the appellant's home save that it was the only time that she spent there.

**10).** In the light of the above observation I do not think that this appeal is meritorious. The allegation of having not been supplied with the statements by the prosecution during trial are an afterthought. The appellant participated in the proceedings very well including cross examining the witnesses and there is nothing to suggest that he did not fathom the proceedings.

I must hasten to add that the applicant's beastly act was to infect the minor with HIV virus. If he had any difference with the minor's mother then he ought to have settled it with her but not to use the child as a pawn. The appeal is otherwise dismissed.

**Dated, signed and delivered at Kisumu this 4th day of May, 2015.**

**H.K. CHEMITEI**

**JUDGE**