



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 19 OF 2012**

*(An appeal against both conviction and sentence of the Senior Resident*

*Magistrate's court at VIHIGA in Criminal Case No. 28 of 2012*

*[L. O. ONYINA, SRM] dated 16th January, 2012)*

EMMANUEL ANUNU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGMENT**

The appellant was charged in the subordinate court with defilement contrary to **Section 8 (1)** as read with Section 8 (4) of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 2<sup>nd</sup> January 2012 at [particulars withheld] County within Western Province intentionally and unlawfully defiled a girl namely S U by causing his genital organ namely penis to penetrate into the genital organ namely vagina of the girl aged 17 years. In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the same Act. The particulars were that on the same day and place intentionally and unlawfully caused his genital organ to make contact with the genital organ of a girl namely S U aged 17 years by touching her vagina with his penis.

When the main charge of defilement was read and explained to him in Kiswahili, the appellant replied that it was true. A plea of guilty was entered. Later, on 12<sup>th</sup> January 2012, the facts of the case were summarized by the Prosecutor in court. The appellant is recorded as having said that the facts were true. That it was true that he had sex with the girl. He was consequently convicted on his own plea of guilty. He was sentenced to serve 15 years imprisonment.

He has now come to this court on appeal, claiming that he was not warned by the trial magistrate of the seriousness of the offence he was charged with. He has also stated that the sentence was harsh and excessive for a first offender. Additionally, that he was kept in custody for more than 24 hours before being charged in court, in violation of his Constitutional rights. He has also stated on appeal that he was a candidate expected to sit his K.C.P.E. Exams in 2012.

The appellant also filed supplementary grounds of appeal stating that the learned magistrate did not consider the prosecution facts and the elements of the case in making his decision.

I have perused the record of the proceedings in the subordinate court. The appellant pleaded guilty to the charge. In my view, the learned magistrate was correct in entering the plea of guilty.

The facts given by the prosecutor established that the appellant stayed with the girl from 1<sup>st</sup> to 3<sup>rd</sup> January 2012. They had sexual intercourse for two consecutive days. The girl was found to have been pregnant. The appellant admitted having sex with the girl.

However, one crucial element of the charge was not established in the facts given by the prosecutor. The girl was said to have been aged 17 years. No medical assessment of her age was done. There is no indication on when the girl was born. No birth certificate was relied upon to establish the age of the complainant. In my view, with the facts given by the prosecutor, it is highly likely that the girl was above 18 years. The facts as given by the prosecutor left a doubt as to the age of the complainant, which was an important ingredient of the offence of defilement. The benefit of this doubt has naturally to be given to the appellant.

In my view, the plea of the appellant was not unequivocal because the facts narrated did not establish all the elements of the charge beyond reasonable doubt. The age of the appellant was not established. Therefore the fact that the appellant agreed to the facts given did not mean that he committed the offence charged, as the facts did not establish an important ingredient of the charge that is the age of the complainant. The learned magistrate was therefore wrong in convicting the appellant. He should have been acquitted.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered this 13<sup>th</sup> day of March, 2014*

**George Dulu**

**J U D G E**