



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 236 OF 2011**

**CHRISPINUS LUCHELI ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising from the original Criminal Case No.522 of 2010 in Butali Senior Resident Magistrate's court – Judgment of [S. N. ABUYA, SRM] delivered on 21.10.1011)***

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

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1)** as read with **section 8(4)** of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant *on the 1.5.2010 in Kakamega North District within Western Province unlawfully inserted his genital organ namely penis into the genital organ namely vagina of M T a child aged 17 years.* The appellant was convicted and sentence to 15 years imprisonment. The grounds of appeal are that the trial court did not properly evaluate the evidence, the prosecution case had contradictions, no proof of age of the complainant was produced and there was failure of justice. Miss Andia, counsel for the appellant filed written submissions and expounded on the above grounds.

Counsel contends that there is no element of force or cohesion in the evidence. The complainant's hymen had already been penetrated before the alleged date of the offence. The complainant had already experienced sexual intercourse before the date of the alleged offence. No treatment notes were produced. The prosecution case indicates that the appellant fled while part of the evidence indicates that the appellant was found sleeping with the complainant. PW2 testified that he found the complainant bleeding but there was no such medical evidence. There was no age assessment report or Birth Certificate produced. The complainant did not even indicate the date of her birth.

The State opposed the appeal. Miss Opiyo submitted that there was medical evidence that proved that the complainant's hymen was broken. The defilement occurred on the 1.5.2010 and the examination was done on the 2.5.2010. The complainant was 17 years and the appellant claimed that he would marry her.

The record of the trial court shows that five witnesses testified for the prosecution. **PW1 M T** testified that on the 1.5.2010 at 5.00 p.m. she was coming from the shop heading home when the appellant called her in his house. When she entered the appellant locked the door and slapped her. He covered her mouth with some clothes and defiled her until Sunday evening when she was rescued by the village elder. The appellant fled and had defiled her once. It was the first time she had sex with a man. She did not know the appellant before but he is their neighbor. She was taken to Malava hospital and treated. The village elder found her in the house bleeding and the appellant ran away.

**PW2 H T** is the father of the complainant PW1. He testified that on the 30.4.2010 at about 6.00 p.m. he sent PW1 to the shop but she did not return. The following morning he continued with his work and at about 6.00 p.m. he heard that PW1 was in the appellant's house. He went there with the village elder and the appellant ran away. The appellant was arrested and taken to the police station on the 3.5.2010. PW2 was working with a tractor which got stuck near the appellant's house and got the information that PW1 was with the appellant. The appellant is his neighbor who had taken PW1 as his wife.

**PW3 REBMAN MUSIMBI** is the assistant chief. He arrested the appellant and took him to Malava police station. **PW4 DANIEL MBOYA MARENYA** was the area village elder. On the 2.5.2010 at about 7.00 p.m. PW2 went to his house and informed him that PW1 was with the appellant. They agreed to ambush the appellant at 9.00 p.m. They went there at 9.00 p.m. and arrested the complainant. The appellant was arrested the following day and taken to the police station. According to PW4 they found PW1 on the bed and the appellant fled when he saw them. **PW5 KIZITO SIFUNA** was a clinical officer who produced the P3 form. According to his evidence the complainant had already been penetrated and her hymen broken before the alleged defilement.

The appellant was put on his defence and gave unsworn evidence. The appellant testified that he went to collect sugarcane that had been harvested by PW2, the complainant's father. He finished the work and sat on his chair listening to a radio when the complainant, the appellant's brother and PW1's brother went there. They wanted to leave with him but he refused. The complainant remained with him while the other two left. One Jomo went there and left with PW1. Later PW1 went back to his house but he told her that she should first finish school before he could marry her. That was only a story as the complainant had asked if he could marry her. He told her that he would if she finishes her school but that was just a story. The complainant's father passed there while on a tractor and the tractor got stuck near his house. He was arrested but denied committing the offence.

The main issue for determination is whether the appellant defiled the complainant. According to the complainant it is the appellant who defiled her. The medical evidence shows that the complainant had had sex before that date. The P3 form indicates that the complainant had been penetrated before. It is clear from the evidence that the appellant is a neighbor to the complainant. Although the defence evidence was unsworn, I do find that the appellant was on the material day working with the father of the complainant using a tractor that got stuck near the appellant's house. The complainant testified that the appellant blocked her mouth and threatened her.

The evidence shows that the complainant and the appellant were friends. It is clear that the complainant was sexually active and had had sex before. It is not clear that the complainant was lured to the appellant's house. PW1 and PW2 stated that the appellant had taken the complainant as his wife. The complainant stated that she was found bleeding on the bed but that is not true as she had already had sex before. No blood stained clothes were produced. No police officer testified so that he could confirm whether there were any blood stained clothes. From the evidence on record it can be deduced that PW2 who is the father of the complainant was aware of the friendship between the appellant and PW1. The evidence of PW1 is quite doubtful. She testified that it was the first time she had sex with a man yet PW5 who examined her noted that she was sexually active. She also stated that she was found bleeding yet that was not true. There were no bruises or lacerations on the complainant's body to show that the appellant forced her.

The evidence on record raises doubt as to whether indeed there was defilement. The age of the complainant was not given. The appellant testified that she was a Form Two student at [particulars withheld] Secondary School. She did not indicate when she was born. Apart from the issue of age, I do find that the entire evidence is doubtful and the appellant is entitled to the benefit of doubt. There is the story of a stuck tractor and it is clear that PW2 and the appellant were ferrying cane as per the defence evidence. The defence evidence raises doubt on the prosecution case. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 9<sup>th</sup> day of July 2014

**SAID J. CHITEMBWE**

**J U D G E**