



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 83 OF 2013**

**NOEL OBURU ODERA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case number 992 of 2012 of the Principal Magistrate's Court at Siaya – J.N. Sani Ag. SRM)*

**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 are that on the 6th day of December 2012 at [particulars withheld] Sub location in Siaya District within Nyanza Province intentionally caused his penis to penetrate the vagina of N A O a child aged 15 years.

**2).** He was equally charged with an alternative count of committing indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 6th December 2012 at [particulars withheld] Sub location in Siaya District within Nyanza province intentionally touched the vagina of N A O a child aged 15 years with his penis.

**3).** The appellant was convicted and sentenced to 20 years imprisonment. He has filed this appeal citing 4 grounds. His counsel Mr. Ragot condensed them to 3 grounds.

**4).** The facts are that the complainant on the material day went to the appellant's house at around 7 p.m with the aim of looking for her friend J A who was the appellant's sister. She told the court that she did not find her and the appellant advised her to wait. At around 9 p.m the complainant's father, PW2 came knocking at the door with other people. The appellant did not open and this forced PW2 to get assistance from the administration police officers. When they arrived the appellant opened the door and the complainant was found in another room where the door had to be broken access it.

**5).** Both the complainant and the appellant were taken to the police cells and later to the hospital after two days. The medical examination carried by PW3 showed that the complainant had been defiled. As a consequence the appellant was charged.

**6).** In his defence the appellant did not deny that the complainant was not found in his house. He however said that he did not open the door as there were several people who were armed and it was only when he saw the police that he opened the door. He further denied that he had any sexual intercourse with

the complainant.

7). This appeal has been conceded by the state. I think this was right as the evidence on record materially contradicted each other. In the first instance there is no doubt that the complainant was aged 15 years and in standard 8 class. At that age and having given her sworn testimony she was able to inform the court whether or not the appellant had sex with her. She was categorical that he did not have sex with her though the door was opened.

8). The complainant gave the same information to PW5 Clp Godfrey Mulianga. Again there was nothing difficult for the complainant to inform even her parents of the ordeal but this seem not to be the case.

9). However, the clinical officer got other ideas in his report. This was an expert's opinion. How he concluded that the complainant was defiled yet she states otherwise is his own genesis. It is trite law that an expert opinion must also be corroborated. There is no indication from both the complainant and the appellant that there was any sexual activity. I do not think it was safe for the trial court to have relied on such uncorroborated expert evidence taking into account that the complainant though a minor was old enough to have appreciated if at all she had sexual intercourse with the appellant.

10). It would be therefore unfair to convict the appellant on doubtful uncorroborated evidence. This benefit should be granted to the appellant. Infact had the trial court taken into consideration the appellant's defence it would have arrived at a different finding.

In the premises, I allow the appeal and order the appellant to be set free unless lawfully held.

**Dated, signed and delivered at Kisumu this 14th day of July, 2014.**

**H.K. CHEMITEI**

**JUDGE**