



taken for medical examination the fact of penetration was not confirmed by the doctor. However, the complainant was found with injuries on the neck and abdomen.

The learned prosecution counsel submitted that the appellant had attempted to push and strangle the complainant and was found on top of her. Therefore, the appellant ought to have been convicted of indecently assaulting the complainant.

Having given consideration to the submissions by both sides, the duty of this court is to re-evaluate the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

Briefly, the prosecution case was that on the material date at about 5.30 p.m., the complainant **P. Z. N (PW3)**, was sent by her father, **P.S (PW1)**, to proceed to the house of the appellant to collect money owed by the appellant for trees sold to him by the complainant's father. The complainant left for the appellant's house but it took long for her to return. Her father asked his grandson, B.S. L (PW4), to go fetch the complainant. B arrived at the appellant's house but before he could enter therein, he heard the complainant crying from inside the house. He retreated and reported the matter to the complainant's father.

The complainant's father and the complainant's brother, **J. B (PW2)**, proceeded to the appellant's house and while there, the complainant's father opened a window using a stick. He then saw the appellant defiling the complainant. The appellant on seeing the complainant's father jumped off the complainant wore his trousers and asked for forgiveness. He was taken to the village elder and was on the next day handed to the police.

**Cpl. Jairus Mutoro (PW5)**, investigated the case and thereafter charged the appellant with the present offence.

A clinical officer at Kitale District Hospital, Kirua Labat (PW6) examined the complainant on 26th April, 2007 and in his opinion, he could not tell whether there was penetration. He nonetheless, confirmed that the complainant had bodily injuries but not on her private parts.

In his defence, the appellant swore that he was at home on the material date when his wife informed him that the complainant's father had sent his daughter to demand a sum of Ksh. 500/= from him. On the following day, the complainant's father sent his grandson to tell him (appellant) to meet him (complainant's father) at the local police station. They all met at the police station but there were additional people in the meeting. These included the complainant. He (appellant) was shocked when it was alleged that he had defiled the complainant. They were both taken for medical examinations.

The appellant considered that the complainant was a liar and that he was a stranger to the charge against him.

**Metrine Mukenda (DW2)**, confirmed that the complainant was sent by her father to collect Ksh. 500/= but was informed by the appellant's wife that the appellant had gone to Kiminini. **Kevin Namaswa Wafula (DW3)**, was also informed by the appellant's wife that the complainant had been sent by her father to collect Ksh. 500/= being an outstanding debt for a tree sold to the appellant.

**John Wangila (DW4)**, confirmed that the appellant had been at Kiminini on the material date upto 5.30 p.m when he returned to his home at Maridadi farm.

After considering the evidence placed before him, the learned trial magistrate took particular interest in an agreement purportedly entered between the appellant's father and the appellant to the effect that the appellant would pay the complainant's father a sum of Ksh. 11,000/= upon the appellant's admission that he had defiled the complainant and had asked for forgiveness. It is apparent that after considering the said agreement, the learned trial magistrate dismissed the defence raised by the appellant and convicted him of defiling the complainant.

With respect, and having reconsidered the evidence, the opinion of this court is that the learned trial magistrate failed to consider or overlooked the fact that medical evidence did not establish beyond reasonable doubt that the complainant was indeed defiled.

The clinical officer (PW6) clearly indicated that he was not certain that there was penetration. He was however certain that the complainant had been assaulted but not necessarily sexually.

It seems that the learned trial magistrate shifted the burden of proof to the appellant yet it was not the appellant's duty to prove his innocence.

As it were, the evidence by the complainant's father (PW1) that the appellant defiled the complainant was not supported by any other independent evidence, medical or otherwise.

B (PW4) did not see the appellant in the act of defiling the complainant and so did J (PW2) yet it was J who allegedly accompanied the complainant's father to the house of the appellant where the complainant's father allegedly saw the appellant defiling the complainant.

As to the complainant's evidence, it was apparently unworthy of credit. Firstly, it indicated that her father could not have seen her being defiled by the appellant as alleged through a window. She said that her father only knocked on the window and it was then that she went out and the appellant proceeded towards his shamba. She thus contradicted her father who said that he opened the window with a stick and saw the appellant in the act of defiling her. The court was not even informed whether it was a glass window or a wooden window.

Secondly, the complainant indicated that she was aged seventeen (17) at the material time yet the particulars of the charge indicated that she was thirteen (13) years old. Significantly, the complainant also indicated that she had an eight month child thereby implying that she had been a sexually active individual even before her alleged encounter with the appellant.

There was no credible documentary evidence establishing that the complainant was a minor as at the material date of the offence. She may as well have been an adult at the time.

Be that as it may, it is the considered opinion of this court that the conviction of the appellant by the trial court on the main count of defilement was unsafe in as much as it was not supported by credible and cogent evidence. If anything, the evidence against the appellant established a charge of assault causing actual bodily harm contrary to section 251 of the penal code.

Consequently, the appellant's conviction on the charge of defilement is hereby quashed and the sentence in respect hereof is hereby set aside. In substitution thereof, the applicant is hereby found guilty of the offence of assault causing bodily injury contrary to section 251 of the penal code and is convicted accordingly. He is hereby sentenced to the term already served under the previous sentence meaning that he is entitled to immediate release unless otherwise lawfully held.

Ordered accordingly.

**[Delivered and signed this 11th day of April, 2013.]**

**J.R. KARANJA.**

**JUDGE.**