



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL NO 5 OF 2012**

**SILAS OMULAYI OKWARO.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the Senior Principal Magistrate, Kitale dated 17<sup>th</sup> February 2012 in Criminal Case No 2752 of 2010)**

**JUDGMENT**

**Introduction**

The Appellant, SILAS OMULAYI OKWARO was charged with defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the 18<sup>th</sup> Day of October 2010 at [*particulars withheld*] Village within Trans Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina of M L, a child aged 15 years.

The facts of the case as recorded by the trial court are that the Appellant and the Complainant, M L were boyfriend and girlfriend and that on 18<sup>th</sup> October 2010, the Complainant sneaked from home and went to the Appellant's house. The Complainant and the Appellant had sex that night and at about 1.00 a.m one Emily who was also the Appellant's girlfriend went to the Appellant's house, caused a scuffle and made a report to the police the following morning at about 7.00 a.m. Both the Appellant and the Complainant were arrested and taken to Ndalu Health Centre for medical examination. On examination, the hymen of the Complainant was found to be torn and old looking and both the Complainant's and Appellant's urine had pus cells. The age of the Complainant was assessed at 15 years while that of the Appellant was assessed at 21 years. The Appellant denied the charge, terming it as fabrication by one Zakaria. The Appellant was tried and convicted at the Chief Magistrate's Court at Kitale and was sentenced to twenty (20) years' imprisonment.

**The Appellant's Appeal**

Being aggrieved by both conviction and sentence, the Appellant filed a Petition and Grounds of Appeal on 25<sup>th</sup> January 2012. The appeal was heard on 16<sup>th</sup> October 2013 with the appellant appearing in person and Mr. Kimanzi appearing for the State. The Appellant relied on his written submissions, whose gist was as follows:

- a. That the Prosecution failed to prove the charge of defilement since the Clinical Officer (PW 3) did not find any fresh tears, bruises or blood on the Complainant's vagina. There was therefore no recent penetration;

- b. The Judgment by the trial court did not set out the issues for determination, the decisions thereon and the reasons for the decisions;
- c. The trial court did not evaluate the Appellant's defence and did not give reasons for rejecting it.

**Opposition by the State**

In opposing the appeal, Mr. Kimanzi, learned State Counsel submitted that the Complainant, whose age was confirmed to be 15 years, admitted having had sex with the Appellant. The Clinical Officer testified that the Complainant's hymen was torn and confirmed the presence of pus. Mr. Kimanzi further submitted that a child of 15 years had no capacity to consent to sexual intercourse. With regard to the Appellant's line of defence that there existed a grudge between himself and the Complainant's father which his parents had attempted to resolve, Counsel submitted that the Appellant should have called one of his parents to confirm the existence of the grudge.

**Finding and Determination**

The Appellant's line of argument is that since the Medical Examination Report did not reveal any fresh tears, bruises or blood on the Complainant's vagina, there was no proof of recent penetration and the offence of defilement was therefore not proved.

The Complainant told the trial court that she the Appellant was her boyfriend and that the two of them had engaged in sexual intercourse previously. That would explain the state of her genitalia at the time the medical examination was conducted. The age of the Complainant was not in dispute and the fact that she had no capacity to consent to sexual intercourse was therefore not in doubt. Further the fact that she had been sexually active did not give a license for her to be defiled. The Complainant was consistent in her evidence even under the scrutiny of cross examination.

The Appellant advanced a general denial in his defence and did not make any attempt to controvert the evidence adduced by the Prosecution. I therefore agree with the learned trial Magistrate that the Appellant's defence was a mere denial and confirm the judgment in both conviction and sentence. Accordingly, this appeal fails and is hereby dismissed in its entirety.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER 2013**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT KITALE THIS 6<sup>TH</sup> DAY OF NOVEMBER 2013**

**J.R KARANJA**

**JUDGE**

**In the Presence of:**

.....Appellant

.....Respondent