



G.O.M.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 467 of 2011 of the Senior Resident Magistrate's Court at Bondo – Mr. J. W. Onchuru Esq.)

JUDGMENT

The appellant was charged with the offence of incest contrary to Section 20 (1) of the Sexual Offences Act number 3 of 2006. The particulars are that on the 24th day of June 2011 in Rarieda District within Siaya County being a male person caused his penis to penetrate the vagina of **MAM** a female person aged sixteen (16) years who was to his knowledge his daughter.

Secondly, he was charged on an alternative count of Indecent Act with a child contrary to Section 20 (1) of the Sexual Offences Act number 3 of 2006. The particulars are that on the 24th day of June 2011 in Rarieda District within Siaya county indecently touched the private parts namely vagina and breasts of **MAM** a child aged sixteen (16) years without here consent and who to his knowledge was his daughter.

The appellant was convicted on the alternative charge and sentence to twenty (20) years imprisonment. He was however acquitted on the main charge. He then filed this appeal which constitutes the following grounds:-

- 1. The learned trial magistrate in law and facts by convicting me on the basis of the complainant evidence which was adduced contrary to Section 19 of the Oaths and statutory act.**
- 2. The trial magistrate erred in law and facts by convicting me on the offence without corroboration evidence from the alleged siblings whom were at the scene of crime with the complainant.**
- 3. The trial magistrate erred in law facts by convicting me without evidence of an independent testimony from that of mother and her daughter.**
- 4. The trial magistrate gravely failed to consider that the complainant is not honest and credible witness after taking one week without informing her mother, teacher and neighbours of the incident.**
- 5. The learned trial magistrate erred in law and fact by convicting me and failed to comply with Section 50 (2) of the Constitution of Kenya.**
- 6. The trial magistrate further gravely failed to comply with Section 50 (g) of the Constitution of Kenya during my trial.**
- 7. I wish to pray that certified true copy of the proceeding and judgment be forward to me for my**

further ground and submission.

8. I wish to be present at the hearing of this appeal to argue the same personality.

The briefs facts are that **PW1 FAR**, the complainant's mother went to Ugenya for a funeral for ceremony on 23rd June 2011 leaving behind the complainant together with her other children under the custody of the appellant who was and is their father. When she came back from the funeral after some few days she was informed by the complainant that the appellant had defiled her.

The said witness proceeded to the school where the complainant by then in standard eight (8) was schooling. She met the deputy head master who advised her to seek advice and assistance from the police.

After reporting at Aram Police Station she was issued with a P3 from which was subsequently filled at Madiany District Hospital.

PW2 DOM is the Deputy Head teacher of L. Primary School where the complainant attends. On 27th June 2011 at 2:00p.m she received the report from PW1 and she proceeded to notify her together with the complainant to seek police assistance.

PW3 MAM, the complainant told the court that on 22nd June 2011 she went home from school and found that her mother had left for a funeral. As she slept that night her father woke her up and told her to sleep on the sofa. Her father that night touched her and on waking up he apologized and left.

On the following day after coming back from school, and after supper her father came back late in the night. He ordered her go to his bedroom where in the course of the night he kissed her and touched her breast and vagina. He asked for forgiveness and apologize.

On 27th June 2011 she told her mother who then proceeded to take action as earlier own observed.

From her evidence it is apparently clear that the appellant did not manage to penetrate her or in other words had sexual intercourse with her.

PW4 P. C. Samuel Ngeerah is the officer who received the information from the complainant and her mother. He recorded their statements and gave them the P3 form. He further produced the complainant's birth certificate.

PW5 Doctor Osiro filled the P3 form and his conclusion was that there was whitish discharge on the genitalia of the complainant. He concluded that the complainant had been sexually assaulted on 22, 23 & 24 June 2011.

On being put on his defence, the appellant simply denied the charges. The duty of this court as is the mandate is to evaluate the evidence on record with a view of reaching a fresh and an independent finding.

The issues which are to be determined is whether the trial court indeed was right in convicting the appellant on the alternative count and acquitting him on the first count.

What is not in dispute from the evidence on record is the relationship between the complainant and the appellant. The appellant is the father and the complainant the daughter. Further the age of the complainant is apparently not in dispute, as she was born on 11th April 1998.

Having read through the entire evidence and in particular the evidence of the complainant, I do agree entirely with the trial court that the offence of defilement was never established. It is the complainants own evidence that the appellant did not succeed in his mission. She went ahead and said **"Had I not pushed him on 24th June 2011 he would have defiled me"**.

That leaves this court to determine the alternative count of indecent Act. As rightfully observed by **Mr. Meroka** the learned State Counsel, the charge sheet shows that the prosecution brought it under the provisions of Section 20 (1) of the Sexual Offences Act number 3 of 2006 instead of Section 11 (1) of the same Act.

This can be rectified under the provisions of Section 382 of the Criminal Procedure Code which states:-

“ Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularly in the complain summon warrant, charge, proclamation order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”.

The failure to indicate the same as Section 11(1) did not occasion any injustice to either of the parties and in particular the appellant. The next issue to be determined is whether the appellant did commit the offence of indecent act. To help this court answer the question is the evidence of the complainant.

On the material night the complainant said in her evidence :- **“He ordered me to leave the bed and sleep on the sofa. I went to the sofa. I told him that I was feeling unwell. He then told me to go to the bedroom and sleep there. When I declined he ordered me to go to the bedroom. I went and slept on the master bed with him for about twenty minutes. I suddenly heard him touch my breast. He kissed my mouth and I told him to stop kissing or else I will tell my mother. I reminded him what he had done the previous day. He asked for forgiveness and told me to sleep. He touched my vagina with his hand and I pushed him “** of importance too is what the complainant told her mother when she arrived.

She said” **My mother did not come on Saturday. She came on Sunday but did not tell her. The following day on Monday I told her what he had done to me. I told her how my father had kissed me touched my vagina and my breast but I pushed him. He did not manage to penetrate me. I was wearing my skirt and pant. I also had a blouse. He passed his hand under the blouse and touched my breasts. He did not remove my pant but pushed it aside and touched my vagina “.**

Having extensively quoted the complainant, it is equally relevant to analyse what she told her mother and others.

PW1 said in her evidence in Chief:- **“The following day at night he grabbed her while armed with a knife took her to his bed and removed her clothes and sex with her. She said when he penetrated her she felt pain and pushed him”.**

PW4 the police officer who received both the complainant and her mother said:- **“On the night of 24th June 2011 while armed with a knife he threatened her. Defiled her while in the house. He touched her breasts and vagina while kissing her”.**

PW5 the doctor in his evidence said:- **She gave a history of having been defiled by her father.....she had been treated for sexually being assaulted from 22, 23 and 24th June 20011”.**

Before making further observations, it is worth defining what is Sexual assault.

Black Law Dictionary defines Sexual assault as **“Sexual intercourse with another person who does not consent, offensive sexual contact with another person”.**

From the evidence adduced by the complainant the same is at variance with what she told the above witnesses.

Sexual assault is of a higher degree than indecent act although both are offences. I do not understand why the complainant failed to tell the court for example during her evidence that the appellant was well armed with a knife. From her evidence nowhere does she mention any threat by the complainant. On the other hand the complainant's mother, the police officer and the doctor gave evidence which are at variance with that of the complainant. As a matter of fact their evidence is more damning against the appellant than that of the complainant.

If indeed the complainant had been sexually assaulted she should have been able to tell her mother least of all the police officer. The doctor did not help things either. How for example did he determine that the complainant had been sexually assaulted on 22, 23 and 24th June 2011. Did the complainant give such information to the doctor?. If so why did she not tell the court?.

Her evidence was very clear on what the appellant did for the two or three days. However what she told her mother and others is indeed complete opposite of what she told the trial court.

The offence facing the appellant is a serious one. Already he has been sentenced to serve twenty (20) years imprisonment. Section 124 of the Evidence Act states:-

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act where the evidence of alleged victim admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that when in a criminal case in which a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth”.

With due respect to the trial court, I do not think in this case the complainant was truthful. My observations are that she ought to have in the first instance notified her mother of what transpired including whether or not her father threatened her with a knife and whether he had sexual intercourse with her. If the evidence of her mother was tallying to a great extent with that of the complainant then I would have thought otherwise.

Further the doctors found as a fact that there was sexual assault upon the complainant. The complainant does not say so. Sexual assault as per the above definition is a serious offence. Apart from other consequences it injures the dignity of a person, more so of the complainant who was young and innocent. Unfortunately, she did not complain of the same to her mother nor at least tell the trial court.

This was a criminal trial. The principle as is always the case is beyond reasonable doubt. If there is any doubt then the same goes to benefit the accused. In this case I shall grant that benefit of doubt to the appellant.

I do not think that the complainant was truthful. This is the position envisaged by Section 124 of the Evidence Act earlier quoted above.

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

Orders accordingly.

Dated, signed and delivered at Kisumu this 9th day of July 2012

**H. K. CHEMITEI
JUDGE**

In the presence of:

.....State Counsel

..... Appellant

HKC/ao