



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA Criminal Appeal 81 of 2007**

*(Appeal arising from BGM CM CR. NO.1071 of 2005)*

**PETER OCHACHI OCHACHI.....APPELLANT**

~VRS~

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant Peter Ochachi Ochachi was convicted by Bungoma Court for the offence of defilement of an imbecile and sentenced to serve 5 years imprisonment. He appeals against conviction and sentence.

In his petition of appeal, the Appellant accused the magistrate of bias that he favoured the prosecution by convicting him on uncorroborated evidence. The sentence meted out to him was harsh and excessive. The defence was rejected by the court, the Appellant states.

The state was represented by Mrs Leting who did not support the appeal on grounds that the evidence was not sufficient to convict on the offence charged. The medical evidence did not corroborate the complainant's evidence. The state calls upon the court to allow the appeal.

I have carefully considered the evidence on record and make a few observations and conclusions. PW1 was a minor and an imbecile who gave sworn evidence after the court ruled that she was intelligent enough to understand the duty of telling the truth. The child testified that on the material day, she had gone out to collect firewood when the accused called her to go to his house to see something. He gave her ten (10) shillings. The Appellant put a mat on the floor and after undressing PW1, he had carnal knowledge with her. The Appellant then released her and warned her not to return to his house again. PW2 who is PW1's neighbour came and found the girl at her home. She said she saw her holding a Ksh.20/= coin which the Appellant had given her. This contradicts what the complainant said, she said she examined the girl's private parts and found lacerations. PW3 was a minor whom the court found unfit to testify on oath but intelligent enough to understand the duty of telling the truth. In her unsworn testimony, PW3 said that she saw the Appellant holding PW1's hand as she and others collected firewood from the land of the accused. The complainant spent sometime with the Appellant. Later PW1 joined them and was holding a coin of Ksh.20/=. PW4 the Clinical Officer examined the complainant one day after the incident. He found no bruises or lacerations. The genitalia was normal and there was no discharge. A urine test showed no infection.

The medical evidence does not support PW2's evidence that PW1 had lacerations. There was no evidence of penetration. The Appellant was charged with defilement which requires corroboration by medical evidence. There was also no evidence of age of the complainant which is also a requirement in order to determine that she was 14 years or below. The evidence from some witnesses is that she was 17 years which is far beyond 14 years.

I entirely agree with the state that the evidence on record cannot sustain a conviction of the offence charged. It is devoid of all the

ingredients of the offence of defilement of an imbecile. There was no evidence to prove that PW1 was an imbecile, not even from her parents or a medical practitioner.

I find that the Appellant was wrongly convicted of the offence of defilement of an imbecile. I quash the conviction and set aside the sentence. The appeal is accordingly successful. The Appellant is hereby set at liberty unless otherwise lawfully held.

F. N. MUCHEMI  
JUDGE

Dated, Delivered and Signed at Bungoma this 1<sup>ST</sup> day of march 2010.  
In the presence of the appellant and the state counsel Mrs leting