



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL 295 OF 2010**

**MICHAEL MAINA NJOROGE..... APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

*(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. O. Barasa–  
Resident Magistrate delivered on the 7<sup>th</sup> June, 2010 in CMCR Case No. 2455 of 2007)*

**JUDGEMENT**

The appellant **MICHAEL MAINA NJOROGE** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru law courts.

The appellant had been arraigned before the trial court on 23/8/2007 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (4) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded 'Not Guilty' to the charge and the trial commenced on 23/3/2009. The prosecution called a total of five (5) witnesses in support of their case.

**PW2 N M** was the complainant in the case. She told the court that in the year 2007 she was aged 15 years. On 17/7/2007 as she was going to school the appellant intercepted her. He carried her into a maize plantation where he proceeded to defile her. Later the complainant conceived and bore a child which she claimed had been fathered by the accused.

Upon the closure of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave a sworn defence in which he denied having defiled the complainant. On 7/6/2010 the learned trial magistrate delivered his judgment in which he convicted the appellant and thereafter sentenced him to serve twenty (20) years imprisonment. Being aggrieved the appellant filed this appeal.

Being a court of first appeal this court has a duty to re-examine and re-evaluate the prosecution case and to draw its own conclusions in the same (**AJODE Vs REPUBLIC (2004) KLR 82**). In any case of defilement the prosecution is required to tender proof of the following

- (i) The fact of penetration
- (ii) The identity of the offender

(iii) The age of the victim

The complainant **N M** testified as **PW2** in this matter told the court that on 17/7/2007 she was on her way to school when the appellant accosted her. He pulled her into the bushes and forcibly removed her clothes. He then proceeded to defile her. After the act the appellant told the child to dress up and go to school.

The complainant told the court that as a result of the defilement she conceived and bore a male child. As a result of her pregnancy she had to drop out of school.

**PW1 F W M** was the mother of the complainant. She told the court that upon noticing certain changes in her daughter, she took her to a local dispensary for examination. A pregnancy test revealed that the child was 20 weeks pregnant. **PW1** questioned the child who told her '**Michael Maina**' (the appellant herein) was the man who had defiled her. The matter was reported to police. The complainant eventually bore a male child.

**PW3 DR. SAMUEL ONCHERE** was a doctor attached to the Nakuru PGH. He told the court that his colleague '**Dr. Kamau**' examined the complainant on 25/7/2007. The doctor observed that the child was mentally retarded and noted that she was about 4 months pregnant. The doctor also noted that her hymen was perforated. The doctor concluded that the complainant had been defiled and ordered for a DNA test to determine the paternity of the child she was carrying. **PW3** produced the complainant P3 form duly completed and signed as an exhibit **P. exb 1**.

From this evidence the perforated hymen, the fact of the pregnancy there can be no doubt that penetration occurred. I therefore find as a fact that the complainant was indeed defiled as she has alleged.

The next issue requiring proof is the identity of the defiler. The complainant herself has identified the appellant as the man who defiled her. The child told the court that the appellant was well known to her as he was a neighbour. She was able to recognize him.

**PW1** the complainant's mother confirmed that the appellant was a neighbour who lived 3 plots away from their home. The incident occurred as the complainant was on her way to school. It was broad daylight and visibility was good. The appellant lay on top of the child as he defiled her which means that she was at all times in close proximity with him. Thus she had ample time and opportunity to see him well.

The complainant when reporting the incident to her mother named the appellant '**Michael Maina**' as the man who had defiled her. At all times the child remained consistent regarding the identity of her defiler. The complainant was a mere child and had no reason or motive to lie against the appellant.

As a result of the defilement the complainant conceived and bore a child. Section 36(1) of the Sexual Offences Act, provides as follows

***“36(1) Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence”.***

In exercise of its powers under this provision the court did direct that samples be taken from the appellant for DNA testing. **PW4 HENRY KIPTOO SANG** was the government chemist who conducted the DNA test. He produced as an exhibit his report dated 6/10/2009 **P. exb 3** which concluded that there was a 99.99% chance that the appellant was the biological father of the child borne by the complainant. This report corroborates and confirms the testimony of the child that it was the appellant who had defiled her. I find that the appellant was positively and reliably identified as the man who defiled the child.

The final issue requiring proof in a defilement case is the age of the victim. The age is a crucial ingredient as the sentence to be imposed upon the offender in the event of a conviction will be determined by the age of the victim.

In this case **PW1** the child's mother said she was 17 years old. The complainant herself told the court that she was born in 1990. Although no document was produced to prove the age of the complainant it has been held that testimony from a parent is sufficient to prove the age of the child. **PW1** told the court that in March 2009 her daughter was 18 years old. Therefore in July 2007 when this incident occurred the complainant must have been aged 16 years. She was under 18 years and was therefore a minor at the time of her defilement. I find that the age of the complainant has been satisfactorily proved.

In his defence the appellant merely issued a blanked denial to the charge. however the evidence presented by the prosecution was overwhelming. I find that the appellant conviction on the main charge of defilement was sound and I do confirm that conviction.

Given that the child was aged 16 years at the time of the incident then Section 8 (5) of the Sexual Offences Act will apply. The mandatory minimum sentence provided for by law is 15 years. I find that the sentence of twenty (20) years was excessive. I therefore allow the appellant appeal against sentence and reduce his sentence from twenty (20) years to **fifteen (15) years imprisonment**. Only in this regard is the appeal successful. Those are the orders of the court.

**Dated and delivered in Nakuru this 28<sup>th</sup> day of July, 2017.**

Read in open court in presence of Appellant.

**Maureen A. Odero**

**Judge**