



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 15 OF 2016**

**J M M..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 557of 2014in the Senior Resident Magistrate’s Court at Wundanyi delivered by Hon K.I. Orange (SRM) on 28<sup>th</sup> April 2016)**

**JUDGMENT**

1. On 8<sup>th</sup> September 2016, this court rendered its Ruling wherein it deferred its final decision in the Appeal herein pending DNA testing of the Appellant herein, C M (hereinafter referred to as “PW 2”) and G M (hereinafter referred to as “the Child”), who was said to have been born out of a sexual relationship between the Appellant and PW 2.
2. On 19<sup>th</sup> September 2016, this court directed the Appellant, PW 2 and the Child to attend the Government Chemist for purposes of taking a DNA test to establish the Appellant’s paternity in relation to the said child. It fixed the matter for Mention on 25<sup>th</sup> October 2016 with a view to establishing if the DNA results would have been received and/or for its further orders and/or directions.The matter was mentioned on the aforesaid date, the same date the Prosecution filed the Human Identification Report dated 30<sup>th</sup> September 2016.
3. The said Report showed that the buccal samples of the Appellant, PW 2 and the child were the specimens that were collected for analysis. George Oguda, Principal Chemist, who prepared the said Reportexplained that every person inherits half of their DNA from their biological mother and the other half from their biological father and that is was possible to determine the elements of DNA gained from the biological mother and the biological father.
4. After analysing the DNA profile, he came to the following conclusion and opined as follows:-  

**“Based on the above findings, J M M is EXCLUDED as the BIOLOGICAL father of G M, C (sic)M’s daughter.”**
5. It was evident from the Judgment of Orange K.I. , the Learned Trial Magistrate who heard the case herein that he convicted the Appellant herein based on the fact that PW 2 positively identified him, PW 2 had no capacity to consent to sex as she was a minor, there was penetration that was evidenced by an absent hymen and more particularly because he was not able to prove his defence of alibi.
6. In Paragraph 17 of its Ruling of 8<sup>th</sup> September 2016, this court found that the said Learned Magistrate

was correct in finding that the Appellant had not proven his alibi as he did not provide any evidence to demonstrate that he was at Mombasa. It also opined that it was immaterial that PW 2 had engaged in sexual relations voluntarily as she was a minor and not capable to giving consent.

7. The question that this court thus posed and sought to be answered conclusively by the DNA test was, who led to the pregnancy of PW 2 as she had averred that the only person who defiled her was the Appellant herein?

8. Undoubtedly, as the date of delivery of the Child appeared to tally with the date PW 2 alleged to have been defiled, an observation this court made in Paragraph 30 of its said Ruling, the biological father of the child could only have been the Appellant herein. The results have, however, excluded him from having been the biological father of the Child.

9. It must be emphasised as was stated in Paragraph 49 of this court's said Ruling that DNA testing is not mandatory in defilement cases as there are innumerable cases of defilement that do not result in babies being born. In the same breathe, the fact that the Child was born herein was not conclusive proof that the Appellant was sexually involved with PW 2. It was a matter of evidence. The burden lay on the Prosecution to prove beyond reasonable doubt and not on a balance of probability, that the Appellant did in fact defile PW 2 as she had contended.

10. As this court pointed out in Paragraphs 31- 34 of the said Ruling, there were several inconsistencies in PW 2's evidence. Bearing in mind the findings of the Principal Chemist that showed that the Appellant was not the biological father of the child, it was evident that PW 2 was not truthful at all during her testimony and lied under oath.

11. A lot of doubt was raised in the mind of this court of exactly what happened on the material date. The Principal Chemist scientifically exonerated the Appellant from having been present at the time PW 2 had contended to have been the day he defiled her. Without a doubt, it cannot be conclusively stated that the Appellant defiled PW 2 as the DNA results showed that she did in fact have sexual relations with another unknown male which resulted in her pregnancy.

## **DISPOSITION**

12. For the reason that this court came to the conclusion that the Prosecution did not prove its case beyond reasonable doubt, the upshot of its decision was that the Appellant's Appeal that was lodged on 10<sup>th</sup> May 2016 was successful. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Learned Trial Magistrate as it was clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

13. It is so ordered.

**DATED and DELIVERED at VOI this 27<sup>TH</sup> day of OCTOBER 2016**

**J. KAMAU**

**JUDGE**

In the presence of:-

Miss Oyier h/b for Gekonde for the Appellant

Miss Anyumba for State

Ruth Kituva– Court Clerk