



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 31 OF 2012**

**P G.....APPELLANT**

**V E R S U S**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT.**

P G was charged before Principal Magistrate's Court Maua with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006 (SOA). It was alleged that on 2.2.2012 at [particulars withheld] Sub location, he defiled H. K. a child aged 10 years old. In the alternative, he faced a charge of committing an indecent act with a child contrary section 11(1) of SOA. The appellant was convicted on the main charge of defilement and sentenced to life imprisonment. He has preferred this appeal challenging both conviction and sentence. The appellant filed grounds of appeal dated 20.2.2012 and additional grounds on the date 10.2.2015. The grounds can be summarized as follows:

1. **That the prosecution failed to call vital witnesses;**
2. **That the clinical officer's evidence was contradictory and there was no medical evidence linking the appellant with the offence;**
3. **That the court should have considered that the witnesses were all from the same family;**
4. **That the first report was not made immediately after the alleged offence;**
5. **That the court failed to consider the alibi defence.**

The appellant relied on the submissions filed together with the additional grounds.

The appeal was opposed by Mrs. Matheka, Learned State Counsel who submitted that there was proof of defilement because the minor was found to be bleeding and was unable to walk after the ordeal. She urged that if the appellant felt that the witnesses were necessary, he should have called them because the prosecution can only call witnesses who are beneficial to their case; that the trial court considered the appellant's defence and counsel urged the court to dismiss the appeal.

Briefly, the case before the trial court was that PW1 M R was at her home in Cheme on 16.1.2011 with her daughter G. M. (PW2) the complainant. At about 6.00 pm the complainant's grandmother sent her for bananas. Later the complainant was brought back by S M, PW1's brother. PW1 observed the complainant and noticed that she had blood on her legs and clothes and enquired what had happened to the complainant. She said that she had been hurt by a stick. PW1 decided to examine her private parts. It is

then PW2 said she had been defiled by P G. PW1 went to report at Police Station and complainant was later admitted to Maua Hospital for one day. PW1 identified the appellant as her cousin because their fathers are brothers.

PW2 G. M. underwent a voire dire examination and was allowed to testify on oath after the court was satisfied that she understood the meaning of the oath and was intelligent enough. PW2 recalled that on 16.1.2011 at about 6.00 pm, she was sent by her grandmother to get bananas. She was with another child on the road when she met the appellant who told her to put the bananas down; he took her to a thicket, removed her clothes and had intercourse with her. After he finished, he released her to go home but she was unable to walk. Her uncle K found her and took her home and it is then her mother took her to hospital. PW3 Paul Murunga, a clinical officer at Maua Methodist Hospital recalled that he was at the hospital on 17/1/2011 at about 2.30 am when the complainant was taken there. She was bleeding from her genitalia. On examining her, he found laceration of the vagina, which needed surgical intervention. A vagina swab revealed red blood cells and he produced the treatment notes as exhibits.

PW4 PC Albert Abere received a report from S M at about 2.00 am about the defilement. He visited the complainant at Maua Hospital. Next day the appellant was taken to Police Station by members of public.

When placed on his defence, the appellant opted to give an unsworn statement in which he said that when the incident occurred he was at Athi having left home on Saturday and returned the next Monday and many people went to his house to arrest him. He denied committing the offence.

Having considered the grounds of appeal and evidence on record, submissions by the appellant and State Counsel, I have no doubt in my mind that the complainant (PW2) was defiled. She narrated to the court what had happened to her. PW2's mother PW1 was the first to notice blood on the complainant's legs and clothes. The injuries she sustained were confirmed by PW3 who examined her on the same night about 2.00 am and found that the complainant was so injured in her vagina that she required surgical intervention. PW2 was admitted for that procedure to be done.

The question is who committed the offence. PW2 was alone at the time she was accosted. She had said that there was another child on the road when accosted but she never named the child. The Appellant never alluded to the said child. PW2 was recalled by appellant for further cross examination she denied that there was anybody on the road at the time she met the appellant. The incident occurred at 6.00 pm, the appellant was known to PW2 as he was a cousin to PW1. I have no doubt in my mind that the appellant was properly identified.

The appellant raised an alibi in his defence whereby he claimed to have been away from home from Saturday to Monday. I have perused the proceedings and I find that at no time during the hearing of the prosecution case, did the appellant intimate to the court that he intended to raise an alibi.

In the case, of **Karanja v. Republic (1983) KLR 501**. The court of appeal considered what constitutes the defence of alibi. The court said:

1. **“The word “alibi” is a latin verb meaning” elsewhere” or “at another place”. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant’s story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged.**
2. **In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.”**

In this case, the appellant raised the alibi in his defence which came as a total after thought. He did not even mention why he went to Athi. The alibi is vague and I prefer the complainant's evidence to the unsworn evidence of the appellant. PW2's evidence was not dislodged.

The appellant complained that only family members testified against him. Under section 143 of the Evidence Act, one witness can prove a fact. The prosecution can only call relevant witnesses to the case. Only family members are witnesses, it cannot go fishing for people who know nothing about the case. There was no miscarriage of justice in PW1 & 2 testifying. PW3 and 4 are not related to the complainant in any event.

The allegation by the appellant that the first report was not made to the police immediately is misplaced because the incident occurred on 16/1/2011 and the report was made on 17/11/2011.

The trial court observed that the complainant presented her testimony in an emphatic manner and was constant throughout and that there was no possibility of mistaken identity. I find that there would have been no reason for the complainant to frame the appellant if somebody else had defiled her. I am in total agreement with the trial court that it is the appellant who defiled the complainant. The conviction was well founded. I confirm it.

The complainant was said to be 10 years, a child of tender age. Under section 8 (2) a person convicted of defilement of a child under the age of 11 years and below is liable to life imprisonment. In the instant case, the sentence is lawful and this court will not interfere.

Consequently, the appeal is dismissed.

**DATED AT MERU THIS 17<sup>TH</sup> DAY OF MARCH, 2015.**

**R. P. V. WENDOH**

**JUDGE.**

**Appellant present**

**Mr. Mungai for State**

**Jane Court Assistant**