



**JAMES KARANJA MWAURA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.2577 of 2007 by Hon T. Matheka, Senior Resident Magistrate, dated 11<sup>th</sup> March, 2008)**

### **JUDGMENT**

The appellant was charged and convicted of the offence of **defilement** contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act, 2006** and was sentenced to life imprisonment.

The particulars of the offence were that on 25<sup>th</sup> day of July 2007 at (particulars withheld) in Nakuru District within Rift Valley Province, the appellant unlawfully had carnal knowledge of RW, a child aged 7 years.

Aggrieved by both conviction and sentence the appellant filed an appeal to this court on three grounds, namely:-

1. that the trial court erred both in law and fact by convicting him when there was no sufficient evidence;
2. that the trial court erred both in law and fact by failing to consider his defence;
3. that the sentence imposed on him was very harsh considering the fact that he was a first offender;

During the hearing of the appeal, learned counsel for the appellant contended that the appellant's *alibi* defence was not considered by the court. He submitted that the prosecution witnesses were contradictory as to the identity of the person who committed the offence; that there was a grudge between the complainant's mother and the appellant as a result of which the appellant was framed up.

Learned counsel for the respondent in opposing the appeal submitted that there was enough evidence against the Appellant; that the offence occurred during the day, that the complainant being eight years old was able to identify the appellant; that the evidence of the complainant was corroborated by that of PW6 and the clinical officer; that the appellant's *alibi* defence was displaced by the evidence presented by the prosecution witnesses and finally that the appellant's defence of bad blood with the complainant's mother was an afterthought as it was not raised at the trial.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence adduced in the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

A total of six prosecution witnesses testified in the case before the lower court. These were:

1. The complainant, PW2, told the court that she was at home with her sister and another girl when a man came and told her to do “*tabia mbaya*”. When her sister and the other girl left, the man pulled her, took her to her bed and did her “*tabia mbaya*”. That the man told her not to say what he had done to her. After she changed her clothes which were blood stained, she informed mama Betty and Mama Asha what had happened to her. This was after the women enquired what the man had done to her. During trial she identified the person who did “*tabia mbaya*” to her as the appellant.
2. PW4, told the court that she saw the appellant, whom she knew, speaking with the children, that she called two of the children, Wambui and Rachel and sent them to the shop as she went into the house to cook. Later she learnt that the complainant had been defiled.
3. PW6, Betty Mundia, recalled that on the day in question at around lunch time she went to collect her child who was playing with the other children in the neighbourhood. That she found her with the complainant who was crying. She saw the appellant standing at the gate. He called the complainant to send her but the complainant refused to go. When she (P.W.6) asked the complainant what had happened to her she told her that the appellant had done “*tabia mbaya*” with her. P.W.6 lifted her dress and noticed that she was bleeding. At that point, the appellant boarded a matatu and fled. She rang the complainant's mother and told her what had happened.
4. PW1, Dr. Daniel Wainaina who produced the P3 filled by Dr. Kamau, testified that at the time the complainant was examined, her hymen was broken and that there was discharge. He concluded that there was penetration.
5. PW5, PC Francis Kariuki, received the report of the alleged defilement on 26th July 2007 at about 4 pm. He arrested the Appellant after he was identified to him by PW3 and PW4.

PW3, the complainant's mother received the information that the complainant had been defiled from PW6, Betty Mundia. After she received the report, she went home and the complainant related to her the incident. She examined her and saw that she was bleeding. She took her to Nakuru Provincial Hospital where she was admitted for 2 days. Later, she made a report at Railway Police Station.

Upon considering the foregoing evidence, the trial court found the appellant guilty of the offence charged accordingly dealt with him as explained earlier.

From the medical evidence presented at the trial, I find that the complainant was defiled. The only issue for determination is whether there was sufficient evidence to prove that the appellant was indeed the person who did the act.

From the record, it is clear apart from the complainant that none of the prosecution witnesses saw the appellant commit the offence. However, there was evidence that the appellant was at the scene of the crime shortly before and after the complainant was defiled. PW 4 left the appellant talking to the children at the scene of the crime sometime before the offence was committed while PW6 found the appellant standing at the gate at the scene of the crime.

From that evidence, I have no doubt that the appellant was at the scene of the crime when the offence was committed. The complainant, who was crying and who refused to heed to the call by the appellant, told the PW6 what the appellant had done to her. Upon examination of the complainant, PW6 noticed that the complainant was bleeding.

In his defence, the appellant raised a defence of Alibi, which defence I have already found to have been totally displaced by the evidence of PW2, PW4 and PW6, he also alleged that he was framed up by PW4 with whom they had differences over a relationship gone sour. I also find this allegation untenable. This is because when PW6 reported the offence to the complainant's mother PW4 was not at the scene and was not even aware of the crime, she only learnt about the alleged offence after she went home from her place of work. No grudge at all was proved to exist between the appellant and PW6 or between the appellant and the complainant's mother.

But of great importance is that the trial court found that the complainant was a witness of truth. Her testimony taken together with those of the other witnesses show that the appellant committed the offence charged.

Having considered and re-evaluated the evidence adduced before the trial court, I find no good reason for interfering with the decision of the trial court. The sentence imposed by the trial court, is only sentence provided for for the offence the appellant was charged with. Consequently, I affirm the trial court's decision and dismiss the appeal.

**Dated, Signed and Delivered at Nakuru this 30<sup>th</sup> day of July, 2012.**

**W. OUKO  
JUDGE**