



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.355 OF 2009**

**ERICK GATHIRU KIMARU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal from original conviction and sentence in Nyahururu P.M.CR.C.NO.4731/05 by Hon C.K. Obara, Resident Magistrate,**

**dated 21<sup>st</sup> December, 2009)**

**JUDGMENT**

This is an appeal from the conviction and sentence of 20 years imposed by the court below, **C.K. Obara, RM** for the offence of **defilement of a girl under 16 years**. The appellant was charged under **section 145(1)** of the **Penal Code** but in convicting the appellant the court based the conviction and sentence under **section 8(1)(3)** of the **Sexual Offences Act** arguing that the charge under the Penal Code could not hold as the relevant provision had been repealed. I will revert to this issue later.

The appellant was aggrieved by the conviction and sentence and preferred this appeal. It is the duty of the first appellate court to re-evaluate the evidence on record afresh in order to draw its own independent conclusion.

Evidence for the prosecution was led that on 22<sup>nd</sup> September, 2005 at about 4.00 p.m. while looking after their livestock, the complainant (**A.W.K**) was approached by the appellant who got hold of her and defiled her. The appellant threatened the complainant with death if she ever told anybody of the incident. According to the complainant, due to this threat she did not tell her parents about the incident until 27<sup>th</sup> September, 2005, five days later.

Upon receiving the report the complainant was taken to the hospital where she was examined by **Dr. Weru**. At the time of the hearing **Dr. Weru** had left Government service and it fell upon **Dr. Peter Kihuria Wanderi** to present the evidence on medical examination on behalf of **Dr. Weru**. The report notes that the complainant's hymen was broken and there was a whitish discharge in her private parts. Although **Dr. Weru** made no conclusion, **Dr. Wanderi** was of the opinion that the broken hymen and the discharge was evidence of penetration.

The appellant was arrested and charged. In his defence he explained that on the day in question he went to the market and bought some goats returning home at about 6.45 p.m. He denied involvement in this offence. He called a witness whose testimony was not relevant. The broad issue to be determined is whether the appellant defiled the complainant.

The only evidence linking the appellant with the offence is through the complainant, whose evidence the trial magistrate believed in finding that the charge of defilement under the **Sexual Offences Act** was proved.

Learned counsel for the respondent did not support the conviction and sentence for the reasons that there was real doubt that the appellant committed the offence in view of the delay in making a report and conducting medical examination, there was no conclusion on penetration, counsel submitted. There is no doubt that the appellant and the complainant knew each other. The complainant maintained that the appellant defiled her while the appellant was categorical that he was not at the scene of the crime charged. That he had differences in his church to which he attributed to his woes. Although it was the complainant's evidence that she was defiled at **4.00 p.m. on 22<sup>nd</sup> September, 2005** she did not report this to anybody until **five days** later on **27<sup>th</sup> September, 2005**. The only reason she gave was that the appellant had threatened to kill her if she reported, yet she nonetheless reported and the threat had not been withdrawn. That piece of evidence is not persuasive, particularly in view of the age of the complainant – 16 years.

Secondly there was no medical nexus between the appellant and the defilement of the complainant. The examining doctor appeared to have forgotten to make a conclusion on the examination conducted on the complainant. The fact of a broken hymen and whitish discharge *per se* cannot be evidence of penetration by the appellant. The hymen may, have been broken by someone else. The nature of the whitish discharge was not explained. But more importantly the appellant was also examined and found not to have any injury to his male organ or a discharge.

With all these, it is clear the learned trial magistrate failed to evaluate the evidence and given the appellant the benefit of doubt.

For these reasons the appeal is allowed, conviction quashed and sentence set aside.

The appellant shall be set at liberty forthwith unless lawfully held.

**Dated, Signed and Delivered at Nakuru this 15<sup>th</sup> day of November, 2011.**

**W. OUKO**  
**JUDGE**