



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 348 of 2008
*(From original conviction and sentence in Criminal Case No.440 of 2007
of the Principal Magistrate’s court at Narok – S.M. GITHINJI, PM)*

KEFAS MOMANYI MWATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **KEFAS MOMANYI MWATI**, was charged with defilement of a girl contrary to “**Section 8(1)(2)**” of the **Sexual Offences Act No.3 of 2006**. He was in the alternative charged with indecent act on a female contrary to **Section 11(1)** of the same Act. He pleaded not guilty to both charges but after trial before the Principal Magistrate at Narok he was convicted on the main count and sentenced to 18 years imprisonment. He has appealed to this court against both that conviction and sentence.

At the hearing, Mr. Mugambi, learned state counsel, conceded the appeal on the ground that the charge against the appellant was not proved as required by law. He was particularly unhappy with the doctor, PW4, who did not say whether or not the complainant’s hymen had been broken. He also said that as there was evidence of bad blood between the appellant and his wife, PW1, the issue of fabricating the case against the appellant cannot be ruled out.

Having read the record, I agree with the learned state counsel that the appellant’s conviction cannot be allowed to stand. As the learned state counsel said the doctor did not come out clearly on the cause of the injuries he found on the complainant’s genitalia. He also did not say whether or not the complainant’s hymen had been torn. He opined that “the girl could have been sexually assaulted.” That is inconclusive evidence that cannot support such a serious charge.

Besides insufficiency, the evidence on record does not support the charge. The appellant was charged that between the dates of 19th March 2004 and 14th April 2007 in Narok District within Rift Valley Province he unlawfully had carnal knowledge of J.K.M, a girl aged 9 years old. There is no evidence of serial defilement. The evidence on the record is one of a single incident on 14th April 2007. Although the learned trial magistrate found the complainant’s mother, PW1, insincere, he nevertheless relied on her evidence. That was a grave misdirection. In **Ndungu Vs Republic, [1976-1980] 1 KLR 1442** the Court of Appeal held that the evidence of a person who is shown to be a liar cannot be relied upon.

For these reasons I quash the conviction and set aside the sentence. The appellant shall therefore be set free forthwith unless otherwise lawfully held.

DATED and delivered on this 24th day of February, 2010.

D. K. MARAGA
JUDGE.