



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 118 OF 2009

**(Being an appeal from original conviction and sentence of the SRM’s court
at Keroka in criminal case No. 392 of 2006 - Wahome, SRM**

BETWEEN

DICKSON OTUNDO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl under the age of 14 years contrary to **section 145 (1) of the Penal Code**. The particulars of the offence were that on the 13th day of June, 2006 in Nyamira District within Nyanza Province, he had unlawful carnal knowledge of T.K., a girl aged under 14 years. After a full trial the appellant was convicted and sentenced to 10 years’ imprisonment. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this court saying that there was insufficient evidence to warrant his conviction.

The evidence that was tendered before the trial court can be summarized as hereunder:

The complainant, PW1, was about 8 years at the time when the alleged offence was committed. She testified that on the material day she was sleeping in the appellant’s grandparents’ house. The appellant, who used to sleep in another house, had slept in the same house as the complainant but in the sitting room where he had put a mattress on the floor. In the course of the night the appellant went to the room where PW1 was sleeping, lit a match stick and held her neck. He then proceeded to defile her. PW1 called the appellant’s grandmother and told her what had been done to her. The complainant was bleeding and her grandmother saw blood on her dress. The appellant and his grandmother took PW1 to their home and the appellant warned the complainant not to tell her father about the incident. The complainant’s mother was informed and she took her daughter to hospital. The matter was then reported at Keroka police station. The complainant’s mother, PW2, said that the appellant and his grandmother tried to persuade her not to take PW1 to hospital.

Jackson Murauni, PW3, is a Clinical Officer. He examined PW1 and filled a P3 form. He assessed her age to be eight years. He found that the complainant’s hymen had been ruptured. In his view there was sufficient evidence that there had been penetration. There was even evidence of a sexually transmitted disease.

Police Constable Zablon Ogutu, PW4, testified as to how the appellant was arrested after a report had been made at Keroka police station.

In his defence, the appellant denied having committed the offence. He said that on the day he was arrested he was going to play football when he met strangers who asked him his name and when he told them they proceeded to arrest him. Thereafter he was taken to Keroka police station.

Although the only source of light that could have enabled the complainant identify the appellant is from a match stick and such light goes off after a very short while, there is additional evidence which tends to point to the appellant as the only person who could have defiled the complainant. They were sleeping in the same house on the material night. There was no other man in that house. The complainant reported to the appellant’s grandmother immediately after the appellant defiled her. The appellant’s grandmother saw the blood that was on the complainant’s dress. Both the appellant and his grandmother talked to the complainant after the incident and persuaded her not to tell her father what had been done to her.

The evidence of PW3 clearly revealed that the complainant had been defiled.

The trial court considered the defence that was advanced by the appellant and rightly rejected the same.

Having evaluated all the evidence on record, I am satisfied that the appellant's conviction was based on sound evidence. The sentence that was handed down to the appellant cannot be said to be harsh or excessive. I find no merit in this appeal and dismiss it in its entirety.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF JULY, 2010.

**D. MUSINGA
JUDGE.**

19/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Mutuku for the State

N/A for the Appellant

Appellant – present

Court: Judgment delivered in open court.

**D. MUSINGA
JUDGE.**