



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

**AT NAKURU**

**Criminal Appeal 112 of 2007**

**STEPHEN MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of **defilement of a girl** contrary to **section 145(1)** of the **Penal Code**. The particulars of the offence state that on the 5<sup>th</sup> of December 2004 at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] had carnal knowledge of **T. N.** a girl under the age of sixteen years. The appellant faced an alternative charge of **indecent assault on females** contrary to **section 144(1)** of the **Penal Code**. The particulars of the alternative charge state that on the 5<sup>th</sup> day of December 2004 at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] indecently assaulted **T. N.** by touching her private parts a girl under the age of fourteen years. The appellant pleaded not guilty.

After a full trial the appellant was found guilty and upon conviction he was sentenced to ten (10) years imprisonment. Being dissatisfied with the conviction and sentence the appellant appealed on the grounds that there were glaring discrepancies in the prosecution's case which should have been resolved in his favour. He argued the prosecution did not discharge the burden of prove. There was contradictory evidence regarding the dates when the offence was committed which should have been resolved in favour of the appellant. The defence by the appellant was not taken into account.

During the hearing of this appeal, the appellant submitted that the evidence by the complainant was that on 25<sup>th</sup> November 2006 she was defiled by the appellant. The charge sheet states that the appellant committed the offence on 5<sup>th</sup> December 2004. The complainant's mother testified that she reported the matter to the Police on 5<sup>th</sup> December 2004. The appellant was of the view that the offence having taken place in 2004, he was not charged in court until 8<sup>th</sup> November 2005. It was not possible to explain from the evidence why it took the prosecution over 11 months to arraign him in court, and why there were varied accounts on when the offence took place. He urged the court to resolve the discrepancies by allowing the appeal.

This appeal was opposed by the State. The learned State Counsel submitted that the appellant was found guilty of defiling a mentally challenged girl aged 12 years. The complainant was duly affirmed by the court after the court conducted a *voire dire* examination. The complainant was also sent for medical examination. The doctor confirmed that she was suffering from mild mental retardation but could give evidence in court if the proceedings were conducted slowly to give her time to think. The evidence by the complainant was clear that it is the appellant who was well known to her who defiled her at 1.00 p.m when she was walking home from school. The P3 report showed that the complainant's hymen was partly broken. The ingredients of the charge of defilement were proved. He urged the court to uphold the decision of the trial court.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing the court should bear in mind that it never saw or heard the witnesses and give due allowance for

that. See the case of **Njoroge vs. Republic [1987] KLR 19**. I briefly set out the evidence that is before the trial court which led to the conviction and sentence of the appellant.

The charge against the appellant is that on the 5<sup>th</sup> December 2004 he had carnal knowledge of the complainant. The charge sheet shows that the appellant was arrested on 5<sup>th</sup> November 2005. He was arraigned in court on 8<sup>th</sup> November 2005. **T. N., PW1** and **L. W. K.** testified that on 5<sup>th</sup> December 2004 she went to report at Njoro Police Station that her daughter had been defiled by the appellant. She told the court that the complainant was mentally retarded. Before she discovered the complainant had been defiled, she had noticed the complainant had not had her monthly periods, she was also complaining of stomach pains that are when PW1 threatened the complainant to tell her what had happened. PW1 beat the complainant that is when she revealed she had been raped by the appellant while coming from school at about 1.00 p.m. According to PW, this was 5 days after the rape.

**Elizabeth Cherop, PW2** was the investigating officer in this matter. She testified that on 6<sup>th</sup> December 2004 she received a complaint by PW1 that her daughter who was mentally handicapped was defiled by the appellant. According to PW2 the offence took place on 25<sup>th</sup> November 2004. The complainant also testified and detailed how the appellant took her into a plantation and defiled her. He warned the complainant not to tell anybody else he would kill her. The complainant was later on interrogated by her mother. She was beaten and she was asked to say to who had defiled her. That is when she revealed what had happened.

The matter was reported to the Police, the complainant was taken to the hospital. **Dr. Asenath Mose, PW4** gave evidence on behalf of **Dr. Obwoga** who had completed the P3 forms. She confirmed that the complainant was under the age of seventeen years. On physical examination no PV discharge was found only hymen membrane was partly present in the genitalia. During cross-examination this witness stated that there was nothing to show the complainant was defiled.

After evaluating this evidence the trial court found:

***“That the hymen membrane was partly present. The P3 indicates that there may have been penetration but no violence was used. The testimony of the subject is very clear. Something was done to her. She is adamant it is the accused person. Her mother told the court that the subject named the accused person upon being asked to say what had happened to her.*”**

***I wanted her under cross examination. She would not budge from that – despite accused effort to show that she had been coached to implicate the accused person. She was defiled. That is the medical evidence. She may not recall the date – but the evidence is there – that it was 3 weeks before she was examined.”***

There are so many discrepancies on the dates when this offence took place. The charge sheet states the offence was committed on 5<sup>th</sup> December 2004. The complainant’s mother states that she went to the Police Station on 5<sup>th</sup> December 2004 while in her evidence she says that she discovered the complainant had been defiled five (5) days prior to her discovery and going to the Police to make a report. The investigating officer categorically states that she received the report on the 6<sup>th</sup> December 2004 and the complainant was defiled on 25<sup>th</sup> November 2004. The medical examination was done on 15<sup>th</sup> December 2004, it is indicated the report was made to the Police on 6<sup>th</sup> December 2004.

These discrepancies of the dates on when the offence took place, when it was reported to the police affect the credibility and the weight of the evidence before the court. Every witness gave a varied date. This is compounded by the P3 report which was completed on 15<sup>th</sup> December 2004. The report indicates and I quote:

***“No PV discharge, No fresh hymeneal tears, no tears in introits, No PV bleeding, hymen membrane partly present.”***

In her evidence the doctor who produced the medical report was none committal when she said that there may have been penetration but no evidence of violence. During cross examination she was categorical that there was no evidence to show that the complainant was defiled. In view of these discrepancies, I find the conviction of the appellant not safe to sustain. The appellant should have been given the benefit of doubt and acquitted of a charge of defilement. Accordingly the conviction and sentence of ten (10) years imposed by the trial court is hereby quashed. The appellant is to be set at liberty forthwith.

**Judgment read and signed on 14<sup>th</sup> November, 2008**

**M. KOOME**

**JUDGE**