



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

**Criminal Appeal 83 of 2006**

**FELIX LUWAMBE GONZI ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**Coram: Before Hon. Mr. Justice L. Ngagi**

**Ms Mwaniki for the State**

**Appellant present in person**

**Court clerk – Kinyua**

**J U D G M E N T**

The appellant was charged with the main count of defilement of a girl under 16 years contrary to section 145(1), and with an alternative count of indecent assault of a female contrary to section 144(1), both of the Penal Code. At the end of the trial, the resident magistrate at Mombasa found the appellant guilty on the charge of defilement, and correctly made no findings on the alternative charge of indecent assault. The trial resident magistrate then referred the appellant to the senior resident magistrate for sentencing, and the latter sentenced the appellant to ten (10) years imprisonment. The appellant has come to this court on appeal against both conviction and sentence.

At the hearing of the appeal, the appellant appeared in person. His two main grounds of appeal were that there were contradictions between the complainant, who was P.W.1, and her mother, who was P.W. 2 as to the time when, and also as to the place where the alleged offence took place. On her part, Ms. Mwaniki for the Republic conceded before the court that the conviction was not safe. There was a contradiction as to the clothes which the complainant was wearing as well as to the actual place where the offence took place.

Before delving into the issue of the contradictions, it is note-worthy that on the day on which the trial commenced, the prosecution is recorded as having said –

**“I have three witnesses”**

**Thereafter the record reads –**

**“Mulongo for accused.**

**Complainant aged 8 years to be sworn.**

## **PROSECUTOR**

**Minor aged 8 years sworn in Kiswahili”.**

This is then followed by the testimony of the complainant, who testified as P.W.1. She told the court that she was eight years old, but did not know the year when she was born. However, she knew that her birth certificate was at home.

The particulars of the offence as charged indicate that the appellant had carnal knowledge of the complainant, a girl under the age of 16 years. It was therefore imperative for the prosecution to establish the age of the complainant as it was one of the ingredients of the offence. This could easily have been done by producing the birth certificate which the complainant said was at home. Even if her birth certificate was not available, the complainant’s age could have been medically assessed. This was not done. Nor did the learned trial magistrate make note of the complainant’s apparent age. Instead, she proceeded to record the complainant’s evidence on oath even without inquiring whether the latter was intelligent enough to understand the nature of the oath and the duty of speaking the truth. How the court arrived at the conclusion that the minor was eight years old and should be sworn even before she testified as to her age remains a mystery.

Coming to the actual evidence, there is a contradiction as to the clothes which the complainant was wearing at the material time. In her evidence, she told the court that she was wearing a dress which was white and blue. Although this was corroborated by P.W.4, the investigating officer, it was contradicted by P.W.2, the complainant’s mother, who told the court that the complainant had been wearing a white dress. Secondly, the complainant told the court that when she came back home, she did not sleep in her clothes, but instead kept them where they usually kept dirty clothes. Her mother, P.W.2, told the court that the complainant had slept in the white dress which P.W.2 identified in court. But the dress which was exhibited in court was not white; it was white and blue. So, what dress was the complainant wearing?

Another point on which P.W.1 and P.W.2 were at variance relates to the place where the incident took place. According to P.W.2, the complainant told her that –

**“there is a man who called her and took her to his house and the man defiled her.”**

This does suggest that the defilement took place in the house. But in her evidence in cross-examination, the complainant said –

**“He took me to the place far away from the houses ... I was not defiled in any house.”**

So, then, where did the defilement take place? Was it in a house or was it outdoors?

Lastly is the issue of the identity of the assailant. The complainant does not come out clearly as having known the appellant before the date of the offence. In her evidence in chief, she said –

**“I had seen the accused before. I don’t know his name.”**

In cross-examination she said –

**“Before that he had seen me with my friend. I had seen him for three other times. When he called me I couldn’t identify him ...”**

Given that this was a person she had seen three other times, why couldn’t she identify him when he called

her? Was it because she didn't know him well enough to identify him, or was it because it was dark? On that note, there is a conflict as to the time when the offence took place. In her evidence in chief, the complainant said that she was going to buy ice cream at 7.30 p.m. In cross-examination, she said it was 7.00 p.m. and that it was about dark. She also said that she reached home at 7.00 p.m. On her part, P.W.2 said in her evidence in chief that P.W.1 had gone to buy ice cream at around 7.00 p.m. and that she came back at 8.00 p.m. How did the complainant identify the appellant? As it was a bit dark, could the complainant be mistaken that the person she had seen about three times was the one who defiled her? This does not come out clearly from the evidence, nor was the complainant asked to identify the appellant in court.

In sum, even though it is clear beyond peradventure that the complainant was defiled, one is not as certain that it was indeed the appellant who defiled her. In the circumstances, it is doubtful whether it was the appellant who committed this heinous offence and he is entitled to the benefit of the doubt. The appeal is accordingly allowed. The conviction is quashed and the sentence set aside.

Dated and delivered at Mombasa this 10<sup>th</sup> day of July, 2006.

L. NJAGI

JUDGE