



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 283 OF 2002**

**(From Original Conviction and Sentence in Criminal Case No. 996 of 2002 of the Senior Resident Magistrate's Court at Nakuru – S. Muketi, Esq. )**

**FRED WALIBWA MASUBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant has appealed against the original conviction and sentence in Criminal Case No. 996 OF 2002, SRM Court, Nakuru. In the above case, the Appellant had been charged for the offence of Defilement of A Girl, contrary to Sec. 145(1) of the Penal Code.

The facts of the prosecution case as stated in the charge sheet are as follows:

**On the 25th May, 2002 at [particulars withheld] in Nakuru District of the Rift Valley Province, unlawfully had carnal knowledge of F C B a girl under the age of 14 years.”**

After a full trial, the Appellant was found “Guilty” and convicted accordingly. He was later sentenced to 14 years imprisonment plus 3 strokes of the cane. During the hearing of the appeal, the Appellant denied that he had gone to the house of the PW1 on the material day.

Besides the above, the Appellant also pointed out the PW2 and PW3 had contradicted each other. Whereas the PW2 had stated that the clothes of the complainant were water soaked, the PW3 stated that the same were blood stained. The Appellant also took issue with the fact that the police officer never took him to the Hospital for examination. Apart from the above, the Appellant also complained that the sentence was excessive.

On the other hand, the State through Mr. Gumo, Ass. DPP supported the conviction on the ground that the Appellant was well known to the complainant. He further added that there was no mistaken identity as the victim knew the Applicant by name. In addition to the above, Mr. Gumo submitted that the attack occurred at 4.00p.m. which was broad daylight. Mr. Gumo also submitted that when the complainant was examined by the PW3 he confirmed the penetration of the vagina.

Apart from the above, the doctor also observed laceration of the labia and bleeding. He was of the opinion that the Medical report was consistent with the complainant's testimony and that even the PW2 had corroborated the same.

The Learned Counsel concluded that the conviction was safe and that the sentence of 14 years imprisonment was well merited with the exception of corporal punishment that was outlawed.

In reply, the Appellant stated that though two people had claimed to have rescued the complainant none of them was called to give evidence.

This Court has carefully perused the above together with the record of appeal that contains the judgement of the Learned Magistrate viz, Mrs. Stella Muketi, then SRM, Nakuru. Being the first Appellate Court I am aware of my duty and obligation to re-evaluate and re-examine the evidence a fresh and reach my own conclusions. This Court also appreciates the fact that it never had the advantage nor opportunity to observe the manner and demeanour of the witnesses when they were giving evidence. This Court is also alive to its obligation to examine and consider carefully the grounds of appeal as stated in the case of

***Okeno Vs Republic [1972] E.A.***

According to the PW1 – F.C. – (herein - after known as the complaint) the incident took place at 4.00p.m. when it was broad daylight. Besides the above, the complainant stated very clearly that prior to the incident she had known the Appellant as Frederick and that he used to go to their home. That means that the complainant was able to recognize the Appellant.

This court is of the considered opinion that there was no mistaken identity. Apart from the above, the medical evidence that was adduced by Dr. Vitalis Kogoyo clearly proved that the complainant had been defiled on the material day. The above facts clearly show that the complainant had been defiled by the Appellant.

Having analyzed the above facts it is apparent that the Learned Magistrate had framed and analyzed the issues properly and reached the correct conclusion. Since the evidence was overwhelming I hereby uphold the conviction. The same is safe and well merited.

Given the fact that the maximum sentence is life imprisonment, I am of the considered opinion that the sentence of 14 years imprisonment is lawful and valid. I hereby confirm the said sentence.

However, I hereby set aside the 3 strokes of the cane since corporal punishment has been outlawed. It is only to that extent that the appeal succeeds.

**MUGA APONDI**

**JUDGE**

Judgement read, signed and delivered in Open Court in the presence of the Appellant and Mr. Gumo, Asst. DPP.

**Right of Appeal Explained.**

**MUGA APONDI**

**JUDGE**

**31ST MARCH, 2005**

