



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

Criminal Appeal 138 of 2003

**(From Original Conviction and Sentence in Criminal Case No. 2291 of 2002 of the
Chief Magistrate's Court at Mombasa B.N. Thurania – Senior Resident
Magistrate)**

DAVID MUNGATHIA APPELLANT

Versus

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was upon trial for the offence of defilement of a girl contrary to section 145(1) of the Penal Code convicted and sentenced to 14 years imprisonment with hard labour. He was also ordered to receive 24 strokes of the cane. He has appealed to this court against both the conviction and sentence. He has listed 7 grounds of appeal which can be condensed to 5 and they are to the effect that:-

- 1. That the learned trial magistrate erred in relying on the evidence of P.W.2 which was a fabrication because of the grudge the Appellant had with that witness.***
- 2. That the learned trial magistrate erred in relying on a minor's evidence which was contradicted by that of P.W.2***
- . 3. That the trial magistrate erred in relying on the "circumstantial evidence of P.W.4" the doctor who examined the complainant.***
- 4. That the learned trial magistrate erred in convicting the Appellant when there was no sufficient evidence to support the charge.***
- 5. That the learned trial magistrate erred in dismissing the defence case.***

In both his written and oral submissions before me the appellant basically repeated what he had said in his defence in the lower court. He said his prosecution was a frame up because of the grudge the complainant's mother bore against him. He said he had lent her Sh. 18,000/= which had proved difficulty to repay. To get him out of the scene and stop him from pestering her, he claimed, she hatched a plot with her daughter the complainant to have him consigned to prison. He said the evidence of the two should not therefore have been relied on. Independent evidence of neighbours should have been sought, he added.

According to the Appellant the evidence of the mother of the complainant that she caught him on the act with the complainant naked contradicted that of the complainant which was that she had her dress

on. The Appellant also claimed that he was examined by a doctor at the Coast Provincial General Hospital and probably because the result of that examination contradicted the rest of the prosecution evidence it was not tendered in court. In the circumstances he urged me to allow the appeal.

In reply, Miss Mwaniki, learned State Counsel, submitted that the appeal was for dismissing. She said there was ample evidence to support the conviction. Though the evidence of P.W.1 was that of a child of tender years it was consistent and truthful and was amply corroborated by that of P.W.2 and the doctor P.W.4. She urged me to dismiss the appeal in its entirety as the conviction was safe and the sentence legal. I have considered these submissions. I have also carefully read the lower court record. It shows that the Appellant and the complainant's mother P.W.2 lived together in a two roomed house as husband and wife. The Appellant was however not the father of the complainant.

The father of the complainant had died a while earlier. The complainant's mother had a kiosk where she sold second hand clothes. It engaged her between 6.00 a.m. and 7.00 p.m. every day. The Appellant on his part sold miraa at Mwembe Tayari. He used to go to Kongowea Market very early every morning for his supplies but returned home at about 9.00 a.m. to shower and have breakfast before he went to sell at Mwembe Tayari.

On 30/8/2002 after taking a shower the Appellant went into the bedroom and lay on bed. He called the complainant there and after touching her private parts he removed her knickers and asked her to join him in bed which she did and he started defiling her. As P.W.2 was not expected at home at that time the Appellant did not bother to lock the door.

On that day by some strange instinct P.W.2 decided to go home at about 9.00 a.m. On arrival she found the Appellant on the act of defiling her daughter. She collapsed and fell down. When she regained her consciousness the Appellant was nowhere to be seen. On enquiry the complainant told her that that had been the order of the day that week. The Appellant had defiled her thrice that week. She took the complainant to hospital and later reported the matter to police.

One of the grounds of appeal attacked the evidence of the complainant as that of a minor. The record shows that she testified on oath after the trial magistrate was on voire dire examination, satisfied that she understood the meaning of an oath. Like the trial magistrate I believe her testimony. She gave a clear and detailed account of how the Appellant got her to go to bed with him and how her mother P.W.2 caught them on the act. The Appellant had, on death threats defiled her thrice previously.

The complainant's evidence was amply corroborated by that of her mother P.W.2 and the doctor P.W.4. The doctor who examined her a few hours after, found that her hymen had been ruptured. She had some lacerations on the vaginal wall and an examination of vaginal swab revealed the presence of spermatozoa.

I am satisfied that the Appellant's conviction was based on sound evidence. His allegation of a grudge the complainant's mother allegedly bore against him was not put to her in cross-examination and was clearly a concocted afterthought. His appeal against conviction is hereby dismissed.

The sentence of 14 years imprisonment imposed upon conviction of an offence which carries a life sentence cannot be said to be harsh. As regards the strokes of the cane, however, in line with the recent amendment I am inclined to set that aspect of the sentence aside which, I hereby do. Accordingly, save for the sentence relating to the 24 strokes of the cane which I have set aside this appeal is hereby dismissed in its entirety.

DATED and delivered this 17th day of May 2005.

D.K. MARAGA

JUDGE