

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 217 OF 2002**

DAVID WAITHAKA KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was charged before Senior Resident Magistrate's court Kajiado for the offence of defilement contrary to section 145 (1) of the penal code. After hearing the witnesses the court found him guilty and convicted him of the offence and sentenced him to 7 years imprisonment, hard labour and two strokes of the cane. He is dissatisfied with the said conviction and sentence against which he appeals.

The appellant raised 6 grounds in his memorandum of appeal in which he contends that his step mother who was supposed to be a key witness and with whom the child was left was not called as a witness; that there was no evidence to corroborate the medical evidence, that the sentence was excessive and it was based on the probation report which was not favourable.

The appeal was opposed and the state counsel submitted that the evidence of PW2 the complainants mother was corroborated by doctor's evidence.

Briefly the background of the case is that PW2 left her 31/2 years old daughter with a neighbour and went to the shamba at about 4.00p.m. On coming back she noticed the daughter walking with legs apart. She examined her and found that there was milking jelly in her private parts, she was bleeding and that the complainant told her that it is accused who had taken her to the banana plantation and did bad things to her. It is then he had appellant arrested and later charged. The doctor PW3 who examined the complainant found she had a foul smell from her vagina and under clothes, a torn hymen and cervix and swollen bruises of the labia majora and on testing he found spermatozoa and pus cells on the swab. He concluded that she was defiled.

The complainant was a child of 31/2 years old. She was not able to tell court what happened to her. The record shows that she only cried when asked if she knew the appellant. When asked if she knew the appellant she denied.

There was no eye witness to this offence. Although PW2 said she left her child with appellants step mother one Lucy Wathake, the said lady was not called to tell court what happened and if the appellant was present and had the opportunity to defile the complainant. The court could not rely on the hear say evidence adduced by PW2 that she was told what happened to PW1 by the said PW1.

It is not disputed that the complainant was defiled. The question is who did it. The doctors evidence does not link anybody with the act of defilement. I do find that the police conducted the case carelessly by not taking the appellant for examination as there was evidence of the complainant having been defiled. The complainant being a minor and unable to talk the police should have got evidence to link the appellant with the offence which they totally failed to do. The appellant may be a prime suspect but there is no evidence to link him with the said defilement. If at all the appellant was at home at the time of alleged offence there is no circumstantial evidence linking him with the offence to the exclusion of all others.

The court is aware that the court no longer require corroborative evidence as proof of such an offence but there has to be ample evidence pointing at the appellant as the offender. In the present case it was mere suspicious upon which the court convicted the appellant.

The standard of proof required in all criminal cases is proof beyond any reasonable doubt. The prosecution having failed to prove the offence beyond any reasonable doubt the appellant should have been given benefit of doubt and acquitted. The conviction is irregular and it is hereby quashed and the sentence of 7 years, hard labour and strokes is set aside. The appellant is set at liberty unless otherwise lawfully held.

Dated, read and delivered at Machakos 19th this May, 2004.

R. WENDOH

JUDGE