



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL APPEAL NO. 77 OF 2003**

(From Original Conviction and Sentence in Criminal  
Case No. 781 of 2001 of the Resident Magistrate's Court  
at Eldama Ravine – S. M. Nyagaka – R. M.)

**WENSUS KIPKEMOI RUTTO.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The Appellant, Wensus Kipkemoi Rutto was charged with the offence of defilement of a girl under the age of fourteen years contrary to **Section 145(1) of the Penal Code**. The particulars of the charge were that on the 7th of November 2001 at [*particulars withheld*] village in Koibatek District had carnal knowledge of A J a girl under the age of fourteen years. The Appellant pleaded not guilty to the charge and after a full trial, was convicted as charged. He was sentenced to serve seven years imprisonment with seven strokes of the cane. The Appellant was aggrieved by the conviction and sentence and has Appealed to this Court against the said conviction and sentence.

The Appellant raised several grounds of Appeal faulting the decision of the trial magistrate in convicting him. The Appellant contended that the alleged defilement was reported to the police fifteen days after the said alleged defilement had taken place and no explanation was given by the Prosecution for this delay; that the evidence of the doctor confirmed that the complainant had not suffered any injury in her private parts; that the trial magistrate did not consider the fact that there existed a grudge between the Appellant and the complainant's family; that the trial magistrate erred in not considering the fact that the complainant did not raise any alarm during the commission of the alleged offence and finally that the prosecution did not prove its case against him to the required standard of proof.

At the hearing of the Appeal, the Appellant reiterated the grounds of Appeal and urged this Court to allow the Appeal. Mr Mutuku, the Principal State Counsel on the other hand supported the conviction and the sentence imposed by the trial magistrate. He submitted that the Appeal did not have any merit and should consequently be dismissed.

The facts of this case are that PW 1 A J, a girl then aged about seven years was sent on the 7th of November 2001 by her mother to go the house of the Appellant to get maize flour. According to PW 1 when she reached the house of the Appellant, the Appellant prepared tea for her and invited her to take it. After PW 1 had taken tea, it was her testimony that the Appellant then placed her on the bed, defiled her and then gave her five shillings and warned her not to tell her mother of the incident. PW 1 testified that she felt pain. She stated that the Appellant did not give her flour. PW 1 narrated the incident to her mother who, on the following day, took PW 1 to hospital where PW 1 was treated and discharged. A P3 form was

also filled.

PW 2, AR the mother of the Complainant testified that on the 7th of November 2001 at about 3.00 pm, she sent her daughter (PW 1) to go to the house of the Appellant, who was her brother-in-law to borrow maize flour. It was the evidence of PW 2 that the Complainant stayed for a long time before returning back home. When she came back, she informed PW 2 that the Appellant had defiled her and given her five shillings. PW 2 examined the Complainant and saw sperms and blood oozing from her private parts. PW 2 testified that she waited for three days before taking the Complainant to the hospital when the Complainant complained of back pains. She further testified that the Complainant was treated and discharged. A P3 form was later filled indicating the injuries that the Complainant had suffered. PW 2 stated that she did not have any grudge with the Complainant. She further testified that she is the person who identified the Appellant to the police during his arrest.

PW 3 Police Constable Josphat Ongok testified that on the 7th of November 2001 while at Eldama Ravine Police Station, he received a report that a minor had been defiled. He investigated the case, took the Complainant to the hospital where the P3 form was filled. He later arrested the Appellant and charged him. PW 3 testified that when he received the report on the 7th of November 2001 he looked for the Appellant with a view of arresting him but could not find him.

PW 4 Dr Sergon Kibet testified that Dr Kemboi, a colleague of his at Eldama Ravine District Hospital, whose hand writing he was familiar with examined the Complainant on the 21st of November 2001 and found that the hymen membrane had been broken but the vaginal wall was intact. It was his evidence that the hymen had been broken because someone had penetrative sex with the Complainant. Dr Kemboi filled a P3 form which PW 4 produced as an exhibit in the case. PW 4 testified that the treatment card that was written when the complainant was treated at the hospital was at the hospital. When the Appellant was put on his defence, he denied that he committed the offence. He testified that he was arrested on the 22nd of November 2001 when he was looking for his employer's cow which had gotten lost. The Appellant testified that the mother of the Complainant had threatened him.

The duty of this Court as the first Appellate Court in criminal cases is to re-examine and re-evaluate the evidence adduced before the trial magistrate. The High Court is required to weigh the conflicting evidence and draw its own conclusions bearing in mind always that it neither saw nor heard the witnesses and make due allowance for this fact (See **Lukas Okinyi Soki –versus- Republic Cr. App. No. 26 of 2004 (Kisumu) (unreported)**). In the instant case the Complainant, PW 1, testified that on the material day she was sent by her mother, PW 2, to go to the house of the Appellant and borrow maize flour. The Appellant is the brother-in-law of the Complainant's mother. The Complainant testified that when she reached the house of the Appellant, the Appellant offered her tea and then placed her on his bed. He then defiled her and gave her five shillings with a firm warning that she was not to tell her mother what had transpired.

PW 2 testified that when she sent the Complainant to the house of the Appellant to borrow maize flour, she became concerned when she did not return at the time she expected her to. When the Complainant finally came back, she narrated to her mother, PW 2, what had happened. She told her mother that she had been defiled by the Appellant. PW 2 examined the private parts of the Complainant and saw sperms and blood oozing out. A report was made to the Police. The Complainant was taken to the hospital after three days when she complained of pain on her back. A P3 form was later filled by Dr. Kemboi. The P3 form was produced by PW 4 Dr Sergon Kibet in evidence on behalf of his colleague Dr Kemboi whose handwriting he was familiar with. The said P3 form indicated that the hymen was broken. PW 4 testified that the fact that the hymen was broken proved that the Complainant had been subjected to penetrative sex. When he was put on his defence, the Appellant denied that he had defiled the Complainant. It was his evidence that there existed a grudge between him and the mother of the Complainant. According to his evidence and the submissions made before Court, the mother of the complainant brought the case to Court to fix him.

I have re-evaluated the evidence adduced by the Prosecution before the trial Court. The burden of proof is always upon the prosecution to establish its case against an Accused person. In the instant case,

the Appellant contends that the Prosecution did not discharge its burden. I do find that the Prosecution established that the Complainant was defiled. The evidence of PW 4, the doctor, confirmed that the hymen was broken indicating that the Complainant had been subjected to penetrative sex. The Complainant testified that the Appellant defiled her after which he gave her five shillings and warned her not to tell any one of the incident. The Complainant is a child of young and tender age. Her evidence, before the Amendment to the **Evidence Act** by the **Criminal Law Amendment Act, 2003 (Act No. 5 of 2003) in 2003**, cannot be sufficient to convict the Appellant. Her evidence required to be corroborated.

In the instant case, her evidence was corroborated by that of PW 2, her mother. After the incident, the Complainant narrated to her mother what had transpired. PW 2 examined the private parts of the Complainant and saw sperms and blood oozing out. The Complainant told her mother that it was the Complainant who had defiled her. It is the finding of this Court that the evidence of the Complainant was sufficiently corroborated by the evidence of PW 2, her mother and that of PW 4 the Doctor. I find that the evidence of the Complainant and PW 2 is a cogent narration of the events that took place on the material day. The Complainant informed her mother immediately after she arrived home from the house of the Appellant.

The Appellant allege that there was a grudge that existed between him and the mother of the Complainant. The Appellant did not tell the trial Court or in his submissions before this Court what the said grudge was. It is inconceivable that a grudge could exist between the mother of the Complainant and the Appellant, yet PW 2 could confidently send her daughter to go and borrow maize flour from the Appellant. I do find that the allegation by the Appellant that a grudge existed between him and the mother of the complainant to be far fetched. Furthermore, PW 4, the Doctor testified that the Complainant's hymen was broken. Even if the evidence of PW 2 was to be discounted on the ground that there existed a grudge between her and the Appellant, it is inconceivable that a child of seven years could have had sex prior to her defilement by the Appellant. The only explanation for the break in the hymen is that the Appellant had defiled the Complainant.

This Court finds that the Prosecution has established its case against the Appellant beyond any reasonable doubt. The Appeal filed by the Appellant lacks merit. The same is dismissed. The Corporal punishment which the Appellant was sentenced to is hereby set aside due to the Amendment to the law made by **The Criminal Law (Amendment) Act, 2003 Act No. 5 of 2003**. Otherwise the conviction and the sentence imposed by the trial magistrate is confirmed.

**DATED at NAKURU this 12th day of November 2004.**

**L. KIMARU**

**AG. JUDGE**