

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.398 OF 2002

**(From Original Conviction and Sentence in Criminal Case No.170 of 2--1 of
the District Magistrate's Court at Hola – G.S. Ndegwa, DM.1)**

**HASSAN MOHAMED APPELLANT
VERSUS
REPUBLIC RESPONDENT**

J U D G M E N T

HASSAN MOHAMED (the appellant) appealed against conviction for the offence of defilement contrary to section 145(1) Penal Code and the fine of Sh.30,000/- in default two years imprisonment.

Miss Kwena, quite rightly has conceded this appeal. Whereas E.S.N (PW.1) aged nine years had claimed that the appellant had defiled her causing injuries and bleeding to her private parts and that she screamed for help, H.W.H (PW.2) who was present at the scene and who saw PW.1 and the appellant coming out of the bathroom, did not hear any screams from the bathroom, did not see any injuries to and bleeding from the private parts of PW.1 upon examination just outside the said bathroom. PW.1 also did not report to her anything when she walked out of the bathroom.

S.S (PW.3) who also examined PW.1's private parts contradicted PW.2's evidence when she said that she saw a whitish fluid streaming down her private parts upon examination.

Medical evidence was of no assistance in this case at all. In any case it was unreliable and suspect. The offence is alleged to have been committed on 14th November 2001 at 11.00 a.m. Dr. Kamangu Waithaka (PW.4) M.O.H. Hola District Hospital said he examined PW.1 on 11th February 2002 about three months later and was able to say that there was a discharge of blood in PW.1's private parts which was tender on examination. If indeed there was tenderness and discharge of blood in PW.1's private parts on 11th February 2002, then she must have been defiled by somebody else, on that date but not the appellant.

I accept the appellant's explanation that he had entered into the toilet/bathroom which was adjacent to PW.1's house to answer a call of nature.

For the above reasons this appeal succeeds, the conviction of the appellant for defilement is quashed and sentence is set aside.

Appellant is to be released from prison custody unless he is otherwise lawfully held.

It is so ordered.

Dated, signed and delivered at Mombasa this 29th August 2003.

A.G.A. ETYANG

JUDGE