



**GABRIEL KAMAU KINUTHIA ..... APPELLANT**

**- VERSUS -**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The Appellant was charged and Convicted for the offence of Defilement of a Girl Contrary to Section 145 (I) of the Penal Code. He was consequently sentenced to serve a prison term of 10 years with two strokes. It is the said Conviction and Sentence that he has appealed against and has cited 7 grounds of appeal which he combined in his submissions.

The evidence adduced before the trial court was that the complainant (PW1) E.W (E) aged 10 years at the time of the trial had gone to the appellant's house to have her sandals mended by the appellant. She found him lying down and asked to wash his dishes while he rested after which he would mend the sandals. Appellant was employed as a security Guard and during the day he used to mend shoes (Cobbler). The Appellant then proceeded to prepare lunch and was joined by three visitors and they all ate. Appellant then escorted the visitors promising E.W to mend her sandals on his return. Meanwhile she fell asleep with her upper body leaning on his bed and feet on the floor. She was awakened by a pain her private part and found herself lying on her back on the bed. Her pants had been lowered and the Appellant was on top of her. She noted that the Appellant had his trouser open and he was pushing his private parts into hers. On noticing she was awake, he pulled his T-shirt to cover his private parts. She screamed and ran out crying towards their house where she met another neighbor who enquired why she was crying. E.W informed him that Kamau was a bad person and in his evidence as PW4, he K.M confirmed E.W did not elaborate why Kamau was bad.

M.W, PW2 and E.W's mother left home at 7.00 a.m. on material day after instructing E.W to take her slipper to Appellant for repair. She returned home after 7.30 p.m. and before she could sit, E.W asked her to go speak to Kamau and narrated what had happened. She checked her private part and noted the flesh looked widened, irritated and red. Next morning she took the child to Coast General Hospital after reporting to Kamau's Employer. E.W was examined and PW2 advised to see a Doctor which she did on 28.8.2000 and the Doctor filled P3 form. In cross-examination she said the Appellant's friend named Ngugi tried to talk to her into settling the matter out of court. The matter was reported to Likoni Police Station on 25.8.00 to Sgt. Margaret Thera and police proceeded to the Appellant's house several times but didn't find him until the 2/9/00 when he was arrested.

PW4, K.M corroborated the Evidence of E.W in that he had seen her emerging from Appellant's house crying and on enquiring why she was crying she answered that the Appellant was a bad man. He however said he didn't hear any screams from the child coming from Appellant's room.

Pw5, Dr. Wadie Mustala produced the P3 Form on behalf of Dr. Bajaber who had since left for medical reasons. The PW3 showed E.W was examined by Dr. Bajaber on 29.8.00 found her hymen missing had a foul discharge due to an infection and confirmed she had been defiled. The Appellant gave an unsworn defence. He stated that he had an affair with E.W's mother PW2 and he had refused to marry her. On the fateful day he admits E.W had gone to his house and after serving her with lunch she refused to go home and he beat her. In his grounds of appeal, the appellant attacked the evidence adduced and that the trial court failed to appreciate that a grudge existed between him and Complainant's mother. He said he was never examined by a Doctor to confirm that it was him who had infected E.W with a disease. The State opposed the appeal on the grounds that the Medical evidence was sufficient as a P3 was completed on 28.8.00 when complainant was examined by a Doctor. She had been attended to by a Medical staff on 25.8.00 and PW2 instructed to return so that E.W could be seen by a Doctor. She did so on 28.8.00.

Further the evidence of E.W was corroborated by that of PW4, who saw her run from Appellant's house crying. He pointed out that there are a few contradictions in the evidence but they were minor and of no

effect to the final finding. I have read the record and proceedings as I am bound to. I am in agreement with the State Counsel that the evidence of PW1, E.W was corroborated by that of PW4 and the Medical evidence confirming she was indeed defiled. I therefore do not find any good reason to interfere with the Conviction. On Sentence, the law provides for a maximum sentence of 10 years and 2 strokes is below the maximum provided. This too I find no reason to interfere with.

Consequently the appeal is hereby dismissed.

**Dated and delivered at Mombasa this 28th day of February, 2002.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**