



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.135 OF 2000**

**(From Original Conviction and Sentence in Criminal Case No.1232 of 1998 of the Chief Magistrate's Court at Mombasa – B.Maloba, Ms – S.R.M.)**

**JAMES NJIRU.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

Appellant was charged with the offence of Defilement of a girl under the age of 14 years contrary to Section 145(1) of the Penal Code. He was convicted and sentenced to 14 years imprisonment with 8 strokes of the cane and with hard labour.

The facts are that on 7.4.98 at [particulars withheld] in Mombasa District had carnal knowledge of G.W a girl under the age of 14 years.

The main witnesses included the girl herself and PW.2 who also was her mother and former wife of the Appellant. The Appellant accordingly is the father of the complainant although not biologically.

Only two witnesses were called to testify, that is the complainant and her mother PW.2. No Investigations Officer was called. The Doctor who is said to have examined the complainant was not called. This also means that even the P3 for the complainant was not produced in the trial.

When the appeal came up for hearing, the State Counsel Mr. Ogoti declined to support the conviction in various grounds which were recorded. He stated finally that the charge being grounded on the evidence before the lower court, was not proved beyond a reasonable doubt.

I have examined the lower court records carefully. I agree with the opinion of the State Counsel.

The charge states that the act of defilement took place on 7th April, 1998. The evidence from the complainant stated that the last time the Appellant defiled her was in unknown date in February 1998. Although she described the acts of defilement from the Appellant in various details, she also in court revealed some animosity against the Appellant. The impression created from the records, however, is that she was well couched probably by her mother.

The charge was a sexually related one. The evidence of the complainant required corroboration, especially since the complainant was a girl of only 11 years.

PW.2's evidence could not corroborate the complainant's evidence because her evidence was based on what the complainant's Aunt had told her. The aunt who apparently served as the house girl of the

Appellant charged with looking after the complainant and her brothers, was not called to give evidence.

The Police Officer who received the reports from the complainant who may have investigated the alleged crime, was not called to testify. The record confirms that PW.2 who was former wife of Appellant and mother of complainant, indicates that the relationship between her and the Appellant was not that cordial. She could easily tell lies to fix Appellant.

The upshot of all these, is that the evidence before the trial Magistrate, although capable of raising anger in anyone who heard it, was not sufficient to prove the charge beyond a reasonable doubt and the trial Magistrate should have found so. She should have paid attention to the rules of corroboration and the requirements of S.124 of the Evidence Act. She did not do so.

This court allows this appeal against conviction which is hereby quashed. Sentence is also hereby set aside.

The Appellant is set at liberty forthwith unless lawfully held in prison.

**Dated and Delivered at Mombasa this 28th day of November, 2001.**

**D. A. ONYANCH**

**J U D G E**