

appellant who asked for forgiveness. PW4 P.C Charles Ondieki was based at Mokowe Police Station. He investigated the case after the report was made on 10/4/2012. He caused the appellant to be charged with the offence: PW5 P. C. Grace Muthoni worked at Gawa guest House. On 9/4/2012 at 9.00 p.m the appellant hired a room and paid Ksh.300/=. He was alone.

In his sworn defence, the appellant denied committing the offence. He testified that he sells CDS. He slept alone at *[particulars withheld]* Lodge and the following morning, he was arrested as someone whom he had sold a CD complained that it was not working. He found himself at Hindi A. P. Camp and was charged with the offence.

The main issue for determination is whether there was defilement. The medical evidence shows that there was proof of penetration. The offence occurred on the night of 9.4.2015. PW2 was examined medically the following morning on 10/4/2015. According to PW2, the appellant used a condom. However, no penetration was proved. It is also not clear how PW2 left her home without being lured. This seemed to be a prior arrangement. There is no evidence that she was a student. The appellant is her church colleague. According to me, PW2 presented herself as an adult and is possible that the two had sex together. The defence under section 8 (5) of the Sexual Offences Act comes to the appellant's rescue. Further, the evidence that there was no penetration disproves the charge. Defilement can only be proved when there is either partial or full penetration otherwise the offence would fall in the category of indecent act with a child.

In the end, I do agree with the state counsel that the prosecution did not prove its case as required by the law: The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 7th day of May, 2015.

SAID J. CHITEMBWE

JUDGE