STEPHEN KIMANI KARIUKI……………………….………........... APPELLANT

VERSUS

REPUBLIC……………………………………….……………….PROSECUTOR

[An Appeal from original conviction and sentence in Nakuru C.M.A.CR.C..NO.1285/2005 by Hon H. M. NYAGA, Senior Resident Magistrate, dated 29th September, 2006]

JUDGMENT

The appellant was charged with **defilement of a girl** contrary to **Section 145 (1)** of the **Penal Code** before it was repealed.

The complainant who was in Standard six (6) at the time of the offence – 23rd April, 2005, recalled that on that day at midday, the appellant who was her neighbour came to their home riding a bicycle. He gave the bicycle to the complainant to ride towards his house.

He grabbed the complainant and dragged her to his house where he defiled her. The complainant reported the matter to her sister and later to her mother who in turn informed the complainant's father. The matter was reported to the police and the complainant taken to the hospital. At Bahati Health Centre, the complainant was examined by a clinical officer who noted that her hymen was broken and redness around the genitalia. The appellant was arrested and charged as explained.

In his brief unsworn evidence, the appellant denied committing the offence and attributed the charges against him to a land dispute between his family and the complainant's parents, who he accused of plotting to take their land.

The learned trial magistrate (H. M. Nyaga, SRM) considered the evidence presented before him and was persuaded that it proved the charges beyond any reasonable doubt and proceeded to convict and sentence the appellant to fifteen (15) years imprisonment with hard labour.

The appellant now challenges that conviction and sentence in this first appeal on the grounds that:

i) the trial court convicted the appellant on evidence of family members;

ii) the investigation was not professionally done;

iii) the complainant was not examined immediately after the alleged offence;

iv) the appellant was convicted on hearsay evidence;

v) the trial court disregarded the existence of a family grudge;

vi) the court ignored the defence.

The appellant has filed submissions in which he has explained that the medical evidence did not link him with the offence; that the age of the complainant was altered in the charge sheet from fourteen to read sixteen years, while according to the trial magistrate, she was 12 years old; that the girl who is alleged to have witnessed the defilement was not called; that the complainant's family and the appellant had a land boundary dispute and that his age was not assessed.

Learned counsel for the respondent opposed the appeal and submitted that the appellant was examined and age assessed to be over 18 years. Counsel further submitted that there was evidence to support the charge as the appellant was known to the complainant before the incident. The complainant immediately reported the incident to her mother and sister. That medical examination found that the complainant's hymen had been broken.

It is the duty of this court, being the first appellate court to re-evaluate evidence on record and arrive at an independent conclusion. Although the complainant's age was not given, there was evidence that she was in standard six. The charge sheet was corrected to read that she was under 16 years. It is also common ground that she was a neighbour to the appellant and therefore they knew each other.

The offence was allegedly committed on 23rd April, 2005 before **Section 145(1)** of the **Penal Code** was repealed by the **Sexual Offences Act**, 2006. **Section 145(1)** which was prior to the repeal amended by **Legal Notice No.5** of **2003** provided that:

"145(1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life."

This amendment increased the age of the girl to 16 years from 14 years and the sentence was increased from 14 years imprisonment to life. The provision dealing with corporal punishment was also deleted. It has been held that unlike the offence of defilement under the Sexual Offences Act, the amendment did not introduce minimum sentence and therefore life imprisonment was not mandatory, giving the court the discretion to consider appropriate sentence depending on the circumstances and antecedents of each case. See **K.K**. V. **Republic**, Criminal Appeal No.239 of 2008.

It is clear from the complainant's evidence that before the appellant came with a bicycle he had sought from the complainant a water jug which she gave him. Subsequently, he returned riding a bicycle, which he offered to the complainant to ride. When they got to the appellant's house, the complainant testified that:

"……..he grabbed me by the chest and dragged me to the house. He pushed me to the bed. He removed my underpants. He took a bar soap and applied it on his penis (witness also refers to it as "*K**"*) It is used by men to urinate. He had removed his trousers. He then slept on me. He had held me by the neck. He spread my legs and put his thing in my "*K******". It was very painful. He did it for a long time. W was also there."**

That testimony was a clear account of the events of that day and unshaken even by cross-examination. The complainant immediately informed her sister, P.W.3 and her mother P.W.2. The clinical officer confirmed that the complainant's labia majora and minora were inflamed and the hymen broken.

Like the trial magistrate, I find that the evidence presented by the prosecution witnesses disclosed the offence of defilement. The complainant's mother, sister and father denied any land boundary dispute between the appellant and them. Indeed the complainant's father emphasized that they were not immediate neighbours. The trial court considered the defence and found no merit on it.

Although three of the six prosecution witnesses are relatives of the complainant, there is no law that bars relatives from testifying in a case involving a member of the family. Besides, there was the evidence

of the doctor, an independent witness.

Finally, the fact that the complainant was examined some four (4) days after the alleged defilement does not affect her testimony and the findings of the examining officer.

In the result, this appeal fails and is dismissed accordingly.

Dated Signed and Delivered at Nakuru this 10th day of July, 2012.

W. OUKO
JUDGE