



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Criminal Appeal 93 of 2006**

**VIDENSIO MAKANGA MWINGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant, Vidensio Makanga Mwinga, was charged with the offence of defilement of a girl under the age of sixteen years contrary to section 145 of the Penal Code.

The particulars of the offence are that on the 31<sup>st</sup> day of January, 2006, at about 9.00pm, in Lamu District, within Coast Province, unlawfully had carnal knowledge of E W M, a girl under the age of sixteen years.

He was convicted after trial and sentenced to serve 7 years imprisonment together with hard labour.

He raised 6 grounds of appeal, in his home made grounds, in the memorandum of appeal (undated), but received in court on 19<sup>th</sup> October 2007, as can be discerned from the court stamp.

At the hearing he argued grounds 1-6 globally. In doing so he adopted his home made grounds by way of submission. He denied the offence. He prayed that the appeal be allowed, conviction be quashed and the sentence be set aside.

Mr. Ogoti, learned state counsel, conceded the appeal. In doing so he urged me to find that the offence is said to have been committed on 31<sup>st</sup> January 2006. Yet the report to the police was made on 5<sup>th</sup> February 2006. This was after a period of 5 days. The lapse of 5 day's seen against the background of a long feud involving land between the appellant's family and the family of the complainant, the motive for the report appears/seems to be a vendetta.

Furthermore the report having been made five (5) days after the event the medical report was vulnerable to intervening events. It was not sound evidence to find a conviction.

Last but not least, I was urged to find that it was night. Being dark the issue of identification did not come out clearly in evidence. One witness claimed he was recognized by voice. Yet another claims that he identified him by the face. There is material contradiction which ought to be resolved in favour of the appellant.

I have had the advantage of re-evaluating the whole evidence as I am bound to do being the first appeal court. Having done so, I find that the report was not made contemporaneous with the event. A delay of 5 days raises suspicion as to the motive of the complainant given the background of a family feud between the two families.

In addition thereto, the medial evidence was taken after 5 days. During which period the intervening facts militated against a proper finding in medical science.

Last but not least, I take issue with the circumstances of identification. It was night. No one saw the appellant except the complainant. She claims to have identified him by voice and face though it was dark. However, she took 5 days to raise the complaint with her mother and the police. A lapse of five (5) days in respect of such offence raises the possibility that the charge was a frame up as against the appellant.

For those reasons, the appeal against the conviction and sentence is allowed. The conviction is quashed, sentence is set aside and the appellant is set free unless lawfully held for some other lawful reasons.

Dated and delivered at Malindi this 4<sup>th</sup> day of May 2009.

**N.R.O. OMBIJA**

**JUDGE**

**Mr Ogoti for Republic**

**N/A for accused**