



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: COCKAR, C.J., SHAH & LAKHA, JJ.A.)**

**CRIMINAL APPEAL NO. 39 OF 1996**

**BETWEEN**

**SIBO MAKOVO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nakuru (Ondeyo J) dated 13<sup>th</sup> December, 1995**

**IN**

**H.C.CR.A. NO. 177 OF 1994)**

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**JUDGMENT OF THE COURT**

The appellant, Sibbo Makovo, was on the 7<sup>th</sup> day of July, 1994, convicted of the offence of defiling a girl contrary to section 145(1) of the Penal Code, by Mr. L . W. Gitari S.R.M. at Naivasha and was sentenced to a term of eight (8) years imprisonment and was ordered to receive four (4) strokes of the cane. He appealed against the said conviction and sentence to the superior court which appeal was dismissed by that court (Ondeyo J) save in regard to four (4) strokes of the cane which strokes were reduced to two (2).

The unfortunate victim of the defilement was B.A.E who was twelve years at the time of the defilement. The mother of B.A.E, E.O (PW1) saw the appellant who had come to her house. He asked of her the whereabouts of her neighbour for whom he had brought maize flour and cabbages. As the neighbour was not present the appellant left the flour and cabbages with PW1 telling her to pass the same to the neighbour.

At this time, B.A.E (PW2) was outside the house. The appellant left and PW2 was not thereafter seen by PW1. The information PW2 obtained was to the effect that PW2 talked to the appellant and went away with him. PW1 was unable to obtain assistance to go and look for PW2 at the appellant's house as it was stated to be at some distance. PW1 did not see PW2 until the next day when she was found at the side of the road at Kihoto, unable to walk with her legs apart and had blood-stains on the back of her dress. PW2 was taken to hospital where she was treated and discharged.

PW2 gave evidence before the Senior Resident Magistrate. She said she did not understand the meaning of an oath. She was then affirmed. At this stage we must point out that the learned magistrate was duty bound to inquire if she understood the need to tell the truth. No such inquiry appears to have been made. In the absence of such an inquiry the probative value of her evidence may be questionable. But of course each case must depend on its own facts. In this case, PW2 gave cogent and clear evidence of what happened to her after she went away with the appellant. She described graphically how she was defiled and was consistent in what she said. The manner in which she gave evidence leads us to believe that she was unaware of her moral duty to tell the truth.

But the evidence of a child of tender years needs corroboration. This corroboration was provided by PW1 who said that PW2 was outside the house when the appellant left the house and frantic efforts to reach the appellant's house. The corroboration was also partly provided by the evidence of PW1 in respect of the physical condition of PW2 who was described as sitting with her legs apart and bloodied dress. This factor was further indirectly corroborated by the appellant himself who confirmed that he saw PW2 on the road when she was allegedly coming to his (the appellant's) house to borrow "unga". There was no need for PW2 to go to borrow flour at the appellant's house. What the appellant said confirms that he was with PW2 after he left the house of PW1.

Further corroboration of what happened to PW2 is provided by Constable Biwott (PW3) who was told by the appellant that he had been "moving" with PW2.

The P3 form which was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in Section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in Courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.

However, the P3 form did not add to the prosecution case in the magistrate's court. There was evidence of the condition in which PW2 was in fact defiled.

Accordingly, we see no reason to differ from the concurrent findings of the two courts below and we order that this appeal be dismissed.

**Dated and delivered at Nakuru this 24<sup>th</sup> day of September, 1997.**

**A.M. COCKAR**

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**CHIEF JUSTICE**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**