



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)**

**CRIMINAL APPEAL NO. 15 OF 2010**

**BETWEEN**

**A M G .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from the judgment of High Court of Kenya at Malindi (Omondi, J.) dated 11<sup>th</sup> December, 2009*

in

H.C.Cr.A. No. 16 of 2009)

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**JUDGMENT OF THE COURT**

The appellant was convicted by the Senior Resident Magistrate Malindi of the offence of defilement contrary to **section 8(3)** of the Sexual Offences Act and sentenced to 20 years imprisonment.

The appellant had also been charged with a second count of compelled or Induced Indecent Act contrary to **section 6(9)** of the Sexual Offences Act. Apparently the trial Magistrate did not make any finding in respect of the second count.

The prosecution case was briefly as follows:

The complainant **M Y** (PW1) was living with her grandmother **D K Y** (D) she was a Standard Four pupil at [Particulars withheld] Primary School.

The appellant was a neighbour and a pastor at [Particulars withheld].

On the morning of 13<sup>th</sup> October, 2006 the appellant went to the complainant's home. He requested her to accompany him to a laundry and both went to the laundry owned by **K K** (PW2)(K) at Majengo Mpya. The appellant removed some clothes from a bag and left them with K for ironing. He told K that the complainant would collect them later and pay for them. The appellant gave the bag to the complainant and told her to take it to the church. He also instructed her to pick the clothes later. The

complainant went back to D's house. The appellant came again and asked D to allow the complainant to escort him to the bus stage. D told him that complainant was busy preparing tea but the appellant insisted. Thereafter the complainant accompanied the appellant to the stage. On arrival the appellant asked her to accompany him to a storeyed building. He told her that his house was located there. They went to that building which turned out to be a lodging house. The appellant found **M W M** (PW3) (*M*), a receptionist and paid for a room. He took the complainant to the room and defiled her. The complainant started bleeding. The appellant told her to say that it was a Somali who had defiled her. The complainant started going home but on the way she started bleeding profusely and one **A K** (PW4) (*A*) went to her. She explained that she was defiled by a person she did not know. A K hired a TukTuk and the complainant was taken to her grandmother's house and thereafter to Police Station where the incident was reported to **Pc. Gladys Akinyi** (PW6) (*Pc. Gladys*). Thereafter the complainant was taken to hospital where she was stitched and admitted for three (3) days. On the following day the complainant disclosed to her nephew **S K Y** (PW5) (*S*) that she was defiled by Pastor M G. The complainant was examined by **Dr. Tunje** who had resigned from civil service by the time of the trial. The Medical Examination Report (P3) signed by him was produced by **Dr. Vitallis Bwire** (PW7)(*Vitalis*). The complainant lost a lot of blood and she had gone to shock. She was stitched and the injuries classified as grievous harm. Her age was assessed at 13 years. The appellant was later arrested.

The appellant stated at the trial that she knew the complainant as her neighbour and that he is married in their home. He further stated that on the material day the complainant escorted him to the new stage for Mombasa Express vehicles where he took a vehicle to Mombasa and that on the third day he was called to Malindi Police Station where he was detained on arrival.

The trial Magistrate made a finding that the complainant was in fact defiled on the material day. On issue whether or not it is the appellant who defiled her the learned Magistrate said that the evidence was purely circumstantial. The trial Magistrate also made finding that the defence of the appellant tending to show that he left the complainant at the stage was discredited by the evidence of *K* and *M*. She believed the evidence of the complainant saying that there was no reason why the complainant would fabricate the story against a pastor. The learned Magistrate further made a finding that the evidence of *M* was truthful. She rejected the appellant's defence saying that the appellant was recognized by witnesses and had influence over the complainant.

The High Court analysed the evidence and made a finding that no bad blood relation existed between parties but rather a cordial relationship. The High Court believed the prosecution evidence and disbelieved the appellant's defence saying:

*“That evidence displaces the appellant’s defence that he parted company with the complainant at the stage and proceeded to Mombasa – If ever he went to Mombasa it was after the event.”*

In his grounds of appeal the appellant complained that the two courts below failed to consider that the initial report of the complainant did not bear his name, that the circumstantial evidence tendered did not prove the appellant's guilt beyond reasonable doubt, that the prosecution evidence had glaring inconsistencies and that his defence which was reasonable was not considered.

He submitted in particular there was no reason why the complainant failed to reveal his name and that the evidence as to whether he went to the guest house was inconsistent.

There was ample evidence that the complainant was defiled on the material day. She received serious injuries in her genitalia and lost a lot of blood and had to be stitched and admitted in hospital. She was examined by a doctor an hour or so after the incident who confirmed the fact of defilement.

The only question was the identity of the person who defiled her.

The admission by the appellant that he knew the complainant, that she was his neighbour and that she escorted him to the stage on the material day corroborates the evidence of the complainant and *K* as to

the events preceding the defilement.

It is true that the complainant at first reported that she was defiled by a Somali. But as she explained that is what the appellant had told her to say. She was already bleeding profusely at that time when she told A K that she was defiled by unknown person who was dressed like a Massai or Orma she was getting unconscious and dizzy. She was unconscious when she was admitted in hospital, a fact confirmed by Pc. Gladys, she revealed the name of the appellant on the following day. The trial Magistrate made a finding that the appellant as a Pastor had influence over her. The two courts below believed her evidence regarding the circumstances of the defilement and the identity of the person who had defiled her. The fact that she initially told a lie does not render her evidence of the identity of the defiler unreliable in the prevailing circumstances.

The identity of the person who committed the offence is a matter of fact. The defence of the appellant was exculpatory. The two courts below believed the evidence of M that the appellant went to the lodging early in the morning accompanied by a little girl – the complainant, and booked a room. They found the evidence of the complainant to be truthful. The evidence of M corroborated the evidence of the complainant which was also found to be truthful.

The grounds of appeal raises matters of fact. The two courts below considered the facts and made concurrent findings of fact based on the credibility of witnesses that it was in fact the appellant who defiled the complainant.

An appellate court cannot interfere with findings by a trial court which are based on credibility of witnesses unless no reasonable court would have made those findings. Further, a second appellate court cannot interfere with concurrent finding of facts unless they were based on no evidence.

In the circumstances of this case there is overwhelming and credible evidence to support the concurrent finding of facts. The evidence was both direct and circumstantial

Accordingly, we find that the dismissal of the appeal by the High Court cannot be faulted.

In the result the appeal has no merit. We dismiss it in its entirety.

***Dated and delivered at Malindi this 7th day of October 2013***

**E. M.GITHINJI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

# **REGISTRAR**