



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

**Criminal Appeal No.183 Of 2008**

**DISMAS ONDENGO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court  
Criminal Case No.889 of 2006 by Hon T.M. Mwangi, RM 31/9/08)

**JUDGEMENT**

1. The appellant was charged with the offence or **defilement** of a girl under the age of **16 years** contrary to **Section 145(1)** of the Penal Code. Particulars thereof being that on the **1<sup>st</sup>** day of **August, 2006** at around **6.00pm** at *[particulars withheld]* **Village, Kauwi sub-location, Kauwi Location** in **Kitui District** of the **Eastern Province** had carnal knowledge of **E K** a girl of **15 years**.

In the alternative he was charged with the offence of Indecent Assault on female contrary to **Section 144(1)** of the **Penal Code**. Particulars thereof being that on the **1<sup>st</sup>** day of **August, 2006** at around **6.00pm** at *[particulars withheld]* **Village, Kauwi Sub-location, Kauwi Location** in **Kitui District** of the **Eastern Province** unlawfully and indecently assault **E K** a girl of fifteen years by touching her private parts namely vagina. .

2. He was tried, convicted of the **alternative count** and sentenced to **15 years** imprisonment. Being dissatisfied with the conviction, and sentence he appeals on grounds that:-
  - The learned trial magistrate erred in law and fact by convicting and sentencing without observing that the prosecution's case was contradictory thus violated the provisions of **Section 163(1)** of the **Evidence Act**.
  - Some crucial witnesses were not called to testify which was contrary to Section 150 of the Criminal Procedure Code.
  - The learned trial magistrate was at fault in admitting that the Appellant was a perpetrator when there was no tangible evidence to link him with the crime.
  - The defence was not considered
3. Facts of the prosecution's case were that on **1<sup>st</sup> August, 2004**, **E K**, the complainant did not return from school. Her parents (PW1& PW4) were not able to establish where she slept that night. She returned the following morning. PW4, the complainant stated that she came from **Msafiri Hotel** when she encountered with a lady who offered to carry for her a bag which she handed over to the appellant. The lady led her to a house where she would collect her bag. She entered inside to find

the appellant who locked the door. The appellant removed her pullover. He then went outside and purportedly used a padlock to lock the house from outside. She shouted but nobody could open for her. At 10.00pm the appellant returned with food. They ate. She asked to go home but the appellant said it was late at night. He removed her clothes and they slept and they had sexual intercourse. On arrival home, her father (PW1) reported the matter to the police. The appellant was arrested.

4. The complainant was taken to hospital and examined. There were bruises or tears on her private parts. She had a white discharge suggesting an infection. There was no spermatozoa. Nevertheless she was treated for possible defilement.
5. When put on his defence the appellant stated that he left his place of work, **Msafiri Hotel** after work. He went home and slept. He was alone. He woke up on 7/8/2006. He opened the door to see two (2) men. He was asked to identify himself. He did and they told him to dress up as he was under arrest. Denying having defiled the complainant he argued that he lived on a plot where there were many tenants. If indeed she had been locked up they would have heard her if she screamed. They could also have verified the complainant's story.
6. The appellant relied on written submissions. **Ms Maingi** learned Counsel for the State urging the court to confirm the conviction and sentence stated that the complainant having had a meal with the appellant identified him positively. She said that despite the fact that the complainant's evidence was not corroborated; the court cautioned itself prior to convicting the appellant.
7. This being a first appeal, I am reminded of my duty to revisit evidence adduced before the trial court, analyse it independently and come up with my own conclusions bearing in mind the fact that I neither saw nor heard witnesses who testified (see ***Okeno versus Republic[1972] E.A. 32***).
8. I have re-assessed evidence adduced. It is not in dispute that the only evidence as to what transpired was that of the complainant. At the time of testifying she was aged **16 years**. When the offence was alleged to have been committed she was **15 years** old. The complainant said they had sexual intercourse on the material night. Medical evidence adduced disapproved her allegation. She was examined for possible defilement. The doctor on coming up with his findings failed to make any remarks. He failed to form an opinion if indeed the complainant had engaged in sexual intercourse. It was for this reason that the trial magistrate failed to convict on the main charge.

**The issue to be determined is whether the accused did an Indecent Act with the complainant. Did he touch her vagina?**

9. The complainant said she was lured by a lady she did not know into falling into the appellant's trap. She stated that she came from school with a colleague. They went to **Msafiri Hotel**, bought mandasi then went home. On arrival at a lower part of the shop a certain lady greeted her and offered to carry her bag. The lady took her bag and gave the appellant. The lady then offered to escort her to where the bag had been taken. They went upto a certain door. The lady told her to enter and get the bag that is when she was locked inside. Later the appellant locked her inside the room. She screamed, a lady passing by peeped through the window and told her the door was locked from outside. On cross-examination she denied having mistaken the appellant for somebody else.
10. The complainant was believed by the trial court. However, the court did not interrogate how come she alleged she had been defiled and there was no evidence to confirm the allegation. The only thing noted was whitish discharge. The doctor said it meant she could have had an infection. He was not certain. The evidence having not confirmed the allegations of the complainant could she be believed when it is said the appellant touched her vagina?
11. In as much as I appreciate that such offences cannot easily be concocted, evidence of the complainant should not have been with precipitate credibility. The testimony required scrutiny with extreme caution in order to survive a high standard of credibility. The credibility of the complainant was questionable. Basing conviction on the testimony of the complainant was erroneous.
12. In the circumstances I disagree with the learned magistrate that the **alternative count** was proved beyond any reasonable doubt. Therefore, I allow the appeal, quash the appellant's conviction, and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

13.It is so ordered.

**DATED, DELIVERED and SIGNED** this 29<sup>TH</sup> day of **JANUARY, 2014.**

**L.N. MUTENDE**

**JUDGE**