



REPUBLIC OF KENYA



**Joseph v Republic (Criminal Appeal E132 of 2022)
[2023] KEHC 24020 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E132 OF 2022
TM MATHEKA, J
OCTOBER 25, 2023**

BETWEEN

ERIC MWENDWA JOSEPH APPELLANT

AND

VERSUS REPUBLIC RESPONDENT

(From the original conviction and sentence of C.A Mayamba (PM) in Makindu Sexual Offence Criminal Case No. E063 of 2022 delivered on 18th November 2022)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on diverse dates between the months of July 2021 and the month of September 2022 in Makindu Sub County within Makueni County, he intentionally and unlawfully caused his penis to penetrate the vagina of WMW, a girl aged 16 years.
2. In the alternative he was charged with Committing an Indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#), No. 3 of 2006. It was alleged that during the same period and at the same places, he intentionally committed an indecent act with a child by causing his penis to touch the vagina of WMW, a girl aged 16 years.
3. He pleaded not guilty and after a full trial, the learned trial magistrate found him guilty on the main charge, convicted and sentenced him to 15 years imprisonment.
4. Aggrieved by that decision, the appellant lodged this appeal on 7 grounds;
 - a. That the learned trial magistrate erred in law and fact in reaching the finding that the prosecution had proved its case against the appellant on the required standard yet the elements of defilement had not been proved in the evidence adduced.



- b. That the learned magistrate erred in law and fact as he failed and or omitted to analyze the evidence on record vis a vis the charge.
- c. That the learned magistrate erred in law and fact as he convicted the appellant based on contradictions and variance in the evidence adduced.
- d. That the learned magistrate erred in law and fact in relying only on the evidence produced by the prosecution which was fabricated to implicate the appellant for the offence.
- e. That the learned magistrate erred in failing to take into consideration the likelihood that the charges against the appellant were borne out of malice and ill will due to the fact that the appellant refused to marry the complainant.
- f. That the learned magistrate erred in law in shifting the burden of proving innocence to the appellant.
- g. That the learned Magistrate erred in law and fact in the sentence imposed on the appellant based on an improper conviction for failure by the prosecution to call vital witnesses.

Summary of the case before the Trial Court

- 5. The prosecution's case was that; the complainant, a girl aged 16 years old at the material time, had been in a sexual relationship with the appellant between the months of July 2021 and September 2022. The appellant was a boda boda rider and their first encounter was when the complainant asked the appellant for a lift to the children's centre. When they got to the gate of the children's centre, the appellant speeded and took her to his friend's house in Kiundani where they had sex. They had sex severally after that and the complainant became pregnant eventually. In September 2022, the complainant went missing and the case was reported to the police. The investigations led to the arrest and prosecution of the appellant.
- 6. The prosecution called 6 witnesses to wit; the Clinical Officer ((PW1), the complainant (PW2), the complainant's cousin ((PW3), the arresting officer ((PW4), the investigating officer ((PW5) and the complainant's mother ((PW6). The following exhibits were produced; P3 Form (P.Ex 1), PRC Form (P.Ex 2), Treatment Notes (P.Ex 3) and Birth Certificate (P.Ex 4).
- 7. In his defence the appellant elected to give sworn evidence and not to call any witness. His case was that in the year 2021, he was summoned by the head teacher of Inzau and questioned about the complainant. He was informed about a note written by the complainant with a message that they were planning to get married. He denied any relationship with her. In September 2022, he returned to Makindu and found his door with another padlock. The landlord asked him to shift. He was then arrested and taken to court.
- 8. On cross examination he denied having had any sexual intercourse with the complainant.
- 9. Parties opted to proceed by way of written submissions and the appropriate directions were given.

The Appellant's Submissions

- 10. Referring to the case of *Okeno v Republic* (1972) EA 32; Mr Ombati for the appellant reminded this court of its duty as a first appellate court.
- 11. He relied on Article 50 of the [Constitution](#) for the submission that an accused person has a right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence as well as the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable



access to that evidence. He submitted that from the certified copy of proceedings, it was clear that at the time of the hearing of the case, the appellant was yet to be supplied with witness statements and the evidence the prosecution intended to rely on. He urged the court to be persuaded by the holding in *Joseph Ndungu Kagiri v Republic* [2016] eKLR, where the court was faced with a question relating to the infringement of the right under Article 50(2) (c) and (j). The court held *inter alia*;

“I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the *Constitution* nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to a violation of their constitutional rights to a fair trial.”

12. It is also the appellant's argument that the speedy manner in which the trial was conducted was prejudicial to him and resulted in an injustice. That the trial was conducted in a record three (3) days from the presentation and close of the Prosecution case; to the delivery of the ruling on whether he had a case to answer; to being placed on his defence; to delivery of Judgment; to mitigation and finally to sentencing i.e between the 16th and 18th November 2022. He has relied on *Joseph Ndungu Kagiri* case (*supra*) where the court dealing with a similar issue of the speedy manner the trial was conducted, stated;

“On this issue, considering the time frames mentioned above, an innocent observer can be easily be pardoned for praising the learned Magistrate and the prosecution for the zealous manner and the remarkable speed with which the proceedings were hurriedly conducted. Within a record of seven days as stated above, the prosecution had closed its case, a rare achievement in this country by any standard. The defense hearing was fixed within seven days from the date the prosecution closed its case, another rare happening in practice and reality.....

“...In my considered opinion, the speedy trial provided for in our constitution is not "a rushed and unconsidered justice." No. It cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system that is not too fast, and not too slow, but just right. To me that is the proper meaning of the phrase "to have the trial begin and conclude without unreasonable delay." The drafters of the *Constitution* never anticipated a trial that is too speedy to the detriment of an accused person. I reiterate that the flip side of the maxim "justice delayed is justice denied..." is a rushed, unconsidered, un-procedural and unconstitutional trial that undermines sound criminal justice system." The effect is that such a trial is a sham and has absolutely no place in our constitutionalism.



13. Further, he submits that the prosecution failed to adduce evidence before the trial court to prove the elements of defilement as stated in *George Opondo Olunga v R* [2016] eKLR i.e identification or recognition of the offender, penetration and the age of the victim.
14. The appellant did not contest that the complainant was a minor but contends that the alleged penetration was not proved. He relied on *John Mutua Munyoki v Republic* [2017] eKLR where the Court of Appeal stated:

“The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration.”
15. Quoting paragraph 18 of the learned trial magistrate’s judgment which states; “...It is important to note that the accused in this case was denying culpability but not the fact that this child had been penetrated “ the appellant submitted that there was no evidence of tears, bruises, broken hymen or spermatozoa attributed to him to establish that he had committed the alleged penetration, yet the learned trial magistrate shifted the burden from the prosecution to prove that he had committed the penetration to him to prove that he had not done it. This is evidenced at paragraph 24 of the judgment where the learned trial magistrate states that the appellant never challenged speeding off with the complainant to a friends’ house and having their first sexual encounter when the complainant was in class 7.
16. Further, the appellant referred to paragraph 25 where the trial court stated that he never challenged the pregnancy and living with the complainant. He wondered how the alleged the relationship between him and the complainant went undetected for a period of more than one year yet (PW2, 3 and 6 testified that indeed he was their neighbor. He contends that the trial court erred in failing to consider that the evidence produced by the Prosecution could be falsehood and a fabrication aimed at implicating him for the alleged offence and the likelihood that the charges were borne out of malice and ill-will due to the fact that he refused to marry the complainant after it came to light that the complainant was pregnant.
17. It is the appellant’s position that that the prosecution failed to call vital witnesses to their case to wit; his alleged friend- in whose house the complainant alleged to have been first defiled, the complainant’s friend by the name Maggy where the complainant stated to have spent the night after being dropped by him and the caretaker to the plot where the appellant lived, to whom she reported what the appellant had done and who assisted her to call her mother.
18. Ultimately it the appellant’s position that his conviction was based on contradictions and variance in the evidence adduced. That the evidence of (PW 2 seems to be pointing to events that took place in the year 2021 and her evidence was contradictory where she stated that she was the Cousin to the Complainant but it later emerged that she was the sister. That the evidence of (PW 3 was that the complainant was rescued from his (appellant’s) compound on the 09/09/2022 whereas the Investigating officer makes reference to the date as 12/09/2022 and the mother as 11/09/2022. That the only common denominator in the three statements and/or evidence is that at the time of the rescue, he (appellant) was not within the vicinity.
19. He concludes by urging this court to quash the conviction and set aside the sentence.



Submissions by the Respondent

20. The State, through Prosecution Counsel Margaret Muraguri, has identified the following as the issues for determination;
- a. Whether there was penetration.
 - b. Whether the Appellant is the perpetrator
 - c. Age
 - d. Whether the appellant was given sufficient time and the prosecution evidence to prepare.
 - e. Whether there were notable inconsistencies in the testimonies of the witnesses.
 - f. Whether the ingredients of defilement have been established.
 - g. Whether the sentence meted out to the appellant is safe.
21. On whether there was penetration it is submitted that the complainant described how the appellant had sex with her on a brown mattress. That he removed his clothes and she removed her innerwear and the appellant forced her to remove her shirt and then he penetrated her thing for urinating with his thing for urinating. She also added that they had sexual intercourse severally. That the examination by (PW1 revealed that the hymen was broken with an old scar and the victim also tested positive for pregnancy.
22. On Whether the Appellant is the perpetrator it is submitted that the complainant identified the appellant as a neighbor and the appellant confirmed as much in his defence. That the appellant also confirmed that he had been called by the complainant's headmaster about the note of them planning to get married and the evidence was corroborated by (PW 3 and (PW6. She submits that there was no grudge between the appellant's and the victim's family hence no reason or possibility of frame up.
23. On the Age of the complainant it is submitted that the complainant's birth certificate was tendered in evidence and it indicates that she was born on 26.11.2006. That the complainant's mother, (PW6, also testified that the daughter was 16 years old.
24. On whether the appellant was given sufficient time and facilities to prepare his defense, it is submitted that the prosecution undertook to supply the appellant with all documentation and he did not raise the issue again during the mentions on 3/11/2022 and 10/11/2022. That during the hearing, the appellant did not raise the issue and he proceeded with the witnesses and even cross-examined them. It is contended that this ground of appeal is an afterthought. On the complaint that the matter was rushed, it was submitted that it was heard during the Judiciary Child justice month held between 8th and 25th November 2022.
25. It is submitted that there is no basis not to believe the evidence of (PW1 and the same should be considered at face value without corroboration. That the law in sexual offences is that no corroboration is required as long as the complainant's evidence is believable. The court is referred to *GOA v Republic* [2018] eKLR where the court held that;

“...Section 124 of the *Evidence Act* comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth...”



26. On whether there were notable inconsistencies in the testimonies of the witnesses. It is submitted that the testimonies of the witnesses considered together point to the fact that there was penetration of the complainant who is a minor and that the appellant is the perpetrator. That the appellant has selected a few sentences and construed them in isolation in a fishing expedition for inconsistencies that do not exist, the court is referred to *Ali Mohamed Ibrahim v Republic* [*supra*] where the court observed:
- “...The appellant has indeed in this case picked out sentences and considered them in isolation in attempt to prove inconsistencies. There is otherwise no inconsistencies or discrepancies in the prosecution’s evidence. The prosecution’s evidence was clear and consistent...”
27. And further, that our courts have in the past held that even in instances where inconsistencies are identified in the evidence; such inconsistencies ought to be significant and sufficient to paint a picture of untruthfulness for the court to reject such evidence. See the Ugandan case of *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, where the court held;
- “...With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case...”
28. On Whether the ingredients of defilement have been established, the court was referred to *Lukas Muli Nzioka v Republic* [2019] eKLR for the proposition that the ingredients of defilement are penetration, minor victim and positive identification of the perpetrator; that the trial court directed itself properly in establishing that indeed there was penetration which was perpetrated by the appellant who was well known to the complainant.
29. On whether the sentence meted out to the appellant is safe, it is the position of the prosecution that the sentence meted out to the appellant was legal, proper and safe. That defilement of a victim between 16 and 18 years attracts a sentence of not less than fifteen years imprisonment. See *SKM v Republic* [2021] eKLR where the court held;
- “...The court when passing sentence gave reason that the applicant was not remorseful. The sentencing is the discretion of the trial magistrate. The discretion was exercised judicially in the circumstances of this case. I find no reasons to interfere with the sentence. In conclusion I find that the prosecution proved its case beyond any reasonable doubts. This appeal is without merits and is dismissed...”
30. In conclusion, it is submitted that the appellant failed to establish that he deserves the reliefs sought in the Petition of Appeal
31. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.
32. Upon considering the grounds of appeal, the entire record, the rival submissions and the authorities cited , the following issues arise for determination;
- a. Whether the appellant’s right to a fair trial was infringed.
 - b. Whether the offence of defilement was proved to the required standard.



- c. Whether the sentence meted was harsh and excessive

Whether The Appellant's Right To A Fair Trial Was Infringed.

33. The appellant complained that he was not furnished with the prosecution evidence in advance and that the trial was conducted hurriedly hence denying him the opportunity to prepare his defence. The record shows that on 06/10/2022, the prosecutor informed court that he had not received statements and he also undertook to supply them. The matter was mentioned on 03/11/2022. The record shows that the appellant was in custody and there was no indication as to whether the witness statements were supplied to the appellant. On 10/11/2022, the matter was mentioned again and the appellant was present but the issue of statements was not mentioned. On 16/11/2022, the matter came up for hearing and both the prosecutor and appellant indicated that they were ready to proceed.
34. The record shows that the appellant was not represented. He was facing a serious charge where he could lose his liberty for more than 15 years. One of the tenets of fair trial is the right to know that you can have legal counsel as provided for by Article 50(2) (g) of the Constitution i.e. to choose, and be represented by, an advocate, and to be informed of this right promptly; This right is explained further in the Legal Aid Act which gives the court the mandatory duty to inform the accused of that right. At s. 43 where it states: Duties of the court
- (1) A court before which an unrepresented accused person is presented shall—
- (a) Promptly inform the accused of his or her right to legal representation;
- (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
- (c) inform the Service to provide legal aid to the accused person.
- (1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—
- (a) the severity of the charge and sentence;
- (b) the complexity of the case; and
- (C) the capacity of the accused to defend themselves.
35. In this case, there is nothing on the record to show that the court did that. The court did not have a choice and clearly by not informing the accused of that right, the journey of infringement of the appellant's right to fair trial began.
36. Plea was taken on the 14th September 2022. On the 6th of October 2022 it is the Court Prosecutor who is saying that he has not received the statements and hence unable to supply the same. He says he will supply the same and the matter is fixed for 3rd of November 2022 for pretrial. On 3rd, the record shows that the accused was not present. The matter is fixed for mention on the 15th of November 2022. The next date however is the 16th of November 2022 when the matter comes for hearing. Nowhere does the record show that there was a pre-trial as indicated by the court, on 6th October 2022, that the same would be on 3rd November. No pre-trial ever took place and there is no evidence on the record that the appellant ever received the prosecution evidence that is; the witness statements, the medical reports etc. to enable him prepare for his defence. Whether or not he was able to cross examine the witnesses is neither here nor there. The prosecution had a constitutional duty and the court was required to oversee its implementation and there is nothing on record to show that it was done.



37. With regard to the complaint that the trial was conducted hurriedly, the record shows that all the prosecution witnesses testified on 16/11/2022 and the appellant testified on 17/11/2022. Judgment was then delivered on 18/11/2022. It was submitted by the prosecution counsel that this matter was handled in November which is the 'Judiciary Service Month for Children Matters'. The question is whether that is a reason to proceed in a manner that would infringe on the rights of the accused person?
38. The November Service Month was established in The Judiciary Calendar in 2019 at the end of the life of the NCAJ Special Task Force on the Administration of Justice and during the commemoration of the International Day of the Child. Service Weeks had been conducted before to clear case back log in jurisdictions the Taskforce had identified as hot spots. The success of those exercises indicated the need for a regular time for the child justice system agencies to come together and not only consider clearance of case back log but other issues hindering child rights, child protection and access to justice. This was in realization of the fact that the child justice system is a chain-link that requires all actors to work in sync so as to prevent breaks through which children in the justice system could fall through and to ensure a seamless provision of services for the child in the justice system. It would also give the agencies an opportunity to look at prevention, rehabilitation and reintegration issues.
39. Courts and court users are expected to proceed with cases expeditiously and where there is backlog, to put other cases on hold for that one month to pay full attention to pending children cases. During that time, the Constitution is not suspended neither are any legal processes suspended. In expediting the matters, courts and court users are expected to abide by the law and no shortcuts are expected.
40. The Taskforce, then, and now the Standing Committee on the Administration of and Access to justice for Children Matters, in collaboration with the Office of the Chief Registrar who doubles as the Secretary of the NCAJ request the courts to supply lists of children matters pending before them. This determines actions from the committee and the OCRJ together with Registrar Magistrate's Court. The launch of the Service Month is done early in November and it is to run through the month. It is also a time for court users Committees to create awareness on issues of children and engage with the local communities on issues on the administration of and access to justice for children.
41. I have gone through this brief to demonstrate that it is not a time to suspend the Constitution or create shortcuts but a time to demonstrate how that system can work effectively and efficiently within our Constitutional framework.
42. I would be the last person to vilify anyone for expediting any case where a child is involved but the rights of the other persons must also be upheld even in the pursuit of the best interests of the child.
43. Article 50(2) (c) speaks to another fundamental right of the accused with regard to fair trial where it is required that the accused person do have adequate time and facilities to prepare a defence. In this case, for a person who was unrepresented, one day could not have been sufficient.
44. I agree with the persuasive holding in John Ndung'u Kagiri v R (*supra*) that;

“In criminal trials, the quest for a shorter process isn't necessarily better. Issues or evidence which matters can be missed. Procedures designed to safeguard rights can be truncated and can lead to unfair trials, subsequent appeals and more costs and waste of valuable time as we have experienced in this matter. The effect is that such hurried trials are "Not so efficient after all." Accused persons may be prevented from properly exercising their rights to put their case, a position entrenched in our criminal justice system, long upheld by common law and enshrined in article 50 of our constitution. In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system



in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society.”

45. In this case, the speedy trial failed both sides. There are gaps in the case for the prosecution and failure to uphold the right to fair trial.

Whether The Offence Of Defilement Was Proved To The Required Standard

46. The parties are in agreement that the ingredients of the offence are; age of the complainant, proof of penetration and positive identification of the assailant.
47. With regard to the complainant’s age, the birth certificate produced shows that the complainant was born on 26/11/2006 hence she was between 15 and 16 years during the period of the alleged offence. Further, her mother, (PW6, confirmed that she was 16 years old. Her age is not in dispute.
48. Starting with the circumstances of the alleged offence, the complainant told the court that she called one Eric on diverse dates in the month of July 2021 at about 10:00am to tell him that she was pregnant for him. She said he told her to prepare that he was going to get her. He then sent someone to direct her to where they were going to meet. She said they went to his house and had sex. He then left for work.
49. According to this evidence in July 2021, the complainant is saying that she was already pregnant for Eric but she did not know where his house was. She states that she rang him on his phone and they spoke. She creates the impression that it was the first time she went to his house. It is in the same breath that she says that the accused was her neighbor. That he was a friend to her brother. How does this add up with the rest of the evidence? It does not. This is because then her family would have been aware especially of the violent incidents that she alleges the accused committed towards her.
50. She states further that when he came back from work, he forcefully took her to Maggy, her friend’s house, for the night and said that he would return for her the next day. When he did not return for her she went to his house. He forcefully threw her out and she had to seek the intervention of the care taker and when that failed, the same caretaker helped her call her sister, who directed her to the police. She did not go but the police came for her the following day. She was taken to hospital and found to be pregnant.
51. From this testimony the complainant is saying that when she had the sexual encounter with the accused in July she was already pregnant. In her evidence she says it is after this incident that she was found to be pregnant that is on the 3rd day after the sexual intercourse with the accused.
52. Further in her testimony she speaks of a first time when they went to the house of a friend of the accused at Kiundani. That after that they had sex severally.
53. The evidence of (PW2) was that the complainant was her cousin. She said she learnt from someone that the complainant was missing on 7th September 2022 at 6pm. On 8th another person told her that the complainant was in the house of Eric Mwendwa. She informed her mother and a report was made to the assistant chief who referred her to the police. On 9th she went to the police and together with an



officer went to collect the complainant. She said “I found and saw the complainant in the plot where the accused had a house in his house. Accused had gone to work”.

54. On his part the Arresting Officer no. 218348 Sgt Mohammed Garongo testified that he received a call from a member of the public about a defilement suspect who was about to shift from his residence. He rushed there and arrested him. It was his first time to see him. He does not state how he identified the accused person.
55. Now compare that testimony with that of (PW5 no. 104416 PC Gladys Santa. She said she received the report of the complainant missing on the 11th of September 2022 from the sister. The following day, 12th, reported that the complainant was in the house of another man. She testifies “We went and found the complainant herein. She showed us the house she was put in but it was locked” she said that she found the accused in the station having been arrested.
56. The evidence of the mother to the complainant is that she was called to school where her daughter was a pupil. She was given a letter said to have been written by her daughter to the accused person. That her daughter confirmed that she knew the accused and they had planned to marry. The accused was summoned to the school and denied such an arrangement saying that he had a wife and could not marry a school girl. Her daughter was counseled and that was the end as far as she knew. Later on 7th Sept 2022, her daughter disappeared. She said she found her in the plot where the accused had a house. She informed them she was pregnant by the accused. She said they did not find her in the accused’s house but outside.

Was There Penetration?

57. The P3 indicates that the matter was reported to the police on 12th September 2022. It indicates that the clothes were torn but no bloodstains and that there was history of consented sex with individual known to her on several occasions, no injuries, no treatment given, no tears, no discharge, tests were negative and the conclusion was that she was a “sexually active 16-year-old girl”.
58. In his testimony the clinical officer indicated that the P3 was filled on the 13th September 2022. That the pregnancy test was positive but all the other tests were negative. The PRC indicated date of last consensual intercourse to be 10th September 2022. The fact of pregnancy and the medical examination is proof that there was penetration.

Who Did It?

59. It is not in dispute that the appellant and the complainant’s family were neighbors. It is also conceded that it is sometime in September 2022 that the appellant was called to the school where the complainant was a pupil on the allegations that she had written a letter to the appellant to get married to him. The appellant denied any relationship with her or any intention to get married to her as he was already married, and no way would he marry a school girl.
60. All the other issues are contested. I have set out the evidence of the witnesses. From the evidence of the complainant there was a sexual encounter with the accused in July 2021, another in the house of a friend in Kiundani and then several other occasions all disputed and challenged by the appellant placing the burden of proof at the door of the prosecution. The evidence is riddled with inconsistencies by the prosecution witnesses. Reading the evidence of (PW2 together with that of (PW3, 5 and 6, paints the picture that they were making reference to one incident where the complainant is supposed to have been in the house of the appellant. The complainant’s evidence is about an alleged incident in



July 2021; all the other witnesses are about alleged events in September 2022. In the persuasive case of *Philip Nzaka Watu v Republic* (2016) CR APP 29 of 2015, the court had this to say;

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.”

61. The case for the prosecution had gaping gaps. The complainant knew the caretaker of the appellant’s plot of residence, he was a crucial witness. He was not called yet he would have confirmed the complainant’s allegations about the violent incidents by the appellant against her at the plot. Her friend Maggy would have confirmed that indeed the day the appellant allegedly defiled her he took her to her house, the Assistant Chief who was allegedly aware of the matter but was never called. In the famous case of *Bukenya v Uganda* (1972) EA, 349 it was held that;

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

62. In these circumstances, this court has the discretion to draw the conclusion that had the prosecution called these witnesses their evidence would have been adverse to their case. On the other hand it is also open to the court to draw the conclusion that these events did not happen as alleged.

63. The complaint spoke of being taken to the house of a friend of the appellant in Kiunduani. The police did not bother to investigate the case and to confirm from the complainant where this house was, and who this friend was because that would confirm the allegation and at the same time arrest the person who had provided room for the defilement of the child. That incident was denied and the prosecution had the obligation to prove it. There was no approximate date attached to these specific incidents of alleged defilement. The other alleged numerous ones, no evidence was led as to when they happened and where they took place. In fact the prosecution did not lead any evidence about them at all leaving the allegation that there were numerous sexual encounters without supporting evidence.

64. Further, I am of the considered view that the inconsistency in the prosecution case makes the defence highly probable. It is probable that the appellant was framed because he refused to marry the complainant. The complainant’s mother testified that she had been summoned to her daughter’s school and questioned about a marriage plan between the appellant and complainant. She said that; “My daughter was counseled and I thought that everything had been finalized.” The appellant denied any such plan and insisted that he had a wife and could not marry a school girl. I also noted the sentiments of the trial magistrate that; “She stated that the first incident happened when she was in class seven. In cross examination of this issue, the defence failed to challenge the same at all.” I respectfully agree with the appellant that by saying so, the trial magistrate shifted the burden of proof to him. It was the burden of the prosecution to prove the same not for the accused person to show that it never happened.

65. It is trite that an accused person can remain silent throughout the trial and the prosecution would still have a duty of proving its case beyond reasonable doubt.



66. In conclusion I find that the rights of the appellant and to some extent of the complainant, to fair trial were violated due to the manner in which the trial was rushed, the prosecution's case was filled with material contradictions and inconsistencies, crucial witnesses were not called, the matter was not investigated, this prosecution failed to prove its case, and the burden was at some point shifted to the appellant.
67. In the circumstances the appeal succeeds, the conviction is quashed the sentence is set aside and the appellant is at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF OCTOBER 2023

Mumbua T Matheka

Judge

CA Mwiwa

For State Ms. Omollo

Appellant Present

Mr. Hassan holding brief for Counsel for the appellant

