REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO E014 OF 2020

ALLAN CHEBORE CHEMOSIT.......APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the Judgement delivered on the 11th November, 2020 by the Senior Principal Magistrate, P.C. Biwott, in Kabarnet SPM's Court Sexual Offences Case No.19 of 2019)

JUDGMENT

1. The Appellant, Allan Chemosit, was charged at the Senior Principal Magistrate's Court at Kabarnet in Criminal (SO) Case No. XX of 2019 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 4 of 2006. The particulars of the offence were that on 31st July, 2019, at around 13.00 hours at [particulars withheld] Trading Centre in Baringo North Sub-County within Baringo County, the Appellant wilfully and unlawfully caused his penis to penetrate the vagina of D. J. C., (abbreviation provided by this Court) a girl aged 13 years.

2. Based on the same particulars, the Appellant faced an alternative charge of indecent act with a girl contrary to Section 11 of the Sexual Offences Act No. 4 of 2006 by wilfully and unlawfully causing his penis to touch the vagina of the said D. J. C.

3. At the trial the prosecution called five witnesses. The complainant who testified as PW1 gave sworn testimony after the Trial Court conducted *voir dire* examination and found that she was intelligent enough to give evidence on oath.

4. According to the complainant, on 31st July, 2019 at around 1:00pm she left her home and went to [particulars withheld] to buy clothes. She testified that her mother and her sister knew that she had gone to [particulars withhe]. At around 5:00pm she met her boyfriend, Villech and stayed with him up to the night.

5. It was PW1's testimony that from her boyfriend's place she proceeded to [particulars withheld] Centre on her way to her home. She told the Court that at Barwesa she met her English teacher by the name Allan Chebore who is the Appellant herein. She stated that she knew the Appellant very well and although it was dark there was light at the Centre from electricity.

6. The complainant told the Court that the Appellant was walking and she followed him to his house as she wanted someone to take her home. Her testimony was that she reached his house before him as she passed a different route. She stated that the Appellant lived near the road and she knew his house as they usually passed there during games time. On reaching the house she found two women. As the door was open she entered the house and was immediately followed by her teacher who found her seated. She told the Court that the Appellant was on a phone call when he entered house and upon finishing his call they heard people saying "fungua mlango".

7. The complainant further told the Court that the people who ordered that the door be opened were police officers and that the Appellant opened the door which was shut but not locked. Her testimony was that the Appellant was arrested and they were taken to Barwesa Police Station before being escorted to Barwesa Hospital where she found her mother. She denied having sex with the Appellant or having a meal in his house. Her testimony was that her attempt to tell the police what she had told the Court was met with threats of imprisonment.

8. Upon conclusion of the complainant's evidence, the prosecution applied that she be declared a hostile witness as she had contradicted her statement to the police. The application was allowed. Consequently, the prosecutor cross-examined the complainant who told the Court that the Appellant had taught her since January, 2019 and that they never talked during the school holidays. She, however, disclosed that she had talked to him a week prior to the trial and sought his forgiveness. She confirmed that she indeed signed the statement she recorded with the police and that the Appellant was in remand elsewhere when she signed the statement.

9. The complainant told the Court that she and the Appellant were dressed up when the police arrived. Further, that among the people who went to the scene were the school chairman and the driver. Her testimony was that the doctor who examined her at Barwesa Hospital retained the medical report.

10. Upon cross-examination by counsel for the Appellant, the complainant told the Court that she left her home at around 1:00pm and went to her boyfriend's place until the night. Her testimony was that the Appellant was to escort her home. It was her evidence that she found two ladies whom she did not know at the home of the Appellant. When the Appellant arrived he asked her why she was at his place. Her evidence was that she signed her statement with the police without reading it.

11. On re-examination by the prosecutor, the complainant testified that upon entering the house, the Appellant told her to leave as she was likely to cause him trouble.

12. Z.K. who identified herself as the mother of the complainant testified as PW2. Her evidence was that the complainant was thirteen years old having been born on 2nd March, 2006 and was in Standard 7 at Lowland Academy. She stated that on 31st July, 2019 at about 1.00pm she left the complainant at home and went to look after the goats. When she came back at 5.00pm she found the complainant absent. She looked for her and even alerted relatives but the search yielded nothing. She went then to sleep.

13. PW2 testified that at about 1.00am she received a call from Barwesa Police Post informing her that her daughter was in their custody. She went and found her in hospital. Upon examination by a doctor, the doctor disclosed that her daughter had sex with a man. She testified that the complainant disclosed that the Appellant who was also present had sex with her. The Appellant was also examined by the doctor.

14. PW2 identified the complainant's birth certificate showing she was born on 2nd January, 2006 and not 2nd March, 2006 as earlier stated. She also identified the P3 form that was filled for the complainant. She told the Trial Court that she knew the Appellant prior to the incident and had no differences with him.

15. On cross-examination by counsel for the Appellant, PW2 insisted that her daughter was thirteen years old and not sixteen years as suggested by the defence. Her evidence was that David Kokwe who was a witness in the case is the person who gave her phone number to the police officer who called her. Her testimony was that David was among the people she had notified about the disappearance of her daughter.

16. PW2 told the Court that she did not know where the Appellant lived. Her testimony was that the complainant claimed she had gone to the market before going to the house of the Appellant. Asked for the complainant's clinic card, PW2 stated that she did not have it in Court but the investigating officer could go for it at the school where it was being kept. Her testimony was that the complainant confided in her that the Appellant had sex with her and the Appellant did not dispute the information.

17. PW3 David Kokwe told the Court that on 31st July, 2019 at about 10:00pm he was at home when a secondary school teacher at [particulars withheld] called him and told him of a girl entering her teacher's house. He went to the scene where he found two ladies. One of them was his informer. He was shown the house and he called the school's director and accountant. He also called the chief. He knew the girl who was said to be in the teacher's house as well as the teacher as he was a parent in their school. When the director and accountant arrived he left them guarding the house and went to report the matter to the police.

18. The evidence of PW3 was that he was accompanied by four policemen to the scene. The police officers were shown the exact house by the two women and they went and fished out the girl from the house. The teacher who the witness identified in Court as the Appellant was arrested and escorted to the Police Post. The witness told the Court that while outside the house he could hear the police tell the girl to dress up.

19. PW3 told the Court that he had known the Appellant for two years and that he taught in the complainant's school. He testified that he went home after the arrest of the Appellant and only met the complainant's mother at the police station the next day.

20. Upon cross-examination, PW3 denied that the mother of the complainant was his sister. His testimony was that one of the women outside the Appellant's house was a PTA primary school teacher and was related to the complainant. The other woman was a secondary school teacher and she is the one who called him. The witness told the Court that he was a driver in the school where the Appellant taught and the complainant schooled. He testified that the two women were present when the Appellant was arrested. He stated that he was present when the Appellant was arrested and denied being outside the gate during the operation.

21. Sammy Kirwok a clinical officer at Kabartonjo Sub-County Hospital testified as PW4. His evidence was that he saw D. J. C. who had allegedly been defiled on 1st August, 2019. Apart from a small tear on her t-shirt, her clothes where intact and she was sober. Upon examination he found that her labia minora was inflamed and there was a greenish yellow discharge with foul smell from the vagina. He noted that the cervix had no bruises. However, there were pus cells with a few spermatozoa. His observation was that the hymen had been broken earlier. PW4 formed the opinion that the girl had been defiled and he filled a P3 form which he produced as an exhibit.

22. In response to questions put to him during cross-examination, PW4 stated that the P3 form which he filled on 1st August, 2019 at about 8.00am was from Kabartonjo Police Station. He explained that although Barwesa Hospital was manned by a clinical officer of his rank, P3 forms were filled at the Sub-County level. He admitted that the words hymen and penetration did not appear in the P3 form. PW4 stated that the girl had been treated elsewhere prior to the filling of the P3 form. The witness told the Court that he did high vaginal swab and spermatozoa was visible. His testimony was that the treatment sheet had a reference number for Barwesa.

23. Isaac Kimeli investigated the incident. He testified as PW5 and told the Court that on 31st July, 2019 at about 10:55pm, members of the public went and reported that there was a pupil in a teacher's house at [particulars withheld]trading centre. He stated that in the company of

other police officers they proceeded to the house where they found members of the public at the gate. They were shown the teacher's house and upon knocking the door the teacher opened the house. On entering the house, they found the teacher standing and the pupil sitting on the bed. The teacher didn't tell them who the pupil was.

24. PW5 testified that they arrested the teacher and the pupil and escorted them to Barwesa Patrol Base. At the Base the girl revealed that she was in Standard 7. She gave them her mother's phone number and their boss called her and informed her that her daughter was with them. At daybreak they took the girl and the teacher to hospital for examination before escorting the teacher to Court to take plea. The witness produced the complainant's birth certificate and her statement to the police as exhibits.

25. In response to questions put to him during cross-examination, PW5 stated that two members of the public by the names David Kokwony and Daniel Kibet made the report to the police after seeing the girl enter the teacher's house. He stated that he never met the women who allegedly saw the pupil entering the teacher's house. Further, that David Kokwony led them to the house and he did not reveal to them the women who first saw the pupil entering the house.

26. Still responding to the questions put to him in cross-examination, PW5 testified that the birth certificate of the complainant was issued on 4th October, 2018. He stated that he never asked for an age assessment report and that it was only the girl's mother who could tell her exact age.

27. PW5 further told the Court that he did not record the statements of the school administrators. His testimony was that although the complainant was treated at Barwesa Health Centre, the clinical officer at the facility told them to go and have the P3 form filled at Kabartonjo since he didn't want to testify in Court.

28. The Appellant gave sworn testimony in his defence and denied defiling the complainant or touching her private parts. He stated that they closed the school on 30th July, 2019 and he went to the centre to book transport as he intended to travel to his home in Mt Elgon on 1st August, 2019. He stayed at the shops until 5.00pm when he went back to his house. He again went to the market for supper where he watched the 9.00pm news before going back home.

29. The Appellant told the Court that when he arrived he found three women making calls. He greeted them and as he proceeded to the house he found the door open and the lights on. The women laughed at him and dared him to enter the house. On entering the house, he found one of his pupils sitting on a stool. He asked her what the issue was and told her that she may get him in trouble. He thought of telling the three ladies to help him but before he could do so there was a knock on the door. Three police officers entered the house and escorted him to the police station. He was later taken to hospital with the girl where they were examined and a P3 form filled for each one of them.

30. The Appellant testified that he didn't know the time the girl entered his house. His evidence was that the girl wanted him to escort her to her home because he was her teacher. According to the Appellant, the lights were on when the police officers entered the house. His testimony was that PW3, the school director and the treasurer were at the gate when he came back home. The Appellant told the Court that the three women disappeared from school when he was arrested.

31. On cross-examination the Appellant stated that although he had been in Barwesa for two years and knew the place very well he did not intend to call as witnesses the people who were present when he took supper. He reiterated that when he arrived he found the door open and the lights on. His testimony was that the girl was inside her house. According to him, the three women laughed at him when he asked who was inside his house and nobody escorted him into the house to see the girl.

32. On the strength of the summarized evidence the Magistrate found the Appellant guilty and sentenced him to imprisonment for a period of ten years.

33. The Appellant being dissatisfied and aggrieved with the judgment of the Trial Court has through the petition of appeal amended on 1st July, 2021 appealed on the following grounds:

> **i. That the learned trial magistrate erred in both law and fact in finding that the prosecution had proved its case beyond reasonable doubt.**
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> **ii. That the learned trial magistrate erred in both law and fact in failing to find that the retraction of her statement by the complainant rendered her evidence inadmissible, unreliable and doubtful.**
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> **iii. That the learned trial magistrate erred in both law and fact in shifting the burden of proof to the appellant thereby arriving at a manifestly wrong conclusion that the appellant was guilty of the offence.**
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> **iv. That the learned trial magistrate erred in both law and fact in failing to find that the prosecution failure to call the alleged eye witness who saw the complainant entering the appellant's house and called PW3 meant that her evidence was adverse to the prosecution's case.**
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> **v. That the learned trial magistrate erred in both law and fact in finding that the complainant had been defiled when there was no evidence of penetration ascribable to the appellant.**
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> **vi. That the learned trial magistrate erred in both law and fact in failing to find that there was no proof that the spermatozoa found in the vagina of the complainant originated from/belonged to the appellant.**
>
> **vii. That the learned trial magistrate erred in both law and fact in disregarding the appellant's defence thereby arriving at a**

manifestly wrong conclusion that the appellant was guilty of the offence as charged.

viii. The honourable magistrate erred in law and fact in failing to address the issue of the truthfulness or otherwise the reliability of the testimony of the complainant.

ix. The honourable magistrate erred in law and fact in improperly conducting the voire dire examination in that he totally failed to satisfy himself on the responsibility or necessity or need of the complainant/witness to tell the truth.

x. The honourable magistrate totally failed to resolve and/or grant the benefit of doubt to or in favour of the appellant.

xi. There was absolutely no evidence connecting the appellant to the alleged sexual offence(s) in the light of the evidence tendered.

xii. The honourable magistrate was biased in his analysis of the evidence and thereby arrived at a wrong decision.

34. In support of the appeal, the Appellant's counsel filed submissions dated 28th September, 2021 and supplementary submissions dated 22nd October, 2021. The Appellant submitted that the prosecution was under a duty to adduce evidence demonstrating that the complainant was sexually molested by the Appellant. On the elements of the offence that must be proved before an accused can be convicted for defilement, the Appellant relied on the case of **Dennis Njuki Muranga v R [2020] eKLR** where it was held that the prosecution must establish the complainant's age, penetration and the identity of the perpetrator.

35. The Appellant submitted that the only eye witness to the alleged defilement was the complainant who had exonerated him by retracting her statement to the police. It was urged that in view of the testimony of the complainant, there was no basis upon which the Trial Court could convict the Appellant. It was also submitted that since the Trial Court had found the evidence of the complainant to the police and the Court to be inconsistent, it ought to have found the complainant to be an unreliable witness and a conviction ought not to have ensued from such testimony. According to the Appellant, as was held in the case of **Denis Osoro Obiero v R [2014] eKLR**, the trial court must believe the victim and record the reasons thereof before convicting an accused person for the offence of defilement.

36. On the question as to whether the prosecution discharged the burden of proof, the Appellant contended that the burden of proof in criminal cases always lies with the prosecution and never shifts. Further, that it is only after a *prima facie* case is established that the accused will be expected to tender a plausible explanation to demonstrate that he was not involved in the commission of the offence. The Appellant submitted that in his case, the Trial Court shifted the burden of proof to him which was a misdirection and hence occasioned him injustice.

37. The Appellant submitted that although the prosecution conceded to the presence of a lady at the scene of crime, its failure to call that witness can only mean that her evidence would have been unfavourable to the prosecution case.

38. The Appellant further submitted that before convicting him on the evidence of a single witness, the Trial Court was under a duty to be convinced that the witness was truthful and reliable. According to the Appellant, the failure of the Trial Court to make a decision on the truthfulness and reliability of the complainant rendered the conviction untenable.

39. It was further submitted by the Appellant that the purpose of the *voir dire* examination was to ascertain whether the minor understood the need to tell the truth and that the failure by the Trial Court to make a finding as to whether the witness understood the importance of telling the truth rendered the conviction unsafe. In support of the argument reliance was placed on the decisions in **Johnson Muriru v Republic [1983] KLR 445** and **Japheth Mwambire Mbitha v Republic [2019] eKLR**.

40. Turning to the value of the evidence of the complainant, the Appellant submitted that the same was of negligible probative value and should not have been used to convict him since she had been declared a hostile witness. The Appellant relied on the decisions in **SCG v Republic [2018] eKLR; Alowa v Republic [1972]** (full citation not provided)**; Batala v Uganda [1974] EA 402;** and **Daniel Odhiambo Koyo v R [2011] eKLR** for the proposition that the evidence of a hostile witness is of little probative value.

41. The Appellant stated that the Trial Magistrate failed to give him the benefit of doubt considering that the complainant had denied having sex with him and there was absolutely no factual or legal basis for convicting him. Further, that the complainant had admitted to having sex with someone else on the material day and without DNA analysis the medical evidence could not link him to the complainant's sexual activities.

42. In conclusion, the Appellant submitted that the Trial Magistrate was openly biased against him as he had failed to look for other evidence to connect him with the offence having found the testimony of the complainant unreliable. The Appellant consequently urged this Court to find his conviction unsafe, allow the appeal and set him at liberty.

43. The Respondent filed submissions dated 23rd September, 2021 in opposition to the appeal. The Respondent submitted that from an analysis of the evidence tendered at the trial it was clear that the prosecution had proved beyond reasonable doubt that the Appellant is the person who defiled the complainant. It was urged that the prosecution witnesses had testified on how the Appellant had arranged to defile the complainant and had indeed succeeded in doing so. Further, that the complainant had positively identified the Appellant. On the issue of identification, the Respondent relied on the decision in **Republic v Joyce Kaburo Muthuri & another [2021] eKLR; Meru HC Criminal Case No. 56 of 2016** in support of its case, and stated that the facts and circumstances of the cited case are similar to those of the instant matter.

44. The Respondent in reliance on the Court of Appeal decision in the case of **Republic v Muthiwa [1935] 2 EACA 66** conceded that a retracted confession is of little evidential value unless it is corroborated in material particulars.

45. Turning to the issue as to whether the prosecution discharged its burden of proof, the Respondent cited the decisions in the cases of **Kiilu & another v Republic [2005] 1 KLR 174; Miller v Ministry of Pensions [1947] 2 All ER 372; Pius Arap Maina v Republic [2013] eKLR;** and **Festus Mukati Murwa v Republic [2013] eKLR** and agreed with the Appellant that the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts should be reconciled in favour of the accused person. Without expressly conceding the appeal, the Respondent submitted that there was no conclusive evidence that there was penetration and the Trial Court therefore erred in arriving at the conclusion that the prosecution had proved penetration beyond reasonable doubt.

46. Referring to the case of **Gordon Omondi Ochieng v Republic, Kajiado HC Criminal Appeal No. 42 of 2019,** the Respondent submitted that the failure to call some witnesses was not fatal to the prosecution case because critical eye witnesses had testified. According to the Respondent, the calling of witnesses depends on the nature of their evidence and whether the same will be of any probative value to the ultimate findings of the court.

47. The Respondent agreed with the Appellant that a trial court is duty bound to consider the defence of an accused person. As to whether the Appellant's defence was considered by the Trial Court, the Respondent asked this Court to consider the record and make an appropriate finding. In this regard, the Respondent referred the Court to the decision in **JM v Republic, Meru HC Criminal Appeal No. E002 of 2020.** The Respondent concluded the submissions by asking the Court to make its determination based on the facts, circumstances and authorities cited. The Court is urged to consider ordering a re-trial in the alternative.

48. In reply to the Respondent's submissions, the Appellant through his supplementary submissions argued that the prosecution had not proved its case to the required standard and that what it did was simply to show that he was in the same house with the complainant on the date of the alleged incident. The Court was urged to find that the circumstances of this case are distinguishable from that of the case **Republic v Joyce Kaburo Muthuri & another [2021] eKLR; Meru HC Criminal Case No. 56 of 2016** which was cited by the prosecution in support of the identification of the Appellant at the scene of crime. Further, that the Respondent in its submissions had admitted that there was no conclusive evidence of penetration.

49. The Appellant reiterated his submission that the moment the complainant retracted her statement to the police there was no basis for his conviction. The Court was told that ordering a retrial was not an option as such a step would only serve to afford the prosecution a chance to fill the gaps in its case to his detriment.

50. I have considered the evidence adduced at the trial, the grounds of appeal, the submissions and authorities relied upon. As expected of a first appellate court, I will subject the evidence adduced at the trial to fresh analysis and evaluation. In doing so, I will also bear in mind the fact that I did not see or hear any of the witnesses testify-see **Okeno v Republic [1972] EA 32** and **Pandya v Republic [1957] EA 336.**

51. The questions that arise for determination in this case are whether the prosecution proved its case against the Appellant beyond reasonable doubt and whether the Trial Magistrate properly directed his mind to the law in respect of the evidence that was adduced at the trial. This Court is therefore called upon to consider the ingredients of the offence *vis-à-vis* the evidence. The Court is required to satisfy itself that the chain of events and statements in respect of those events must be such as to rule out the likelihood of the innocence of the Appellant. The duty placed on this Court to consider the evidence afresh and reach its own independent conclusion is a solemn one as it affords the Appellant an opportunity to have his case reviewed by a court different from the one which tried him.

52. As was correctly held in the case of **George Opondo Olunga v Republic [2016] eKLR**, the prosecution in a case of defilement is required to prove the identification or recognition of the offender, the age of the victim and the penetration of his or her genital organs. This is what the prosecution was required to prove in the case against the Appellant.

53. Turning to the evidence that was tendered before the Trial Court, I find that the age of the complainant was proved by the production of her birth certificate. The document confirmed that the complainant was born on 2nd January, 2006. She was therefore 13 years at the time of the alleged defilement. The Appellant does no dispute the age of the complainant in his appeal. It therefore follows that the age of the complainant was proved beyond reasonable doubt.

54. Although the Respondent joined hands with the Appellant in faulting the Trial Court for concluding that there was penetration, it is clear from the evidence on record that the complainant's vagina was penetrated. This fact was confirmed by PW4 who examined the complainant and filled a P3 for her. The P3 form was produced as an exhibit in the trial. PW4 was clear that he examined the complainant on 1st August, 2019 and found pus cells and spermatozoa which led him to the conclusion that the complainant had sex.

55. The fact of sexual intercourse was further affirmed by the complainant's own admission that she had sex on the material day, albeit with a different man. The only question therefore is whether the complainant had sex with the Appellant. This question becomes more crucial considering that the complainant retracted her statement to the police at the trial. That leads me to the law on recanted testimony.

56. The parties have in their submissions correctly stated the law in regard to recanted testimony. In **Daniel Odhiambo Koyo v Republic [2011] eKLR,** the Court of Appeal stated the law on the probative value of the evidence of a refractory and hostile witness as follows:

> **"… The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In <u>Maghenda v. Republic</u> [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:**
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> > **"The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court."**

There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.

Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify…

PW3 as stated earlier was treated by the court and the prosecution as a refractory witness and we stated earlier that evidence of such a witness needs to be treated with circumspection because of her conduct. In certain cases however, such evidence may be accepted as corroborative of other evidence if the court is satisfied that it cannot be but true and is consistent with other evidence adduced and which the court has accepted. Although PW3 was initially refractory she appears to us to have accepted to co-operate and her testimony was clearly consistent with what PW2 had testified on."

57. The Court of Appeal also summarized the applicable law in **Abel Monari Nyanamba & 4 others v Republic [1996] eKLR** as follows:

"In Coles v. Coles, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said:-

"A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.'

In Alowo v. Republic [1972] EA at page 324 the predecessor of the Court said:-

"The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.'

Again in Batala v Uganda [1974] E.A. 402 the said court at page 405 said:

"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."

The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.

The inevitable conclusion after PW4 had been declared a hostile witness was that he became an unreliable witness, whose evidence would be rejected as untrustworthy. He was discredited completely. In our view, PW4 was substantially an unreliable witness and all parts of his evidence should have been rejected. It must follow, therefore, that nothing PW4 said in Court could be accepted against any of the appellants."

58. My understanding would then be that once a witness is declared hostile their evidence becomes almost worthless and is of no value to either the prosecution or the defence. The act of recanting before the Court the evidence given to the police only goes to show that the witness is unreliable. In such a situation, the Court is called upon to look elsewhere in the search for the truth.

59. Having reached the conclusion that the complainant by recanting her testimony became an unreliable witness, it is no longer necessary to explore the Appellant's submission that he was prejudiced by the Trial Magistrate's failure to determine after the *voir dire* examination whether the complainant understood the importance of telling the truth.

60. At this juncture it is important to state that the evidence adduced at the trial established beyond reasonable doubt that the complainant was a child aged 13 years at the time of the alleged offence and she had a sexual encounter with a man. The offence of defilement was therefore committed and the only remaining question is whether the prosecution successfully linked the defilement to the Appellant. I will proceed to consider the evidence of the other witnesses.

61. The mother of the complainant told the Trial Court that her daughter was examined in her presence and the doctor disclosed that she had been defiled. She further testified that her daughter confided in her that the Appellant had sex with her. When cross-examined by counsel for the Appellant, PW2 persisted that her daughter told her that she had sex with the Appellant who was her teacher. She added that the Appellant heard the statement of her daughter but he did not dispute it. She also told the Court that she knew the Appellant prior to the incident and had no differences with him.

62. PW3 testified that when he was alerted about a pupil entering a teacher's house he dashed to the scene where his informer pointed the house to him. He called other people to the scene and left them on guard as he proceeded to report the matter to the police. From the police post he led police officers to the scene.

63. The investigating officer who testified as PW5 told the Court that upon receiving a report of a girl being seen in a teacher's house they visited the scene where they found members of the public. They knocked the door and on entering the house they found the Appellant standing and the girl sitting on the bed.

64. The evidence of PW3 and PW5 placed the Appellant and the complainant in the Appellant's house. The evidence of PW2 confirmed that there was sexual engagement between the complainant and the Appellant. The evidence of the three witnesses was never shaken during the intense cross-examination subjected to them by counsel for the Appellant.

65. The evidence of the Appellant cannot be considered in isolation. Although the complainant's evidence has already been found not to be of any probative value, it is important to consider it alongside that of the Appellant in order to determine whether the Appellant's case is believable. The complainant told the Court that she had gone to the Appellant's house so that he could escort her to her home. She testified that she saw the Appellant and followed him from behind before taking a different route to his house where the Appellant found her.

66. In his testimony the Appellant gave the impression that he was not aware of the presence of the complainant in his house. His testimony was that it was only after he came home from the shops after watching the 9.00pm news that he found the complainant in the house. He stated that the complainant wanted him to escort her home but before he could do anything police officers arrived and arrested him. The evidence does not add up because the complainant's testimony was that the Appellant entered the house immediately after her.

67. I have considered the defence case as purportedly supported by the evidence of the complainant and find the same unbelievable. The Appellant and the complainant were engaged in unlawful and immoral relationship and it was only after they were found that they formed an alliance in order to rescue the Appellant. Sex is an activity that ordinarily takes place in secluded areas and in the absence of prying eyes. In the case at hand, the evidence that was adduced established that the complainant and the Appellant had sex on the material day. It is immaterial that they have denied coitus. Defilement is a matter beyond those involved in the act and one can be convicted for it notwithstanding denial by the concerned parties. The Trial Magistrate was therefore correct in finding that the Appellant had defiled the complainant.

68. The accusation that the Trial Court did not consider the Appellant's defence is without merit. The Magistrate did indeed consider the Appellant's case and rejected it.

69. There was the suggestion by the Appellant that only DNA analysis could have linked him with the penetration of the complainant. A male teacher who locks himself in his house with his pupil who is not his relative cannot be heard to deny having carnal knowledge of the pupil. As was aptly stated by the Court of Appeal in **AML v Republic [2012] eKLR** the **"fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

70. Indeed, as was held in **Kassim Ali v Republic [2006] eKLR "the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."** The circumstantial evidence in this case leads me to the same conclusion as the Trial Court that the Appellant had sex with the complainant in contravention of the law as charged in the main count. Although the complainant talked of having sex with her boyfriend, the said boyfriend was not called by the defence to testify and it can only be concluded there was no such boyfriend.

71. There is yet another question as to whether the failure to call all those witnesses who were present at the scene should have led to the acquittal of the Appellant. In particular, the Appellant faulted the prosecution for failing to call the women who were said to have seen the minor enter the Appellant's house. While it is the duty of the prosecution to adduce evidence beyond reasonable doubt in any given case, once the prosecution has satisfactorily discharged the burden of proving the main elements of a charge, there is no need to bombard the trial court by calling all the persons who may have witnessed the incident to come and testify. The duty of the prosecution is simply to satisfy the court on the evidence that has been adduced that an offence was committed by the accused as alleged.

72. The law on the number of witnesses to be called is found in Section 143 of the Evidence Act, Cap. 80 which states that:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

73. The legal principle was affirmed in **Keter v Republic [2007] EA 135** as follows:

> **"… the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt."**

74. The witnesses that were called by the prosecutor were sufficient to establish the case against the Appellant. The witnesses that were not called by the prosecution were known to the Appellant and he could have asked for them to be summoned to testify if he thought they had evidence that may have been useful to his case. That is not the same as shifting the burden of proof to him since the prosecution had already discharged the onus placed on it by the law to prove its case beyond reasonable doubt.

75. While I agree with the Appellant that the teacher who alerted PW3 about the presence of the minor in his house may have shed more light about the movements of the complainant and the Appellant, the failure to call her or any other witness did not take anything from the prosecution case. The evidence that was placed before the Trial Court clearly established what the prosecution set out to achieve and that is the fact that the Appellant had unlawful sex with the complainant. The evidence of the uncalled witnesses cannot therefore be said to have been so vital such that their absence would vitiate the conviction of the Appellant.

76. I am alive to the pronouncement in **Bukenya v Uganda [1972] EA 549** that failure to call a crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution's case. That statement must, however, be understood in the context of Section 143 of the Evidence Act, Cap. 80.

77. In **Julius Kalewa Mutunga v Republic [2006] eKLR,** the Court of Appeal held that:

"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493."

78. Similarly, the same Court of Appeal in **Benjamin Mbugua Gitau v Republic [2011] eKLR** held that:

"This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."

79. I have said enough to point to the conclusion which I must now reach that the instant appeal has no merit. The consequence is that the decision of the Trial Court is upheld and the Appellant's appeal is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 27TH DAY OF

JANUARY, 2022

W. KORIR,

JUDGE OF THE HIGH COURT