REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 54 OF 2019

SOLOMON MUNUVE MUTHU......................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Mavoko Chief Magistrate's Court Criminal (SO) Case 4 of 2015, Hon. L. Kassan, SPM on 12th March, 2019)

BETWEEN

REPUBLIC...PROSECUTOR

VERSUS

SOLOMON MUNUVE MUTHU..ACCUSED

JUDGEMENT

1. The appellant, **Solomon Munuve Muthu**, was charged before Mavoko Chief Magistrate's Court Criminal (SO) Case 4 of 2015 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 were that the appellant, on the 30th day of January, 2015 at Mlolongo Township in Athi River Subcounty within Machakos County, intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of **MN**, a child aged 14 years. Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, the Appellant intentionally and unlawfully caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of **MN**, a child aged 14 years.

2. According to the complainant who testified as PW1 after *voire dire* examination, she was 14 years old and on 30th January, 2015 at 6pm, she had gone to buy water near their plot and after doing so, their neighbour, one Alex told her to give him the water to take it home for her. According to her, she then went round and met the Appellant whom she named as Solo, alone. The time was going to 7pm and it was getting dark but there was still light. According to the Complainant she knew the Appellant very well. The Appellant took a piece of cloth, closed her mouth and when she struggled the Appellant threatened to kill her. The Appellant then pushed her to his plot which was a bush with sugar cane branches threw her on the ground and removed her inner clothes. It was her evidence that she had a skirt and a T-Shirt which she identified in court. The Appellant then removed her panty and threw it away, removed his trouser and since he had no underwear, removed his penis and put it into her vagina. It was her evidence that though she felt pain, the Appellant continued doing it and after he was done, he threatened the Complainant.

3. The Complainant went home crying and when she met her father, PW2, on the road, on the road, she informed him that she had been kidnapped. According to the Complainant she disclosed to PW2 that the culprit was **Solo** who, after the incident sent her away and went back. PW2 then took her to the Police before they proceeded to Kitengela Health Centre where she was examined and treated and was admitted for 4 weeks. She stated that she was also injured in the mouth. Later she was taken to Athi River Hospital. She recognised the Appellant as the person who defiled her that day. Cross-examined by the Court she stated that she was able to see him since it was not dark and she knew him since he used to sell sugar cane. It was her evidence that that was the first time such an incident occurred to her and she only saw blood on her skirt.

4. In cross-examination by the Appellant, she stated that the time she met the Appellant was between 6 and 7 pm and it was not very dark.

She reiterated that the Appellant took her to a farm which was known to his from where he used to sell sugar cane. She stated that she never saw other people using the same farm. She confirmed that the Appellant had a knife. According to her, the Appellant was PW2's friend. She denied that she had stated that it was Kuria who defiled her and denied knowing the said Kuria and denied that she had been told by PW2 to tell lies. She however insisted in re-examination that the Appellant showed her a knife at the farm.

5. PW2, **GMO**, the Complainant's father was on 30th January, 2015 at 6.30 pm at home with her 2 daughters having returned from work when he was informed by her said daughters that they did not have water and vegetables. The Complainant then brought vegetables and went for water but overstayed. At 8pm, he called his brother and a neighbour and they started looking for her. At 10pm he heard a child's scream coming from the direction of the Appellant's sugar cane farm. When he went there he found the Complainant dusty with blood stained cloth and her mouth was bleeding. The Complainant disclosed to him that it was his friend, Solo who had done that to her. When they looked for the Appellant they did not find him. They then proceeded to the Hospital where the Complainant was admitted for 1 week and was given PRC Form which he identified. He later took the Complainant to Athi River where she was treated and he identified the treatment documents. According to him, the Complainant washed her face and the under wear. Upon being informed that the Appellant had locked himself in his house he alerted the police who arrested him. According to him the Complainant was 14 years at the time of the incident having been born on 9th June, 2001 and he identified her clinic card and birth certificate. He identified the Appellant as the person who was arrested. According to him he had never differed with the Appellant.

6. In cross-examination, PW2 stated that the Appellant was a bhang cultivator but was a member of community policing. He reiterated that the Complainant's blouse was blood stained and dusty. He stated that the Complainant directed him to another person, one **Kuria**, who had a similar jacket as that of the Appellant but the said **Kuria** said he was not **Solo**. They however arrested the Appellant due to information gathered from the Complainant since the person they were looking for knew his children. He disclosed that the Appellant was arrested after 2 weeks though they knew who had committed the offence and were gathering evidence. It was however his evident that they found the Appellant's door locked but he was always inside the house. Asked about **Kioko**, he denied knowing him. According to him the Complainant was treated for one month.

7. PW3, **Ruth Lengere**, a clinical officer from Nairobi Women, was called to produce the PRC form on behalf of her colleague, one Christine whose handwriting and signature she was conversant with. According to the said report, the Complainant was born in 2002 and was seen on 31st January, 2015. The examination revealed bruise and cut on the lower lip. On her genitalia she had discharge and her labia was tender and swollen while her hymen was torn. She produced the same as exhibit.

8. In cross-examination, PW3 stated that the Complainant was taken to the Hospital on 30th January, 2015 at 1200 am having been taken to the Police Station first. According to her high vaginal cells showed epithelial cells though no sperms were seen. However, her clothes were bloody.

9. PW4, **Maureen Mwende**, a clinical officer from Athi River Health Centre testified that on 7th February, 2015 she attended to the Complainant who had been taken to Nairobi Women Hospital. According to her the Complainant who was 14 years old had bruises on her lower lip and had stomach ache. Her hymen was torn and there were lacerations on her labia. She proceeded to produce the P3 form as exhibit.

10. In cross-examination she stated that the Complainant was taken there on 7th February, 2015 though she was defiled on 31st January, 2015. By the time she examined the Complainant she had been treated and she elide on the results from Nairobi Women which stated they did not get any spermatozoa, the blood and her fluid.

11. PW5, **PC Elizabeth Mbithi**, the investigating officer, testified that on 30th January, 2015 the complainant in the company of her father, PW2, reported that the Appellant, who was their neighbour in Mlolongo, had defiled her and was referred to Nairobi Women Hospital. On 3rd February, 2015, she saw the Complainant at the Hospital who was complaining of stomach pains. As per the birth certificate the Complainant was 14 years old and was dressed in hospital clothes. She also had a brown skirt, white undergarment and grey sweater. On interrogation, the Complainant disclosed that she had gone to fetch water between 5-6 pm when she met the Appellant who carried her on his back to a farm, blocked her mouth to prevent her from screaming and defiled her. According to the Complainant's information the Appellant had a knife. It was her evidence that the medical examination confirmed that the Complainant had been defiled. According to her the Appellant lived 100 metres from the Complainant. She produced the birth certificate and the clothes as exhibits.

12. In cross-examination, PW5 stated that the report was made at 10.58 pm while the defilement occurred between 5-6pm and the Complainant was found her parents at 9pm. According to her the village had many community policing officers but the list she was shown did not bear he Appellant's name. According to her the name appearing against the Appellant's ID was **Monduvi** and not **Munuve** and she did not know where the said document came from. According to her the Appellant had run away from the village and could not be called by phone. According to her the Complainant was defiled 700 metres from their plot. In her evidence the Complainant did not complain that anyone else had defiled her and even pointed at the Appellant. She insisted that she carried out proper investigations before the Appellant was arrested as the Complainant revealed his name as the person who defiled her. According to PW5, a good Samaritan who was a white man assisted in arresting the Appellant. According to her, since they did not get the Appellant in his house, they used the White man though she was not present during his arrest. In her evidence the Appellant was arrested by the OCS after the White man called the police.

13. In re-examination, she explained that she only knew the Chairman of the Community Policing and was not aware that the Appellant was also a member. According to her the Appellant was arrested 10 days after the incident. She explained that a White Man helping the children at Kicheko tricked the Appellant that he wanted to help his children.

14. Placed on his defence, the appellant opted to give sworn evidence and called 2 witnesses. According to the appellant, on 30th May, 2015, he was at work as a mason where he stayed up to 5pm. At 5.30pm he took back their tools. At 6pm he was recalled with another person to guard the site and he was at work from 7pm till mid night when he went to sleep. The next day he was informed that a child had been defiled. It was his evidence that he was one of the community policing officers and his colleagues reported the matter to the police. His colleague, the

sub location chairman went and informed him that he was called by the OCS and was informed of a person who had defiled a child in their village called Kuria and he was told to investigate. They waited for Kuria to be arrested. After one week he was arrested and upon a search in his house, nothing was found. According to him, the police wanted him to tell who committed the act but he denied.

15. In support of his case, the Appellant called **Zachary Wambua**, DW2, the chairman of community policing. According to him, he knew the Appellant as their secretary. On 1st February, 2015 he received a report from the OCS who called him to his office and asked him if he knew a Mr Kuria, and DW2 confirmed that he knew him as his neighbour. The OCS then told him to investigate the said person for the offence of defilement. When he got hold of the said Kuria and relayed the information to the OCS, the OCS did not go for him and after some days he heard that the Appellant had been arrested. According to him, he only knew Kuria, who was at large. As the suspect.

16. In his judgement, the learned trial magistrate found that there was no doubt that the Complainant was 14 years old and had been defiled. He found that the only issue before him was whether the Complainant was defiled by the appellant though the only evidence of this was from the Complainant. According to him, the fact that Kuria was released indicates that the Complainant knew who Solo was. According to the learned trial magistrate there was no reason why PW2 would implicate his friend. He found that since the attacker was known by the Complainant and the plot where she was attacked belonged to the Complainant who spent some time with her and the fact that the appellant had some marijuana and had locked himself in the house proved that the Appellant committed the offence. He therefore found that the case against the Appellant was proved beyond reasonable doubt, proceeded to convict him on the main count and sentenced him to 20 years imprisonment.

Determination

17. I have considered the above evidence as well as the submissions made herein. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

18. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

19. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

20. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

21. In this case there is no doubt at all that the Complainant was 14 years old at the time of the offence. This was sufficient proved by the evidence of PW2 as well as the documentary evidence. Similarly, based on the medical evidence, there is no doubt that the Complainant was defiled.

22. The only issue for determination as rightly found by the learned trial magistrate was whether the Complainant was defiled by the Appellant. It is clear that the only evidence regarding the identity of the appellant came from the Complainant. It is not in doubt that the evidence of a minor requires corroboration and in this regard the Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR** stated that:

"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."

23. Similarly, in **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal was of the opinion that:

"The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:

'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'

The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124."

24. It follows that as a matter of practice, corroboration is necessary in sexual offences. What then is corroboration? The meaning of corroboration as defined or stated in the Nigerian case of **Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108** is thus: -

"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".

25. In **Mukungu vs. Republic [2002] 2 EA 482**, the Court of Appeal citing **Mutonyi vs. Republic [1982] KLR 2003**, held that:

"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."

26. In **R vs. Kilbourne [1973] 2 WLR 254, 267**, **Lord Hailsham** of St Marylebone LC stated:

"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed."

27. In **Khalif Haret vs. The Republic [1979] KLR 308,** **Trevelyan** and **Hancox, JJ** pronounced themselves as hereunder:

"What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."

28. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

29. In this case there was clearly no material corroborating the Complainant's evidence that it was the Appellant who defiled her. That however, is not the end of the matter. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added]

30. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175**, the Court held that:

"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."

31. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

32. Therefore, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. What is required of the trial court is to be satisfied that the victim is telling the truth. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. The fact of the warning must appear in the judgement of the trial court and the record itself must show that the trial court was so satisfied. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."

33. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In

the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."

34. In this case apart from reproducing the evidence of the witnesses, there was no express finding by the learned trial magistrate that the Complainant was telling the truth. In effect section 124 of the ***Evidence Act*** was not dealt with at all by the learned trial magistrate.

35. Apart from that there was evidence both from the Prosecution and the defence that at one-point suspicion was cast upon one **Kuria**. In fact, according to defence case the OCS detailed DW2, the Community Policing Chairman to trace the said Kuria. This piece of evidence was not challenged. Section 309 of the ***Criminal Procedure Code*** states as follows:

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

36. By failing to call the OCS to rebut this damning evidence, the evidence relating to the suspicion cast on the said **Kuria** remained unchallenged. Though the learned trial magistrate found that he must have been left off the hook because the Complainant realised he was not the one, the fact that the OCS took the allegations against him so seriously ought to have called for explanation as to why he was eventually left. While this Court does not say that the offence was committed by him, what this means is that there was a problem with the Complainant's recognition of the assailant. As was held in **R vs. Turnbull (1976) 3 ALL E.R 549**:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

37. In her own evidence, when the incident happened it was going to 7pm and it was getting dark but there was still light. Having considered the evidence adduced by the prosecution I find that there were gaps in that evidence regarding the identification of the appellant. In the South African case of ***Ricky Ganda vs. The State [2012] ZAFSHC 59,*** a decision of the Free State High Court, Bloemfontein *cited in* ***Philip Muiruri Ndaruga vs. Republic [2016] eKLR*** *it was recognised that:*

"The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt…**To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him…"**

38. I also realise that though the record indicates that the Appellant testified on oath, he was not cross-examined on his evidence. In **Macharia vs. Republic [1976] KLR 209**, **Kneller & Platt, JJ** held that.

"Neither of the appellants' statements on oath was tested in cross-examination, which means that the Republic did not challenge it. The magistrate did not touch on this. He did not accept it as true or have any reasonable doubt that it was untrue. We are satisfied that the prosecutor before the magistrate forgot, or did not know, that if the defendant elects to make a statement on oath in his defence he is to be cross-examined on it if it is different from the case for the prosecution and the court may believe the defence or declare that it raises reasonable doubt if it is not so challenged. The unchallenged evidence of each appellant was, however, in the circumstances, clearly untrue and could not raise any doubt about the truth of the girls' stories in view of all the evidence as a whole, including that of the policeman who caught them all in twos in two separate coaches in a railway siding, the reports by the doctor and the analyst, and that of the mothers of the two girls. The failure by the prosecutor to cross-examine and challenge the appellants' denials on oath in this case is not fatal to the conviction. We hope, in future, that the magistrates will ask a prosecutor who does not cross-examine a defendant on his sworn defence statement, if it is different in any material respect from the prosecution case, whether or not the prosecutor's instructions are that the defence is, or might be, true and exculpatory; and if the prosecutor says that they are not so, the magistrate should advise him to cross-examine and challenge it. The defendant has selected this way of making his defence knowing that he might be challenged with searching questions from the prosecutor designed to reveal to the court whether or not the defence is true or results in the prosecution's case failure to prove beyond reasonable doubt the defendant guilty of the offence charged or any other one open to it on the relevant facts adduced and the law."

39. Therefore, as a result of the failure by the Court to strictly comply with section 124 of the ***Evidence Act*** as well as the prosecution's failure to prove that the Complainant was defiled by the Appellant, a key ingredient of the offence of defilement, I find that the appellant's conviction was for those reasons unsafe and cannot be sustained.

40. In the premises this appeal succeeds, the conviction of the appellant is hereby set aside and his sentence quashed. He is set at liberty unless otherwise lawfully held.

41. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 27th day of February, 2020.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey