



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NUMBER 78 OF 2015**

**EDWARD KIBUGI KIRATHI alias MASAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against both the conviction and the sentence of Senior Resident Magistrate Hon. J.H.S. Wanyanga, delivered on 25<sup>th</sup> of March 2015 in Molo CM Criminal Case No. 1608 of 2013 Republic v Edward Kibugi Kirathi Alias Masai.)*

**JUDGMENT**

1. The Appellant, Edward Kibugi Kirathi Alias Masai, was charged before the Molo Chief Magistrate's Court with one count of defilement contrary to section 8(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence as per the Charge sheet were that on diverse dates between 1<sup>st</sup> and 11<sup>th</sup> day of August, 2012 in Molo District within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of AW, a child aged 16 years. The Appellant faced an alternative charge of committing an indecent act contrary to section 6(a) of the Sexual Offences Act. The alternative charge is based on the same facts and victim
2. The Appellant pleaded not guilty and a fully-fledged trial ensued. The Prosecution called six witnesses.
3. The summary of the evidence that was adduced at the trial is as follows. The Complainant gave evidence under a Warrant of Arrest. She had apparently run away from home to avoid testifying. She was apprehended and put in Juvenile custody for fourteen (14) days before she testified. After she started testifying, the Prosecutor applied to have her declared a hostile witness. The Court acquiesced to the request and she was declared. She was, then, cross-examined by the Prosecutor.
4. In her cross-examination by the Prosecutor, the Complainant stated that she went to see her friend, the Appellant on an unstated day. She said that she prepared food for him and that he came back home at 8:00pm and ate. She told the Court that they went to sleep in his bed and they "made love" throughout the night. He promised to marry her, she said. She insisted that he inserted his penis in her vagina and until he released sperms; and that they did not use protection.
5. The Complainant further told the Court that he was taken to the hospital for examination where a P3 Form was filled out.
6. In cross-examination by the Appellant, the Complainant insisted that it is her version of the story told after being declared a hostile witness which was true and not the story she had started to tell before. The story she had told the Court before was that she had gone to the Appellant's house to take care of his baby and that after she cooked food and fed the baby she slept on the couch until morning. In that version, the Appellant did not defile her.
7. The Complainant's mother, ANM, testified that the Complainant was her daughter and that she was born in 1999. She said that her friend, S, called her and informed her that she (S) had seen the Complainant in the Appellant's house. The Complainant had, apparently, disappeared for two months and the mother had reported the disappearance to the Police. ANM testified as PW2.
8. The said SW testified as PW3. She testified that on 04/08/2013, she realized that some of her clothes were missing from the drying line. About a week later, she spotted a certain MW wearing the same clothes. When she reported to the Police and M was interrogated, she said she had been given the clothes by the Complainant who was staying at the Appellant's place. S then said that the Appellant took her and the Police to his house where the Complainant was allegedly staying.
9. APC Jared Okun confirmed that he was involved in arresting MW who, in turn, led them to the Complainant. He also confirmed arresting the Appellant over the present case. Corporal Godfrey David Otieno was the Investigating Officer in the case and he testified that he recorded the statements in the case and recommending the charging of the Appellant with defilement. He also produced an age assessment report showing that the Complainant was between 15 and 17 years old as at 21/10/2014.

10. Dr. Motonya testified under section 77 of the Evidence Act and produced the P3 Form which had been filled out by Dr. Getutu. The latter was not available to testify. The P3 Form confirmed that the Complainant's hymen had been broken. It also showed other signs of penetration including the presence of pus cells.

11. Put on his defence, the Appellant gave a sworn statement in which he denied defiling the Complainant. He said that he was married to MM with whom they have two children. He said that the Complainant lived in the same plot as him for some time and that he had his son with him the day he is alleged to have defiled the Complainant.

12. The Learned Trial Magistrate was persuaded that a case of defilement was made out against the Appellant and convicted him. He also sentenced him to the minimum fifteen years imprisonment as provided for under section 8(4) of the Sexual Offences Act.

13. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see *Okeno v Republic* [1972] EA 32).

14. I have now considered the evidence with a keen evaluative eye as required as a first appellate Court. The main issue on appeal is whether there was sufficient evidence to convict the Appellant in view of the fact that the conviction was based on the evidence of a single eye witness who was declared hostile.

15. On appeal, the State Prosecutor, Ms. Nyakira informed the Court that the State was conceding the appeal. This was due to the fact that the evidence used to convict was from a hostile witness which, she submitted, has little probative value.

16. Ms. Nyakira is right that the evidence of a hostile witness is of little value. In *Batala v Uganda* [1974] EA.402 the Court of Appeal stated:

*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.*

17. Similarly, in *Daniel Odhiambo Koyo v Republic KSM CA Criminal Appeal No. 182 of 2010* [2011]eKLR, the Court of Appeal held that the probative value of such evidence is negligible and may only be relied upon in clear cases to support the prosecution or the defence case. The Court cited *Maghenda v Republic* [1986] KLR 255, where the same Court had observed that, “[T]he evidence of a hostile witness must be evaluated in particular if he intends to favour the accused though it may not necessarily be acted upon by the court”.

18. In a case on all fours with the present one, the Court of Appeal stated as follows in *Abel Monari Nyanamba & 4 Others v Republic NRB CA Criminal Appeal No. 86 of 1994*[1996]eKLR:

*The evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.*

19. In the present case, the only evidence used to identify the Appellant as the person who defiled the Complainant is that of the Complainant. That witness was declared hostile. Worse still, she was testifying under compulsion after initially refusing to attend Court. She had earlier given a narrative directly at variance with the narrative she gave after being declared hostile. This makes her an unreliable witness. Her uncorroborated testimony was not sufficient to find the Appellant guilty.

**20. The upshot is that the conviction was unsafe. Consequently, the appeal herein is allowed. The conviction and sentence imposed are hereby quashed. The Appellant shall be set at liberty forthwith unless otherwise lawfully held in custody.**

21. Orders accordingly.

**Dated and Delivered at Nakuru this 19<sup>th</sup> day of December, 2019**

**JOEL NGUGI**

**JUDGE**