REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 139 OF 2014

MICHAEL MWAZUMBI MWANYALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 494 of 2013 made on 31st July 2014 by the Senior Principal Magistrate's Court at Voi (the Hon. S.M. Wahome, SPM)]

JUDGMENT

INTRODUCTION

1. This is a judgment on first appeal from original conviction and sentence of Senior Principal Magistrate's Court at Voi Criminal Case No. 494 of 2013. The appellant was convicted for the offence of defilement of a girl contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for 20 years on the 31st July 2014.

2. The particulars of the offence were that –

> *"PARTICULARS OF OFFENCE: Michael Mwazumbi Mwanyalo - On the 25th July 2013 at Kaloleni location within Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of S G a child of 15 years."*
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> The appellant faced an alternative charge of indecent act with a child contrary to section 11 (1) of the sexual Offences act No. 3 of 2006.

3. The prosecution called 5 witnesses in support of the charge and, when put on his defence, the appellant gave sworn testimony and called one witness in defence.

The prosecution's case

4. The case for the Prosecution was simply that the appellant had somehow lured the child complainant into accompanying him with her bag of clothes to a lodging house at Kaloleni, Voi where he defiled her and subsequently put her onto a Kisii-bound Otange bus on a journey to return to her home in Marsabit, upon inquiries as to her whereabouts made by her relative with whom she lived on information that he was with her. The said relative of the complainant upon being informed by the accused that the girl was

on Otange bus caused the bus to be stopped at Makindu and the complainant arrested after which he went to pick her up and the accused was arrested and later charged.

5. The evidence of the complainant PW2 was as follows:

> ***"PW2 S G Female minor duly sworn and states in Kiswahili -***
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> *I live in Kaloleni. I am 15 years old. I do not go to school. I live with my uncle J. On 24/7/013 at 9.00 pm I was at home with guests. My uncle and his wife escorted guests and left me alone.* ***I went out to pick socks on the line. The accused came and called me. I know the accused who owns a shop. He asked me to pick my bag from the house. I picked the bag and he took it. I followed the accused as he has directed me. We walked to another house. We got into a lodging and the accused paid for a room. The accused took a shower and then told me to also bathe which I did. He asked me to lie on the bed but I refused. He forcible brought me down on the bed. The accused removed my pantie and forced me to have sex with him. I later screamed and he left me. No one came to help. I was in the room on a seat until morning. The accused told me that people were calling him. We stayed there until 4.00pm on the following day. The accused stopped a vehicle Otange bus and paid fare. He told me to go to my home at Marsabit. I left the accused behind. My uncle called the conductor of Otange bus after we had reached Mtito Andei and told him to stop at the police station. We went to the police station. I alighted with my bag and stayed there. My uncle came for me and we came back to Voi and I went to Voi Police Station.*** *I narrated what had taken place. The accused was arrested. I was taken to Voi Hospital for examination. I was given a P3 form which was later filled."*

6. On cross-examination, the PW2 responded as follows:

> ***"****I do not know when I was born. My uncle had escorted guests and it was far. I do not take beer. I have not had any accident. You used to sell milk to me in your shop. You called me. You took me to Kasarani in Voi. Someone opened the room for us. You removed all my clothes by force. I screamed but I was not helped by anyone. You held my mouth. You defiled me at about 11.00pm. You ordered me to get into Otange bus. I boarded the bus at Kasarani in Voi.****"***

7. In support of the complainant's testimony, the following other witnesses testified as follows:

> **PW1** – Dr. Maha Salim, a medical officer at Voi hospital said that the complainant was seen at the hospital on 26/7/13 and found to have normal genitalia but hymen was broken, indicating penetration and her age had been assessed at 15 years.
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> **PW3** – J I the complainant's relative with whom she lived who testified that following the disappearance of the complainant on the night of 24/713 he was informed by his wife that the accused's wife had told her that the accused had gone with the complainant the previous night. He then went to the accused's home and obtained his telephone number whereupon he called the accused seeking to have him release the complainant and the accused said that he was in Mombasa. Upon a subsequent visit to the accused's parents' home in Voi, he found the accused who had indicated that he was at Mombasa. He said that the accused told him that the complainant had boarded Otange Bus to Kisii, after which he called the conductor of the bus asking him not to go with the complainant. The witness said that the bus was later stopped at Makindu and the complainant arrested, and the witness had subsequently gone to Makindu Police station and picked the complainant.
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> **PW4** – Cpl. Grace Ngima, the investigating officer testified as to the receipt of the complainant at Voi Police station with a report of defilement by the accused who had asked her to carry her clothes and taken her to a lodge in Kasarani where he had defiled her.
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> **PW5** – Pascal M. Mwanyumba who was called pursuant to an order of the court after the prosecution had closed its case testified that he lived at Mwatate and worked as a receptionist at

Flyover Pub and restaurant and that he had received the accused as a guest at their lodgings on the 24/7/2013 producing the receipt for Room NO.8 for Michael indicating his national Identity Card and Mobile phone number. On cross-examination, the witness confirmed that the accused was alone when he booked the room but on reexamination conceded that it was possible for someone to enter with a friend without the receptionist knowing.

Defence Case

8. When put on his defence, the appellant gave sworn testimony in which he put testified as follows:

> ***"I sell milk and I own a shop. I had gone home to Taita Guodoma to pay farmers who supply me with milk. I slept at Mwatate town and on the following morning I left the room at 6.00am and paid the farmers. I also went to see my grandmother. Later I was called by people who told me that someone was looking for me. I said that I had gone to Mombasa. I got a lift from Kenya Power from Guodoma to Mwatate and got into a matatu to Voi. Those who were calling me asked me to yield the person I was with. I went home at about 7.00pm and after a while PW3 and his wife came and they arrested me. The Police were called and I was taken to Voi Police station."***

On cross-examination, the accused confirmed that he knew PW3 and his wife as well as the complainant who used to buy items from his shop and that he had no grudger with any of them.

9. DW2 Mwanyalo Mwazumbi the accused's father testified to confirm that the accused had on 25/7/15 come home from Taita Gadome told him that he had gone to pay his customers and that the complainant (the child's relative) with his wife had come and they stated arguing (with the accused) and the accused was arrested by Police and taken to Voi Police Station.

THE APPEAL

10. Upon conviction and sentence by the learned trial magistrate, the appellant appealed from both the conviction and sentence of imprisonment for 20 years. The appellant was represented by Counsel who set out in his written submissions three grounds of appeal, namely that –

a. The medical examination form P3 was inconclusive;

b. The evidence of the prosecution witnesses do no add up to the conclusion that the appellant is guilty; and

c. On the other hand, the evidence of the prosecution witness seen together with the Appellant's own are such as to overwhelmingly argue against the conviction of the appellant.

11. During the hearing, Counsel for the appellant, Mr. Kertiony made supplementary oral submissions before the court while, Mr. Sirima, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

12. The issue for determination before the court is whether on the evidence presented before the court the charge of Defilement of a girl contrary to section 8 (1) as read with 8 (3), or the alternative charge of indecent act under section 11(1) of the Sexual Offences Act 2006 No. 3 of 2006, had been proved.

DETERMINATION

Analysis of Evidence

13. The complainant said that on the 24/7/13 at 9.00pm she had been asked by the appellant to take her

bag of clothes and she followed him and walked to a house and later to a lodging house where the appellant took a room wherein the appellant forced her to have sex with him at about 11.00pm, staying there through the night until 4.00pm the following day when the appellant forced her to board a bus. According to the complainant, the Lodging house was at Kasarani, Voi, which is the same place from where she took the bus on the orders of the appellant. There was no evidence that the complainant could have been mistaken as to the names or location of the Lodging house or the place from where she boarded a bus.

14. The appellant offered an alibi defence which it was the prosecution's duty to disprove and not for the appellant to prove: [It is a cardinal principle that in offering an alibi, an accused does not thereby assume a duty to prove the alibi. See ***Karanja v. R***. 1983) KLR 501.] His testimony was that, on the material night the 24/7/2013, he was at Mwatate where he put up on the way back to Voi from Guodome where he had gone to pay his milk suppliers. This alibi coincides with the testimony of the Prosecution witness PW5 who brought a recipt for the appellant's booking of a room at Flyover Pub and restaurant.

15. The court takes judicial notice of the different location of the towns of Voi and Mwatate as a matter of geographical division and of general and local notoriety in terms of section 60 (g) and (o) of the Evidence Act. Mwatate is several kilometers outside the town of Voi in the County of Taita-Taveta. Mwatate is not within walking distance of Voi town. Science has also established that, unlike atoms or sub-atomic particles such as electrons which by laws of physics known as Quantum Mechanics may exist at different places at the same time, human beings cannot be at two different places at the same time because of the gravitational pull of the Universe.

16. If the complainant PW2 was confident that she had walked with the appellant to the Lodging where the appellant defiled her and later the next day put her on the Otange Bus, the discrepancy with the evidence of PW5 the Lodging operator who confirmed that appellant had booked a room at the Lodging at Mwatate, which evidence the trial court accepted, must raise a doubt as to the prosecution's case that the appellant had defiled the complainant, as the appellant's presence at Mwatate would confirm his alibi.

17. The prosecution relied on section 382 of the Criminal Procedure Code to defend the discrepancy between the evidence and the charge as regards the alleged defilement taking place at Mwatate where the appellant was shown to have spent the night in a Lodging by the evidence of PW5. This court would have agreed that section 382 applied to cure the defect of the inconsistency between the charge and the evidence produced as to the place of defilement had evidence been produced of defilement at a place other than the one charged. However, in this case, defilement was not proved to have occurred at Mwatate. The complainant was clear that the events surrounding the alleged defilement happened in Voi at Kasarani. She did not mention Mwatate at all in her testimony. There was no proof that the appellant had defiled the complainant at Mwatate. It is simply that the charge of defilement of the complainant, at Kasarani Voi or anywhere else, was not proved.

18. The prosecution's case had numerous gaps. Some questions which arose from its evidence are as follows:

a. Why was the wife to PW3 who was alleged to have been informed by the appellant's wife that the complainant had gone off with the appellant the night of 24/7/13 not called as a witness?

b. Why had the complainant taken her bag of clothes when she allegedly went out in answer to a call by the appellant?

c. If the defilement happened at Mwatate which is outside Voi town, why was there no description in the complainant's account of her journey from Mwatate on her way to Makindu as alleged?

d. If the defilement happened at Mwatate why was there no description of the journey from Voi to Mwatate. The complainant only described her walking to a house at Kasarani before going into the Lodging. There was no evidence that the complainant was a person who did not know her way and the names of areas around Voi town so that she could be mistaken as to where they had gone for the

Lodging. The court has taken judicial notice that Mwatate is definitely not within walking distance of Voi!

e. If the complainant's allegation that she was defiled at a Kasarani Lodge, why does a prosecution witness (PW5) confirm that the appellant was at another place (Mwatate) at the same time?

f. The medical evidence on the P3 that the complainant's hymen was broken and that the injuries were 12 hours old on the 26/7/13 leaves in doubt what injuries the doctor was recording - whether it was breaking of the hymen or other bodily injury. The P3 appears to have been casually filled with section B item No. 1 on *Details of site, situation, shape and depth of injuries sustained* being shown as "no injuries" yet the item no. 2 on *Approximate age of injuries* being shown as 12 hours and under section C item 2 (a) showing "normal external genitalia. Hymen broken." No indication as to whether the hymen break was fresh or longstanding to confirm the entry on age of injuries.

19. In this case, having considered the evidence presented by the prosecution the court finds the charge of defilement not proved against the appellant to the required standard of beyond reasonable doubt. I also do not find the alternative charge of indecent act with a child proved as the appellant and the child were not shown to have been together at the place charged.

20. Although this issue was not taken up by counsel for the appellant, it appears that the calling of evidence by the court after the close of the prosecution's case was improper. It would appear that the trial court felt that it need further evidence to support a prima facie case to justify the placing the appellant on his defence. The court said:-

> *"The court is of the view that evidence from Kasarani lodging where the complainant was allegedly defiled is important. The prosecution is directed to call* ***evidence for the court to ascertain if indeed PW1 and the accused were in that place.****"*

21. Clearly, the court was in doubt and it needed evidence to ascertain if indeed PW1 and the accused were in that place. In such circumstances, according to authorities as shown below, the trial court should have found that no prima facie case had been established against the accused as to require his being placed on his defence under section 211 of the Criminal Procedure Code and, consequently, acquit the accused under section 210 of the Code. The trial Court is not entitled to call for evidence under section 150 of the Criminal Procedure Code to fill in gaps left by the prosecution in its case. In the leading decision on the matter, the Court of Appeal for East Africa in ***Murimi v. Republic*** considered sections 151, 205 and 206 of the Tanzanian Criminal Procedure Code which are *in pari materia* with the Kenyan Code's sections 150, 210 and 211, and held as follows:

> *"Section 151 reads as follows:*
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> > ***"151. Any court may, at any stage of an inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case."***
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> *There are numerous decisions of the High Court of Tanzania and of this court to the effect that it is the duty of the trial court under the latter part of the provisions of s.151 to call a witness if his evidence appears to the court to be essential to the just decision of the case; and this is so even if the evidence results in strengthening the prosecution's case. (See* ***Boniface v. R*** *(1957) EA 566,* ***Manyaki v. R.*** *(1958) EA 495 and* ***R. v. Kulukana Otim*** *(1963) EA 253)."*
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> *The provisions of s.151 must, however, be read together with the other provisions of the Code and in particular in so far as this is concerned ss. 205 and 206. The relevant portion of s. 205 states:*
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> > ***"205. If at the close of the evidence in support of the charge, it appears to the court that a***

case is not made out against the accused person sufficiently to require him to make a defence,… the court shall dismiss the charge and acquit the accused."

Section 206 provides that if it appears to the court that a case is made out the court then calls upon the accused for his defence in accordance with this section. The provisions of s. 205 are mandatory and if at the close of the prosecution's case a prima facie case has not been made out the accused person is entitled to be acquitted. We do not consider that s.151 was designed, nor should it be used, to empower the trial court immediately after the prosecution has closed its case to call a witness in order to establish the case against the accused except, possibly, when the evidence is of a purely formal nature. The onus is on the prosecution to prove its case and the Criminal Procedure Code provides that an accused shall be acquitted if at the end of the prosecution's case this has not been done."

Findings of the trial court

22. In convicting the appellant, the trial court in its Judgment delivered on 31st July 2014 found as follows:

"*PW2, the complainant told the court she was defiled by the accused. As earlier noted, PW2 and the accused are known to each other. She did not have any grudge with the accused as to frame him up. She testified how he picked her and they left the house of PW3. PW2 is a child and her evidence is corroborated by that of PW1, the doctor.* ***The only point of departure is that PW2 was defiled at Mwatate and not Kaloleni and that does not give the accused any advantage at all.***

The reason, the court finds the prosecution's narrative convincing is the fact that ***when PW3 went to the accused, he led him to the discovery that PW2 was in Otange bus headed for Kisii and that is how she was salvaged from being lost as she had been duped that she was going to Marsabit. The accused is the one who put her in the bus and he did so to cover up his offences against her. The accused's act of ensuring that she boarded the bus was in bad faith and was extremely prejudicial to the complainant who was from Marsabit.***

*The evidence on record is clear that the complainant was defiled and her evidence is that the accused did it. The evidence of PW1 and PW2 together with the conduct of the accused has proved beyond reasonable doubt that the accused defiled PW2 and consequently he is convicted as charged with defilement of a girl contrary to section 8(1)(3) of the Sexual Offences Act No.3 of 2006 in accordance with section 215 CPC.****"***

23. With respect, the fact that there was uncertainty as to whether the appellant had defiled the child at Kasarani or Mwatate does not confirm the alleged defilement anyway but rather raised a doubt as to whether the defilement happened in view of the appellant's defence that he had spent the night at Mwatate while on a mission from Guodome to pay his milk suppliers. If the prosecution were to succeed in the circumstances, it would have to show that the appellant and the complainant were at the lodging at Mwatate. The complainant was categorical as to the place where the defilement occurred, twice repeating the place of the alleged offence as Kasarani, Voi. The witness at the Lodging, PW5, also stated that the appellant was alone when he booked the room. No one placed the complainant at the Mwatate Lodging where the prosecution and the defence agreed the appellant spent the night of 24/7/13.

24. Again with respect to the trial court, even if it was accepted that the appellant lied that he was in Mombasa and that he informed the complainant's relative, PW3 that the girl was on Otange bus to Kisii, it is no proof of defilement the previous night. There was clearly information as to the alleged offence, if it happened at all, that was withheld by the prosecution witnesses.

25. The court acts only on evidence presented before it and, for reasons given above, the court finds that the guilt of the appellant was not established in accordance with the standard of proof of beyond reasonable doubt applicable to criminal trial.

ORDERS

26. Accordingly, for the reasons set out above, the court finds merit in the appellant's appeal herein and consequently quashes the conviction and sets aside the sentence imposed on the trial court, and therefore directs that the appellant be released from custody forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF AUGUST 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

……..... for the Appellant

……..... for the Respondent

.....2.. Court Assistant.