REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HCCRA NO. 14 OF 2019

JOSHUA MWANGI GITHII...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being an appeal from the sentence of the Senior Resident Magistrate

Hon. R. Kefa dated 28/02/2019 in Nyeri C.M Sexual Offence Case No. 11 of 2018.)

JUDGMENT

1. **Joshua Mwangi Githii** the Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on 17th day of March 2018 in Nyeri county within the Republic of Kenya, intentionally caused his penis to penetrate the vagina of **JNW** a child aged 12 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 17th day of March 2018 in Nyeri county within the Republic of Kenya, intentionally touched the vagina of **JNW** a child aged 12 years with his penis.

3. He denied the charges and the matter proceeded to full hearing with the prosecution calling eight (8) witnesses. The Appellant gave a sworn statement of defence and called no witnesses. He was later convicted on the main count and sentenced to life imprisonment.

4. Aggrieved by the judgment he filed this appeal through Magua and Mbatha advocates raising the following grounds:

> a) **That** the learned trial Magistrate erred in fact and in law in passing judgment convicting the Appellant when the prosecution had not proved the case by discharging the required burden of proof.
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> b) **That** the learned trial Magistrate erred in law and in fact in convicting the Appellant on the uncorroborated and or insufficiently corroborated evidence of a minor.
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> c) **That** the learned trial Magistrate erred in fact and in law in relying on the evidence of the prosecution witnesses which was insufficient and contradictory, whereas crucial witnesses were not availed.
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> d) **That** the learned trial Magistrate erred in fact and in law in reaching an erroneous finding from the defence and the evidence of the Appellant as well as his submissions.
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> e) **That** the learned trial Magistrate erred in fact and in law in failing to acknowledge that the complaints attending the charges and the criminal prosecution in the matter was as a result of the animosity that existed involving the accused person and the head teacher (Pw2)
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> f) **That** the learned trial Magistrate erred in law and in fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the Appellant and in convicting the Appellant herein against the weight of the evidence adduced.
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> g) **That** the learned trial Magistrate erred in law and in fact in failing to find and rule that there was no cogent substantial, credible and direct evidence connecting the Appellant to the offence of defilement or committing an indecent act with a minor.

h) **That** the learned trial Magistrate erred in law and in fact in convicting the Appellant on highly contradictory, misleading, inconsistent and unreliable evidence presented by the prosecution.

5. A summary of the prosecution case is that the Appellant was a driver at Mary Immaculate Academy Mweiga. The JNW who testified as Pw1 said she was born on 23rd September 2007. On 17th March 2018 the pupils were driven to Kamwenja teachers college for games at 7:30 am by the Appellant. The games went on well. Their teacher F asked JNW to go to the vehicle with his daughter as she was not participating in the games.

6. The Appellant gave her the keys to the vehicle. After a short while the Appellant came and asked for the keys which she gave to him. He drove the bus near the volleyball pitch and parked it between trees and left. JNW and teacher F's daughter (B) remained in the bus and slept. Later the Appellant returned and entered the bus. JNW was at the back of the bus sleeping while B was at the front.

7. The Appellant took his jersey and covered the window of the bus. He came to JNW knelt down and removed her track suit trouser and opened his trouser zip, put saliva on his penis and placed his head on her chest as she lay on the bench facing up. She removed her panty. He then inserted his penis inside her vagina. He started breathing heavily and on seeing students coming he jumped to the driver's seat.

8. Two students MI and CN came into the bus. MI found her shivering and asked what it was. They returned to school, to the shops, then back to school. She was taken to hospital the next day by sister CC whom she had explained the ordeal to. The matter was taken up by the school administration. She identified the P3 and PRC forms.

9. In cross examination she said the Appellant penetrated her after moving her to where he knelt next to the window. She admitted having written a letter to the Appellant and the letter was found in the bible. It was the first time the Appellant was having sex with her, she said.

10. **Pw2 Sister CC** is the head teacher of JNW's school. She explained how she sent students for games at Kamwenja teachers college on 17th March 2018. Accompanying the children was the Appellant (driver) and F (a teacher). They arrived back at 7:00 pm. At around 10:00 pm she was called to the dormitory by the school matron LN. It's there that she received a report from students on how the Appellant had been found having sex with JNW. It is PK who reported this to her and as this went on JNW was crying.

11. The next morning JNW explained to her all that had transpired. She asked one of the employees (E) to take her to hospital. After mass she reported the matter to Mweiga police station from where she was referred to Nyeri police station. JNW was examined at Nyeri referral hospital (P.G.H) and the P3 form and PRC forms were filled for her (EXB2 and 3). She identified JNW's birth certificate showing she was born on 26th September 2007 (EXB4); she also identified the Appellant's letter of employment.

12. In cross examination she denied that the Appellant had made sexual advances towards her. She also denied having been found drunk by the Appellant or framing him to terminate his employment.

13. **Pw3 Dr. Mary Ann Nyingi** with the consent of the Appellant produced the P3 form in respect of JNW on behalf of Dr. Ndungu Elizabeth.

Findings:

- Genitalia was normal
- No laceration
- Missing hymen
- Vagina and anus were normal
- No bleeding, no discharge
- HVS, pregnancy test, syphilis were all negative.
- Urine analysis and blood test were normal.

The P3 form (EXB1) was signed on 19th March 2018. She was treated on 18th March 2018 and the incident allegedly took place on 17th March 2018.

14. **Pw4 PK** is in the same school with JNW. She testified on having seen one back window of the school van covered. She went to the opposite side to check and she saw pullovers in one place and JNW was sleeping lying on the back seat with the school driver (Appellant) lying on her. Their bodies were moving while JNW was speaking but she could not hear what she was saying. She later saw the Appellant jump over metal rods. She informed JN who asked her to investigate.

15. She then returned to the van and found both the Appellant and JNW pretending to be asleep. She went and picked sweaters from the back seat and found one with whitish mucus. She sat next to JNW who was eating a lollipop from a teacher. Back in school she informed others about JNW who started crying. Pw2 came and she explained to her what the matter was.

16. **Pw5 LN** is the school matron. She confirmed calling Pw2 for a meeting with Pw4 in the dormitory. Pw6 a clerk at the school was instructed by Pw2 to take JNW to the hospital for examination on allegations of defilement. She took her to Nyeri medical and diabetic centre. The doctor confirmed the allegation of defilement and she was treated.

17. **Pw7 No. 89150 CPL Kena's Adera** was the investigating officer. He stated that on 19th March 2018 at 8:00 am he was at Mweiga police station when nuns from Mary Immaculate reported a case of defilement of a student. The suspect was the Appellant who drove the school bus. The Appellant was arrested by this witness while at the school gate.

18. **Pw8 No. 91343 PC Barako** of Nyeri police station received the same report on 18th March 2018 and he too investigated the case. A P3 and PRC (EXB 2 and 3) forms were filled. He produced the birth certificate (EXB4).

19. The Appellant testified on oath as Dw1. He said he was employed as a driver for the school by a priest and Pw2. The priest later left after a dispute with Pw2 and he even warned him about her. Later he developed an intimate relationship with Pw2. He explained how they had differed because he had failed to pick her at a particular time. There are things they did together and he met her drunk one day. In January she started claiming he was not working well. One day he caused an accident due to exhaustion. She threatened to sack him. Later he threw the car keys at her and told her he would resign.

20. While at Kamwenja teachers college JNW informed him she had been sent by Pw2 to do something with him. That she had done a similar thing with another teacher who had been sacked. Teacher F had told him of the said incident. Pw2 came and called JNW and told her to sit in the vehicle. He was arrested on 20th (Monday).

21. In cross examination he said teacher F had been sacked though he had nothing to support that.

22. The appeal was canvassed by written submissions. Through Mr. Kiboi the Appellant submits that the charge sheet was defective as he was charged under section 8(1)(4) instead of section 8(1)(3) of the Sexual Offences Act as the complainant was 14 years of age. Counsel also submits that omission of the words "willfully" and unlawfully was fatal to the charge as the *mens rea* was not disclosed. He refers to the case of **Wambua Kaimeta & Another –vs- Republic (2016**) as cited in **Gedion Mwenda Kamundi –vs- Republic (2018) eKLR** in support of the submission.

23. On the issue of age he submits that proof of age is a critical element of the charge of defilement. He refers to the case of **Karingu Elias Kasomo –vs- Republic Criminal appeal No. 504 of 2010; Eliud Ouma Agwara –vs- Republic (2016) eKLR**. It's his submission that the judgment showed that JNW was 10 years old; the charge sheet indicates 12 years; the P3 indicates 12 years in (part 1) while paragraph C of the same P3 shows 11 years, the treatment notes indicate 12 years. All these ages refer to the same person he observes.

24. The Appellant raises two issues on the medical evidence. First that it did not prove penetration as everything was normal. It did not show how the grievous harm came into the P3 form. There was no age of the grievous harm shown. He relied on the case of **Charles Murage Muindi –vs- Republic Criminal Appeal No. 82 of 2014** and **Ben Maina Mwangi –vs- Republic 2006 eKLR** to support his argument that age and penetration were not proved. Secondly the P3 form was irregularly produced in court in violation of section 33 and 77 of the Evidence Act. That the contents of the P3 form were never explained to him and there was nothing to show that the author was unavailable. He referred to the cases of **Komora Wairo Burjo & 4 others –vs- Republic (2008) eKLR and Dennis Kibaara –vs- Republic 2019 eKLR** on this.

25. Referring to page 9 of the judgment and lines 3-4 he said the trial Magistrate erred in finding that the missing hymen was proof of penetration. He cited the cases of **Langat Kinyo Domokonyang –vs- Republic (2017) eKLR; P.KW –vs- Republic (2012) eKLR** on this.

26. He further cites page 9 lines 5-12 of the judgment which states

> "*…The testimony of Pw1 does not require corroboration under the proviso of section 124 of the Evidence Act chapter 80 of the Laws of Kenya. The court of appeal in **Geoffrey Kioji –vs- Republic, Nyeri Criminal appeal No. 270 of 2010** the court stated under the proviso of section 124 of the Evidence Act where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim, the court shall proceed and convict the accused if the court is satisfied that the alleged victim is telling the truth. This court is satisfied that Pw1 is telling the truth. I find no reason as to why she would frame the accused person."*

He submits that the trial Magistrate did not give any reasons for believing J.N.W. He cites the cases of **Jacob Mumo Mutia –vs- Republic (2015) eKLR and Geoffrey Kioji –vs- Republic Criminal Appeal No. 270 of 2010 (Nyeri)** in support.

27. He further argues that the trial court shifted the burden of proof to the Appellant. He referred to page 7 lines 16-25 of the judgment which states:

> "*The accused person stated that he is being framed because of a love relationship with Sister CC which turned sour. However he failed to avail any evidence to prove the said relationship in case sister CC intended to terminate his employment she would have*
>
> *done so when he caused the accident. His assertions that sister CC is framing him with such a serious offence to terminate his employment is not credible. Further he failed to challenge the medical evidence that was adduced by the prosecution that after the incident pw1 was found to have been defiled. He failed to explain to the satisfaction of this court why Pw4, who told the court that she witnessed the incident, would frame him".*

28. To the Appellant the trial court expected too much from him beyond what the law requires. On this one he relies on the case of **Stephen**

Ndungu Maina –vs- Republic 2013 eKLR.

29. The Appellant contends that the trial court did not conduct the voire dire examination in the manner expected of section 19(1) of the Oaths & Statutory declarations Act Cap 15 Laws of Kenya. He further relied on the case of **Joan wanjohi Kabau –vs- Republic HCCR Appeal No. 29 of 2010** to argue this.

30. Counsel for the Appellant has submitted that the mandatory nature of the sentence passed against the Appellant is unconstitutional. He relies on the cases of : **Francis Karioko Muruatetu & Another –vs- Republic Supreme court petition no. 16 of 2015, Christopher Ochieng –vs- Republic (2018) eKLR, Jared Koita Injiri –vs- Republic Kisumu Criminal appeal no. 93 of 2014.** He urges the court to allow the appeal.

31. The appeal was opposed through learned counsel M/s Martha Ndungu. She submits that JNW was born on 23rd September 2007 and she was therefore aged 11 years old at the time of incident. She identified the Appellant as the perpetrator. She gave details of what transpired. She submits that JNW's evidence was well supported by that of Pw2, Pw3 and Pw4. Infact she argues that Pw4's evidence was not contested by the Appellant. On the Appellant's defence she says it was unfounded and an afterthought.

Analysis and determination

32. This is a first appeal and this court is guided by the principles set out in the case of **Okeno –vs- Republic (1972) E.A 32** where the Court of Appeal stated:

> ***"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."***

33. In a much later decision, the Court of Appeal similarly held in **David Njuguna Wairimu –vs- Republic (2010) eKLR** that:

> ***"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

34. Upon considering the evidence on record, the grounds of appeal, both submissions and the law, I find the main issue falling for determination to be whether the conviction is sustainable on the strength of the evidence adduced in the trial court. In other words, whether the case against the Appellant was proved beyond reasonable doubt. The key ingredients of the offence of defilement include proof of age of the complainant, proof of penetration and proof that the Appellant was the perpetrator. See **Joseph Kima Philip –vs- Republic (Migori) 2019 eKLR; Philip vs- Republic (Kajiado) (2019) eKLR**. I will therefore consider each of these ingredients.

35. Before I proceed to deal with the ingredients stated above I wish to address an issue raised by the Appellant's counsel. He submitted that the charge sheet was defective as it failed to include the words "willfully and unlawfully". That in the absence of the two adjectives the charge could not disclose ***"mens rea"***

36. It is true the words willfully and unlawfully were not included in the charge sheet. The Charge facing the Appellant is defilement. The offence is perpetrated against children. Children lack the capacity to give consent. Once defilement is proved the issue can never be whether it was willful or unlawful. There is no defilement that is lawful and it cannot be said to be willful as a child can't give consent unless she/her misled the perpetrator to believe she was an adult.

Proof of complainant's age

37. The Appellant was convicted of the offence of defilement contrary to section 8(1) of the Sexual Offences Act.

> **Section 8(1)** provides a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> **Section 8(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 a term not less than twenty years.

38. The importance of proving age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offences of defilement and forms an important part of the charge because the prescribed sentence depends on the age of the victim. See **Alfayo Gombe Okello –vs- Republic Criminal Appeal No. 203 of 2009 (Kisumu); Hadson Ali Mwachongo –vs- Republic 2016 eKLR.**

39. JNW told the court she was born on 23rd September 2007. The birth certificate (EXB4) produced by Pw8 (investigating officer) shows

her date of birth as 26th September 2007. It follows that at the date of incident J.N.W was aged 10 years plus six months. She was therefore proved to be a minor and was below 11 years of age, which is covered under section 8(2) of the Sexual Offences Act.

Proof of penetration of complainant's genital organ identification of the assailant

40. Another ingredient necessary to prove the charge of defilement is the fact of penetration. The Sexual Offences Act 2006, defines ***"penetration** as the partial or complete insertion of the genital organs of a person into the genital organs of another person;"*

41.

42. The Court of Appeal in the case of **Sahali Omar –vs- Republic (2017) eKLR** held that:

> **"…… penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act"**

43. JNW said she was sent to sit in the vehicle by teacher F. She was accompanied into the vehicle by F's daughter (B). Even when she was allegedly being defiled F's daughter was present in the said vehicle. Neither teacher F nor his daughter testified before the lower court. It's not even indicated what the age of teacher F's daughter was.

44. JNW explained that the Appellant pulled her trousers and underpants and unzipped his trousers before inserting his penis into her vagina, as he knelt down with his head on her chest as she slept facing up on the bench. This ought to have been illustrated to make sense. This small girl never screamed for help. It also transpired that she had at one point written a letter to the Appellant asking him to meet with her. That letter was found by Pw4 in a bible.

45. The other witness whose evidence was relied on by the learned trial Magistrate to prove penetration was Pw4 aged 11 years. She said she could see JNM lying at the back seat with the Appellant lying ontop of her with their bodies moving and JNM was speaking though she could not hear what she was saying. She claims to have seen everything through the uncovered window. First of all, JNM never at any point said the Appellant lay ontop of her. She said he was kneeling down.

46. The incident is said to have occurred in a school vehicle or school bus. The scene is therefore critical. Pw1 referred to the scene as a school bus. Pw2 who was the head teacher also referred to it as a bus. **Pw7 Cpl Kena Adera** who arrested the Appellant said he

arrested him before he alighted from the school bus. On the other hand, Pw4 said it was a school van but later refers to it as a bus. There is a big difference between a bus and a van.

47. My key interest in this was how Pw4 an 11 year old girl was able to see with detail what could have been happening inside a school bus when she was outside. That she even moved to the opposite side of the back seat and could still see JNM being laid on by the Appellant. She did not however do anything but went back using the road and saw the Appellant jumping over metal rods.

48. Since the trial court did not satisfy herself as to whether the scene was in a van or bus, then that issue remains hanging. Given her age and probable height could Pw4 have been able to see what was happening inside the bus while standing outside? She never said she was standing on anything raised.

49. Coming to the medical evidence by Pw3, the P3 form (EXB1) was filled on 19th March 2013 same to the PRC form (EXB2). The lab tests were done at Nyeri medical and diabetic centre on 18th March 2013 (EXB3). The alleged incident occurred on 17th March 2013 evening. These were the findings:-

- Approximate age of injuries was days.
- No treatment was given prior to examination
- Degree of injury was assessed as grievous harm

Genitalia

- Was normal
- No laceration
- No hymen present
- Vagina and anus were normal, no bleeding , no discharge
- HVS (high vaginal swab) was negative, pregnancy test was negative, urine analysis was normal.
- HIV and syphilis – negative

- Blood test normal

50. In cross examination this is what Pw3 stated at page 17 lines 7 -10.

> *"JNM was treated on 18/03/2018. The incident allegedly took place on 17/03/2018 P3 form showed everything was normal injury was assessed as grievous harm according to the results, the grievous harm is in reference to defilement."*

In re-examination she stated at page 17 lines 13-15:

> *"The child is approximately 12 years, on examination; hymen was not present, meaning she was not a virgin. That was grievous harm. It's not indicated if hymen was freshly broken."*

Based on Pw3's evidence the trial court found corroboration to be the evidence of JNM and Pw4. According to the trial court a broken hymen was proof of penetration.

51. This is what she said at page 9 lines 3-4 of the judgment.

> *"Pw5 the medical doctor produced the P3 form for Pw1 indicating that her hymen was broken. I therefore find that penetration was proved".*

52. JNM was a child aged slightly less than 11 years. The Appellant is an adult. There was no treatment offered to JNM save for the tests done when she allegedly went to hospital on 18th September 2018. This confirms nothing was detected on her, to warrant treatment.

53. Nothing abnormal was revealed through these tests according to the results (EXB3) and the evidence of Pw3. Pw3 was also very clear that everything including the genitals of JNM were very normal. The minor had no bruises, lacerations, bleeding or discharge in her vagina. Moreso there was nothing said about the broken hymen. Infact hers was a missing hymen because its not known when it went missing. It was not freshly broken for if it was, there would have been signs from the examination by the doctor.

51. A broken hymen *"per se"* is not full proof of penetration, and in particular penetration by a penis as stated by JNM. I wish to rely on the case of **David Mwingirwa –vs Republic (2017) eKLR (Court of Appeal at Nyeri** sitting in Meru). The court stated thus:

> *"We think it was an error for the learned Judge to form a firm conclusion of defilement from the fact alone of the broken hymen. The Appellant very helpfully drew our attention the decision (sic) of this court (Maraga and Rawal JJA, as they then were) on P.K.W vs- Republic (supra) on the issue of the proper view that courts ought to take on the fact of a broken hymen, without more;*
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> ***"15.** In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?*
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> ***16.** Hymen also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are there are times when hymen is broken by factors other than sexual intercourse. These include, insertion into the vagina of any object capable of tearing it like the use of tampons masturbation injury an medical examination can also rapture the hymen when a girl engages in vigorous physical activity like horseback riding, riding bicycle, gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of **The Queen –vs- Manuel Vincent Quintanila (1999) AB QB 769.** They went further to state thus:*
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> *"We think that had the learned Judge not attached undue and undeserved weight to the state of L.K's hymen, she would have been less confident about the strength of the prosecution case against the Appellant"*

52. I am duly guided by the above finding and decision by the Court of Appeal. The medical evidence in this case did not by any chance confirm penetration of JNM's vagina. The doctor ought to have explained more about the missing hymen if the report was to be of any assistance in this matter.

53. It was the evidence of the Appellant which was sworn that he was fixed in this matter inorder for him to lose his job. The cause of the fabrication according to him was a broken love relationship between him and the head teacher of the school (Pw2). This had been brought up in cross-examination of Pw2 who denied the allegation.

54. The issue is now whether in the absence of supportive medical evidence the court could rely on Pw1's and Pw4's evidence to convict the Appellant. The proviso to section 124 of the Evidence Act states:

> ***"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 can 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".*

I have already analysed the evidence of Pw1 and Pw4 above.

55. There are contradictions and inconsistencies in the said evidence as pointed out. Pw4 a small girl of 11 years could not claim to have witnessed anything being done in the bus with minute details while she was outside the bus. She also claimed to have seen the Appellant lying ontop of JNM with their bodies moving. It was not possible for her to see that from outside. JNM said she was penetrated while the Appellant was kneeling with his head on her chest as she lay on her back on the back seat of the bus. Could that have been possible?

56. JNM was taken to hospital the next morning after the alleged incident. How come she was not treated? There was also nothing revealing in the tests that were conducted on 18th September 2018. In as much as the prosecution is not tied to availing a fixed number of witnesses, failure to avail certain witnesses raises eyebrows. See **Bukenya –vs- Uganda (1972) 259**.

57. Teacher F is the one who allegedly sent JNM and his daughter (B) to the bus. The teacher was never called to testify. His daughter who was allegedly in the said bus when this incident was taking place was never called as a witness. Instead Pw4 was called to come and give her story of great imagination which was not even been supported by J JNM’s own evidence. Had the trial court seriously considered all this evidence without making assumptions she could have found some sense in the defence by the Appellant.

58. The evidence of JNM and Pw4 was clearly orchestrated inorder to achieve something against the Appellant. I do not find JNM and Pw4 to have been credible witnesses. E knew the Appellant as their driver but their evidence on what he is alleged to have done is wanting.

59. The Appellant raised an issue about the voire dire examination which I wish to address for the sake of the trial court. The purpose of this examination is to achieve two things, namely:

i. To ascertain whether the witness possesses sufficient intelligence and understands the importance of speaking the truth.

ii. Whether the witness being possessed of such intelligence understands the meaning of an oath.

60. If a witness possess no. (i) and not no. (ii) she/he gives unsworn evidence; when the witness possesses both no. (i) and no. (ii) he /she gives sworn evidence. All this is usually grasped from the record on the voir dire examination.

61. In the instant case JNM and Pw4 were not examined on whether they knew what an oath is or whether they understood what should be done when one has taken an oath. This comes out clearly in the manner JNM and Pw4 lied to court after being sworn.

62. The analysis above leads to the conclusion that the conviction herein is not safe and should not be left to stand. That being the case I shall not deal with the ground relating to sentence. The upshot is that the appeal has merit and is allowed. The conviction is quashed and sentence set aside.

63. Appellant to be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Dated and signed this 10th day of November 2020, in open court at Makueni.

H. I. Ong’udi

Judge