



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL APPEAL NO. 23 OF 2018**

**MUTUKU MUSAA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(From the original conviction and sentence of Hon. Otieno. J (RM) in Makueni Senior Principal Magistrate's Sexual Offence Case No. 1 of 2018)

**JUDGMENT**

1. **Mutuku Musaa** the Appellant was charged with the offence of **defilement** of a girl **contrary to section 8(1)(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 16<sup>th</sup> day of December 2017 at Makueni district within Makueni county, the Appellant jointly with another not before court intentionally caused his penis to penetrate the vagina of **MNK**, a child aged 17 years.

2. There was an alternative count of **committing an indecent act with a girl contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and at the same place, the Appellant jointly with another not before court caused his penis to touch the vagina of **MNK**.

3. After a full trial, the learned trial Magistrate convicted him on the main count and sentenced him to life imprisonment.

4. Aggrieved by that decision, the Appellant filed amended grounds of appeal and listed 6 grounds stating that the learned trial Magistrate erred in law and fact by;

**a. Failing to find that the key ingredients of the offence i.e. age and penetration were not proved.**

**b. Failing to comply with mandatory provisions of section 77 of the Evidence Act when it came to the production of the medical report necessary to corroborate the case facing the appellant.**

**c. Failing to find that the prosecution's evidence was so inconsistent and contradictory and thus could not sustain a conviction.**

**d. Failing to find that essential witnesses and exhibits necessary to corroborate the prosecution's case were not availed hence violating Article 50(2)(c) & (j) of the Constitution.**

**e. Rejecting the cogent defence which not only exhibited bad blood between the Appellant and Pw4 but also reasonably exonerated him from any wrong doing.**

**f. Failing to comply with the mandatory provisions of section 169 of the Criminal Procedure Code during sentencing.**

5. The case presented to the court is that **Pw1 MNK**, was a 17-year-old class 7 student at primary school. She said that on 16/12/2017 (*material day*), she went to look for firewood and while at the river, the Appellant's son, M, grabbed her and took her to his house. That she always went to fetch firewood with her siblings but was with a neighbor on the fateful day.

6. At M's house there was a panga, some clothes and a pair of sickles. He grabbed her hands and removed her clothes. When she cried he threatened to kill her. He then removed his clothes and defiled her by inserting his penis inside her vagina. This took about ten minutes. When he was through he locked her in the house and left. He returned after an hour and they slept till morning but they never talked at all.

The next morning, he woke up and locked her in the house.

7. He later came with a cup of tea and chapati and nothing more. The Appellant later brought her another cup of tea and chapati but she did not consume it. She stayed in the house until 12:00 noon when the Appellant came, removed her clothes and defiled her for a long time by inserting his penis in her vagina. She had tried to scream before he defiled her but he warned her and told her to keep quiet. He left locking her inside the house and promising to come and take her home. She never saw him again.

8. M returned later and released her. She went home and informed her mother who accompanied her to Mukuyuni police station the next day. She informed the police what had transpired and recalled that the house had no windows but when the Appellant defiled her, there was light from air spaces under the roof. She identified the clothes which she had on the material day as MFI1-7. She said she knew the Appellant prior to this incident.

9. On cross examination, she said that M defiled her on the material day while the Appellant defiled her on the material day and on 17/12/2017. She left the Appellant's house at 4.00pm but told the police officer that she left at 5.00pm. She used to see M in their home area but did not know his school. When he released her, he took her upto the river and thereafter ran away. She denied being M's friend. She denied knowledge of any dispute between the Appellant, her mother and her aunty.

10. In re-examination, she said that the Appellant defiled her once on 17/12/2017 at 12.00pm. She denied that there was any grudge between her and the Appellant. She was not aware of a previous marriage between her aunt and the Appellant.

**11. PW2 Dr. Emmanuel Loiposha**, filled Pw1's P3 form and testified that spermatozoa was detected on the vaginal swab and gram positive coccu staining was positive for STI. The hymen was freshly broken with a whitish discharge. The presence of spermatozoa was highly suggestive of a successful sexual penetration. He produced the P3 form as Exb-1, the PRC form-Exh2, bundle of treatment notes-Exh 3(a)-(d).

12. He told the court that the patient visited the hospital on 18/12/2017 while shabbily dressed, anxious and afraid. He said that the defilement had been recent and evidence was fresh. She was not admitted but was given medication. She mentioned to them that the assailants were father and son.

13. On cross examination he said that the PRC form was filled by Dr. Kituku and could be filled by a nursing officer, clinical officer or even intern. He confirmed knowing the severity of the sentence to be imposed but there were conditions that could not allow them to do specialized tests. According to him it was upon the investigative arm to make requisition for specialized tests.

14. He agreed that anxiety can be caused by other factors. He explained that the hymen was inflamed which meant that the process of healing hadn't commenced. He said that the gram positive coccu manifests differently in a man and woman and confirmed that specialized treatment ought to have been conducted.

**15. PW3 James Kamwana Mutiso**, the assistant chief of Kyuasini sub-location, testified that on 17/12/2017, he received information from the policing officer about a missing girl. The girl returned later and informed her parent that she had been locked in the Appellant's house and that the Appellant and his son had defiled her. He advised them to take the child to the hospital which they did. He visited the home of the suspects but did not find them. He requested administrators in other locations to assist in tracing them.

16. It was his evidence that the Appellant and his son were away from home for two weeks which was not normal especially for the Appellant. The Appellant was a resident of his location and therefore known to him. He traced and arrested him between 7 and 9pm. PW1 had informed him that M found her fetching firewood and took her to his home where she spent the night. The following day, the Appellant took tea to her and defiled her. He told the court that there was no grudge between him and the Appellant.

**17. PW4 MK**, is Pw1's mother. She testified that on the material day at 4.00pm, Pw1 went to fetch firewood but did not return. She returned the next day at 4pm and told her that M defiled her at night while the Appellant defiled her in the morning after bringing her tea and chapati. Further that the Appellant defiled her twice i.e. at 9:00 am and 12 noon. She took her to Mukuyuni patrol base the next day at 6:00am. At the hospital, she was advised to pack the bloodied clothes in a nylon pack.

18. Pw4 was not able to produce Pw1's birth certificate as it had been destroyed by a fire. She stated that Pw1's age had been assessed and she produced the report as Exb 4. She was not sure of Pw1's age but said her elder sibling was 17 years while the younger one was 11 years of age. Pw1 was found to be 13 years of age upon assessment.

**19. PW5 PC Peter Wanjohi**, the investigating officer, testified that on 18/12/2017 at 9:00 am, he was at the station when Pw1 arrived with her father. She reported that she was fetching firewood when the Appellant's son who was armed with a panga confronted and ordered her to accompany him to his home. He forced her to enter his room and threatened to kill her.

20. In the room he removed his clothes and defiled her. The Appellant went to the same room the next day and defiled her. Pw1 was escorted to the hospital by PC Mercy and her age was assessed at 13 years. He visited the Appellant's house on 21/12/2017 at 10:00am but did not find him. The age indicated in the charge sheet was from the mother.

21. On cross examination, he said that the age assessment was done about a month later. That in defilement cases, statements are recorded by female officers hence the reason P.C Achieng' recorded Pw1's statement. That the suspect defiled her at 3:00pm and the Appellant defiled her on the second day. In re-examination, he said that there was no birth certificate and that the alleged panga was not recovered. He also said that the first defilement took place at 4:00pm and overnight.

22. When placed on his defence the Appellant gave sworn testimony and called one witness. He testified that he was a casual labourer, and on the material day, he had gone to Mbooni in search of casual work and was therefore not at home. He returned on 05/01/2018, and was arrested in Kiniu market at 7pm by 2 sub-chiefs on allegations of defilement.

23. They told him that his son was also on the run and he only learnt about the case on that day. He was not aware of his son's whereabouts and that only his wife was at home on the alleged day. He said he saw PW1 for the first time in court though he knew her mother as he had married her sister.

24. On cross examination by the prosecution, he denied knowing Pw1 but said he knew her home was a few kilometers away from his. That the only dispute was between him and Pw4's sister and he blamed his son for committing the offence. He stated that he was away looking for casual jobs and was not aware of the defilement case. He denied fleeing or going to his son's house which was about half a kilometer from his. He claimed he had lost his phone in August, 2017 and therefore had none.

25. He further stated that at times he would be away looking for or doing casual jobs for three weeks. His wife who works about one kilometre away from home usually returns home for lunch. M's is one of the three (3) houses on his compound. On relationships, he said he separated with Pw1's aunt in 2004 and had been seeking a refund of dowry for quite some time i.e. approximately Kshs.15,000/=. It was his position that the case against him was fabricated.

26. **DW2 RNM**, his wife worked as a chef at Particulars Withheld] secondary school. She said that she was at home and did not witness anything related to this case. That the Appellant was a casual laborer and would at times stay away for 3 weeks.

27. It was her evidence that M's house is five steps from theirs and he was at home in December, 2017 herding livestock. Further that the Appellant was away in December 2017 cutting trees at her sister Kasive's home. She denied knowing Pw1. She finally stated that M disappeared from home before the Appellant's arrest.

28. On cross examination, she said that they had been married for 27 years and had 7 children but only one stays at home. She denied that the Appellant was ever married before. She couldn't tell the number of times the Appellant got casual jobs, and she never asked him the type of casual jobs that he did. She also didn't know where he slept whenever he was away. She spoke to her husband using a neighbor's phone, since she didn't own a phone.

29. It was her evidence that had Pw1 been defiled in that house she would have screamed. She denied the existence of any grudge between her and Pw1. She confirmed that M's male friends would visit and some girls would also visit and ask for books at their home.

### **The appellant's submissions**

30. On grounds **(a)** he submits that Pw1's age was not ascertained by conclusive evidence. He says that the only credible evidence was the age assessment report but contends that it was not conclusive. He cites the case of **EK –vs-R (2018) eKLR** where the court stated as follows;

“The trial court in its judgment did not resolve this issue. Though the court had indicated that the girl was aged 15 years and looked about it, in the judgment it was held she was 16 years old. PW5 did not state or disclose how the age was assessed. Even with the current advancement in scientific medical knowledge, age assessment on a person is still a problem experienced in the entire world. Methods mostly applied are interviews, documentation, physical examination, sexual maturity assessment, dental observation and radiological tests. Radiographic methods addressed to evaluate the degree of skeleton or dental development is said to be the most accurate parameter to estimate the chronological age of children. The use of the words ‘to estimate’ makes it clear that medical methods in use raise questions about accuracy and reliability. They are to say the least imprecise. They have an error margin of 2 years and cannot be considered as conclusive evidence of age.”

31. Based on the above decision, the Appellant submits that the person who assessed Pw1's age was not called as a witness and contends that if the margin error is to be applied, she could have been 15 or 16 years.

32. The Appellant submits that penetration was not traced to him as the prosecution's case was that two men were involved and the medical evidence revealed that Pw1 had contracted a venereal disease. He contends that a DNA test was of great need in order to ascertain which of the two suspects had the same disease. He cites the case of **Amos Kinyua Kugi –vs- R (2015) eKLR** where the court expressed itself as follows:

“Although I have found that the evidence against the appellant falls far short of proving the case to the required standard, it is important that I comment on the issue of the DNA test. The appellant submitted that he ought to have been taken for the test so that the prosecution would rule out that no other person other than himself defiled PW3. Under section 36(1) of the Sexual Offences Act, No. 3 of 2006, a forensic DNA test is not mandatory unless the Court directs that the same be conducted where circumstances demand so. In the present case, given the weak evidence on identification and the glaring contradictions on the evidence of PW3 and 4, it is my view that a DNA test would have sufficed as a concrete hammer to nail the appellant. However, this was not done and as earlier noted; doubts abound as to whether it is indeed the appellant who committed that offence. There is no doubt that PW3 was defiled in very unfortunate circumstances. This is a case which justice ought to be served particularly for the victim who was left injured and traumatized. It is also a situation in which the court empathizes with but again, justice must balance for all the parties.”

33. On ground **(b)**, he submits that even though Pw2 laid a basis for producing the medical documents prepared by Dr. Kituku, the prosecution did not explain why it was difficult to procure the attendance of Dr. Kituku as per section 33 of the Evidence Act. He contends that a transfer in itself is not a ground for failing to avail the maker of a document especially where the document is likely to generate intense cross examination.

34. Still on the issue of the production of the P3 form, the Appellant submits that the prosecution took advantage of his ignorance and that the trial court closed its eyes to the need of ensuring that the laid down procedure was adhered to. He contends that he was denied an opportunity to cross examine the witness and that failure to raise an issue with it does not matter as he was a layman who could not comprehend such an implication.

35. On ground (c) he submits that there were many inconsistencies which displaced the credibility of the various witnesses and dislodged the prosecution's burden of proof. He says that there was inconsistency as to whether he defiled Pw1 and how many times he did it. He wonders how Pw1 could give contradictory versions of what transpired yet she was the victim. He also submits that there were contradictions on Pw1's age and contends that the contradictions were not minor as argued by the State. He relies on **Criminal Appeal No. 11 of 2016; John Mutua Musyoki –vs- R (2017)** where the Court of Appeal stated;

“Clearly, the High court failed to evaluate the veracity of all these contradictions and discrepancies. To our mind, these contradictions and inconsistencies are not minor as submitted by the respondent. They were critical and go to the root of the prosecution's case and whether the complainant was a credible witness. If the complainant could lie as to what had led her to report to school late, what else did she lie about?”

36. On ground (d), he submits that there were key witnesses who were not availed and as such, the case was uncorroborated. He gives the example of the neighbor who was with Pw1 when she was fetching firewood. He also contends that the bloodied clothes were not availed to the Government chemist for analysis. He relies on the case of **Paul Kanja Gitari –vs- R (2016) eKLR** to support his argument where it was held that;

“The state of the evidence tendered with all its inconsistencies means that the appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for proof of a fact. See section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the Court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case.”

The Appellant submits that failure to adduce evidence from the Government chemist broke an important link in the prosecution's case.

37. On ground (e), he submits that the trial court ignored his cogent defence and contends that the case was based on an existing grudge between him and Pw4's family which emanated from a protracted call to them to refund the dowry which he had paid for Pw4's sister. That their refusal to refund had caused tension between the two families and was enough motivation for them to get rid of him. He submits that the dowry issue was not an afterthought as he had raised it when Pw1 and Pw4 testified. He relies on the case of **Kiarie –vs- R (1984) KLR 739** where the Court of Appeal opined thus;

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable. The judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.”

38. On ground (f), he submits that the trial court did not comply with section 169 (1) and (2) of the Criminal Procedure Code (CPC) as it did not identify the law relating to the issues it was canvassing, failed to provide reasons for conviction and failed to identify the offence and section under which it convicted him. He contends that if the trial magistrate had properly directed herself on the law, she would have sentenced him to 20-years imprisonment.

### **The respondent's submissions**

39. Mrs. Owenga for the Respondent opposed the appeal and submitted that the evidence overwhelmingly linked the Appellant to the offence. She contends that the key ingredients were proved and the victim knew the Appellant well, and the medical evidence corroborated the victim's narrative. She argued that the Appellant denied the offence in his defence but did not water down the prosecution's case.

### **Analysis and Determination**

40. This is a first appeal and it is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. See **Okeno –vs- R 1972; Simiyu & Anor –vs- (2005) IKLR 192**. Further in the case of **David Njuguna Wairimu –vs- R (2010) eKLR the Court of Appeal** stated thus:

**“The duty of the first appellate court is to analyse and re-evaluate the 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 facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think 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.”**

41. Having considered the evidence on record, grounds of appeal, and to the rival submissions, I find the following issues to arise for determination;

i. Whether there was non-compliance with section 169 of the Criminal Procedure Code and section 33 of the Evidence Act.

ii. Whether the offence of defilement was proved to the required standard.

**Issue no. (i) Whether there was non-compliance with section 169 of the Criminal Procedure Code and section 33 of the Evidence Act.**

42. Section 169 of the CPC requires every judgment to contain the point(s) for determination, the decision thereon and reasons for the decision. It should also be dated and signed by the presiding officer in open Court at the time of pronouncing it. In case of conviction, the judgment should specify the offence of which the accused person is convicted, the law under which he/she is convicted and the punishment given.

43. The three issues for determination are boldly captured under sub-title **E** of the learned Magistrate's judgment after which she proceeds to analyze and make a decision on each issue. The judgment is also clear that the Appellant was convicted of defilement under section 8(1) as read with section 8(3) of the Sexual Offences Act, 2006 and his punishment was life imprisonment. It was dated, signed and delivered in open court on 13/06/2018. Evidently, the judgment is compliant with section 169 of the Criminal Procedure Code and I find no merit in that ground.

44. On the other hand, section 33 of the Evidence Act relates to statements of deceased persons, persons who cannot be found, persons incapable of giving evidence or persons whose attendance cannot be procured without unreasonable delay or expense. The Appellant concedes that indeed sufficient basis was laid for production of the PRC form and treatment notes under section 77 of the Evidence Act. Despite the maker being Dr. Kituku, the exhibits were produced by Dr. Loiposha (Pw2) who is also an expert in the medical field. Accordingly, he was competent to tender the evidence as provided under section 48 of the Evidence Act.

45. Further, the record shows that the Appellant was ably represented by an advocate Mr. Ogude during trial and the exhibits prepared by Dr. Kituku were produced without any objection. Accordingly, the Appellant cannot invoke the '*layman tag*' at this juncture. I therefore find that production of the exhibits by PW2 did not occasion any prejudice to the Appellant.

**Issue no. (ii) Whether the offence of defilement was proved to the required standard.**

46. Section 8(1)(2) of the Sexual Offences Act defines defilement as follows;

'8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

47. The critical ingredients of the offence are therefore;

- a. Age of the complainant.
- b. Proof of penetration.
- c. Positive identification of the assailant.

48. The importance of the victim's age in defilement cases cannot be overstated. In the instant case, both the victim and her mother were not sure of the age. According to the mother, the birth certificate got lost in a fire. PW1 was however taken for age assessment and the report produced as exhibit 4, again without any objection from the defence.

49. According to the report, the assessment was done by Dr. Kilisya Dalmás, a dental surgeon who opined that Pw1 was 13 years. It is generally accepted that dental surgeons are best placed to conduct age assessment. Looking at that evidence together with that of Pw4 which was to the effect that there was an elder child aged 17 years and a younger one aged 11 years, I am inclined to agree with the learned trial Magistrate that indeed, Pw1's age was proved to the required standard.

50. As for the case of **EK –vs- R (supra)**, the same is distinguishable to the extent that the victim's age was assessed by a clinical officer and the trial Magistrate did not lay a basis for her finding in light of the glaring discrepancies. Further, the State conceded that indeed the victim's age was not properly established. It is also noteworthy that the authority is from a court of concurrent jurisdiction hence can only be persuasive in nature.

51. With regard to penetration, the necessary medical examination was conducted shortly after the date and time of incident and the results were indicative of successful penetration. Further, Pw2 testified that the inflammation of Pw1's broken hymen meant that the process of healing had not commenced.

Accordingly, I have no doubt that the same was positively established by the medical evidence.

52. On whether the Appellant was positively identified as the assailant, the prosecution's case was that two perpetrators were involved but only one was arrested and charged. From the evidence, it is obvious that M was the key player as he was the one who placed Pw1 at the *locus in quo*.

53. Pw1's evidence in chief was that she was defiled once by M and once by the appellant. In cross-examination, she said that M defiled her once and the Appellant defiled her twice, i.e. on the material day and on 17/12/17. In re-examination, she said that the Appellant defiled her once on 17/12/17 at 12noon. Pw4 was of course regurgitating what she had been told by her daughter. She said that Pw1 was defiled twice on

17/12/17 i.e. at 9.00am and 12 noon. So, did the Appellant defile her once or on two different days or two times on the same day?

54. Contrary to the finding of the learned trial Magistrate, Pw4 did not corroborate Pw1's evidence on the number of times she was defiled by the Appellant. I join the Appellant in wondering why Pw1's evidence lacked consistency in that regard yet it is the crux of the matter. As it has been held in numerous judicial authorities, the witness upon whose evidence it is proposed to rely should not raise credibility issues in the mind of the court. In the case of **Kilu & Anor (2005) IKLR 174** the court of appeal held thus;

**“The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which make it unsafe to accept his evidence.”**

55. With regard to the venereal disease found on Pw1, I find that the circumstances of this case demanded that proper tests be conducted on both the Appellant and Pw1 to establish whether the Appellant had the same disease. After Pw1's testimony on 19/01/2018, the Appellant's counsel applied to have a DNA test conducted and the trial Magistrate correctly noted that the issue should have been dealt with during investigations. She nevertheless ordered that the test be conducted and the samples from both parties were to be collected on 23/01/2018.

56. **Dr. Loiposha's** reaction to the said order, through a letter dated 23/01/2018, was that Makeni county referral hospital had no capacity to conduct DNA analysis. He advised that only Kenya Medical Research Institute, Government chemist or Lancet private lab had the capacity and noted that the relevant specimens should have been collected on or around the date of offence. He opined that the DNA test ordered would be highly insignificant.

57. I am aware that the Appellant was arrested approximately two weeks after the incident and the lapse of time may have discouraged the investigative arm. There were however clothes from Pw1 which were collected and not utilized. Pw4 testified that she was advised at the hospital to pack the bloodied clothes in a nylon pack.

58. The clothes were marked MFI 1-7 but for some reason, they were never produced. I find, the Appellant's complaint about omission of some relevant exhibits is not idle. If indeed the clothes were bloodied, it was possible and necessary for the investigative arm to extract the necessary specimen and store it properly to await the apprehension of the suspects. From the wording of the charge sheet, the police were aware that the case involved two suspects and were therefore duty bound to adduce evidence that would fully link either or both suspects to the offence.

59. Back to the scene at the river, Pw1 was collecting firewood with a neighbor whose identity remains unknown and who was not called to testify. The Court of Appeal in **Shali Omar –vs- R 2017 eKLR** stated that;

**“Section 143 of Evidence Act provides that: -**

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

**The principle used to determine the consequences of failure to call witnesses was succinctly stated in *Bukenya & others –v- Uganda (1972) E.A 549*; where the court held that: -**

**“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**(ii) That court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.**

**(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”**

60. The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. (see ***Keter –vs- Republic (2007) 1E. A 135***)

61. In the instant case the question of identity is very crucial. Pw1 was at the river with an identified neighbor, when she was accosted by one Muendo, who grabbed her while armed with a panga and took her to his house. She also said her home to Ikumba where she used to collect firewood is not far. Could this “neighbor” not have rushed to Pw4's home and report what had happened to Pw1? Pw4 received no information until Pw1 resurfaced on the evening of 17<sup>th</sup> December, 2017.

62. Pw1 in her evidence in chief stated that the house from which she was defiled had no windows. That there was light from air spaces under the roof. Did the Investigating Officer visit the Appellant's home to confirm the presence of such a house on his compound? This to me was crucial evidence because both the Appellant and Dw2 denied that anything like that took place at their home. From Pw5's evidence he only visited the Appellant's home on 21<sup>st</sup> December, 2017 at 10:00 am for purposes of arrest only and not investigation.

63. From the totality of the evidence, I find that indeed Pw1 was defiled. It is the duty of the prosecution to adduce sufficient evidence to connect the Appellant to the penetration of the complainant. As pointed out earlier, it was not clear from Pw1's evidence exactly when the Appellant defiled her. What evidence is there to confirm that indeed when M grabbed her he took her to his house or the Appellant's homestead? It was never established that this house with allegedly missing windows is in the Appellant's homestead.

64. The bloody clothes identified by Pw1 as MFI – 1-7 were never produced as exhibits. In any event, no blood samples were extracted from them to assist in determining whether the Appellant was involved in this activity or not. My finding therefore is that the sexual penetration has not been fully traced to the Appellant. There is doubt as to whether he participated in the offence. The doubt created should have been exercised in favour of the Appellant.

**65. The result is that the appeal has merit and is allowed. The conviction is quashed and sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

**Delivered, Signed & Dated This 1<sup>st</sup> day of November 2019, in Open Court at Makueni.**

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**H. I Ong'udi**

**Judge**