REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.47 OF 2014

ABRAHAM MBAYA GICHAGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Sexual Offence Case No.176 of 2014 of the Senior Principal Magistrate's Court at Mukurweini)

J U D G M E N T

The appellant herein **Abraham Mbaya Gichagwa** was charged with defilement contrary to section 8(1) (3) of The Sexual Offences Act No.3 of 2006, and the alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act.

It was alleged that on the diverse dates between 20th and 27th day of April 2014 within Nyeri County, intentionally caused his penis to penetrate the vagina of CWM a child aged 14 years.

On the alternative count he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006. It was alleged that on diverse dates between 20th and 27th day of April 2014 within Nyeri County, intentionally touched the vagina of CWM a child aged 14 years with his penis.

In the Judgment delivered on 16th June 2014 by the trial magistrate the appellant was found guilty and convicted of the offence of defilement contrary to section "8 (1) (3) of the Sexual Offence Act" and sentenced to serve 20 years' imprisonment.

Aggrieved by that conviction and sentence he filed his petition of appeal on 20th June 2014. He amended the same and filed the amended petition and grounds on 12th February 2016

He raised the 4 (four) Grounds of Appeal;

1. THAT the learned Magistrate fell into error in affirming conviction and sentence without considering that the purported identification by PW1 was mistaken identity and her evidence was unsatisfactory and unsafe to support a conviction.

2. THAT the learned Magistrate equally fell into error in affirming conviction and sentence failing to find that key witnesses were not called to testify.

3. THAT the trial Magistrate erred in law and facts in convicting the appellant in failing to hold that the medical evidence casts doubt on the prosecution case and further the alleged blood stained clothes were not proved beyond reasonable doubt.

4. THAT the learned Magistrate fell into error in failing to consider my credible defence that displaced the reliability of the prosecution's case.

His prayer is that his appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.

The appeal came for hearing on 12th February 2018 and was opposed by the state through Ms. Jebet prosecution counsel. The appellant appeared in person. He submitted that he was relying entirely on his written submissions.

I have read the submissions which he set out serially.

The court of appeal in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** held that: -

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

The appellant has attacked the judgment of the trial court on four facets:

i. Mistaken identity

ii. Lack of key evidence

iii. Inconclusive medical evidence

iv. Credible defence vis a vis prosecution's case.

CASE FOR PROSECUTION

On the 20th April 2014, the complainant CWM, aged 14 years then, and a class 7 pupil at M. Primary School, accompanied her brother, IM then aged 10 years and his friend JC of the same age to collect her brother's shoe from the cobbler at Kiharo shopping Centre.

They met the appellant whom she knew by appearance as an employee of one Salome. He invited them to his home, which was in another village. They all went there. His sister was at home. Since there was no tea, he gave the boys and his brother one J, money to go take soup at the nearby shopping Centre. He asked his sister to buy the complainant a soda, but she said she did not take soda. He then gave her Ksh 100/-, left her in the sitting room, and went upstairs to do some work.

Meanwhile her brother, his friend came back. When they knocked on the door twice, there was no response. They announced they were leaving and they left, on the assumption that the complainant was locked up inside the house with the appellant. Her evidence was that the appellant told her not to respond. After some time, she wanted to leave. He called a boda boda rider, one Masika' who took both of them to Kiharo shopping Centre. They passed the 2 boys on their way and upon arrival at Kiharo shopping Centre, the said Masika went back for the boys. The four of them now boarded the boda boda to Gathogo where the three children alighted and went home.

On 27th April2014 CWM went to church with her sister. They left at 11.00am. They met her friend L who requested her to escort her to the posho mill at Kiharo.

On the way they met the appellant. CWM took L to the posho mill, but she, Lilian sent her to buy sweets. At the sweet shop she met the appellant, and when she went back to the posho mill, Lilian had left her. As a result, she was stranded. Somehow, the appellant came to the rescue. He suggested that they go to his house and she obliged. They got there, entered the sitting room. He then suggested that they go to bed. She obliged. He told her to remove her clothes. She did, removed all her clothes, a green track suit, trouser and jacket, red T-shirt, white pantie. He was in faded jeans. He removed them. They got into bed and had sex from 3.00pm to 5.00pm.

Now she wanted to go home. He said it was still early. They dressed up. When she dressed up, she noted that she was bleeding. They sat in the sitting room till 6.00pm when they left for the shopping Centre. She wanted to make her hair. He offered to pay for it but the hair dresser said it was too late. She said she wanted to go home. He rang Masika, the boda boda guy, who responded that he was busy. He rang another boda boda rider whose number she noted was saved as *'mtu was nduthi'* but his phone was not being picked. She was now scared of going home. They visited a friend of the appellant's then went back to appellant's house where they watched TV with his 2 friends. The friends left. She slept on the sofa till 8.00am the following day.

When she woke up and found that the appellant had left.

Around 9.00am a sister of the appellant came told her that the appellant had been arrested. This sister then escorted her to the chief's office and told her to tell the chief whether she wanted to get married or go to school.

At the chief's office she found her mother PW3, her father PW4. She was beaten up by a lady officer. Asked whether she had sex with the appellant she said yes She told them she did not want to get married. She said that the appellant forced her to have sex with him

She, the appellant and her parents went to Mukurweini Police Station, then to hospital. She was treated, and issued with medical records a P3, PRC, and treatment notes.

The appellant was charged with these offences.

On cross examination she denied she admitted to having sex with the appellant because she was beaten. She said that the appellant held her hands as he had sex with her and when she wanted to scream, he lay on top of her and told her not to scream. He told her not to tell anyone. She said that they went to the salon together.

Her brother IM was PW2. He told the court about the events of 20th April 2014, and that when his sister went missing on 27th April 2014, he told his parents about their visit to the house of the appellant, and the story of the closed door. He said the appellant was not a stranger to

him.

CWM's mother, LW was PW3. She testified how on the night of 27th April 2014 about 8.23pm she received a call from a number she did not know. At the other end was her daughter's voice telling her she was at some lady's house in Mukurweini. She tried to call back in vain as the phone would not go through.

Her daughter never came home that night. The following morning **PW4 FMM** the father to the complainant came home from work. She told him that their daughter was missing.

PW2's story led them to the employer of the appellant, with whom they wanted to confirm whether the phone number that had called her phone belonged to his worker. Instead he took them to where the appellant was. Together with the appellant they went to Kiharo AP Camp. Shortly CWM came to the station in the company of the appellant's sister and another man.

The complainant was taken to hospital and she later told the mother that the appellant had sex with her.

On cross-examination PW3 told the court that the complainant lied to her that she was in some woman's home, while she was actually at the appellant's home. That the police did not find CWM at the home of the appellant.

Both parents alleged that the complainant spent the night at the appellant's home but was chased away in the morning.

PW5 was Dr. Kimathi Paul. He produced the P3, the PRC and treatment notes. He said upon examination the subject's hymen was "freshly" broken but there were no lacerations. She had a bloody, smelling discharge.

The Investigating Officer was **PW6 No.86297 PC Maurice Odhiambo**. He received the appellant at Mukurweini police station on 28th April 2014 at 15.45hrs on allegations of defilement. He placed him in cells, escorted the minor to hospital, and recorded statements. He noted that CWM's under garments and trouser were stained with blood.

He produced all the exhibits including a certificate of birth showing that she was born on 14th June 1999.

On cross-examination he stated when he visited the appellant's home the appellant's father told him he had chased CWM from the home.

PW7 APC Alias Angila No.2008113679 testified that he received the report from PW4 at the AP Post Gikondi at 10.30am on 28th April 2014 that CWM was missing from home from 27th April 2014. He was in the company of the suspect whom he placed in the cells. Later they went to the police post where the complainant surrendered herself and 'admitted' that she had had sex with the appellant.

On cross-examination he said both the appellant and the girl admitted to spending the night together and having sex. He denied that they beat her to accept that she had sex with the appellant.

THE CASE FOR THE DEFENCE

In his defence the appellant testified and gave sworn testimony. He told the court he was at work the whole day on 27th April 2014and worked late leaving work at 8.00pm.

At Kiharo shopping Centre he met this girl whom he did not know but who knew him. She asked to use his phone to call her mother. He did so then he went home and slept.

He went to work the next day. At 8.30am, his employer visited him in the company of PW3 and PW4.

PW3 said she had received a call from his phone. He told them he had assisted a young lady the previous night. They all went to look for the girl.

At the police post he was surprised when he was arrested.

Later the girl surfaced. He was asked for Ksh. 20,000/- to finalize the case. He told them he had no money. He was taken to Mukurweini police station and later, the hospital.

On cross-examination he said he did not know CWM, he said he had one sister and she was married. He said he had given his phone to someone to call. He denied any knowledge of the people who testified. He said his house was three roomed and it had a T.V.

DW2 was Francis Maina Warui who testified that the accused person used to be his employee. He knew nothing about the events of 27th April 2014

DW3 Richard Thuo Mwangi testified about the 24th April 2014 as the day when the appellant was arrested. He knew nothing about the happenings of 27th April 2014.

In her judgment the trial magistrate found as a fact that the appellant had sex with CWM. She was convinced that CWM was involved in some sexual intercourse on 27th April 2014. She relied on the evidence of PW2 IM who confirmed that indeed the complainant met with the appellant on the 20th April 2014.That he and the appellant were friends, there was no grudge. She found IM's testimony credible. She also found that the sexual intercourse was proved by her testimony, the medical notes, the PRC, the P3, the inner wear soaked with blood. She stated that indeed the inner wear and the track bottom when produced as evidence were blood stained.

She rejected the appellant's defence because one, it bore no mention of the events of 20th April 2014. She found his story of where he was on 27th April 2014 unbelievable, especially the part where he confirmed that he met a girl in distress, allowed her to use his phone and just left her at the market at night. The two witnesses he called were of no assistance to his case and only added to its incredulity.

APPELLANT'S SUBMISSION

On the first ground the appellant relied on 2 cases **Republic -Vs- Sebwato (1960) E.A 174** quoting where the court held that *"where the evidence alleged to implicate an accused is entirely of identification that evidence must be absolutely water tight to justify a conviction"*. His argument was that this was a matter of mistaken identity. That he never met PW1 and PW2 on the material date as alleged by the prosecution. He stated further that this was confirmed by the fact PW3 the father to the complainant testified that he was told his missing daughter had said she was with someone by the name 'Kabando".

In his view this piece of evidence was important as it seemed to indicate that there was someone else who was with the complainant, and that person was not him.

He also relied on the case of **Woolmington -Vs-DPP (1935) A.C** quoting where the court held that *"**if there appears any reasonable doubt as to the guilt of an accused person and the doubt is created by the evidence brought forward by the prosecution, then an accused person ought to be accorded the benefit of doubt and is entitled to an acquittal on this footing".***

He argued that PW2 did not connect him with the complainant. That this was evident from his testimony that they went to accused house, knocked three times and nobody came to open the door. He never saw the complainant inside the appellant's house. To him this testimony was irrelevant it did not connect the appellant and the complainant.

On the 2nd ground the appellant submitted that the prosecution failed to call key witnesses to support its case.

i. His alleged sister whom PW1 said they met at the appellant's home.

ii. The complainant's friend by the name L who had requested her to escort he to the posh mill and left her stranded left her at the Shopping Centre

iii. The chief who received the complaint the first time and who it was alleged knew the appellant's family

iv. The appellant's alleged sister who allegedly escorted the complainant the chief and the police station.

v. "Masika the bodaboda rider" who allegedly ferried her, her brother, her brother's friend and the appellant from appellant's home to their home.

He submitted that he was aware of section 143 of the Evidence Act which gives the prosecution the ultimate decision on who to call as their witness. However, his view was that these were key witnesses who would have supported the evidence of PW1. Failure to call them, or even speak to them/ record their statements left a gap in the case for the prosecution. He urged the court to find that the only reason these witnesses were not called was because their evidence would have been detrimental to the prosecution case – he referred to **Reuben Gitonga -Vs- Republic Criminal Appeal No.349/09 (UR)**.

The third ground was about the medical evidence. The appellant submitted that the prosecution did not produce any documentary proof that the clothes produced in evidence were actually stained with the complainant's blood. He submitted that the complainant had testified that after the defilement when she wore the pants she realized she was bleeding from the private area. That she had not bathed after the defilement. PW3 testified that the complainant's clothes were blood stained. The doctor testified that the complainant's trousers were blood stained. She had no lacerations but had smelling bloody discharge.

He submitted that the prosecution made no effort to establish that what was alleged to be blood, was indeed blood and that it belonged to the complainant. That samples were never sent to the Government Chemist for analysis hence there was no proof that the clothes belonged to the complainant.

That the fact that the complainant testified she had not bathed after the alleged defilement ought to have led to further investigations. He referred to the case of **Richard Nyaga Kariuki -Vs- Republic HCCR Appeal No.103 of 2011** where the investigating officer had arranged for a vaginal swab and the accused's blood sample to be taken to the Government Chemist for analysis.

He was not examined although he was arrested the same day. He submitted that had the trial court addressed its mind on these points it would not have convicted him.

Finally, he submitted that he had a believable defence which the court rejected without taking into consideration that he had raised an alibi. He relied on **Wang'ombe -Vs- Republic KLR 145** that it was upon the prosecution to disprove his alibi.

RESPONDENT'S SUBMISSIONS

On behalf of the state Ms. Jebet submitted that the appeal was opposed. She summarized the case for the prosecution in the Lower Court. That the incident happened on 20th and 27th April. That the appellant just took the complainant and her brother to show then his house. He bought them soup, and gave the complainant Kshs.100/- to buy soda.

On the 27th, the complainant was from church at 3.00pm when the appellant took her to his house and defiled her at 5.00pm. They spent the night together, she used his phone to call her mother. That the trial court found her evidence believable.

That the doctor's evidence proved penetration – her hymen was freshly broken. Her brother confirmed that they were in appellant's house on 20th April 2014.

She submitted that the state did not see any reason to call the witnesses alleged by the appellant as they had sufficient evidence. There was no need for a vaginal swab as other tests had been conducted.

That the trial court had considered the appellant's defence and found it contradictory, and a sham

The appellant did not respond and confirmed that he was relying totally on his submissions.

ANALYSIS AND DETERMINATION

The role of the first appellate court is settled as described **in Kiilu and another vs. R (2005) 1 KLR 174** where the court held;

> "an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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.

The starting point in re-evaluating the evidence is that the appellant denied the offence. It was upon the prosecution to prove its case beyond a reasonable doubt. This court is enjoined to re-examine the evidence as though it was a fresh trial but bearing in mind that it never witnessed the demeanor of witnesses.

I have carefully considered the evidence on record, the submissions by each party. The issues are

1. Whether the prosecution proved the age of the complainat?

2. Whether there was penetration?

3. Who did it?

To prove the charge of defilement, as provided for under s. 8(1) as read with s. 8(3) of the Sexual Offences Act the prosecution is required to prove penetration, *the partial or complete insertion of the genital organ of the appellant n into the genital organs of the complainant,* and whether her *age falls between 12 and 15 years, f*or purposes of sentencing.

The prosecution produced as P Exhibit 3, a copy of the certificate of birth which shows that the complainant was born on 14th June 1999. It was alleged that the offence was committed on 27th April 2014 so she was 14 years old. Age was proved.

The second issue is whether penetration was proved. Let us look at the evidence tendered by the prosecution on the issue.

According to the prosecution the events of 20th April 2014 were the setting for the defilement to occur on the 27th. The complainant and her brother gave evidence on how they interacted with the appellant in his home with his relatives specifically his sisters on the 20th April 2014. It was also alleged that one of the sisters escorted the complainant to the chief and the police station on 28th April 2014.

From the description of witnesses, it appears that the appellant's house is within the family homestead. That is why there was his sister who was to serve the kids with tea, and go to fetch a soda for the complainant and the younger brother who went out with the other boys to take soup at the shopping Centre. This is also the place where the complainant testified that an older sister of the appellant took her from and escorted her to the chief's office. It is also the home where the investigating officer found the father of the appellant and told him he had chased the child out of his home.

If the prosecution witnesses are to be believed, there were people in the homestead the whole time. These were key witnesses who would have placed the complainant and her brother in that home on 20th April 2014, and the complainant in the home on the 27th and 28th April 2018. If they refused to testify there was the chief, who was the first person to receive the child and who knew the appellant's family. He would have placed the complainant with the appellant's big sister, and in the appellant's house on the morning of 28th. Then there was the

boda boda rider Masika who was known to the complainant, even by name. He was an independent witness who would have placed the children with the appellant on the 20th April 2014. He would also have confirmed being called on the 27th to take the complainant home. There was F the complainant's younger sister, and L her friend who would have confirmed the meeting with the appellant on the 27th at the shopping Centre, and abandoning the complainant at the same. These in my view were key witnesses whom the prosecution made no effort to avail The prosecution did not think it fit to provide this crucial link between the complainant and the appellant's home.

There is no evidence that investigations were conducted in relation to the issues raised by the complainant regarding these witnesses.There is no evidence that the investigating officer conducted any investigations to establish the story around the boda boda rider. They would have placed the complainant and the appellant together on 20th April 2014, and 27th April 2014.

There is no evidence on record that the sister to the appellant escorted the complainant to the chief's office and to the police station. Even the chief could have confirmed that the complainant was taken to his office by the sister of the appellant. In fact, PW3's testimony is that when they went to the home of the appellant they were "told that the complainant had been there but had been chased away". This could only mean one thing that the family of the appellant did not want to be associated with the complainant's case. How then would they chase her, and then have the appellant's sister escort her to the chief's office and the police station? It does not add up. This is compounded by the fact that the PW7 from Gikondi Police Post testified that the 'girl surrendered herself' at the police post, seriously contradicting the key prosecution evidence that the girl was escorted to the police post by the sister of the appellant. This same witness testified that the appellant *'admitted he had been with the girl the previous night…Mbanya's father …admitted that she had been there but he had chased her away…. she admitted she had spent the night with the suspect and they had sex…'.* This was the first port of call for this case. One can see that the basis was 'admissions' on the part of key participants, and clear violation of the rights of each one of them, and particularly the appellant, without any record of any warning that anything he said would be used against him. The question that lingers however is why the complainant had to' admit' she had had sex with the appellant, when her position was that he had forced her to having sex, and hence that would have been her opportunity to complain and report the matter.

Further, in cross-examination the mother to the complainant PW3 told the court that she and the police went to collect the complainant's jacket from the home of the appellant. PW7 said he visited the scene with his colleague. There was no mention of the complainant's jacket. There was no mention of the said jacket by the investigating officer as well. No such jacket was produced in court. Hence this piece of evidence mentioned by PW3 to connect the complainant to the appellant's house appears not to have existed. This goes together with the evidence that it was the appellant's sister who escorted the complainant to the police.

There was the phone call, or phone calls. This was very crucial evidence as it placed the complainant with the appellant at a very specific time. It is noteworthy that the complainant told the mother PW3, she was in Mukurweini. It is the story given by the complainant's brother about the events of 20th April 2014 that led to the search for the appellant. At his employer's place, PW3 and PW4 asked for appellant's phone number. None was given. Nowhere in the case for the prosecution has the phone number of PW3 been mentioned of that of the appellant. No evidence was given by the prosecution to prove that the appellant's phone had been used to call that of the complainant's mother. How then did the prosecution prove that the complainant had called her mother using the appellant's phone? That fact was not proved. Taking into consideration the centrality of this evidence, the prosecution left a big gap by failing to prove it. This also includes the phone calls to the boda boda rider(s). A confirmation from the appellant's phone log, and the service provider would have placed the appellant with the complainant.

<u>Then there was the medical evidence</u>.

It is evident that the trial court relied heavily on this evidence.

The case for the prosecution is that the appellant and the complainant had sex on 27th April from 3 to 5pm. The complainant's testimony under cross examination is that the was forced to have sex, and attempts to scream were thwarted by the appellant. When she wore her panty she noticed she was bleeding. She did not bathe. They then went to the shopping Centre, they went to the salon, spoke to the hair dresser, then visited a friend of the appellant, went back to appellant's house where they watched TV with some boys friends to the appellant, who later left. She slept on the sofa, woke up at 9:00am the following day and was taken to police station and hospital later in the day. How did she walk around while bleeding and in blood soaked panties? The treatment notes from Mukurweini D. Hospital indicate that she was still bleeding at the time of examination and had foul smell. Her inner wear was 'soaked with blood'. This would mean that the complainant was bleeding from the evening of 27th April 2014 to the evening of 28th April 2014. There ought to have been evidence in the house of the appellant. None was found even after the police officers allegedly visited his home.

However, when the P3 is read it speaks of the track suit as being' blood stained'. The blood soaked pantie was not shown to the doctor. The Investigating officer speaks of having noticed that the under garments and trousers were 'blood stained'. He says nothing about collecting them as exhibits.

The P3 what was presented to the doctor as clothing was a "blood stained trouser". It is noteworthy that this blood soaked inner wear was not presented to the doctor when the P3 was filled. It is also noteworthy that the PRC was completed on the 28th just like the treatment notes but it only makes mention of a 'blood stain' on trouser, what happened to the inner wear soaked with blood? How did the person examining the complainant miss the blood soaked inner wear while conducting a vaginal examination? Secondly, the investigating officer does not state at what stage he took over these clothes, after noticing that they were blood stained though the same were produced and admitted as exhibits. The appellant's concern that it was not established that the clothes were stained or soaked with blood belonging the complainant are therefore valid and point to lack of investigations.

It is on the basis of this evidence that trial magistrate found that penetration was proved. That even without the corroborating evidence the complainant's evidence was believable under section 124 of the Evidence Act.

However, Section 124 provides

…. where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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

Section 124 is not a cure it all. It is not automatically applicable in all sexual offences matters. It is where ***the only evidence is that of the alleged victim of the offence.*** It is evident from the judgment that the trial magistrate did not rely on section 124 of the Evidence Act with regard to the complainant's evidence. The trial magistrate relied on the medical evidence i.e. outpatient card Exhibit 1, the PRC form – Exhibit 9, and the P3 –Exhibit 2 which indicated that upon examination the complainant's hymen was broken, she had no lacerations, had "post vaginal and bleeding" foul smelling discharge. She also relied on the evidence of the blood soaked innerwear P Exhibit 7 and blood stained track suit bottom P Exhibit 4. This is evidence that was discredited. .

The trial magistrate formed the opinion that the appellant and the complainant knew each other and even had sex on the 20th April 2015. In her view that was the explanation for the locked door, and that the complainant had left home for the purpose only of meeting the appellant. This is view is demonstrated in the judgement where she takes issue with the complainant accompanying her brother and his friend to go to the cobbler's. This the trial magistrate posed the question as to why the complainant would accompany children much younger than herself to the market. The trial magistrate drew the inference that the complainant knew the appellant and it was just an arrangement for her to meet with him.

However, this is not supported by the complainant's testimony. She said,

"We then started to go back home. We met this man here. I did not know him. He is called Ibrahim. It is his people who told me. He is not from my village. He was however employed by Salome from our village……. I had seen the accused for several times. When we met the accused person he told us to go visit him at his home…."

Evidently, the complainant was struggling to identify the appellant. She moved from not knowing him, being told who he was, and seeing several times. She had never spoken to him yet she and her brother agreed to go with him to is home. The inconsistency of this evidence is apparent. Her evidence on how she knew the appellant is inconsistent. Her father's testimony that she had first said she was at Kabando's. This Kabando was not identified to be the same person as the appellant, creating a doubt as to where the complainant was on the material night if at all she slept out.

The question then is, did the prosecution prove penetration? From the foregoing the evidence given by the prosecution witnesses around that issue was inconclusive, contradictory and inconsistent.

If, as was stated by the police officer at Gikondi Police post, the complainant had admitted to having sexual intercourse, did the prosecution prove it was with the appellant? Again the answer to this question must be a no. The complainant was not found in the appellant's house on 27th April 2014. No witness placed her in his house on that day. No evidence was found and produced in court to prove that indeed she was in that house. No effort was made to identify who the 'Kabando' the complainant is alleged to have said she was with at first was.

It was always the burden of the prosecution to establish a prima facie case to warrant the putting of the accused person on his defence. This what was held in **RAMANLAL TRAMBAKLAL BHATT -VS- REPUBLIC (1957) E.A. 332, where the court stated:** -

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.

(ii) The question whether there is a case to answer cannot depend only on whether there is 'some' evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence."

Had the trial magistrate analysed the evidence these contradistinctions, gaps and inconsistencies would have stood out and perhaps the decision would have been different.

Then there was the appellant's statement of defence. Assuming that his witnesses were aware of the specific dates they were meant to address, then they were of no use to him as they appeared completely unaware of the dates. The appellant said absolutely nothing about the 20th April. For 27th he explained where he was. He said he gave someone his phone to call her mother, and left and went home. If the prosecution had proved their case, then this would be a sham.

Defilement is a very serious offence, carrying very stiff penalties, but more seriously, causing emotional, psychological and physical harm to the victims. A desk investigation cannot be sufficient to obtain the requisite evidence to support the charge. Investigations cannot be carried out in such a manner as to leave out crucial evidence. There is no need to rush with a prosecution that ends up leaving out crucial evidence. The prosecution have a role to point out those gaps for the investigators to fill in before the trial takes off. The evidence ought to be cogent, consistent and watertight and ought not to create a doubt in the mind of the court.

Having analysed and re evaluated the evidence before the trial court it is evident that the case for the prosecution is filled with inconsistencies and contradictions, and unfilled gaps. It would be unsafe to uphold the conviction. The appeal is allowed. The conviction

is quashed. The sentence is set aside. The appellant be set at liberty unless otherwise legally held.

Dated, delivered and signed in open court at Nyeri this 4th April, 2018.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant A. Atelu

Ms. Jebet for state

Appellant present