



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 74 OF 2015.**

**THOMAS MUTURI MUNYI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the judgment of Senior Resident Magistrate Hon. A.G. MUNENE, delivered on 02/9/15 in Embu Court Criminal Case No.1149 of 2014).***

**JUDGMENT**

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 of the offence are that the appellant, on the 14<sup>th</sup> day of July, 2014, at [particulars withheld] village, Itabua sub location, Mbeti North Location, within Embu County, intentionally and unlawfully defiled PWN a girl aged 15 years old by causing his penis to penetrate the vagina of PWN

The appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11 (a) of the Sexual Offences Act No. 3 of 2006. The trial court convicted the appellant and sentenced him to serve fifteen (15) years imprisonment. The grounds of appeal are THAT:-

- 1) The appellant pleaded not guilty to the charge.
- 2) The trial court misdirected itself by convicting the appellant on the basis of recanted evidence.
- 3) The trial court erred in law and fact by failing to find that PW1 was a hostile witness and failing to treat her evidence as such.
- 4) The trial magistrate erred by convicting the appellant on the basis that the defence evidence corroborates PW1's evidence.
- 5) The conviction is based on the evidence of a witness whose credibility is doubtful and whose evidence was not corroborated.
- 6) The prosecution failed to call vital witness in support of its case.
- 7) The trial court erred in law and fact by failing to warn itself on the dangers of relying on a single eye witness.
- 8) The appellants' constitutional rights under Article 50 (2) (b), (c) and (j) were violated.
- 9) The trial court erred in law by failing to find that the appellant was not positively identified.
- 10) The medical evidence indicated that there was no penetration and therefore defilement was not proved.
- 11) The appellant's defence was rejected on weak reasons.

The appellant submit that **PW1** testified on 3/9/2014. She informed the court that it was not the appellant who had defiled her. She was stood down. She later changed her evidence after talking to the police and alleged that the appellant defiled her. Her explanation was that a lady had approached her and instructed her to lie to the court and state that she was defiled by a short black man yet while testifying she referred to a short brown man. This was a contradiction. No formal report of alleged interference was made to the police. The fact that **PW1** recanted her evidence raises doubt. That evidence is unreliable.

It is further submitted that **PW1** ought to have been treated as a hostile witness. **PW1** was clearly a hostile witness. The appellant relies on

the case of **ABEL MOWARI NYANAMBA & 4 OTHERS VERSUS REPUBLIC (1980) eKLR**. The court of appeal held that the evidence of a hostile witness is of little value. The appellant also relies on the case of **NDUNGU KIMANYI Vs REPUBLIC (1976- 80) KLR, 1442** where the court of appeal stated as follows:

**“In our opinion, the evidence of the complainant does not come up to the minimum standard, which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows. 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 of his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

The appellant submit that **PW1** ought to have been treated as a hostile witness or her evidence ought to have been treated as that of a hostile witness.

The appellant contends that the trial court wrongly held that the appellant’s defence corroborated the evidence of **PW1**. While **PW1** alleged that she was defiled, the appellant denied defiling **PW1**. The evidence of **PW1** is quite different from that of the appellant. There was no corroboration of **PW1**’s evidence by the defence evidence. **PW1** was not a reliable witness and her evidence is devoid of any credibility.

It is further submitted that vital witnesses were not called to testify. One **F** is mentioned but was not summoned. Also **F** mother was not summoned as **PW1** alleged that she escaped and went to **F** home. **PW1** told **F** mother what had happened to her but still left **PW1** to go home alone. The conviction is based on the evidence of a single eye witness. Had the trial magistrate warned himself on the dangers of relying on the complainant’s evidence he would have reached a different finding.

The appellant further submit that he was not provided with **PW1**’s supplementary statements. This violated his constitutional rights under **Article 50**. **PW1** was the only eye witness. The identification was not proper. The complainant testified that when arrest was being made, she was not sure whether it was the appellant who had defiled her.

**MISS NANDWA**, Counsel for the state, opposed the appeal. Counsel submit that section 143 of the evidence Act does not require a particular number of witnesses for a case to be proved. The witnesses who testified were sufficient. Counsel relies on the case of **ALLAN OCHIENG OKEYO & ANOTHER Vs REPUBLIC (2015) eKLR**. The court of appeal held that one does not need a plethora of witnesses to prove a fact.

It is also submitted that **PW1** positively identified the appellant as her defiler. The **P3** form indicates that there was a recent penetration on **PW1**. **PW1** led police officers to the house where she had been defiled.

The prosecution evidence is clear, consistent and well corroborated. **PW1**’s hymen was found to have been recently perforated. **PW1** was able to explain how a woman had approached her and asked her to lie to the court about the person who had defiled her. **PW1** was therefore under duress. **PW1**’s evidence is credible. **PW1** was able to give a detailed account of what the appellant did to her. When the police went to the appellant’s house, there were only two men and **PW1** was able to identify the appellant. Counsel relies on the case of **PMM Vs REPUBLIC (2014) eKLR** where the court of appeal held that the evidence of a minor in sexual offences can be sufficient to sustain a conviction. The medical evidence did prove that **PW1** was defiled.

Counsel further submit that the appellant’s defence was considered. The appellant gave unsworn evidence and was not cross examined. Counsel relies on the case of **MAY Vs REPUBLIC (1981) KLR, 129**. The court of appeal held as follows on unsworn evidence:-

**“That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya).”**

**MISS N**, maintain that the prosecution applied to have **PW1** stood down when it was realized that she was giving evidence which is different from her statement. The trial court did warn itself of the dangers of relying on retracted evidence. Counsel relies on the case of **REPUBLIC Vs ELIZABETH WAITHERA MARY & ANOTHER (2011) eKLR** where the court held as follows. **“The legal position of a retracted or repudiated confession is that a trial court should accept any confession which has been retracted or repudiated with caution and must before finding conviction or such confession be fully satisfied in all the circumstances of the case that the confession is true. That is the standard of proof.”**

It is contended that the appellant’s constitutional rights were not violated. **PW1** testified and was stood down. She was recalled and continued with her evidence. The appellant cross examined her and was given enough time to prepare for his case. The trial was fair.

This is a first appeal. The evidence adduced before the trial court has to be evaluated and this court makes its own conclusion. **PW1** was the complainant. She was a standard 7 pupil 15 years old. On 14/7/2014 she was sent away from school due to a fee balance of **Ksh.470/=**. She went home and later visited her friend **F**. Later, **F** escorted her up to a place where there are water tanks. A man appeared on a motorcycle. It was around 1.00pm. He offered to give her a lift. The man took a different route and stopped near some house. He pulled her inside the house, locked the house and went away. She was still in school uniform. The man returned and defiled her. She spent the night in that house. In the morning, while the man was still asleep, she managed to escape and went to **F** home. She explained to **F** mother what had happened to her. She spent the day there and left at 8.30pm. She met **PW2** on her way home and **PW2** carried her on a motorbike to her home.

It is **PW1**’s evidence that she explained what had happened to her to her parents. On 16/7/2014 she was taken to the area chief. The matter was reported to the police and she was referred to Embu General Hospital. On 18/7/2014 at around 4.00pm she took the police to the house

where she was defiled. Since they went to the house at night, she identified the appellant but was not so sure. Initially, **PW1** testified that the appellant was not the defiler. She stood down and continued with her testimony on 7/10/2014 in Camera. She told the court that a woman had told her not to say that it was the appellant who defiled her. She followed her instructions and misinformed the court. She had seen the woman in court.

**PW2, MICHAEL GICHORI** was at his shop on 15/7/2014 at about 8.00pm. He went out and saw a crowd of people with a girl in school uniform. The girl was saying that she got lost and wanted means to go home. He offered to take her using his motor bike. He knew the girl's father. The girl never told them that she had been defiled.

**PW3, LNN** is **PW1's** father. On 14/7/2014 **PW1** went to school and they left for their daily duties. In the evening **PW1** was not at home. They looked for her but could not get her. On 15/7/2014 **PW1** was taken home on a motor bike. She did not tell them where she was the previous night. They took her to the village sub chief. She told the sub chief what had happened to her. They went to Itabua police station and reported the matter. **PW1** was referred to hospital.

It is **PW3's** evidence that **PW1** took them to the house where she was. They were in the company of police officers. The appellant opened the door. There was another man. **PW1**, pointed at the appellant as the one who had defiled her. After **PW1** had testified and stood down, she told him that the appellant's mother had told her to lie. **PW1** was born on 16/7/1999.

**PW4, DR. GODFREY NJUKI NJERU** was based at the Embu General Hospital. He produced the P3 form that was filled by **DR. RUTH MUTUA** who was on maternity leave. **PW1's** vaginal walls were bruised. The hymen was recently perforated. She had whitish smelly discharge. The doctor opined that **PW1** was penetrated. **PW1** was examined on 16/7/2014.

**PW5, CORPORAL CATHERINE AYA NYAMBURA**, she was based at the Itabua police station and investigated the case. The case was reported on 16/7/2014. **PW1** was taken to Embu General Hospital. She went to the scene and arrested the appellant.

In his unsworn defence, the appellant denied committing the offence. He was arrested on 27/7/2014 which was two weeks after the incident. He is a security guard. Police went to his house and **PW1** pointed out at him. He got scared. He had a young brother in the house and did not want him to be harassed.

The appellant contends that the prosecution evidence does not prove the case beyond reasonable doubt. The evidence of **PW1** is that she was sent away from school. She went to her friend's place and they were together until when **F** escorted her up to a place where there are water tanks. A man appeared and offered to give her a lift. She was taken to a house. It was about 1.00pm. The man locked her inside a house and left. He returned later and defiled her. They slept in that house. In the morning she escaped and went back to **F** house.

It is **PW1's** evidence that when she went back to **F** house she stayed the whole day. It is not clear why she did not proceed home. She stayed at her friend's place up to 8.00pm yet she had been defiled. She never sought treatment. According to **PW2**, he saw a crowd and there was a girl in school uniform. The child told them that she was lost. She did not tell them that she had been defiled. He took her to her parents as he knew her father.

There is the evidence of **PW3**, the complainant's father. It is his evidence that when **PW1** was taken home, she refused to reveal what had happened. They had to take her to the sub chief where **PW1** said that she had been defiled.

The essence of a Criminal trial is that the evidence adduced against the accused must as of necessity prove the case beyond reasonable doubt. If the court is in doubt, which doubt should be reasonable, then the accused should be acquitted. The main reliance on the prosecution case is the evidence of **PW1** and that of **PW4**. The sub chief did not testify. The evidence of **PW1** seems to raise a lot of doubt. It is not clear why **PW1** decided to continue staying at **F** place for the whole day yet she had been defiled. It is equally not clear why **PW1** could not trace her way home and had to be taken home by **PW2** yet she took the police and her father to a house which she alleged is where she was defiled. How could she retrace the route yet she found herself lost and attracted a crowd whom she sought for assistance. There is also the manner in which **PW1** testified. She testified on the first occasion as follows:-

**"I took them to a house I had seen the accused enter, the police knocked the door. The door was opened. Police had torches. I was asked who the person was, I said I thought it was the accused person but I was not sure as it was in the night. The person who had carried me with a motorcycle and raped me was short, brown. Today, when my father asked me whether it was the accused I told him the one who did that was short and brown. I had told the police that the suspect was a short brown man. The accused is not the one who raped me."**

Upon making the above statement the witness was stood down. The next time **PW1** testified she stated as follows: -

**"On 22/7/2014 police came to our house and interviewed me. They asked me why I gave wrong information in court. I told them that there was a woman who called me and told me not to say it is the accused who defiled me. She told me on 3/9/2014. I also got shocked why she told me like that. I followed her instructions and misinformed the court. It is the accused at the dock who defiled me. I don't know the name of the woman but I know her physically."**

**PW3, PW1's** father testified that **PW1** had told him after the first court session that the appellant's mother had told her to lie. There is the other issue as to **PW1's** evidence that she was locked in the house and the appellant left. By that time she had not been defiled. She was all alone in the house but did not scream or make any attempt to break through and ran away. The house was not described in the evidence. If she could not break the door at least she could have screamed.

**MISS N** relied on the case of **REPUBLIC Vs ELIZABETH WAITHERA MARY & ANOTHER (2011) eKLR**. That case mainly refers

to retracted confessions. The requirement is that a trial court should accept a retracted or repudiated confession with caution and must be satisfied that in all circumstances of the case, the confession is true as held in the case of **TUWAMOI Vs UGANDA (1967) EA, 84**. The current case involves two different versions of evidence by **PW1**. In one version, she categorically stated that it was not the appellant who had defiled her. In the other version, she stated that it was the appellant.

If **PW1** was carried by the appellant on a motorbike at around 1.00pm, she must have seen him. The two slept together if we are to go by her evidence. The incident occurred on 26/7/2014. **PW1** testified on 10/8/2014, hardly two weeks later and she denied that it was the appellant who had defiled her. She gave the description of a different person. Between 26/7/2014 and 10/8/2014, it is not clear where the woman met **PW1** and told her to lie to the court. It is also not clear why **PW1** did not tell the police or her parents that a woman had told her to lie. The manner in which **PW1** testified on 10/8/2014 clearly shows that she knew what she was saying. **PW1** made her second appearance in court on 7/10/2014. This is a period of about two months from her previous appearance. She could now remember that it was the appellant who had defiled her.

It is true that the medical evidence indicated that **PW1's** hymen had been perforated recently. That in itself does not mean that it is the appellant who had recently penetrated **PW1**. The entire evidence of **PW1** is doubtful. Although **PW1** made reference to 3/9/2014 as the date the woman told her to lie, I believe she meant 3/8/2014. However, how and where she met the woman is doubtful. Why did she trust the woman instead of her own father and police. The manner in which **PW1** described her defiler cannot be said to have been as a result of the woman's instructions.

Given the evidence on record, I do find that the conviction is not safe. Although **PW1** was a minor, she was fourteen (14) years old and capable of giving a clear line of evidence instead of giving two different versions. If the woman who told her to lie was the appellant's mother, why then wasn't she arrested and charged for obstructing justice. I do find that the story of a woman telling **PW1** to lie to court is **PW1's** own invention. I find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated and signed at Marsabit this.....Day of.....2018.**

**S. J. CHITEMBWE**

**JUDGE.**

**DATED, SIGNED AND DELIVERED AT EMBU THIS 19<sup>th</sup> DAY OF April, 2018.**

**F.MUCHEMI**

**JUDGE.**