**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 28 OF 2011**

**PATRICK KIRUMA KANIARU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from original conviction and sentence by Hon. B Kituyi, Resident Magitrate in Nakuru A/Criminal Case No. 74 of 2010 dated 2nd February, 2011)

**JUDGMENT**

The appellant, Patrick Kiruma Kaniaru, was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act, No.3** of **2006** and upon conviction was sentenced to life imprisonment. The appellant also faced an alternative charge of committing an Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, No.3** of 2**006.**

The particulars of the offence was that on 12th April, 2010 at London Estate in Nakuru within the Rift Valley province, unlawfully and intentionally, did an act which caused penetration of his male genital organ namely penis into the female genital organ of **MW**, a child aged 7 years.

Aggrieved by the conviction, the appellant appealed on ten (10) grounds of appeal that can be summarized as follows:

i. **That the evidence adduced by the prosecution witnesses was incapable of forming the basis of his conviction;**
ii. **That the trial magistrate did not follow the procedure of admitting evidence of minors;**
iii. **That the prosecution evidence was not corroborated and was contradictory;**
iv. **That the trial magistrate failed to find that there existed a grudge between his family and the complainant's family.**

The appellant further contended that the prosecution failed to call essential witnesses; that the medical evidence adduced in court was unsafe to warrant a conviction; that contrary to **Section 30 (1)** of the **Sexual Offences Act, No.3** of **2006** he was not taken to hospital for medical examination and that the trial magistrate did not give reasons for rejecting his sworn defence.

Subsequently, through the firm of advocates, Karanja Mbugua & Co. Advocates, the appellant filed a supplementary petition of appeal dated 28/2/2011 in which it is contended that the trial magistrate erred in law by shifting the burden of disproving the appellant's defence of alibi; that the trial magistrate

misdirected herself by convicting the appellant merely because he had not issued a notice of his alibi defence to the prosecution and that the trial magistrate disregarded the testimonies of the defence witnesses and failed to assign reasons for doing so. Further that the trial magistrate failed to appreciate the facts of the case and as a result failed to find that the appellant had been framed owing to disagreements between himself and the complainant's parents.

**APPELLANT'S SUBMISSIONS**

When the matter came up for hearing, counsel for the appellant, Mr. Karanja, submitted that whereas the appellant faced two counts, one being that of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act** (main count) and the other being an alternative charge of committing an indecent act contrary to **Section 11 (1)** of the same Act, the conviction and sentence do not specify the particular offence for which the appellant was convicted. Counsel contended that it is possible the appellant was convicted on both offences.

Of the five (5) prosecution witnesses who testified, counsel pointed out that two were minors. In respect of the testimonies of the minors, counsel contended that the trial magistrate conducted a voire dire test but failed to make a finding as to whether she believed the truthfulness of the minors. Counsel submitted that by failing to make a finding as to whether the minors were to give a sworn or unsworn testimony, the trial magistrate erred in law. Further that such a determination was necessary for the purpose of informing the court on the way forward.

Counsel also faulted the trial magistrate for having failed to caution herself when relying on the evidence of the two minors to convict the appellant. Relying on the decision of the Court of Appeal in **Oloo** v. **Republic,** (2009) KLR 416, Mr. Karanja submitted that the trial magistrate ought to have formed an opinion on the voire dire test before relying on it to convict the appellant and that failure to do so occasioned miscarriage of justice. Further that the trial magistrate ought to have recorded an opinion as to why she preferred unsworn evidence after conducting voire dire test.

Explaining that the testimonies of the two minors' and that of **P.W.4** were testimonies of relatives, counsel submitted that the testimonies of the defence witnesses revealed that there was bad blood between the complainant's mother **(P.W.4)** and the accused over property. In this regard **D.W.3** (the appellant's father) is said to have given testimony to the effect that many a times he would find the appellant and the complainant's mother quarrelling over the appellant's business premises.

In view of the said allegations of bad blood, between the complainant's mother and the appellant, counsel submitted that there is a possibility of the appellant having been framed up through the complainant **(P.W.2).** The trial magistrate is said to have failed to address that issue.

Concerning **P.W3's** testimony to the effect that the complainant was taken to a house with glass windows and a curtain, Mr. Karanja submitted that the said testimony raises identification issues. He wondered how **P.W.3** could have peeped through the window in such circumstances and seen what the appellant was doing to the complainant. Concerning the testimony of **P.W.2** and **P.W.4,** counsel submitted that it was fabricated and skewed in favour of getting a conviction and sentence of life imprisonment.

With regard to the appellant's defence of alibi which the trial magistrate did not believe, counsel submitted that the trial magistrate did not assign reasons for her failure to do so. Counsel submitted that the appellant's defence of alibi was not displaced by prosecution.

Arguing that a defence of alibi can be raised at any stage of the proceedings, counsel submitted that the appellant was not under any duty to prove his whereabouts. He referred to the decisions in **Lucas Okinyi Soki** V. **Republic, James Muthee Karanja** V. **Republic C.A NO. 193/195/2002**; **John wandati & another** V. **Republic Cr. App. No. 49/ 1999 (Kisumu)**; to argue that the burden was on the trial court to weigh the evidence. In the circumstances of this case, the three defence witnesses are said to have placed the appellant away from the crime scene on the material day and time.

Counsel faulted the trial magistrate for relying on an old Ugandan case, **Bogere Moses (Uganda) 1997** when there are more recent Kenyan authorities on the issue. Counsel urged the court to allow the appeal.

**RESPONDENT'S SUBMISSIONS**:

In opposing the appeal, counsel for the respondent (State) Ms Rugut, stated that there is no doubt that the complainant was defiled. She submitted that the documents produced by **P.W.1** (treatment notes, P3 forms and PRC forms, PEX 1-3) showed that the complainant had a fresh broken hymen. She also tested positive for Gonorrea.

Concerning the voire dire test, counsel pointed out that the trial magistrate made a finding that **P.W.2** and **P.W.3** would give unsworn evidence.

On issues of identification counsel submitted that **P.W.2** was able to identify the appellant, she called him **"uncle Kirima"**. In any event, the appellant was well known to the complainant.

**P.W.3** stated that he saw appellant on top of **P.W.2** and gave a detailed account of what he saw on that date. As for **P.W.5**, she produced the complainant's birth certificate, "**PEXb 4"**, which showed that the Complainant was eight years old.

Concerning the appellant's defence of *alibi* she contended that the appellant did not produce any receipts to prove that he travelled and attended the funeral as alleged.

Terming the appellant's defence as an afterthought, counsel submitted that the trial magistrate was right in rejecting it. Counsel for the State urged the court to dismiss the appeal and uphold both the conviction and sentence.

**REJOINDER**

In a rejoinder Mr. Karanja reitereated his contention that the burden was on the prosecution to disprove the appellant's alibi which was supported by the Eulogy and the photograph he produced.

**FURTHER FACTS**

The evidence adduced at the lower court and which led to the conviction of the appellant was to the effect that on the material day, 12/4/2010, the complainant **(P.W.2)** in the company of her mother, **V M K (P.W.4)** had gone to visit her grandmother who lives at London Estate in Nakuru. On that day at about 5.30 pm, the complainant's grandmother sent the complainant to go and call **S G,** (**P.W.3)** who was playing near the appellant's home.

The trial court heard that, when the complainant reached the appellant's home the appellant called her to his house and did bad manners to her (read defiled her).

**P.W.3**, who allegedly witnessed the offence, allegedly saw the appellant on top of the the complainant. When the complainant came out of the appellant's house, **P.W.3** asked her what she was doing in the appellant's house and she told him that the appellant had done bad manners to her.

When **P.W.2** and **P.W.3** returned home (read complaint's grandmother's home), in the company of another child called Mary**, P.W.3** told the complainant's mother **(P.W.4)** about the offence. When **P.W.4** sought to know whether what **P.W.3** had told her was true, the complainant confirmed to her that the appellant had defiled her. Consequently, she took the complainant to a nearby clinic whereat she was advised to take her to the Provincial General Hospital (PGH). Based on that advice, she took the complainant to Nakuru PGH where she was admitted from 12/4/2010 to 14/4/2010.

Upon being cross-examined by the appellant, the complainant's mother denied having had any

quarrels with the Appellant before and also denied the possibility of the children having mistaken the appellant with another person.

On her part, the complainant told the court that on 12/4/2010, at a time she could not remember, her grandmother sent her to go and call **P.W.3** who was playing at the appellant's house. When she got there, the appellant called her and pulled her into his house and after locking themselves in removed his trousers, including hers, and did bad manners to her. She felt pain in her genital area. After the appellant finished, he gave her sweets and assisted her to wear her trousers. She further told the court that **P.W.3,** who saw what the appellant had done to her informed her mother. After she confirmed to her mother that, the appellant had defiled her, her mother **(P.W.4)**, took her to hospital, where she was admitted. Thereafter they reported the crime to the police.

In his testimony, **P.W.3**, a child aged 11 years, confirmed to the court that the complainant came to look for him and that he saw the appellant taking **P.W.2** to his house. He informed the lower court that he peeped through the window and saw the appellant on top of the complainant. When the complainant came out of the house, he confronted her and she told him that the appellant had done bad manners to her. When they returned home, he informed the complainant's mother about the incidence. The complainant's mother sought confirmation from the complainant who said it was true that the appellant had defiled her.

According to the testimony of Dr. Samuel Onchere **(P.W.1)**, who examined the complainant on 15/4/2010, for purposes of filling a P3 form for her, the complainant had been defiled by a known person. On examination, the complainant, who was 7 years old, looked depressed. Although she had no external injuries, genital examination showed a fresh broken hymen. She had a whitish discharge. Labaratory examination, on the other hand, showed that she had contracted a sexually transmitted disease, Gonorrhea. He produced the P3, the treatment card and the PRC forms he relied on in filling the P3 form as **"PEXB1", "PEXB 2"** and "**PEXb3"** respectively.

On 13/4/2010 at about 9p.m **P.W.5, PC Beth Kamande,** received the report of the offence herein from **P.W.4**. She recorded their statements and issued them with a P3 form. She informed the court that she carried investigation which revealed that the complainant had been defiled by the appellant at the appellant's house at London Estate in Nakuru. After the appellant was arrested, she charged him with the offence herein. She produced the complainant's birth certificate as, **"PEXb 4".**

When put on his defence, the appellant gave a sworn statement in which he claimed that he was not at the scene of crime on the material day. In this regard, he stated that on the material day and time, he was in Molo attending a funeral of a friend's mother. He informed the trial magistrate that he had gone to the funeral in the company of his friends on 11/4/2010. The funeral took place the following day, 12/4/2010 at about 4 p.m. To prove those allegations he produced the Eulogy for the funeral in question and a photograph that was allegedly taken at the funeral as "**DEXb 1"** and "**DEXb 2"** respectively.

He contended that the complainant's mother decided to implicate him in the offence because of disputes over the business premises he occupied (the premises belonged to the complainant's mother). He explained that they had differences concerning the cleanliness of the premises.

With regard to his arrest, he explained that he had been called at the **P.W.4's** home at Free Area allegedly to discuss the problems concerning the business premises. While there, Police officers came and arrested him in connection to the offences herein.

On his part, the appellant's father, (Simon Kaniaru) who testified as **D.W.3** informed the court that there existed differences between the appellant and the complainant's mother over the business premises the appellant occupied. He informed the trial magistrate that he advised the appellant to move out of the premises but after he moved out the problems became worse.

On the circumstances leading to the arrest of the appellant, he told the court that the appellant called him on 30/4/2010 and informed him that the complainant's mother had called him over to his workshop (they wanted to buy it). When he went to **P.W.4's** place to discuss the issue, on the following day, the

police came and arrested the appellant.

With regard to the appellant's alibi, **D.W.3**, told the court that the appellant informed him that on the material day, he had attended a funeral in Molo.

**D.W.1, Isaac Njenga,** informed the court that the appellant and himself attended a funeral at Dagaria on the material day, 12/4/10. The funeral ended at 4 p.m but because it rained heavily on that day, they put up there and returned the following day 13/4/2010. It was his testimony that he witnessed the taking of the photograph that the appellant produced. The photograph was taken at about 11 a.m. However, he could not remember who took it.

**D.W.2, Jason Nganga,** on the other hand, told the court that he met the appellant on 13/4/2010 and that he informed him that he had attended a funeral on 12/4/2010.

Upon considering the foregoing evidence, the trial magistrate believed the prosecution case and disbelieved the defence case.

**ISSUES FOR DETERMINATION**

From the grounds of appeal filed herein and the submissions by advocates for the respective parties, the issues for determination are:-

1. Whether the testimony of the minors herein was irregularly admitted?

2. Whether the trial court erred in disregarding the appellant's defence of *alibi?*

3. Whether the prosecution evidence was sufficient to support a conviction

**ANALYSIS**

As the first appellate court, it is my duty to consider and re-evaluate the evidence presented in the lower court in order to arrive at my own independent conclusion, bearing in mind that I neither heard nor saw the witnesses testify. See **Okeno** V. **Republic**, (1972) E.A 32.

**WHETHER THE TESTIMONY OF THE MINORS WAS IRREGULARLY ADMITTED**

**PW2** and **PW3** were children of tender years aged 7 and 11 years respectively. A child of tender years may under **Section 19** of the **Oaths and Statutory Declarations Act, Cap. 15**, give sworn testimony if he understands the nature of an oath and the consequences of giving false testimony. If he does not understand the nature of an oath, he may give unsworn testimony provided that he is possessed of sufficient intelligence and understands the duty of telling the truth. (Also see **Oloo** V. **Republic,** [2009] KLR 416)

In order to determine how to receive the evidence of the child of tender years, the court conducts a *voire dire* examination. The procedure to be followed was laid down in the case of **Peter Kiriga Kiune,** Criminal Appeal No. 77 of 1982 [U/R] which was cited, with approval, in **Johnson Muiruri** V. **Republic**, [1983] eKLR, as follows-

> **"Where in any proceedings before a court, a child of tender years is called as a witness, the court is required to form an opinion, on voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth.....**
>
> **It is important to set out the questions and answers when deciding whether a child of**

**tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided and not be forced to make assumptions."**

In the instant case, the court conducted *voire dire* examination on both minors and then stated for each minor ***"the child will give unsworn testimony in Kiswahili"***. Counsel's objection was that the court did not state whether she believed that the minors were being truthful and did not state the reasons for them to give unsworn testimonies.

As I have stated earlier in this judgment, the purpose of a *voire dire* examination is to investigate on the competence of a child of tender years in order for the court to determine how to receive his evidence. The trial court asked the minors on their age, where they attend school and their class, if they attended church and whether they understood the duty to tell the truth. On the basis of the answers, the court found that they were competent to give unsworn testimony.

The trial court substantially complied with the procedure set out in **Johnson Muiruri** V. **Republic** (supra). The nature of questions asked were intended to determine the intelligence of the child and whether they understood the nature of an oath and their duty to be truthful. It is their answers that informed the court's decision to receive their unsworn testimony. On my part, I find that the trial court exercised its discretion to admit the evidence of both minors in the manner it did properly and find no reason to interfere with it.

**WHETHER THE PROSECUTION EVIDENCE WAS SUFFICIENT TO CONVICT THE APPELLANT**

Under this ground I will consider two issues that were raised by the appellant. The first is that the trial court erred in disregarding the appellant's defence of alibi. The second is that the court erred in relying on the uncorroborated evidence of the minors to convict him, particularly on the key ingredients of penetration and identification.

It was established by the evidence that the complainant was defiled on 12th April 2010. The medical report established that on being examined the complainant had a freshly broken hymen and a whitish discharge. The high vaginal swab revealed that she had gonorrhea and many pus cells. The dispute and which is the crux of this appeal was whether the appellant was properly identified as the person who committed the offence.

It is a settled principle of law that the defence of alibi does not shift the burden of proof to an accused. The prosecution has the duty to investigate and test the evidence. Therefore, if an accused person intends to raise an *alibi* defence, he should raise it at the time he is pleading to the charge to allow the prosecution sufficient time to inquire into it. However, if it is raised during the defence hearing, as in the instant case, the court should weigh it against the prosecution's evidence. (See **Wang'ombe** V. **Republic**, [1980] KLR 149 and **Ganzi 2 Others** V. **Republic,** [2005] eKLR.

This was the approach adopted by the trial court. She considered that the defence of *alibi* had been raised at a time when the prosecution could not properly test it and considered it against the prosecution case. She found that the prosecution's evidence was not displaced by the defence and proceeded to convict the appellant.

Upon carefully considering and weighing the evidence, I find no reason to depart from the finding of the trial court.

There was no question that both **PW2** and **PW3** knew the appellant well prior to the incident. They both stated that he was their grandmother's neighbour and the complainant actually referred to him as ***"Uncle Kirima".***

Their evidence was consistent and substantially similar. The complainant testified that the appellant

pulled her to his house, locked her in, removed his trousers and then hers and then did *bad manners* to her. He thereafter gave her a sweet before dressing her. She felt pain around her genital area.

This incident was witnessed by **PW3** who was riding his bicycle near the Appellant's house. **PW3** followed them and saw, through a glass window which was closed and covered with a sheer curtain, the appellant, who had removed his trousers was lying on top of the complainant. He had known him for a long time as a neighbour.

The appellant presented evidence to the effect that he was not the person who defiled the complainant because on the date of the alleged offence, he was at a friend's funeral. In his sworn testimony, he testified that on the said date, he attended a friend's funeral at Muchorwe in Molo which ended at about 4.30pm. He produced as "**DExb 1"** and "**DExb 2"** the eulogy and a photograph of him and his friends that was taken at the funeral. He stated that they spent the night in Molo because of the heavy rains. He then went to a friend's place in Njoro where he remained for seven days before returning home.

**DWI** and **DW2** who allegedly attended the funeral with the appellant confirmed that they spent that night in Molo Town and the following day, they left the appellant in Njoro Town.

I concur with the trial magistrate's findings and note that **D.W.2** and **D.W.3's** evidence on the whereabouts of the Appellant is hearsay. Further, **D.W.1's** evidence on where they put up does not tally with that of the Appellant.

The prosecution evidence was strong and credible when tested against that of the defence which had not been investigated and established by the prosecution. The minors' evidence was clear and they did not appear to have been coached. The appellant was known to both P.W.2 and P.W.3 and this court is satisfied that the identification by way of recognition was proved by the prosecution. The evidence on penetration was sufficient to convict the appellant under **Section 124** of the **Evidence Act Cap 80**, which provides that the sole evidence of a minor may be relied on to convict an accused person where the court, is convinced that the minor is telling the truth. In any event, **P.W.2's** evidence on penetration corroborated the medical evidence of **PW1**, the doctor, who examined the complainant which evidence confirmed that she had been defiled.

Lastly upon perusal of the Record of Appeal at page 29, I am satisfied that the trial court clearly stated that she convicted the Appellant on the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.**

Therefore counsel's contention that there was a possibility that the appellant was convicted on both counts, that is the main count and the alternative count, this submission therefore has no bearing.

**FINDINGS**:

For the above stated reasons, this court makes the following findings:

1. This court finds that the minors' testimonies were properly admitted.
2. This court finds that the Appellant's defence of *alibi* was not disregarded by the trial court but was properly weighed and tested against the prosecution's evidence. This court finds no reason to depart from the trial court's findings.
3. The prosecution is found to have proved its case on the key ingredients of identification and penetration beyond reasonable doubt.
4. This court finds no reason to interfere with the conviction.
5. The sentence is found to be legal as it is the one prescribed by statute.

**DETERMINATION:**

The appeal is found lacking in merit and is hereby dismissed. The conviction and sentence are both upheld.

Orders accordingly

**Dated, Signed and Delivered at Nakuru this 12th day of March, 2015.**

**A. MSHILA**

**JUDGE**