NO.437/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 217 OF 2013

ANDREW MULIKA KITHUSI …… APPELLANT

VERSUS

REPUBLIC ……..…..... RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief

Magistrate's Court Criminal Case No. 1154 of 2012 by

Hon. E. K. Too – Ag. S.R.M. on 12/9/2013)

J U D G M E N T

1. **Andrew Mulika Kithusi,** the appellant was charged with the offence of defilement contrary to **Section 8 (1), (3**) of the **Sexual Offences Act, 2006**. Particulars of the offence thereof being that on the **26th day of February, 2009** at **[Particulars Withheld] primary school** in **Nzaui District** within **Eastern Province** caused his penis to penetrate the vagina of **M M** a child **aged 15 years.**
2. In the alternative, the appellant was charged with committing an Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**. Particulars of the offence thereof being that on the **26th day of February, 2009** at **[Particulars Withheld] primary school** in **Nzaui District** within **Eastern Province** unlawfully and intentionally touched the vagina of **M M** a child of **15 years** with his penis.
3. Having pleaded not guilty to the charge he was tried, convicted on the main charge and sentenced to serve **thirty (30) years** imprisonment.
4. Being aggrieved by the conviction and sentence thereof he appealed on grounds that the learned trial magistrate erred in law and fact by:

i. Failing to warn himself against the danger of convicting the appellant on uncorroborated evidence of the complainant.
ii. By failing to give a benefit of doubt to the appellant after the prosecution failed to produce exhibits mentioned by the complainant and her mother which were escorted to the government chemist for analysis on allegation that they were blood stained.
iii. By convicting the appellant when the government analysts report showed that blood stains found on the missing clothes neither belonged to the appellant nor to the victim.
iv. By demonstrating the fact that he was biased and prejudicial against the appellant. As a result the appellant was not accorded a fair trial.
v. By failing to believe defence witnesses and dismissing the defence of the appellant as unreliable.

vi. No reasons were given for rejection of the appellant's evidence and not of his witnesses who had been lined up to be called by the prosecution but opted to testify in favour of the appellant.

5. According to the prosecution's case, on the **26th February 2009, PW1**, **Z M M,** the complainant was in class when she was informed by **M M,** a prefect that the appellant, their school headmaster wished to see her. She proceeded to his office whereby she found him inside the office. He sought to know if she was mature enough not to tell her parents anything in case of something that he committed. He went on to pull up her clothes by force, tore her pant, put her on the table and used his penis to penetrate into her vagina. She bled. He took her pant and wiped himself and he told her not to tell her parents. Her pant was torn. She returned to class but her clothes were blood stained at the back. This prompted her classmates to laugh at her. Thereafter, **M K** a classmate notified her that the appellant was calling her.
6. She complied and found the appellant standing outside his office. He alluded to having sent her to call those who were talking in class, instructions that he had not given her. Five minutes later, he told her to go back to class. Thereafter, he summoned all standard 7 and 8 pupils to the assembly and dismissed them to go back home.
7. Her mother, **B N M, PW3** returned home at about 7.00 p.m. She notified her what had transpired. She examined her and found that she was bleeding from her private parts. They reported the matter to the police then she took her to hospital.
8. PW5, **Dr. Kataka Jaquin** who examined her found her clothes were blood stained. The vulva was inflamed. The external genetalia and hymen were perforated. He concluded that she had been defiled.
9. In the course of investigations some items were subjected to analysis at the government chemist. A report thereto was made by PW2 **Paul Waweru Kang'ethe**, a Government Analyst hence this case.
10. In his defence the appellant denied having defiled the complainant. It was his evidence that on the material date he taught the complainant English language hence saw her in class. Thereafter, while standing at the parade ground he called a pupil, **M M** and instructed him to call the class prefect. The class prefect went to see him whereby he asked for the names of noisemakers. The complainant was taken to him. When questioned she denied having made noise. He warned her and directed to go to class and take to him another pupil who was making noise. When she returned to class all was silent. Later she returned with another girl called **M K** who was a noisemaker. They then returned to class. He denied having asked the complainant to have sex with him or having had sexual intercourse with her. At 5.00 p.m. he released pupils to go home.
11. On the **2nd March 2009** he received a letter from the **OCS Sultan Hamud** requiring him to go to the police station. He complied. It was alleged that he had defiled the complainant. He was charged.
12. Thereafter he wrote a letter to the **Principal State Counsel** requesting for **DNA** profiling to be done because previously the complainant's mother had blackmailed another teacher, **N. K**. She had written a letter to the **Teachers Service Commission** alleging that the teacher had sexually assaulted the complainant's sister.
13. **R W, DW2** was called as a witness by the appellant. It was stated that the state intended to call her as a witness but she decided to testify for the defence. It was her testimony that on the fateful date she was in the same class with the complainant. After they were given homework by the appellant the complainant started making noise. She was called by the Headmaster (appellant) who talked to her while outside his office then she returned to class. The complainant just like other pupils was in her school uniform. On going back to school she raised no complaint. They were released to go home by the appellant at 6.00 p.m. She however heard the complainant say that she would be transferred to another school. She did not return to school. Two (2) days later the police went to record her (DW1) statement.
14. **DW3 M K** who was the complainant's desk mate stated that on the material date the complainant was making noise. She was called outside and she talked to the appellant their headmaster and returned to class. She did not complain of anything. Thereafter they were released to go home.
15. **DW4 J N** who said that she had attended adult tuition at the school stated that she saw the complainant being called by the teacher (appellant) outside the classroom. They stood outside for a while and she went back to class. She (DW4) was one of the last persons to leave the school.

She heard of no complaint.

16. At the hearing of the appeal **Mr. Konya**, learned Counsel for the appellant submitted that there was no independent witness to corroborate evidence adduced by the complainant that the appellant defiled her in his office. The complainant on reporting to PW3, her mother examined her. She was bleeding. The clothes the complainant had were escorted to government chemist. On analysis the blood stains found on them were neither for the blood group of the appellant nor the complainant. The said clothes having not been produced in evidence was fatal to the prosecution's case according to him.
17. Further he stated that the officer who investigated the case never testified. He called upon the court to find that this meant that his evidence was adverse to the prosecution's case. Emphasizing the fact that the trial magistrate was biased against the appellant he stated that he barred the appellant from calling the Principal State Counsel, **Mr. Omirera** as a defence witness. The trial magistrate having remarked in his judgment that he was disturbed by the way the police and office of the Director of Public Prosecutions handled the case. The benefit of doubt should have been resolved in favour of the appellant. The magistrate having attacked the credibility of witnesses called by the defence was prejudicial. He failed to consider the ruling of the High Court. The charge sheet was defective and sentence imposed illegal.
18. In response thereto, **Mrs. Abuga** learned State Counsel stated that evidence adduced by the complainant that she was defiled was corroborated by medical evidence adduced. The complainant was not mistaken as to the identity of the person who defiled her as the offence was committed in broad daylight. Citing the proviso of **Section 124** of the **Evidence Act,** she stated that corroboration of the evidence of the complainant was not a necessity as long as the court was satisfied that she was telling the truth.
19. Further, she submitted that the defence was not barred to call **Mr. Omirera** as a witness. The charge sheet was not defective. The omission pointed out was a mere technicality. On sentence she conceded that the same was excessive and added that a minimum sentence should have been considered.
20. This being the first appellate court, it is duty bound to re-consider and re-evaluate evidence adduced at trial and come up with its own conclusions bearing in mind that it did not see or hear witnesses who testified at trial. **(See *Okeno versus Republic [1972] E.A. 32).***
21. Generally, corroboration is not a requirement in Sexual Offences. A Sexual Offence can be proved by evidence of a victim perse as long as the trial court is satisfied that the witness is truthful. The proviso to Section 124 of the Evidence Act provides thus:

"***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."***

(Also see ***Stephen Nguli Mulili versus Republic (2014) eKLR.)***

22. In arriving at the conclusion to convict on evidence adduced by the complainant, the trial court had this to say:

"Based on the foregoing I am inclined to believing the narration of the events set out by the complainant. I must admit that it was hard arriving at this conclusion based on the issues earlier raised in the judgment. However, after careful consideration of the evidence as adduced and after many warnings and cautions to myself in believing the evidence of the complainant, I find based on the evidence on record that there is no logical explanation of the events of that day other than the fact that the accused defiled the complainant. That explains why the accused kept calling the complainant."

23. It is therefore not true to allege that the magistrate did not caution himself as required by the law. The issue to be considered is whether he misdirected himself. He clearly expressed the difficulty he found himself in when making the decision to believe the complainant. At this point in time I must therefore consider issues raised in the judgment that deterred the learned trial magistrate in

reaching the decision easily.

24. The trial court received evidence that the appellant used the complainant's underpant to wipe himself after the act. The underpants and the clothes the complainant wore were surrendered to the police. The investigating officer did not turn up to give evidence. The clothes that were produced in court were disowned by the complainant. The learned trial magistrate pointed out that he was dismayed that the clothes were not produced in court as exhibit. Further, he stated thus:

"What happened to the complainant's clothes is a question well within the understanding of the police and the people who handled the same. Attempting to answer that question will be basically speculative and prejudicial to parties' cases. In absence of clothes and considering the report presented to the court, it is therefore clear that there could be a problem with the report presented to the court by the government chemist official rendering the report unreliable in the matter."

25. The prosecuting counsel on calling evidence of the Doctor closed the prosecution's case. Nothing was stated why the arresting officer or investigation officer were not called as witnesses. In the case of **Alfred Bumbo and others versus Uganda. Criminal Appeal No. 28 of 1994,** the Supreme Court stated thus:

"While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charge".

26. This is a case where the police submitted some items to the government chemist for analysis. According to PW2 and the report that he produced in evidence, **No. 71005 P.C. Antony Mute** submitted the following items to the chemist:

A. Blood sample of the complainant.
B. Blood sample of the accused.
C. (i) A white skirt of the complainant.

C.(ii) A green dress of the complainant.

C.(iii) A black torn apart underpant of the complainant.

Per the findings of the Analyst, the blood sample of the complainant was of group O. The blood of the accused was of group B.

The skirt [C(i)] of the complainant was heavily stained with human blood group A. The dress [C(ii)] and underpant (item [(iii)] were not stained with blood, semen or spermatozoa.

The witness on cross-examination stated that the clothes were returned to the police. The complainant was shown some clothes in court and she stated:

" I do not know the clothes"

The Government Analyst was not asked to identify the clothes that he examined. The clothes having not been identified by either the complainant or the analyst, it would be difficult to tell which clothes were submitted for examination. However, since evidence was adduced by the state it would be presumed that those were the items submitted for examination and should be treated as such.

27. This ambiguity that left the trial magistrate at loss would have been clarified by the prosecution had they called the investigation officer. Evidence adduced by the government analyst creates a doubt as to the blood that was found on the clothes to have belonged to either the complainant or the appellant.

28. The question begging is if indeed the complainant was defiled and if she bled as alleged.
29. Having found himself in a quagmire the learnt trial magistrate chose to rely on the sole evidence of the complainant.
30. The incident is said to have occurred when other pupils were in class. The complainant, a class seven pupil stated that they were in class for evening preps. She was called out by a prefect known as **M M** who notified her that the appellant was calling her. When she entered the office, the appellant tore her pants and used his penis to penetrate her vagina. Nobody witnesses what transpired. In his defence, however, the appellant argued that the complainant was taken to him while he was outside the office block. The mistake she made was noisemaking. He warned her and instructed her to bring the other pupil who was making noise. Later she returned with **M K.**
31. It was the evidence of the complainant that after she was defiled she bled and soiled her clothes. When she returned to class her colleagues laughed at her as the clothe she wore was blood-stained at the back. She stated that later on **M K** said they were being called by the appellant apparently for making noise. They complied. The appellant asked her about having sent her to call noisemakers.
32. On cross examination she stated that she screamed and the office block being about 20 metres away from their class other pupils were bound to hear.
33. Considering the fact that clothes which had blood that were examined and the results did not indicate that the blood belonged to either the complainant or appellant, this was a case that called for corroboration of the fact of blood having been on the complainant's clothes soon after the alleged defilement. The only people who were bound to confirm the allegations were the complainant's classmates. None of them were called as prosecution witnesses. An application was made by the prosecuting counsel on the **26th October 2012** for summons to issue for the parents of witnesses who were said to be minors to produce them. An order to that effect was made by the court.
34. Thereafter the prosecution closed its case without mentioning the fate of the said witnesses. However, when the defence called witnesses, the prosecuting counsel applied to have them not testify stating that the witnesses had declined to honour the court's summons. He failed to produce summons issued. The application was rejected by the court. It turned out that DWI was in the same class with the complainant on the fateful date. She stated that the complainant was making noise in class. She was called outside by the appellant who talked to her for approximately three (3) minutes and she returned to class. They were dispersed at 6.00 p.m. She did not hear the complainant make any allegations but she said she would be transferred to another school.
35. She was cross examined on the statement she recorded with the police. In her statement she had stated that the class monitor **M M** was called out by the Headmaster to call noisemakers. When he returned he called M to see the Headmaster. There was nothing to suggest that she mentioned having seen the complainant with blood stained clothes.
36. **DW2** said he was the complainant's classmate. He confirmed in material particular what **DWI** stated. On cross examination he denied having seen the complainant with blood stained clothes.
37. Evidence was called by the prosecution showing that the complainant was examined by **PW5** who found her having a bruised genitalia, blood stained inflamed vulva and perforated hymen. He formed an opinion that she had been defiled. This evidence was proof of her genetalia having been penetrated. The question that must be answered is whether the person who penetrated her was the appellant.
38. Evidence of the complainant that she bled following the act was doubtful because none of her classmates alluded to that fact. PW5 the Doctor saw her clothes that were bloodstained. Clothes that were handed over to the police for examination. The results were not favourable to the prosecution's case. The skirt was indeed heavily stained with human blood of group "A" which neither belonged to the complainant nor the appellant. The only reasonable conclusion that could be drawn would be that there was a third person involved. The prosecution having adduced evidence that was not favourable to it definitely the doubt should have been resolved in favour of the defence.
39. I must also point out that this was a case where the learned trial magistrate found himself in a dilemma as there was a lot of interference from both the prosecution and the defence. There is a letter forming the court record whereby **M.M. O''mirera, Senior Principal State Counsel** wrote

a letter to the **DCIO Makueni** copied to the then magistrate hearing the matter expressing the fact that evidence seized by the state was insufficient to establish the case and that he was constrained to forbear terminating the case due to public interest in the matter. He went on to advise that a report be obtained from the government chemist. A report obtained was adverse to the prosecution. It was in this regard that evidence of P.C**. Antony Mute** would have been important. Without such evidence the question not resolved is if the evidence would have been detrimental to the prosecution's case?

40. In the case of **Bukenya versus Uganda (1972) EA 549 at page 550** the court of Appeal stated thus:

"Thirdly, while the Director is not required to call a superfluity of witnesses, if evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

41. Taking into consideration the kind of report adduced by the prosecution itself, the question that was not answered and which must be resolved in favour of the appellant is whether the evidence not tendered would have destroyed the prosecution's case in totality?
42. From the aforegoing this was a case that the appellant should have benefited from the loopholes that were exposed.
43. It was therefore unsafe to return a verdict of guilty. The appeal therefore succeeds. The conviction is quashed and sentence meted out set aside. The appellant shall be set at liberty unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **12TH** day of **NOVEMBER, 2014.**

L.N. MUTENDE

JUDGE