



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 172 OF 2009**

D N N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence and Conviction of F.W. MACHARIA Resident Magistrate Embu in Criminal Case No. 588 OF 2006 on 8<sup>th</sup> September, 2011)*

**J U D G M E N T**

D N N the appellant was charged with offence of **Defilement contrary to Section 145 (1) of the Penal Code.** The particulars are that:

*On the 20th day of July, 2005 In Embu District within Eastern Province, had unlawful carnal knowledge of CMK, a girl under the age of sixteen years.*

In the alternative, the appellant was charged with **indecent assault on a female contrary to Section 144(1) of the Penal Code.** The particulars are that:-

*On the 20th day of July, 2005 in Embu District within Eastern Province, unlawfully and indecently assaulted CMK a girl under the age of sixteen years by touching her private parts namely vagina.*

After a full hearing, the appellant was convicted and sentenced to life imprisonment. He was aggrieved by the judgment and so filed this appeal against conviction and sentence. He raised the following grounds:

1. *That the Learned Trial Magistrate erred in both law and fact by failing to consider that he had pleaded not guilty to the charges.*
2. *That the adduced evidence could not air tight that it was inconsistent totally contradicted and therefore unfavourable for reliance as per the charges.*
3. *That the Learned Trial Magistrate overlooked the fact that he was arrested unlawfully which weakened the prosecution case since the truth of the case was not proved beyond any reasonable doubt.*
4. *That the Trial Magistrate erred in law and fact when convicting him on a defective charge sheet which is at variance with the evidence adduced.*
5. *That the Trial Magistrate erred in law and fact when he failed to consider contradictions and inconsistencies between one witness and another.*
6. *That the investigation carried out towards the alleged offence did not reach the standard of convicting in the said offence whereby the Trial Magistrate erred in relying on hearsay*

*evidence.*

7. ***That the trial Magistrate erred in law and fact when he disputed his defence without countable reason whilst the same was cogent and very true.***
8. ***That the Learned Magistrate erred in law and in fact in relying on a skeletal medical report.***
9. ***That the circumstances of his arrest were unsatisfactory as nobody pointed at him.***

The facts of the case are that PW1 then aged 9 years took a bucket to his uncle (the appellant) when the said uncle defiled her. She went home and told no one. The next day, she went to school and reported to her teacher (PW2). she was taken to Hospital and the matter was reported to the police. The appellant and another were arrested and charged for this offence.

The appellant in his unsworn defence denied the charges. He stated that PW1 is a daughter to his late brother. He had taken full responsibility of her until the mother started bringing issues. He was then accused of defiling her.

When the appeal came for hearing, Mr. Igati for the appellant who had filed written submissions highlighted them. He submitted that the charge sheet was defective as it showed that PW1 had been defiled by two (2) people. He submitted that PW1 was not a truthful witness and that her demeanor should have been noted reference: ***OMURONI VS UGANDA [2002] 2 EA 531.***

The doctor's report he said was also not clear and should have been rejected. Ms. Ing'ahuzu for the state opposed the appeal saying defilement had been proved and that the issue of the complainant's mother not testifying did not affect the case.

This being a first appeal, this Court has a duty to re-evaluate the evidence on record and come to its own conclusion. I am alive to the fact that I did not hear nor see the witnesses. The court of appeal in the case of ***MWANGI VS REPUBLIC [2004] 2 KLR 28*** held that

1. ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
2. ***The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.***
3. ***It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.***

I have evaluated the evidence on record alongside the grounds of appeal. I have equally considered the submissions by Mr Igati for the appellant and MS. Ing'ahizu for the state. The prosecution had called four witnesses viz:

PW1 - Complainant.

PW2 - The teacher she reported to.

PW3 - The examining doctor

PW4 - Arresting officer.

Mr. Igati raised issue about the intermediary the complainant testified through. The trial court found PW1 to be a vulnerable witness and directed that a social worker be used as PW1 was comfortable with her. It is important to note that an intermediary is used in cases where a vulnerable witness is not free to speak. So he/she speaks through a person she/he is free with.

It is therefore important that before a court makes such an order there be a finding on record to show how it arrived at such a decision. The intermediary must also take an oath to state exactly what the vulnerable witness is saying. This guards the credibility of such evidence. In this case, the court just decided the court will use a social worker who the complainant was most comfortable with (page 31 lines 5 – 7). This was unprocedural.

#### **Ground 4:**

Counsel submitted that the charge was defective. The truth of the matter is that though the charge sheet was one, each accused faced his own count. The charge sheet could have been defective if the accused persons had been jointly charged in one count.

I would wish to consolidate the rest of the grounds and deal with them together. There is no dispute that the appellant is a close relative of PW1. He is a brother to her late father. So he is an uncle. It is not clear why he was not charged with the offence of incest. The said offence existed even before the enactment of the Sexual Offences Act.

The first person PW1 reported to was PW2 (her teacher). PW2 has stated that PW1 told her she had been defiled by two persons i.e the appellant and his co-accused. The report given to PW3 and PW 4 also indicated that the girl was defiled by two persons. This led to the arrest of the appellant and his co-accused. In her evidence in court, PW1 exonerated the appellant's co-accused leading to his acquittal by the Learned Trial Magistrate.

The Learned Trial Magistrate relied on the word of PW1 to acquit the appellant co-accused. She also relied on the same evidence to convict the appellant. What made her not to believe what PW1 had told PW2, PW3 and PW4 about who defiled her? It is given that PW1 was the only witness to this incident. There was no eye witness not any other evidence direct or otherwise to support her identification of the appellant.

**Section 124 of the Evidence Act** provides as follows:

***“Corroboration required in criminal cases notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), 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”.***

It is clear from this provision that in a criminal case involving a sexual offence that the court may convict on the evidence of the victim alone if it finds that evidence to be credible. And that is why the court must give reasons for finding the witness credible. It is PW 1's evidence that the court relied on to convict yet this witness lied to PW2, PW3 and PW 4 about who defiled her.

In the case of ***KIILU AND ANOTHER VS REPUBLIC (2005) 1 KLR 174*** the Court of Appeal stated the following about such a witness:

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

A scrutiny of PW1's evidence does not even indicate what time of the day this incident occurred:

Was it at night or day time? The appellant appears to be a very mature person. Does he have a family? She said the incident occurred in the appellant's house. Where were his family members? My finding is that PW1's evidence required some other independent evidence linking the appellant to the offence to sustain a conviction.

I have failed to find any such evidence on the record. From the issues discussed above, I find merit in the appeal which I allow. The conviction is quashed and the sentence set aside. The appellant to be released unless otherwise lawfully held under a separate warrant.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Ingahizu for State**

**Appellant**

**Njue CC**