**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A.)**

**CRIMINAL APPEAL NO. 11 OF 2016**

**BETWEEN**

**JOHN MUTUA MUNYOKI……..……**
**APPELLANT**

**AND**

**REPUBLIC……..……..……RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at*

*Machakos (**Mutende, J**.) dated 11th March, 2014*

*in*

*H.C.CR.A. No. 77 of 2012)*

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**JUDGMENT OF THE COURT**

"JK", the complainant in the criminal case filed against the appellant in the Senior Resident Magistrate's Court at Kitui was aged about 16 years and a form 3 student at *[particular withheld]* school, Kitui. On 5thJune 2010 she was on her way back to school having been sent away for want of school fees. She had been waiting for means of transport to school when at about 9.00 pm she encountered her teacher **Mrs. M D** (**PW3**) who was similarly waiting for means of transport to go home. Soon a motor vehicle arrived and they both boarded. However the motor vehicle already had many other passengers. On the way they met the appellant, who is a priest, in his motor vehicle. PW3 then requested the appellant to drop the complainant at school, which request the appellant accepted. In the appellant's vehicle were other 7 parishioners. They first proceeded to *[particulars withheld]* where the parishioners alighted. Thereafter, instead of the appellant driving to the school, he drove in the opposite direction from the school with the complainant. Ultimately he stopped the motor vehicle in the bush and caressed her legs and breasts. He then removed her underpants and they engaged in coitus. Done, the appellant gave her Kshs 1,000/= and warned her not to divulge to anyone what had transpired between them. Thereafter he delivered her to school at about 12.00 am or thereabouts.

The complainant was received by the school security guard, **P M K** (PW10), who in turn took her to the school matron, **M M** (PW2). When asked by PW2 why she had come to school that late, she responded

that they had been with PW3 and the appellant. Seeing nothing wrong with the answer she released the complainant to go to bed.

Considering the inordinate time taken by the appellant to deliver the complainant to school, PW3 was keen to find out what had actually transpired. So on Monday morning PW3 summoned the complainant and after interrogating her she owned up to what the appellant had done to her.

PW3 referred the matter to the deputy headmaster of the school who in turn reported the incident to **Fidelis Mutanu Ng'ang'a** (PW4) a member of the Board of Governors of the school. The school administration reported the incident to **PC Joseph Musomba** (PW9) of the gender and children desk, Kitui Police Station who immediately launched investigations. In the course of those investigations, he issued a P3 form to the complainant which was filled by a clinical officer, **Martin Njue** (PW6). During the examination of the complainant, PW6 noted no tears, bruises, hymen and no discharge. The complainant confided to him though, that she had engaged in sex previously and prior to the encounter with the appellant. PW6 formed an opinion after the examination that he could not ascertain whether indeed there had been defilement. The complainant was then passed over to the Senior Dental Officer, **Naftali Muturi Kariuki** (PW 7) to assess her age. Her age was assessed at 16 years. Satisfied with his investigations, PW9 caused the appellant to be arrested and charged with one count of defilement contrary to section 8 (1) (4) of the Sexual Offences Act, particulars being that on 5th June 2010 at around midnight he intentionally did an act which caused penetration with the complainant. He was alternatively charged with Indecent Act with a Child contrary to section 11 (1) of the Sexual Offences Act , particulars being that on the same day, place and time he willfully and intentionally committed an act of indecency with the complainant by touching her private parts namely, breasts, buttocks and vagina using his hands.

The appellant denied the charges and was tried in earnest. In his defence the appellant, a local Catholic priest, admitted to having been requested by PW3 to ferry the complainant to school. Indeed he drove the complainant to school and having ensured that she was safe and settled in the hands of PW10 he returned to the parish and escorted the other parishioners to Mwitika church. The following day which was a Sunday, he celebrated mass at the school during which he learnt of the allegations from his fellow priest, Father Kamwuwa that he had sexually assaulted the complainant. He went to Kitui police station and met the Officer Commanding the Police Division who confirmed the allegation. He then recorded a statement denying the allegation. He suspected that the allegations were trumped up perhaps by PW3 on account of his failure to pay for the curtains he had ordered from her since he felt that he had been overcharged.

The trial court was not at all taken in by the defence. Ultimately the defence was dismissed as a mere denial following which the appellant was convicted and sentenced to 15 years imprisonment on the main charge. The learned magistrate correctly made no findings on the alternative charge. Being dissatisfied with the conviction and sentence aforesaid, the appellant lodged an appeal in the High Court of Kenya at Kitui. The appeal was heard by **Mutende J.** who in a judgment dated and delivered on 24th September, 2015 dismissed the appeal as lacking in merit.

Undeterred, the appellant is now before us on a second and perhaps last appeal. He seeks to impugn the judgment of the High Court on the grounds that the learned judge erred in:-

(i) Failing to discharge her duty as a first appellate court.

(ii) Confirming a conviction based on circumstantial evidence.

(iii) Concluding just like the trial court that the prosecution had proved the case beyond reasonable doubt.

(iv) Failing to give due regard to the material contradictions, discrepancies and inconsistencies in the prosecution case.

(v) Rejecting the appellant's defence

(vi) Misapprehending the application of section 124 of the Evidence Act.

(vii) Shifting the burden of proof to the appellant, and

(viii) Refusing to draw an adverse inference against the prosecution for failing to call certain crucial witnesses.

During the case management conference presided over by the Deputy Registrar of this Court, parties agreed to canvass the appeal by way of written submissions with limited oral highlights. However, come the hearing day and only the appellant had complied with the directions. The respondent opted to oppose the appeal nonetheless by way of oral submissions.

**Mr. Kanjama**, learned counsel for the appellant in both his written and oral submissions reiterated that this being a second appeal, our jurisdiction is limited to dealing with issues of law only, and that the issues raised in the appeal were all on matters of law. He submitted that the evidence adduced by the prosecution was not sufficient to warrant the conviction of the appellant as corroboration was wanting, that a conviction was still entered against the appellant even though medical evidence was unable to determine whether there had been penetration and even after the complainant herself had admitted to prior sexual liaisons. In this regard counsel referred us to the case of **Arthur Mshila Manga v Republic (2016) eKLR**. It was equally the argument of the appellant that the findings of both courts below that the testimony of PW1 was corroborated by nine prosecution witnesses was erroneous; that the only evidence of the purported defilement was the allegation by PW1 which was totally unsupported by any corroboration.

On circumstantial evidence, counsel submitted that the prosecution did not satisfy the legal requirement for circumstantial evidence in relying on the testimonies of PW3, 5, and 10. Further, that though the complainant was of a reasonable age, 16 years old to be precise, she did not on her volition come forward to claim that she had been sexually assaulted. She only made the allegations after being pestered by PW3. The question that begs for an answer is why the complainant never reported the

incident on her own volition? On this, the appellant sought reliance on the case of **Paul Kanja Gitari v Republic (2016) eKLR.**

The appellant further submitted that in all criminal cases, the prosecution bears the burden of proving the accused person's guilt. It is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged and in this case the offence of defilement. The prosecution failed to prove penetration of the complainant by the appellant. That being the case, the appellant submitted that the prosecution evidence did not meet the required standard of proving the case beyond reasonable doubt. For this proposition, the appellant once again called in aid the case of **Arthur Mshila Manga** (supra). The appellant further faulted the prosecution for failing to call crucial evidence such as the alleged clothes that the complainant claimed were wet as a result of the alleged defilement and whether the spermatozoa actually belonged to the appellant, the motor vehicle that was used on that day by the appellant, and finally the alleged Kshs 1,000/= that was given to the complainant by the appellant should have been dusted to ascertain whether it came from the appellant. Failure to adduce such evidence should have attracted adverse inference from court. The appellant relied on the case of **Nguku v Republic (1985) eKLR** for that proposition.

As to the inconsistencies, discrepancies and contradictions in the prosecution case, it was the appellant's submissions that the High Court erred in holding that they were immaterial. The High Court should have evaluated the veracity of the inconsistencies in the evidence of the witnesses and resolved them in favour of the appellant. The case of **Paul Kanja v Republic (2016) eKLR** was relied upon for that proposition.

Opposing the appeal, **George M. Murithi**, learned Senior Assistant Director of Public Prosecutions urged us to uphold the concurrent findings of the two courts below. That there was direct evidence by the complainant that she was defiled by the appellant inside his vehicle at night; that the appellant had an opportunity to commit the crime; that though there was evidence of penetration, the clinical officer could

not attribute it to the appellant; that the complainant was a truthful witness and section 124 of the Evidence Act was properly invoked. Further, that there were circumstances which corroborated the evidence of the complainant. Counsel submitted with regard to inconsistencies in the prosecution case that they were not material.

This being a second appeal the issues for consideration are on points of law only. See **Samuel Warui Karimi v Republic (2016) eKLR**. The appellant has identified three issues of law that call for determination in this Appeal; whether the two courts below erred in convicting the appellant on uncorroborated evidence, and on alleged circumstantial evidence; in failing to appreciate that the prosecution failed

to apply the cardinal principle of criminal law that requires the prosecution to prove each and every ingredient of the charge beyond reasonable doubt.

Under the Sexual Offences Act the main elements of the offence of defilement are as follows:

(i) The victim must be a minor, and

(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt. Did the prosecution discharge this task? According to the appellant the prosecution failed in this undertaking, whereas the respondent is of a different view. Apart from the testimony of the complainant, there was no other evidence linking the appellant to the crime. The only reason why the appellant was the prime suspect was because he was the last person to be seen with the complainant. Much reliance was placed on the evidence of the complainant despite having been discredited by the evidence of the clinical officer. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual

intercourse and was therefore not a virgin. Accordingly the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of **Arthur Mshila Manga** (supra) observed while allowing the appeal that:

> ***"But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI"***
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> The Court proceeded and stated that:
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> ***"From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can***

***do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."***

As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the Evidence Act aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.

Circumstantial evidence is information presented by a party in a case that permit conclusions that indirectly establish the existence or non-existence of a fact or event that the party seeks to prove. According to the appellant the prosecution witnesses failed to pass this muster. The trial court in its judgment opined that the evidence of PW1, PW3, PW5 and PW10 clearly placed the appellant at the scene of crime. This was clearly a misreading of the evidence. It is readily apparent that apart from PW1, none of the aforesaid witnesses saw the appellant at the scene of the alleged crime. They were at various places but not the scene. How could they then have placed him at the scene of crime when they did not even see the appellant and complainant going to the scene of crime? For instance, PW3 only made calls from her house at different times wanting to confirm the whereabouts of the complainant. As for PW5, he testified that he heard about the incident three days later on radio. As for PW10 he only received the complainant at school and could not tell whether she

had been defiled. He explained further that when he received the complainant she appeared normal.

In our view, the evidence of these witnesses does not lend itself to circumstantial evidence. The evidence does not link the appellant irresistibly with the commission of the offence without leaving or suggesting any other conclusions without which, circumstantial evidence loses its probative value. As we stated in the case of **Sawe v Republic (2003) KLR 364;**

> "***In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on***."

The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence of the suspect is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused. It is also evident that the complainant never connected the appellant to the crime out of her own volition. Despite the fact that she was 16 years old, she did not on her own volition report or make a complaint to the school administration after the alleged act of defilement. She only came forward after she was pestered twice by PW3. Even at this stage, she was not being consistent. At one point she claimed that she was late in reporting to school because there was a problem with transport on that day. Pressed further by PW3, she capitulated and claimed to have been with the appellant who ended up defiling her. The question that begs for an answer is whether the complainant's accusations were voluntary or made up. Was she scared of the punishment for reporting to school late or what her parents would do to her if summoned to school as PW3 had threatened? In **Paul Gitari v Republic** (supra) a case with more or less similar facts as this appeal, we observed:

> ***"What we find troubling about this case is that J.M.K did not on her volition make a complaint that the appellant had defiled her. Her testimony was that after the 'bad thing' she went home where she met her aunt (PW2) who beat her up to reveal what transpired. It was the appellant's contention that J.M.K's testimony was procured by threats and that it was only given as instructed by PW2. We cannot dismiss this as an or insubstantial contention..... Given the***
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> ***totality of the evidence and the specific circumstances of this case, we are not satisfied that the evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere."***

The appellant's case is not any different. As already stated the complainant did not volunteer the information. She only came through after PW3 came down hard on her twice. Was there possibility that the complainant did something untoward from the time she left home in the morning when she was alone until rescued by the appellant? Both the High Court and the trial court failed to interrogate this aspect of the case.

The trial court felt that the complainant was a truthful witness worth of believing. But given what we have stated regarding her credibility we doubt whether this assessment is correct. In reaching this conclusion which was also adopted by the High Court, the trial court was trying to rely on the proviso to section 124 of the Evidence Act. However we think that the trial court went about it the wrong way. What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "**therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school."** What or where are the reason(s) for the belief?

It appears to us that the appellant was convicted on mere suspicion. The school administration suspected some mischief on the part of the appellant in failing to deliver the complainant to school in good time and pestered the complainant over it. We think that the complainant was left with no other choice but to conjure up the defilement story to avoid probable sanctions and the school administration bought her story hook line and sinker. After all, the appellant was the last person seen by PW3 with the complainant. Her story fitted their suspicion and that the appellant had the opportunity to commit the crime as urged by Murithi. All this is but

suspicion and speculation. This can never be the basis of a conviction. In the case of **Michael Mugo Musyoka v Republic (2015) eKLR** we observed:

> ***"We have looked at the evidence on record, there is no evidence or testimony to prove that there was any contact between the genital organs of the appellant with that of the minor. We are of the considered view that the evidence of PW1 was hearsay and did not carry much weight. We say so because she was not present at the house and did not witness what actually happened. She relied on what her daughter C had allegedly told her. Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child.....we find that the case against the appellant was***
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> ***based on a mere suspicion. In Mary Wanjiku Gichira v Republic, Criminal Appeal No 17 of 1998, this court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life".***

In our view the evidence of PW1, 3, 5 and 10 as relates to the appellant only helped to advance the suspicion and was not cogent enough to found a conviction.

As correctly submitted by the appellant, in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged. As already alluded to, the most important ingredient of the offence of defilement is penetration. PW6 who examined the complainant was non committal as to whether the complainant had actually been penetrated thereby casting doubt as to whether the offence was committed. It is therefore clear that both courts below erred in holding that the evidence on record proved beyond reasonable doubt that the offence of defilement had been committed on the complainant. It is obvious that the two courts did not evaluate the evidence carefully before the verdict aforesaid.

How about inconsistencies and contradictions? There were quite a number though the respondent

dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully. In this case there were a number of such contradictions and inconsistencies that have been alluded to by the appellant in his written submissions. For instance PW3 testified that she called PW2 and asked her about the complainant when she received her and PW2 informed her that the girl was okay. PW3 further called the complainant and she reiterated that she was okay. However, according to PW2, when asked about the complainant at the time she received her, she claimed that the complainant looked scared. Secondly, the complainant first told PW3 that she was late in coming to school because there was a problem with transport but later changed her story to the alleged defilement. Thirdly, the complainant did not account for her whereabouts for the period since leaving home until she chanced on PW3 at the bus stage. Lastly the trial magistrate concluded that the alleged defilement occurred between 11. 30 pm and 12.30pm while according to the school security guard, he saw the appellant's motor vehicle approach the school at 11.40 pm.

Clearly the High Court failed to evaluate the veracity of all these contradictions and discrepancies. To our mind these contradictions and inconsistencies are not minor as submitted by the respondent. They were critical and go to the root of the prosecution case and whether the complainant was a credible and truthful witness. If the complainant could lie as to what led her to report to school late, what else did she lie about?

As we observed in the case of **Paul Gitari v Republic** (supra);

> ***"We also note the contradiction between PW2's claim that the appellant habitually had sex with J.M.K and J.M.K's own evidence on oath that it was the first incident and that the appellant "had never joked with her before". There is also the contradiction that contrary to what PW2 herself said, the investigating officer PC Nixon Tallam (PW4) provided a different picture that the report he received was that pw2 went to the appellant's home during the incident and "found the complainant on accused's bed without pants". That variance is not minor one. The first appellate court seems not to have dealt with those contradiction and inconsistencies in the prosecution evidence with the effect that we find merit with the appellant's complaint that his appeal did not***
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> ***benefit from the thorough, exhaustive and independent re-evaluation that he was entitled to. They should have been interrogated and resolved in the appellant's favour".***

The same situation obtains here.

We think that we have said enough to show that this appeal is for allowing. Accordingly the appeal is allowed, the conviction quashed and the sentence imposed set aside. The appellant is set at liberty unless otherwise lawfully held.

**Dated and delivered at Nairobi this 28th day of July, 2017.**

**ASIKE- MAKHANDIA**

**…….……..……..**

**JUDGE OF APPEAL**

**W. OUKO**

**…….……..……**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**……..……..**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

***DEPUTY REGISTRAR***