



**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: O’KUBASU, GITHINJI & NYAMU, J.J.A)

CRIMINAL APPEAL NO. 217 OF 2010

BETWEEN

PATRICK MWABILI APPELLANT

AND

REPUBLIC RESPONDENT

***(An appeal from a Judgment of the High Court of Kenya at
Mombasa (Odero, J.) dated 7th July, 2010***

in

H. C. Cr. A. No. 205 of 2007)

JUDGMENT OF THE COURT

The charge against the appellant in the trial court was that of the defilement of a girl under the age of 16 years contrary to the now repealed section **145 (1)** of the Penal Code. In the alternative the appellant was charged with the offence of indecent assault contrary to section **144 (1)** of the Penal Code.

The prosecution case was that on 29th April, 2005 in Mombasa District of Coast Province, the appellant had carnal knowledge of B. C. R (PW 1) a girl under the age of 16 years. The background facts as narrated by prosecution witnesses were that at the material time, the complainant was sharing a bed with her nine year brother C.R PW 2. The incident is said to have happened at 11.00 p.m. when the complainant’s mother was upcountry and her father PC .R PW 4 had temporarily gone out of his house. While asleep PW 1 was awoken by the presence of the appellant who had already undressed her and gained penetration. Her elder brother PW 2 had also noticed the presence of a stranger but the two children could do nothing about the appellant’s presence because he was also armed with a knife. By a twist of fate the father, Police Constable R PW 4 came back to the house and upon switching on the lights he noticed to his horror, that the appellant who was his fellow policeman had defiled his daughter, but after PW4 switched on the lights, the appellant pushed him and jumped off the bed and ran out of the house. Subsequent medical examination confirmed that PW 1 had been defiled.

After a full trial the appellant who had in his defence admitted that the towel and the knife which were abandoned in the house where the defilement took place were his, was convicted of defilement and sentenced to 10 years imprisonment.

An appeal against both conviction and sentence was dismissed by the High Court.

What is now before us is a second and final appeal.

The five grounds relied on are:-

- “1. *That my constitutional rights as entrenched under section 72 (3) b of the old constitution (now under article 49 (1) (f) were violated by (sic) unlawfully and inordinately detained me in the police custody for than the prescribed time frame.*
2. *That the learned trial magistrate and the high court judge erred in law by basing conviction on evidence of wrong identification by the fact that the existing circumstances did not favour positive identification.*
3. *That the two lower courts erred in law by convicting on corroborated evidence of pw1 c/sec. 124 of the Evidence Act Cap 80.*
4. *That the medical evidence was dubious and the evidence of the doctors findings did not connect the date of the alleged defilement of the victim with the age of the injuries noted.*
5. *That the prosecution case was maliciously interwoven in the nature of unplied (sic) malice in the sense of spite or ill will concocted by PW4.”*

During the hearing of the appeal the appellant appeared in person and the State was represented by Mr. Ondari Assistant Deputy Public Prosecutor.

The appellant’s written submissions focused on the appellant’s alleged contravention of his constitutional right to be taken to court within 24 hours as stipulated in **section 72 (3) (b)** of the retired constitution in that he had been detained for 18 days and there was a wealth of case law of this Court to the effect that a violation of **section 72 (3) (b)** results in an automatic acquittal; that he had not been properly identified, as the incident allegedly took place at 1.00am at night; that there was no proof of penetration as required under the law and that the medical evidence was insufficient to sustain the charge of defilement; the age of the injuries in her private part was not proved, the medical examination having taken place 20 days after the event and that the P3 form had been issued before the commission of the offence and finally that the evidence of PW 1 was not corroborated by any independent material evidence as required under **section 124** of the Evidence Act.

On his part Mr. Ondari in his submissions in support of the conviction and sentence stated that although PW 1 was a young girl of seven years, she had a very clear mind and that in her evidence she had proved that she had been defiled by the appellant whom she knew as a friend of her father and who in the past had been entrusted by her father with the task of taking money to them to enable them to buy food and other essential items. Her evidence, he submitted, was therefore that of recognition as well and in addition, the complainant’s father PW 4 who returned in the nick of time did identify the appellant after he had switched on the lights of the house where the defilement took place. Mr. Ondari further submitted that PW 3, the clinical officer, had produced in Court a P3 form which confirmed the existence of penetration with an accompanying torn hymen and fresh blood in the complainant’s vagina. On this point he concluded his submissions by stating that the complainant’s elder brother PW 2 had at the material time shared the same bed and had also given evidence indentifying the appellant as well.

Coming to the alleged constitutional violation of the appellant’s right not to be detained beyond the stipulated period as outlined in section 72 of the retired Constitution, the learned Assistant Deputy Public Prosecutor submitted that the issue was being raised for the first time and without giving the prosecution an opportunity of either conceding the alleged violation or offering an explanation. Mr. Ondari also drew the Court’s attention that the Court has since the case of *Albanus Mutua* developed jurisprudence to the effect that unless a Constitutional contravention had a direct bearing on the charge an accused would not necessarily be acquitted. In addition, an accused who alleges a constitutional violation would be entitled to the remedy pursuant to **section 72 (6)** of the retired Constitution. On this point Mr. Ondari relied on the case of *Dominic Mutie Mwalulu V. Republic Nairobi Criminal Appeal No. 217 of 2005.*

As regards the alleged malice, Mr. Ondari submitted that the appellant was on the contrary in breach of trust in perpetrating the defilement because he was both a friend and a colleague of the minor's father. The father of the victim could not in the circumstances be said to have harboured any malice. Regarding alleged absence of safe identification the learned Assistant Deputy Public Prosecutor stated that there was both evidence of identification and recognition by both the complainant and the father and that the evidence of the father corroborated that of the complainant.

Concerning the appellant's contention that there was no corroboration, we find no basis for it because there was no such requirement of corroboration in law. In our view, it was proper for the trial court to have found that the evidence of PW 1 was credible and then to look at other independent evidence to support it. Even where corroboration was required as a matter of law, the starting point is for the court to believe the evidence of the witness requiring corroboration. The principle is that the evidence of a witness whether an accomplice or a child of tender years or in sexual offences the court must first decide whether the witness requiring corroboration is credible and it is only when the court has decided that the witness is credible that it looks at other evidence.

After weighing the rival submissions of both the appellant and the learned Assistant Deputy Public Prosecutor, our immediate observation is that the grounds relied on except the ground raising the constitutional point, centre on concurrent findings of fact of the two courts below and as a result, we think that the appellant has not demonstrated the existence of any of the exceptions which would justify the Court unraveling such concurrent findings of fact. This is so because the courts believed the complainant and the father and any challenge to this is clearly a challenge of the credibility of the witnesses. On the other hand, the finding on the alleged violation of the Constitution seems to us to have been an afterthought in that the prosecution was not given an opportunity to explain the alleged contravention or violation beyond the stipulated time limit notwithstanding the fact that the appellant was ably represented by Counsel in the two courts below. In this regard, in the light of recent decisions from this Court this ground has no basis and the same is rejected. In this regard, we wish to reiterate in full the reasoning in the case of **JULIUS KAMAU MBUGUA VS. REPUBLIC** CR.A. 50/2008 which is undoubtedly both a ground breaking and the leading decision on the constitutional point. In the result, we have been unable to sustain any of the grounds relied on by the appellant. The appeal is dismissed in its entirety.

Dated and delivered at Mombasa this 6th day of October, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR