Case Number:	Criminal Appeal 15 of 2017
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Case Class:	Criminal
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	Teresia Mumbua Matheka
Citation:	James Mbugua Muraguri v Republic [2017] eKLR
Advocates:	Mr Gitonga for the state
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. R.Kefa - SRM
County:	Nyeri
Docket Number:	-
History Docket Number:	Criminal Case 56 of 2015
Case Outcome:	Appeal Allowed.
History County:	Nyeri
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 15 OF 2017

JAMES MBUGUA MURAGURI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from the judgment, conviction and sentence in Nyeri CM Cr. Case No. 56/2015 Hon. R. KEFA, S.R.M of 7th March 2017)

The appellant **James Mbugua Muraguri** was charged with the offence of Defilement contrary to section 8(1)(2) of the Sexual Offences Act No.3 of 2006. It was alleged that on 13th September 2015 in Nyeri Country he intentionally and unlawfully caused his penis to penetrate the vagina of EW, a child aged 7 years.

In the alternative he was charged with Committing an Indecent Act with a child contrary to section11(1) of the same Act. That on the same date, time and place he intentionally touched the vagina of EW a child aged 7 years, with his penis.

The case for the prosecution started on 6th June 2015 with the testimony of EW, that on the 13th September 2015 EW aged 7 years, and in class 3 at K. Primary School came from church around 5.00p.m. Together with her brother P and her cousins, N and S all younger than her, they went to play at her mother's shop. The appellant called them to go to his house. When they got there he chased the others away and took her by force to his house. While in there he removed her clothes dress, stockings, and socks. He removed his trouser and underpants. She lay on the bed, and he slept on top of her. He did tabia mbaya to her between her legs.

While this was happening, her mother called out from outside. The appellant got up, went and switched the lights off, then switched them on. She called again, this time from right outside Kairu's door but neither of them answered. The appellant covered her mouth. She could not scream. However, she dressed up and he passed her through the back door of his house. She noticed that there was timber in his house. She went home.

She found her mother at the milk shop. It is then that her pant fell off. She told her mother that the appellant had done tabia mbaya to her. She was taken to hospital, and then to the police station.

On cross examination EW told the court she could not remember the people they met with on the way as appellant took her to his house; that when her mother called she answered but accused covered her mouth and she could not answer.

On the 16th June 2016 the prosecution made the following application:

Prosecutor: - *I have one witness in court however I am not ready to proceed. I wish to re –call PW1 to first clarify some issues before we call the next witness.*

Accused: - *I have no objection*

Court: -*PW1 to be recalled.*

On 18th August 2016 the above scenario was replayed as hereunder;

Prosecutor: - *I wish to recall PW1 for her to clarify some issues not addressed previously*

Accused: - *I wish to object to the re-call of the witness*

Court: -*the Prosecution is allowed to recall a witness, before the close of their case.*

The record then shows: ***PW1; Duly sworn and states as follows in Kiswahili***

The complainant was not asked to clarify any issue, instead she was made to testify all over again, afresh as though she had not said anything before. Her testimony now contained more detail.

This time round she testified that the appellant called her and her brother and friends to his green lorry, packed next to his house. When they got there he chased the others away. He took her inside his house. He stripped naked, i.e removed all his clothes, trouser, panties, shirt and vest. She was wearing a dress, stockings, socks and a panty. He stripped her naked as well. He then proceeded to insert his "susu" or "kasusu" into her "kasusu", "susu" meaning "urinating thing". He did it on his bed. She felt pain.

I think it is important to reproduce the rest of the evidence here.

"I was sleeping on Kairu's bed, he carried me to his bed. Then my mother came calling, Kairu covered my mouth. He was switching on the lights, then switched off. Kairu's belt was untied. Later he opened the door and told me to pass through the fence. There is a passage through the fence. I had already put on my clothes by the time I left Kairu's house.

My mother then asked me where I had come from. My inner clothes fell down. My panty fell down; it was at my waist being held by the stockings. I told my mother I was at Ciru's place. When she asked me the third time, I told her I was at Kairu's. My mother was at the milk shop. My mother together with the lady who sells milk took me to hospital. I told them what had transpired. We later went to the police station. I heard Sylvia calling his name. Kairu is there in the dock."

On cross examination she told the court that she and her friends were playing outside her home where there is a building with a hotel a butchery, her mother's shop, a petrol station and a bar. That there were many people there. That the children she was playing with actually saw the appellant taking her away to his house. That she saw the milk seller at the appellant's place. That the reason she did not answer when her mother called was because the appellant told her not to answer, and also covered her mouth. After that he told her to leave through the back door.

Her mother **WWW** testified as P.W.3. She told the court that on the material day 13th September 2015 at 6:00p.m. she had come from church and was busy with her work at home. Her daughter P.W.1, her brother P, and the other children N and S were playing outside. After a short while the children left. Shortly thereafter she saw a man by the name Kairu. He called them to go and play at his house. Later she noticed that the children were missing. She began to look for them. She did not find them even in the houses of the other children. Later, the three S, P and N came back but EW was missing.

It is then that P told her that they had left EW sleeping at Kairu's. On hearing this she ran towards Kairu's house. On the way she met some women at the posho mill whom she told that her daughter was missing and her son P had told her she was sleeping at Kairu's. In the same breath she testified that after being told by P that EW was sleeping in Kairu's place she then proceeded to Kairu's place, stood outside, noted that the door was locked, called him three times. There was no response.

She went and called her neighbours and told them that EW was missing and she had been informed that she was sleeping in Kairu's house. They began to discuss what course to take.

Later, she went back to Kairu's place, the 2nd time and knocked on the door. He opened the door. She asked him whether the child was there. He told her all the children had left for Kiriti. She noticed that Kairu's trouser was not fastened with a belt, his zip and button were open and the trouser did not have a belt. He denied locking her daughter in the house.

She again called the neighbours. They began to discuss on how to search for EW. It is then that she saw her daughter emerge from behind Kairu's house. She asked her where she was from and the child told her she was from Ciru's place. She quarreled her and demanded the truth from her. It was then that EW told her she was from Kairu's house and Kairu had done her tabia mbaya. At this point the child's pant fell down. The child had not put it on and it was being held by other clothes. She was in a black trouser which fell down. In the company of one Wamugeci she took the child to Provincial General Hospital Nyeri where she was treated. She reported to police station Nyeri, and was issued with a P3. She said it is the other children who were known to Kairu. That when he called them, EW and her brother just followed their friends. She knew Kairu as timber seller and a neighbour, and had no grudge with him.

On cross examination she said that from her shop to Kairu's business was about 100m, but there were many shops in between, and being a Sunday there were any people along the way.

She said Kairu called the children about 6;00pm and N's mother saw him going with the children. That P told her he saw EW sleeping in his house and that that is why she went knocking on his door. That she first went alone to his house before consulting with the neighbours. That she went to check at his house twice. That she was shocked that his neighbours were afraid to confront him, one being his land lord, the other he had a relationship with. She mentioned that one Madam Wangui and Wangeci were there and they calmed her down. She said that appellant influenced one Mugeci not to record a statement. She said she informed her husband of the incident. She denied knowing the appellant before this incident.

She denied framing the appellant. She said the appellant did not switch on the lights when she went to knock on the door. She also said that the child was inside the house but the child told her that the appellant had covered her mouth. She said the child at first lied to her that she was at Ciru's place all this time.

P.W.2 **Dr. Samuel Kagema**, medical officer at Nyeri Provincial General Hospital produced the P3 form on behalf of Dr. Beatrice Gathua, and a clinical officer by the name Weru who allegedly filled the PRC. This was after the appellant's objection to his producing the documents was overruled.

He testified that the complainant aged 7 years complained of defilement by a person known to her. That she was seduced by the assailant to his house where he defiled her.

Upon physical examination, she was found to have a creamish discharge of the vagina with tender genitalia and broken hymen, and intact anus. A high vaginal swab was done and moderate pus cells were seen, and red blood cells as evidence of some bleeding.

The PRC form was filled on 13th September 2015 at 9:03pm. It had the same history, indicated the treatment given, and same information with regard to the broken hymen, presence of pus cells and blood.

On cross examination the doctor testified that the appellant was not examined because that was not the doctor's work. That the child's hymen was broken and she was bleeding and in great pain. That he deduced this from the term 'tender' as used in the P3. He said that no sperms were found on her because *'it is not a must for every sexual encounter that a man produces sperms'*.

P.W.4 **No. 73082 IP Elizabeth Nyaga** was the investigating officer from Nyeri Police Station. She told the court that the report was received on 14th September 2015 at 11:20. hours from the complainant accompanied by her mother. The report was that

"…as she was playing with other children, the accused herein whom they knew as Mbugua came and took her to his house and defiled her. The other children told EW's mother that EW had been left with Kairu at his lorry. EW's mother left in search for her at the lorry but did not find her. She proceeded to Kairu's house who told her that EW was not in the house. As EW's mother was at the gate she saw EW emerge from Kairu's house behind the house. The mother interrogated her and she told her that Kairu had defiled her…afterwards I arrested the accused person and charged him with the offence. He brought himself to Nyeri Police Station."

She issued a P3 and it was returned together with the PRC duly filled. She also received the birth certificate for the child which showed she was 7 years old.

On cross examination she told the court that she investigated the case, recorded the statements of the complainant and other witnesses and read the P3. She said arrested the appellant on 6th October 2014 claiming that she did not arrest him immediately because she was still investigating the case. That she went to his house and found he had demolished it and relocated. That the other neighbours refused to record statements and she could not have forced them to do so. That when the complainant's mother went to the house, the appellant went to answer the door leaving the child inside the house.

The prosecution closed their case and the accused was put on his defence.

He made a sworn statement. He told the court that at the material time he owned a timber cutting machine and had rented premises for his business. Prior to his occupying the said premises, there had been a caretaker who was employed by the landlord by the name Kamau. This caretaker used to split timber. Apparently, this Kamau had an affair with the complainant's mother, as he, the appellant used to see her frequent Kamau's place. He had no idea she was married until sometime after Kamau had been sacked, due to loss of timber, a very angry Meru man by the name Maina Wadire, came to him demanding to know what relationship he, the appellant had with his (Maina's) wife. He denied having any relationship with her and pointed out that it was one Kamau who was no longer living in the promises who did. He testified that that the mother of the complainant was now framing him because he had revealed to her husband that she was having an affair with one a former caretaker at his place of business.

That on 13th September 2015 he came home from the bar at 7.00p.m. and as he entered the gate he heard someone greeting him. He saw it was P.W.3. She asked whether he had seen her children. He said no and she left. He entered his house and closed the gate. Later he heard rumours that he had defiled a child. He went to the Assistant chief to enquire and found there was no such report. He then went to Tetu Police Post to check whether such a matter had been reported, again, there was no report. Two weeks later he met the P.W.3's husband who told him he had separated from the P.W. 3 and that this was a revenge frame up.

He took himself to Nyeri police station on 6th October 2014. The investigating officer Nyaga arrested him and charged him. When he was released on bond he learnt that P.W.3's husband had committed suicide.

He wondered why the police had taken that long to arrest him. That until he took himself to the police station, nobody had visited his house or interrogated him. He pointed out the contradictions in the case especially the evidence of P.W.1 and P.W.2 to confirm that it was a frame up.

In cross examination he told the court the P.W.3's boyfriend was the caretaker at his (accused's) place in 2015 but was removed when it was noticed that timber was getting lost. He conceded that the P.W.3 went to his house looking for that child at about 7:30pm. He denied seeing the child that evening.

In her judgment the trial magistrate pointed out the obvious defect in the crafting of the charge but relied on **Michael Lennox Odero vs. R. HCCR Appeal No. 2/2016** and **Kipkurui arap Sigilai & Anor. V. R. HCCR Appeal 2004 KLR** where the court held;

"… "The principle of law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence to the charge" …

to find that the accused person had not been prejudiced. She proceeded to find that the particulars of the charge of defilement penetration, age. of the complainant, had been proved. She found that there was sufficient evidence that it was the appellant who had committed the offence. She found that the testimony of the child did not require corroboration. She relied on the case of **Geoffrey Kianji vs. R. Nyeri Cr. Appeal No. 270/2010** and the proviso to section 124 of Evidence Act, cap 80 Laws of Kenya.

She rejected the appellant's defence that the case was based on a grudge and was a frame up on the ground that it was not persuasive. She found the complainant and her mother to be credible witnesses. She found the accused guilty of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, no. 3 of 2006 and sentenced him, as by law provided, to life imprisonment.

It is against these findings that the appellant has brought this appeal.

I The appellant through his advocate Mr. Warutere filed supplementary grounds of appeal which he relied on in arguing the appeal. The grounds are that the trial magistrate erred in law and fact: -

i) in holding that P.W.1 was a competent witness to give sworn evidence

ii) in arriving at a conviction of the appellant by relying on contradictory and insufficient evidence

iii) in failing to find that a key witness was not called by the prosecution hence a miscarriage of justice was occasioned to the appellant.

iv) disregarding the appellant's defence as sham hence occasioning miscarriage of justice against the appellant.

Submissions.

Ground no. 1

Mr. Warutere argued that the trial magistrate conducted a very shallow *voire dire* examination which was not sufficient to establish that the child understood the nature of an oath, and the importance of telling the truth. This occasioned a miscarriage of justice on the appellant.

In response Ms. Jebet submitted that in conducting *voire dire* there is no set of questions that a child is expected to be asked it is the discretion of the court to make that determination. Ms. Jebet referred to this court's decision in **NYERI HCCR APPEAL No. 194 of 2006 JUSTUS MACHIRA THUKU vs. R** (Unreported) where the issue of *voire dire* was dealt with at length. She urged this court not to fault the trial magistrate opinion

In his rejoinder Mr. Warutere submitted that children have a propensity to lie, that the questions put to the child were insufficient to establish her competence to give sworn testimony, that the weight of sworn testimony was heavy and the trial court had not discharged its duty.

Ground No. 2 and 3.

Mr. Warutere submitted that there were material contradictions in the evidence nce of P.W.1.For instance, she testified that when she was inside the appellant's house her mother called, in one instance she said she could not respond because the appellant covered her mouth, in another she said she responded. She also testified that in one instant that she told her mother what had happened, in another, that her mother had to prod her for answers and she only told her the 3rd time that she was at Kairu's. He submitted that the complainant's evidence was also not corroborated. That the prosecution failed to call crucial witnesses, the other three children who would have corroborated her evidence as whether it is the appellant who called them.

In her response Ms. Jebet submitted that the apparent contradiction as to whether the child responded when her mother called was cleared in re-examination when she that the appellant had covered her mouth. With regard to corroboration of the child's testimony Ms. Jebet submitted that the four witnesses the prosecution had called were sufficient to prove the case against the appellant. That the trial magistrate invoked section124 of the Evidence Act. That this was sufficient as the court was satisfied with the demeanor of P.W.1.

In his rejoinder Mr. Warutere submitted that there were no two ways to it. It was in black and in white what the child said. It was either that she answered when her mother called or she did not answer. That despite the fact that the prosecution has the discretion to decide the number of witnesses to call, in this case they failed to avail crucial witnesses, and that resulted in a miscarriage of justice.

Ground no. 4

It was submitted for the appellant that he raised a plausible defence of the grudge that P.W.1's mother had against him for disclosing her affair to the husband. That P.W. 4's testimony regarding the period it took to get the appellant arrested gave credence to appellant's defence.

The state in response was of the view that the appellant's defence was an after-thought and that trial magistrate was right in rejecting it. In any event the ingredients of the offence were proved hence the conviction and sentence.

In his rejoinder counsel for the appellant submitted that the doctor testified there was defilement but did not connect the appellant to the offence.

As a 1st appellate court my duty is to review, re-evaluate and re-assess the whole evidence and draw my own conclusions always bearing in mind that I neither saw or heard the witnesses. This was stated in **Erick Otieno Arum v Republic [2006] eKLR**

*It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same. There are now a myriad of case law on this but the well-known case of **Okeno v. Republic (1972) EA 32** will suffice. In this case, the predecessor of this court stated:*

*"The first appellate court must itself weigh conflicting evidence and draw its own conclusions **(Shantilal M. Ruwala vs. R (1975) EA 57**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 has had the advantage of hearing and seeing the witnesses."*

I am well guided.

On the issue of the manner in which the voire dire examination was conducted, the record speaks for itself;

"A child before court states as follows"

"EW I am seven years old, I understand Kiswahili. I am in class three. I attend K. primary school. I attend church at AIPCA on Sunday. I attend Sunday School. I know that when a person lies he/she goes to satan"

Court: – "*This court is satisfied that the child is of sufficient intelligence to give sworn evidence based on the answers that the child has given to questions posed by the court".*

The court that proceeded to take sworn evidence from the child.

Section 19 (1) of Cap 15 requires court to form an opinion as to whether a child of tender years who is called as a witness understands the nature of oath, is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. In this case the child said she was 7 years old, was in class three, and attended a Christian church, including Sunday school, where she was taught about sin (lying) and the punishment for sin (satan or hell).

With the limitations presented by the trial court set up, the magistrate cannot be faulted for drawing the inference that a 7-year-old in class three, who has some basic Christian principles about not lying and the consequences of doing so, is intelligent and capable of telling the truth. As to whether the child would tell the truth, that was another issue. see **Nyeri HCCRA 194 of 2006 Justus Machira Thuku vs R**.(unreported)

Counsel also submitted that children have a propensity to lie. He did not support his submission with any authority, but with due

respect, it is now well supported by law and authorities that that is no longer the position. The proviso to section 124 of the Evidence Act section is evidence to that paradigm shift.

As to whether the trial court was wrong in finding the child a competent witness-

Section 125 of the Evidence Act Cap 80 Laws of Kenya provides; -

(a) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause".

In this case counsel's submissions were geared towards demonstrating that the child was incompetent by virtue of her age. I find no fault with the trail court's finding. It was based on her own observation and examination. She posed questions to the child and formed her opinion from the responses. Verbal responses is only one of the aspects, and I must be alive to the fact that I do not have the privilege of the non-verbal / demeanor observations, and by dint of section.19 of Cap 15, the trial magistrate established the child's competency and proceeded to take her evidence.

On the issue of contradictory and uncorroborated evidence and failure to call crucial witnesses

The prosecution, without specifying the issues, in the guise of recalling the P.W.1 for the purpose of clarifying some issues, put her in the witness box, and made to give her testimony all over again.

This was not only prejudicial to the child, who for unknown reasons, had to retell the story, most likely for the umpteenth time, but also to the appellant who opposed the application, but was overruled, for being exposed to two sets of evidence by the complainant. It created two sets of evidence both given on oath, and at times, contradictory.

The Criminal Procedure Code allows recall of a witness in specific situations and provides the procedure for doing so. For instance, it is allowed under section 214 where a charge is altered, and witnesses have already testified. The accused person has the right to have them recalled for cross examination on the issues arising out of the altered charge; section 200 where the trial court is unavailable to complete a trial that is already under way and a new trial court takes over. The accused person may have the witnesses re- summoned and re-heard either to testify afresh if it is determined that it is in the interests of justice that the matter starts *de novo,* or for cross examination, as the case may be; and section 150 where the court is empowered at any state to recall and re-examine a witness, under specific circumstances.

Section 146 of the Evidence Act Cap 80 Laws of Kenya, provides for the order and direction of examinations of witnesses.

(1) Witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.

(2) Subject to the following provisions of this Act, the examination-in-chief and cross examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

What happened was un -procedural as it is not provided for in the Criminal Procedure Code and is unknown to the Evidence Act as it was neither further examination in chief nor further cross examination.

The prosecution simply proceeded to have the child give her testimony ‘afresh’ and she was cross examined all over again.

There were now two sets of evidence on what happened on the material date both given on oath.

In the 1st set the appellant took her by force to his house, stripped her naked and only removed his trouser and inner pants. In the second, he removed all his clothes, trouser, shirt, vest and underpants. In the 1st she was sleeping on his bed and he slept on top of her did her tabia mbaya between her legs, on her private parts. In the second, her inserted his ‘kasusu’ into her ‘kasusu’. ‘Kasusu’ here used to mean urinating parts. She felt pain. When her mother called out it was not clear whether she answered or not. In one she said she answered, in another that the appellant covered her mouth and she could not scream for help. In one she said the appellant told her to say she was at Shiru’s place, yet in the other she is the one who told her mother she was at Ciru’s and only mentioned the name Kairu after being asked the third time. In the first she said there was timber in the appellant’s house, in the 2nd that there were metal rods. In the 1st that the appellant passed her through his back door when she was leaving, in the 2nd, that he made her pass through an opening in the fence.

She said that the other children saw the appellant take her to his house but none of them was called to confirm this. Her mother PW3 said that N’s mother also saw the appellant going with the children but N’s mother was not called to testify. It was also PW3’s testimony that the child P had seen the complainant sleeping in the appellant’s house. The child P did not testify and that evidence can only be treated as hearsay evidence.

The investigation officer’s testimony introduced a new angle to the case. She told the court that in the report she received the appellant was known to the children as ‘Mbugua’. This piece of evidence, that the children did not know the appellant as Kairu was suppressed by the prosecution. However, the complainant alluded to the fact that she did not know the appellant by the name Kairu when she said ‘I heard S calling him’. PW3 also told the court that the appellant was only known to the N and S and not to her children. That clearly throws doubt as to the identity of the person alleged to have committed the offence.

This is so much so because throughout the proceedings the appellant has been referred to as Kairu. No one bothered to explain why this was so and the I.O only mentioned the name ‘Mbugua’ in passing. Even the charge did not include the name as an alias, to show that the appellant was also known as Kairu. In addition, the child said she had gone to Ciru’s place, and when the mother insisted she said she was from Kairu’s place. No one explained how it was settled upon that the reference to Kairu actually meant the appellant James Mbugua Muraguri. With this kind of evidence, it becomes doubtful whether she was actually in the house of the appellant or the house of the said ‘Kairu’. The trial magistrate did not address her mind to this fact. Could that be the reason why the other children were not called, or the other witnesses, because they would not confirm the identity of the culprit" Could be the reason for their reluctance to record statements" These are inferences to be drawn from this, and they make the case for the prosecution so much the weaker.

The investigating officer said she did not arrest the appellant immediately because she was still investigating the case. She also said that she visited the scene only to find that the appellant had demolished his house and disappeared. This was contradictory to the evidence given by PW3 and inconsistent with the facts. The appellant was a tenant, a fact attested to by PW3, when she said that his landlord had refused to confront him. He could not have demolished his rental house. The investigating officer’s testimony in this regard was untruthful.

The appellant had to take himself to the police station after hearing allegations that he was being accused of committing defilement. There is no reasonable explanation given as to why the appellant was not arrested the same day of the alleged offence, yet according to the PW3 he was caught red handed. This again makes her account doubtful.

P.W.3’s conduct on learning about her daughter’s whereabouts creates doubt as to whether the events happened as alleged. She said her son P told her that he left the sister sleeping in Kairu’s house. She went to Kairu’s house, knocked thrice as the door was locked and when no one responded, she left. Her child was missing. Her other child had told her he had left her sleeping in that house. If that was so why was she roaming around having discussions with neighbours on how and where to look for her child" She did not call for help. Here was a mother with information that her baby girl was locked up in the house in bed with a man, and instead of going to the rescue, was holding discussions with neighbours" Apparently she did not ask and /or none of the neighbours accompanied her to the appellant’s door. The first people she met after receiving the information of the whereabouts of her child were two women, one of them a ‘madam’. I can safely presume that that was a teacher. She told them what P had told her. These two women ‘s reaction to the information that the appellant as at that moment sleeping with her child was to simply calm her down.

That they let her go all alone to the accused's house to look for the child"

There was an unnamed second set of neighbours who also, after discussions about the whereabouts of her daughter, left her to go alone to confront the appellant. She said it was a Sunday and there were many people around. It is not believable that in a shopping centre with a shop, a bar, a hotel etc with many people moving around she would have failed to get help to rescue her child, and have the appellant arrested. Her version does not ring of truthfulness.

She said she saw her child coming from the appellant's house. The matter was reported the same night. What prevented the appellant's arrest"

In his defence the appellant testified and gave a sworn statement of defence. He described what happened on the material night. It does not sound far-fetched in light of P.W.3's testimony.

The doctor who testified read the medical reports.

It is noteworthy that the P3 was a replica of the PRC word for despite the fact that the P3 was completed on the 16th of September 2015, while the PRC was filled on the 13th September 2015. It is evident from the this that one of these officers did not physically examine the child. The findings could not have been exactly the same when the examinations were done on different dates. The PRC reads *'Patient was seduced by the assailant to go to his house where she was stripped and raped'*, the P3, 'Patient was seduced by the assailant to go to his house where she was stripped naked and defiled sexually'.The P3 indicates that at the time of examination the approximate age of the injuries was **'hours'**, treatment, if any received prior to examination is indicated as **'none'.**The PRC indicates approximate age of the child as 5 years, the P3 says 7.The PRC under the heading GENITAL EXAMINATION OF THE SURVIVOR provides the description that the outer genitalia was tender, the vagina had mucoid creamish discharge, the hymen was not seen, the anus was intact. This was the exact description given in the P3 at SECTION C except the specification of out genitalia as labia. In his oral testimony the doctor who testified spoke of a broken hymen. There is a difference between a broken hymen and a hymen that is 'not seen'. One is damaged. The other is just not seen. No explanation was given for the indication that the hymen was not seen.

There is no explanation by the prosecution why the appellant was not arrested when the scene (himself) was still fresh. A medical examination would have at least established engagement in recent sexual activity. The child's clothes were also not subject to examination they would have given clues to what may have happened. A high vaginal swab was done but there was no spermatozoa.

The record shows that at some point the child broke down and cried during her testimony. The trial court made the presumption and recorded that the child was still traumatized from the alleged sexual assault, took a break for the child to calm down. She did not ascertain why the child was crying.

The appellant's defence considered in the light of the evidence given by the prosecution witnesses is plausible. The trial magistrate said it was an after -thought but the appellant had raised those issues in cross examination of PW3.

In dealing with the contradictions in this case I found guidance in the Court of Appeal case **Erick Onyango Ondeng' v Republic [2014] eKLR** where it stated that not every contradiction would cause the evidence of a witness to be rejected. There would need to be more to the contradiction. The Court cited with approval the findings in Court of Appeal case **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA**

*As noted by the Uganda Court of Appeal in **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA,** 6 it is not every contradiction that warrants rejection of evidence. As the court put it:*

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

I find the contradictions herein to be grave enough, coupled with all these answered questions, and inconsistencies to create a doubt in the mind of the court as to whether the offence was committed as alleged, and whether the appellant was involved. Without the necessary independent evidence to corroborate the testimony of the complainant and that of her mother PW3 the case for the prosecution stands on shaky ground.

I have carefully considered all the evidence before me and the submissions by both counsel.

I have done my duty;

*This is a duty no court should run away from or play down…a duty imposed on … by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same.(**Erick Otieno Arum v Republic [2006] eKLR)***

I have come to the conclusion that the conduct of the prosecution case, and the evidence as placed before the court leaves gaps in the case for the prosecution that renders the conviction unsafe. A retrial would only expose the appellant to more prejudice.

The appeal succeeds. The conviction is hereby quashed. The sentence of life imprisonment is set aside. The appellant is to be set at liberty unless otherwise legally held.

Right of Appeal Explained.

TERESIA MATHEKA

JUDGE

Dated, delivered and signed this 13th Day of December 2017 at Nyeri .

In the presence of;

Court Assistant Hariet

Mr Gitonga for state

Appellant present.

Ms. Mwai holding brief for Mr. Warutere