



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 67 OF 2019

GEDION MUGENDI.....APPELLANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of the Hon. D. Odhiambo (RM)

on 15th May 2019 in Shanzu S. O. No. 13 of 2013).

JUDGMENT

Background

1. Gedion Mugendi the appellant herein was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years in prison.
2. The particulars of the charge were that the accused on diverse dates between 3rd day of February 2018 and 5th February 2018 in Mtwapa Township within Kilifi County in the Coast Region intentionally caused his penis to penetrate the vagina of HKS. a child aged 14 years.
3. In the alternative, Gedion Mugendi was charged with the offence of committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
4. The particulars are that on the 4th day of February 2018 at Mtwapa Township within Kilifi County in Coast Region, intentionally touched the vagina of HKS. child aged 14 years old with his penis.
5. The amended grounds of appeal were stated as follows:-

- 1) The learned trial magistrate erred in law and fact in convicting and sentencing the appellant without considering that he was not accorded a fair trial thus contravening Articles 50(2) and 25(c) of the Constitution.
- 2) The learned trial magistrate erred in law and fact in convicting and sentencing the appellant without considering that the source of arrest was not well established and thus the conviction was unsafe.
- 3) The learned trial magistrate erred in law and fact in convicting and sentencing the appellant without considering the defence testimony thus giving the prosecution overriding rights thus contravening the constitution.
- 4) The learned trial magistrate erred in law and fact in convicting and sentencing the appellant without considering that the appellant was a victim of mistaken identity.

6. The appellant prayed that the appeal be allowed, conviction quashed, sentence set aside, and he be set at liberty.

Prosecution Case

7. PW1, the complainant, a female minor of 14 years, in standard 4 understood the duty of saying the truth, could give a sworn testimony and testified in Kiswahili. She stated that she goes to [Particulars Withheld] Primary School and that between 3/4/2018 and 5/2/2018, Gedion

their neighbor whom she knows gave her Kshs. 20 and told her to go to his house. PW1 said that he called her and went to his place at 8pm. It was a big house with six rooms and he was alone. PW1 said that she got into one of the rooms and he followed her and removed her clothes. PW1 said that she had a white skirt and a black shirt. He removed her clothes and removed his as well. He then took his penis and put it in her vagina and did that 3 times. PW1 said that she was forced to do that. She wanted to leave but he refused. In the morning, she remained in the house but he left and closed the door from outside. He came back at 11.00 am where PW1 left and went to her aunt called ZR because she feared going to her mother. PW1 told her aunt what had happened. She stayed at her aunt's place until 6 pm. She went home and her father called the police to arrest him. He went to the DO and was taken to the police in Mtwapa. PW1 was then taken to Vipingo Hospital and given PRC form – MFI 1 as well as a P3 form MFI 4. PW1 said that she was told by her mother that she is 14 years old and was born in 2004, according to the clinic card MFI 3. PW1 stated that she knows Gedion and that he was in court and she could identify him. That she wrote her statements at Mtwapa Police Station.

8. PW2, SNM, said that she stays in Matugu and runs a small business. She said that on 3/2/2018 at 8.00 pm, they had eaten and were preparing to sleep. She then left briefly at 9.00 pm. She checked if PW1 was around and found out that she was not in the house. She asked around but did not find her. She sat outside waiting for her but PW1 did not come back. On 4/2/2018, she asked again within the family but she did not find her. On 5/2/2018 before PW2 left, Rich told her that he had seen PW1. He went and brought her. PW1 told PW2 that she was with Gedion. She did not know him well. PW1 told her that Gedion had given her Kshs. 20 and told her to go to his place. On Saturday, he followed her and went with her. They then went and arrested Gedion and was taken to Mtwapa Police Station. They took H to hospital where they were given PRC MFI 1 and were later given P3 MFI 2. PW1 is PW2's daughter and was born in 2004. She has a clinic card, MFI 3. PW2 said that she wrote a statement at the police base and knew Gedion on the day he was arrested and can recognize him.

9. PW3, Mercy Kwekwe, said she stays in Majengo and that she is a ward administrator. On 5/2/2018 at 11 am, she was on her way to work and found a group beating the accused. She alighted and asked what had happened and she was told that he had defiled a girl. PW3 said that she called Francis Meuze, the Children Officer, and he told the child to go to Kijipwa to write a statement. The group wanted to kill him. PW3 in the company of others took the accused to the DO and went to Mtwapa to write a statement as per what she saw. She did not know Gedion at the time and stated during her testimony that he was in court and she could identify him.

10. PW4, Francis Kaluga Manza, the serving Children's Officer stays in Mtwapa. He said that on 5/2/2018, he was at Mtomondoni Primary School dealing with children's issues when he was called by Mercy Mutusi, the ward administrator. She told him a man had defiled a child and they were around. PW4 went to the place and PW3 showed him the child who had been defiled. The child was with her parents. PW4 was told that the child was 14 years and in standard 4 at [Particulars Withheld] Primary School. PW4 told the parents to report to Kijipwa Police Station. They took the accused to the Deputy County Commissioner at Kilifi station sub-county and handed the accused over to the police to make a report. He was later called to write a statement at Mtwapa Police Station.

11. PW5, Dr. Daniel Rambei, works at Coast General Hospital and has an MBChD from the University of Nairobi. He said that he had worked for 4 years at Coast General Hospital and had P3 form (MFI 2) filled by Dr. Majda whom he knows and had worked with for one year. The P3 form is for PW1 aged 14 years. She complained of being defiled by someone known to her. The incident happened on 5/2/2018 and she went to hospital on 6/2/2018 with changed clothes. PW5 said that PW1 gave a history of being defiled by someone known to her. Her physical appearance was normal. The approximate age of the injuries was one month and a blunt object was used. She was put on PEP. The degree of injury was maim. The tests done were not indicated on the P3 form. The form was signed on 8/3/2018 by Dr. Majda. The same was produced as Exhibit 2. PW5 also stated that he had a PRC form for PW1 aged 14 years. She reported being defiled by someone known to her. There was redness and tenderness on the superior vaginal walls, the labia majora and minora were normal, the hymen was broken, pregnancy test was negative, and urinalysis and blood tests were normal. The information was filled by Jadu Musau.

12. PW6, PC Caroline Gathoni from Mtwapa Police Station stated that on 4/2/2018, a woman went to report at the station that she had found her daughter at the home of the accused. The accused had been arrested by members of the public. PW6 recorded statements from four people who testified in court. She said that she had the PRC form, Exhibit D showing the child was defiled. The accused was then charged in court with the offence of defilement.

Defence Case

13. Evidence of the defence at trial was tendered by DW1, Gedion Mugendi who gave an unsworn testimony. He stated that he went to the main road and saw 4 people standing. One of them started beating him and told him that he would know Coast is not Kenya. DW1 was then rescued by a motorbike rider. He then saw Aaron and asked him to help him call the boss. DW1 went with the person who took him to the police station. He was then arrested and taken to court. He said that he was framed because of jealous from work.

Appellant's Submissions

14. The Appellant submits on denial of a right to fair trial contrary to Article 50(2) of the Constitution that the right to a fair trial is a non-derogable right and once it is realised that a right has been violated, an acquittal must result irrespective of the weight of evidence. The Appellant cited the case of *Republic v Speaker of the Senate & Another Ex parte Afrison Export Import Limited & Another*. The Appellant further submits that an accused person has the right to be informed promptly and in a language which he/she understands of the nature and cause of the charge against him as stipulated in Article 50(2)(b) of the Constitution. The right to be informed of the charge in detail is derived from Article 14(3)(a) of the International Covenant on Civil and Political Rights. Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

15. The Appellant submits that once a suspect becomes an accused by reason for the confirmation of the indictment or when charged, the extent of the information required by the accused person is greater. The accused person would wish to prepare an adequate defence in accordance with Article 50(2)(c) of the Constitution will require the facilities to do so. Part of the right to facilitate to prepare a defence is contained in Article 50(2)(j) is to access to information to defend himself. Thus the right to be informed of the charge and the right to preparation of a defence are interlinked. The Appellant submits that in order for the accused person to enjoy the rights contained in the Article 50 of the Constitution, disclosure of information is required on the part of the prosecution. Article 25(c) states that there can be no limitation on the right to a fair trial and the judiciary criminal bench also states that the right that should be accorded to an accused person

and cannot be limited.

16. The Appellant further submits to the above that it is crystal clear that the substance of the charge was not read/stated to the Appellant before taking plea. The Appellant submits that this was a violation of the accused person constitutional right as he went ahead to cross examine witnesses and defend himself on a charge he was not aware of thus rendering the trial court proceedings a nullity. To this effect, the Appellant cited Section 207 of the Criminal Procedure Code and the case of *Eliud Wefwafwa Luucho & 3 Others v Attorney General*.

17. The Appellant submits on the issue of the source of arrest having not been well established that the court was fooled into believing that the Appellant was arrested for the offence charged. All the prosecution witnesses gave a conflicting account of what really transpired thus leaving the issue in limbo. The Appellant has quoted Article 9(1) of the International Covenant on Civil and Political Rights which states that everyone has the right to liberty and security of a person, and that no one shall be subjected to arbitrary arrest or detention. The Appellant submits that PW3 (Mercy Kwekwe) ward administrator told court that on 5/2/2018 while on her way to work, she found a group of people beating the accused. She intervened and was informed he had defiled a minor. She took a bold move and called the children officer (PW4) who responded immediately. He was shown the girl who had been defiled by the name of ISB a pupil at [Particulars Withheld] Primary School. He helped apprehend the accused person as an attempt to save his life from the mob. The Appellant submits that instead of the girl called ISB from [Particulars Withheld] Primary School being brought to court, a totally different person was brought in. PW1 in her evidence told court that her name was HKS and was a pupil at [Particulars Withheld] Primary School.

18. The Appellant submits that the present case as per the evidence of PW1, PW2, PW3, and PW4 was reported on 5/2/2018 the purported date of arrest. Whereas PW6 PC Carolyne Gathoni seemed not to be aware of when this case was reported as she told court that a woman came to report a case of defilement on 4/2/2018 and the accused was brought in implying the same date it was reported. The Appellant submits that PW2 who was the Complainants mother denied ever reporting the case on 4/2/18 through her evidence at page 5 of the trial court proceedings. The Appellant submits that the particulars on the charge sheet indicate the accused person was arrested on 7/2/2018 and taken to court on 8/2/2018. That PW1 was not a truthful witness and her evidence ought to be disregarded as it does not stand as per the requirements of Section 124 of the Evidence Act. The Appellant submits that from the P3 form, it is well indicated that the Complainant was sent to hospital for medical examination on 15/2/2018 several days after the Appellant had been charged in court and was languishing in prison implying that no defilement had been confirmed prior to taking plea. The Appellant cited the case of *Wycliffe Shakwila Mungo v Re*, Cr. App. No. 57 of 2017 at Mombasa where it was held that in the absence of concrete evidence, the court must give the benefit of doubt to the accused. The Appellant submits that his arbitrary arrest, harassment, beating, torture, detention, denial of medical care, access to legal representation provided for by the state amounted to inhumane and degrading treatment thus contradicting article 25(a) of the Constitution.

19. The Appellant submits on the issue of defence testimony that it was improper for the trial magistrate to have rejected the defence testimony without giving a reason. The Appellant has cited the case of *Wycliffe Shakwila Mungo v Rep*. He submits that he had been in the place only 3 days prior to my arrest and knew no one, he never had a house of his own thus wrongfully identified. That he was a victim of circumstance only rescued from a group of unknown people who were beating him for their own interests and cooked up a defilement case after being cornered by the village administrator.

20. The Appellant submits that he was a victim of mistaken identity. He submits that he had newly been employed in the area from a different county and it had barely been 3 days. This corroborate the evidence of PW2 who told court in her testimony that she had never seen him before. The Appellant submits that he was surprised that PW1 told court that she knew him as their neighbor yet her mother who was her guardian and her custodian was not aware of the neighbor. The police did not investigate if at all the neighborhood ever existed to remove doubts. The Appellant submits that identification being an essential element in a case of defilement need to be well established as it forms the basis of a conviction. He submits that his identification was more of recognition as stated by PW1, as was stated in the case of *Turnbull*, the jury needs to be warned since mistakes are always made even on close relatives. The Appellant submits that he was a stranger to PW1 and all the prosecution witnesses. He had hardly stayed in the area, never had a place of abode and could not accommodate PW1 as alleged.

Respondent's Submissions

21. The Respondent submits that in a charge of defilement, the prosecution is supposed to prove three ingredients which are penetration, age of the victim and identity of the perpetrator. The Respondent submits that penetration is defined under Section 2 of the Sexual Offences Act and the fact of penetration was proved by the testimony of the complainant PW1. Also, PW5 the Doctor produced the P3 form and the PRC form as exhibits in compliance with Section 7 of the Evidence Act. The finding was that there was redness of the vagina on the superior vaginal wall and hymen was broken.

22. The Respondent submits on the age of the complainant that this was proved with the production of the Immunization card of the complainant which indicated that she was born on 6/2/2004 hence 14 years old at the time of the alleged offence. The Appellant was charged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The offence is committed if the child is between the age of twelve (12) years and fifteen years. The Complainant was 14 years old. The Respondent submits that the prosecution discharged the burden to prove the age of the victim by the Immunization Card and through the evidence of PW2 and PW5 who were the mother of the victim and the doctor respectively who gave the apparent age.

23. The Respondent submits on the identity of the perpetrator that the appellant was known to the complainant. PW1 stated that the appellant was their neighbor. Similarly, they spent a lot of hours together. The entire night until the following day therefore the issue of mistaken identity cannot arise.

24. The Respondent submits that the Appellant in his defence gave unsworn evidence alleging work rivalry but he did not demonstrate how the complainant was connected to the work rivalry. He also described how he was arrested. In his grounds of appeal, the Appellant alleged that he was denied the right to a fair trial. The Respondent submits that he outlines the issue of failure by the court to inform him of the charge in detail so as to prepare for his defence in accordance with Article 25 (c) and Article 50 (2) (j) of the Constitution. He also states that he did not understand the proceedings therefore needed representation by an advocate. The Respondent submits that the Appellant cites the

court proceedings during plea. From the extract, he contends that the substance of the charge was not read to him. Evidently, he denied the charges. The Respondent submits that on page 4 line 2 of the typed proceedings, the accused states that he was ready to proceed with the hearing. Clearly, he was supplied with prosecution witness statements. The issue raised above was an omission by the trial court which did not prejudice the Appellant since he had pleaded not guilty and the matter went to trial. He heard the evidence of the witnesses and cross examined them and can therefore not state that he did not understand the charges. The Respondent submits that they rely on Article 159(2)(d) of the Constitution to submit that this is an undue procedural technicality that is curable under Section 382 of the Criminal Procedure Code.

25. The Respondent submits on the source of arrest not well established that it is very clear from the prosecution's case that the Appellant was arrested by members of the public and taken to the police station. The Respondent submits that PW2 on page 6 line 8 stated that the appellant was arrested by Anne and Richard. PW3 the ward administrator found the public beating the accused for allegedly defiling a girl. She further states that the defiled girl was also present. On the other hand, PW4 the Children Officer stated that he was called by PW3 who showed him the girl had been defiled. PW6 the Investigating Officer states that the Appellant was arrested by members of the public. The Respondent submits by highlighting that PW1 said that her name was H.K.S. PW2 her mom said that the child was H. PW3 who called PW4 to the scene stated that she did not know the parties before this date. PW4 the doctor filled a P3 form in respect to HKS. The immunization card was for H.K. The Respondent submits that PW4 only saw the mob justice and not the alleged offence. He does not say that the parties were known to him but that he was given the details of the child. The Respondent submits that PW4 refers to PW3 as Mercy Mutusi on page 12 line 6-7 whereas from the proceedings on page 6 line 15 she is Mercy Kwekwe. The Respondent submits that it can therefore be safely said that was an honest error in names but the facts are similar to those in the case. The Appellant has not disputed the facts of his arrest thus there was no doubt that he was arrested by members of the public who started beating him.

26. The Respondent submits that the Appellant in the trial court gave unsworn evidence and did not call any witnesses. On page 22 and 23 of the proceedings he alleges discord with his boss and colleague though did not establish the complainant's connection to them. He also demonstrated how he was arrested and was beaten or being a non-coastarian. He did not discuss the charges. The Respondent submits that in his submissions before the court, he is raising issues that were not brought up before the court such as on page 9 line 13-14 of his submission. The Respondent submits that he gave an unsworn statement which has no probative or evidentiary value and more importantly did not dissuade the prosecution's case. The trial court in its judgment considered the defence and page 33 line 21 and 22 of the proceedings found the same unsatisfactory and convincing. The Respondent submits that the law relating to unsworn statements is well expressed by Emukule, J Retd. in the case of *Mercy Kajuju & 4 Others v Republic* [2009] eKLR.

27. The Respondent submits on mistaken identity that on the issue of identification, the locus classicus is the case of *R v Turnbull* [1976] 3ALL ER549 where the court established factors to be considered before determining whether or not to rely on the visual identification evidence of a single eye witness. The Respondent submits that the victim knew the Appellant well since they were neighbours. He also did not rebut this assertion during cross examination of PW1. Similarly, the victim spent the night with the Appellant till the following morning. Lastly, the Appellant was arrested on the 5th day of February 2018 just a day after PW1 had spent the night at his place. She even described how his house was and who else lived there leaving no doubt that they were well acquainted with each other. The Respondent submits that PW2 her mother said she did not know him well but all the same she knew the Appellant. The Respondent holds the view that identification was proved to the required standard since the evidence was that of recognition rather than identification of a stranger.

28. The Respondent submits that Section 124 of the Evidence Act permits the court to convict in Sexual Offences on the evidence of the victim if the court deems the witness truthful. The P3 form proved that the injuries established that there was penetration. The story by the other witnesses on what the Complainant reported to have happened to her was consistent and uncontroverted even during cross-examination. The Respondent submits that the trial court properly evaluated the evidence and that the conviction was safe.

29. The Respondent submits that what the trial court meted out was the minimum sentence provided in Section 8(3) of the Sexual Offences Act. Accordingly the sentence was lawful and appropriate in the circumstances as the trial court took into account mitigation by the Appellant. In addition, the Appellant took advantage of a 14 year old child and destroyed her inherent dignity. He violated her body. Sexual offences traumatize the victims for a long period of time. He had an opportunity to have sex with consenting adults but chose to violate the young child.

Analysis and Determination

30. This is the first appellate court and its duty is to reanalyze and reevaluate all the evidence from the lower court before making its conclusion. Duties of the first appellate court were set out in the case of *Okeno v Republic* [1972] EA 32 where it was held as follows:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding 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 has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

31. After considering the grounds of appeal, circumstances of the case and submissions by both parties as well as records of the lower court, the issues for determination are as follows:-

- i) Whether the Appellant was accorded a fair trial
- ii) Whether the source of arrest was well established
- iii) Whether the Appellant's defence was considered

iv) Whether the Appellant was a victim of mistaken identity

Whether the Appellant was accorded a fair trial

32. The Appellant submitted that the substance of the charge was not read or stated to him before taking plea. That this was a violation of his right as he went ahead to cross examine the witnesses and defend himself on a charge he was not aware of.

33. The Respondent submitted that in a defilement case, the prosecution is required to prove penetration, age of the victim and identity of the perpetrator. The three ingredients were proved beyond reasonable doubt. The Respondent submitted that the Appellant alleged work rivalry but he did not demonstrate how the complainant was connected to the same. Further, the Respondent submitted that the accused states that he was ready to proceed with the hearing, he was supplied with the prosecution witness statements. The Appellant heard evidence of the witnesses and cross examined them and can therefore not state that he did not understand the charges.

34. **Article 50 (2) of the Constitution of Kenya** provides as follows:-

(b) To be informed of the charge, with sufficient detail to answer it,

(c) To have adequate time and facilities to prepare a defence

35. In the case of **Constitutional Court of South Africa in *S v Jaipal* [2005] 2ACC 1 SA 582**, it was held that:-

“The right of an accused to a fair trial requires fairness to the accused, as well as to the public as represented by the state. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.”

36. This court finds that at page 1 of the typed proceedings, the Appellant was informed of the charge including the alternative charge where he responded that it was not true and a plea of not guilty was entered. The matter then proceeded to hearing where he cross examined the witnesses. This is a clear indication that the accused person understood the charges. This amended ground of appeal has no merit and it is therefore dismissed.

Whether the source of arrest was well established

37. The Appellant submitted that the prosecution witnesses gave a conflicting account of what really transpired leaving the issue in limbo. The Appellant submitted that PW3 was shown the girl who was defiled by the name ISB from [particulars Withheld] Primary School. However, the Appellant submitted that a totally different person was brought to court by the name HKS, a pupil at [particulars Withheld] Primary School. The Appellant submitted that the present case as per the evidence of PW1, PW2, PW3, and PW4 was reported on 5/2/2018. However, according to the testimony of PW6, a woman went to report a defilement case on 4/2/2018. On the contrary, PW2, the Complainant's mother denied ever reporting the case on 4/2/2018. Further, the Appellant submitted that particulars of the charge sheet indicate that the accused was arrested on 7/2/2018 and taken to court on 8/2/2018. According to the P3 form, the Complainant was sent to hospital for examination on 15/2/2018, several days after the accused had been charged in court.

38. The Respondent submitted that on the issue of error of names however, the facts are similar to those in the case. The Appellant has not disputed the facts of his arrest. Therefore, there is no doubt that he was arrested by members of the public who started beating him.

39. This court makes reference to the case of ***John Nyaga Njuki & 4 Others v Republic, Cr. App. No. 160 of 2000***, the court held that:-

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.”

40. This court has noted that in the proceedings, the Appellant stated that he was arrested and taken to the police station by members of the public. This position was confirmed by PW2, PW3, PW4, and PW6. When the matter came up in court, the Prosecution went ahead and proved the ingredients of defilement beyond reasonable doubt. Therefore, the discrepancies pointed out by the Appellant have not affected the prosecution's case as to doubt the guilt of the Appellant. According to the medical documents, the PRC form was filled on 6.2.2018 while the P3 form was filled on 8.3.2018 and both documents indicated that the Complainant's hymen had been broken. On the discrepancies in the name of the Complainant, the Appellant in cross examination of the witnesses did not seem to question the same. On the contrary, the identity of the Appellant was confirmed by the witnesses as indeed the person who was arrested by the public for defiling the complainant. This amended ground of appeal is equally dismissed.

Whether the Appellant's defence was considered

41. The Appellant submitted that he had been in the place 3 days prior to his arrest, knew no one, and he never had a house of his own. The Appellant submitted that he was a victim of circumstance with a cooked up defilement story.

42. The Respondent submitted that in the Appellant's defence, he did not discuss the charge, he did not demonstrate how the complainant

was connected to his rivalry at work, and he gave an unsworn statement. The trial court generally found the defence unsatisfactory.

43. In the case of *R v Coughlan (1977) 64 Cr App Rep*, it was held as follows:-

“... when a person charged with an offence chooses to make an unsworn statement from the dock, although such a statement might throw light on the sworn evidence and thus influence the jury’s decision, its potential effect was persuasive rather than evidential, for such a person was not a witness, and thus his statement could not prove facts that were not otherwise proved by evidence ...”

44. This court has established from the proceedings that indeed the Appellant gave an unsworn testimony, called no witnesses and did not testify on the charge save for his arrest. It is clear that the Appellant’s defence did not in any way cast doubt on the prosecution’s case. The trial court in its judgment stated that it indeed considered the defence of the accused and found the same to be unsatisfactory and convincing. Therefore, the Appellants amended ground of appeal that the trial magistrate convicted and sentenced him without considering his defence has no basis.

Whether the Appellant was a victim of mistaken identity

45. The Appellant submitted that PW2 said he had never seen him before and that the police did not investigate to establish whether the neighbourhood existed. He submitted that he had hardly stayed in the area, never had a place of abode and could not accommodate PW1 as alleged.

46. The Respondent submitted that the victim knew the Appellant well since they were neighbours. However, he did not rebut this assertion during cross examination. That the victim spent the night with the Appellant till the following morning. The Appellant was arrested the next day after spending the night with the victim. She described how his house was and who else lived there, leaving no doubt that they were well acquainted with each other. The mother to the Complainant said she did not know him very well but all the same she knew the Appellant. Therefore, identification was proved to the required standard.

47. In the case of *Peter Musau Mwanzia v Republic [2008] eKLR*, the Court of Appeal expressed itself as follows:-

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”

48. According to the proceedings, this court finds that the identity of the Appellant was not disputed. The Complainant stated that the Appellant was a neighbor, he gave her Kshs. 20, spent the night with her, locked her in the house when he left in the morning and on return at 11 am, he instructed her to leave. It is without doubt that this is an issue of recognition rather than identification. The Appellant was a person known to the Complainant and the duration of time they were together both at night from 8.00 pm to the next day at 11.00 am leaves no doubt he was properly recognised.

49. In conclusion, this court finds no merit in the appeal. The prosecution proved the ingredients of defilement beyond reasonable doubt. The appeal is therefore dismissed. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 28TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Respondent - Present

Appellant – No appearance

Order: Production order to issue for 28.1.2022 from medium prison.

HON. LADY JUSTICE A. ONG’INJO

JUDGE