REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 26 OF 2019

EMMANUEL SHIKUKU *alias* **OPICHA.................APPELLANT**

-versus-

REPUBLIC.. RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. S. Ouko Resident Magistrate in Migori Magistrate's Court Criminal Case No. 26 of 2017 delivered on 4/04/2019)

JUDGMENT

1. The Appellant herein, **Emmanuel Shikuku** *alias* **Opicha,** was charged with the offence of *Defilement* contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative count of *committing an indecent act with a child.* The Appellant denied both counts.

2. The particulars of the offence of defilement were that '*on 4th day of December 2017 at [Particulars Withheld], intentionally caused his male genital organ namely penis to penetrate into female genital organ namely vagina of SAO. a child aged 9 years*'.

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Five witnesses testified in support of the prosecution's case. **PW1** was the complainant one **SAO. PW2** was an uncle to the complainant. The mother of the complainant testified as **PW3. PW4** was a Clinical Officer attached to Migori County Referral Hospital. **PW5** was the investigating officer one **No. 70665 Corp. John Mwithia** attached to Migori Police Station. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the PW1 whom I will refer to as '**the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant gave a sworn defence without calling any witness. Thereafter the court rendered its judgment on 04/04/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 15/04/2019.

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant complied. He submitted that he was not properly identified as the assailant and that his defence was not considered. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure. He prayed that the appeal on conviction be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable

doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions. The trial court properly captured both the prosecution and the defence evidence which evidence I incorporate as part of this judgement by reference.

11. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. I will begin with the issue of identification of the assailant.

12. The Appellant vehemently denied being the assailant and attacked the evidence on his identification as unreliable. He relied on the case of **Wamunga vs. Republic (1989) KLR 424.**

13. The complainant and PW2 were the alleged eye-witnesses. The incident occurred at the heart of the night. It took place around 02:00am. The complainant testified of the assailant as follows: -

> **…I saw him leaving. It was dark……**
>
> **……..**
>
> **There was no light on….**

14. PW2 stated as follows: -

> **I woke up suddenly to see Opicha leaving the room. Moonlight streamed in and I saw him leave….**
>
> **……..**
>
> **I saw him when he opened the door to leave……**

15. Evidence on identification must always be weighed with such great care. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

> ***It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

16. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a witness. The Court said:

> ***... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

17. In this case, the complainant and PW2 were both asleep. The complainant only saw someone leaving their room. She however confirmed that there was no light in the room. She did not state which part of the suspected assailant she saw. PW2 testified that he saw the appellant by the aid of moonlight which streamed inside when the door was opened. PW2 did not state where he was inside the room in relation to the moonlight. There was also no evidence of the strength of the moonlight capable of illuminating inside the room.

18. If the complainant and PW2 really saw someone leave their room, then it may not have been that ease to readily identify and recognize who the person was. As they had just woken up from sleep and immediately moonlight gushed inside their room, chances of the complainant and PW2 recognizing whoever was leaving that room were so minimal, if any.

19. By placing the prosecution evidence against the law, I am not convinced that the identification of the appellant as the assailant was safe. In the circumstances of this case, and so respectfully, I find that the trial court erred in finding that the appellant was identified by recognition as the assailant.

20. With such a finding, there is no need of dealing with the other grounds of appeal since they may not add any value herein. I chose to end this journey here.

21. The upshot is that the appeal is allowed, conviction quashed and the life sentence set-aside. The appellant shall be set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 22nd day of May, 2020.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Emmanuel Shikuku *alias* **Opicha** the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant