REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.17 OF 2019.

EVANS SHEM..1ST APPELLANT

ONYANGO SAMMY JUMA ....2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal from the conviction and sentence of the Honorable Senior Resident Magistrate Hon. Eunice Kelly delivered on 28th of February 2019 in Nakuru CM's Court Adult Criminal Case No. 132 of 2014.)

JUDGMENT

1. The appellants were charged with the main charge of **gang defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006** and alternative charge of **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.**

2. The particulars of the main charge were that on the 1st day of June 2014 in Rongai District of the Nakuru County in association with **Evans Shem** and **Onyango Sammy Juma** unlawfully and intentionally committed an act which caused their genital organ namely penis to penetrate into a genital organ namely vagina of **CC** a child aged 17 years which caused penetration.

3. The particulars of alternative charges being that on the 1st day of June 2014 in Rongai District of the Nakuru County in association with **Evans Shem** and **Onyango Sammy Juma** unlawfully and intentionally committed an indecent act by touching organ namely vagina of **CC** a girl aged 17 years with male genital organ namely penis without her consent.

4. The appellants denied both the main and alternative charges and the case proceeded for full trial and with the prosecution calling 7 witnesses in support of their case while the appellants opted to give sworn defence and called 4 witnesses. The appellants were convicted of the main charge and sentenced to 15 years' imprisonment.

5. The appellants being aggrieved and dissatisfied with the conviction and sentence filed a Petitions of Appeal dated 12th March 2019 challenging the conviction and sentence on 5 on the following grounds: -

i. The learned trial magistrate erred in law and fact by failing to properly establish the age of the victim i.e through age assessment and/or birth certificate yet age of the victim was critical element to prove for the offence of gang defilement/rape.

ii. That the learned magistrate erred in law and fact in convicting the appellant of the offence of gang defilement/ rape without specifically recording reasons for believing the testimony of the victim as per provisions of Section 124 of the Evidence Act and which entire testimony was untruthful considering that the victim was not forthright about her age and failure to produce the birth certificate which was in existence.

iii. That the learned magistrate erred in law and fact when she based her conviction on the identification of perpetrator's through recognition and/or description whereas the identification could have been mistaken considering trauma of the victim thus the court should have called for first report of the victim made to officers in authority regarding identification of perpetrators.

iv. That the learned magistrate erred in law by convicting the appellant without evaluating in totality the incredible evidence and without taking cognizance of the evidence on surrounding circumstances during occurrence of the alleged offence as per Section 33 of the Sexual Offences Act whereby the neighbourhood of the alleged locus quo was crowded and busy for the heinous crime to have occurred in daytime.

v. That the learned magistrate erred in law and in fact in failing to give sufficient cognizance to the appellant's reasonable defence

of alibi and further by the court failing to consider that the defence witnesses were not discredited during their testimony thus the defence raised reasonable doubt.

6. The appellants urged this Court to quash the conviction and set aside the sentence.

7. The state opposed the appeal on both conviction and sentence.

8. Both parties canvassed the appeal through written submissions.

APPELLANT'S SUBMISSIONS

9. The appellants submitted that the prosecution failed to prove the main ingredients of gang defilement beyond all reasonable doubt by the prosecution witnesses that is age, penetration and identification of the assailants and also failed to consider appellant's *alibi.*

10. Counsel for the appellants urged this Court to consider the evidence at the trial and evaluate it afresh before coming to its own independent conclusions subject to the understanding that it is only the trial Court that had the advantage of seeing and hearing the witnesses. The appellant cited the case of **Kamau -Vs- Mungai & Another 1200611 1LR 150** where the Court of Appeal held as follows:-

> **"This being a first appeal it was the duty of the Court of Appeal to re-evaluate the evidence asses it and reach its own conclusions remembering that it had neither seen nor heard the witness and hence making due allowance for it...**
>
> **A Court on Appeal will not normally interfere with a finding of fact by the trial Court in a civil or criminal case unless it is based on evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did..**

11. Appellants submitted that the charge sheet as framed at page 3 of the record of appeal is defective since the accused persons were charged with a nonexistent offence in law. They submitted that there is no offence known as **gang defilement**; that the offence as particularized under the section is **gang rape** as opposed to gang defilement. They submitted that an accused person should be tried for an offence known in law which should contain sufficient and clear details to enable them to adequately prepare and answer to it; that the non-existent offence goes to the root of the charge and this defect is not curable under **Section 382 of the Criminal Procedure Code**.

12. The appellants' counsel quoted **Section 10 of the Sexual Offences Act** as follows: -

> **"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."**

13. Appellants further submitted that in sexual offence cases, the age of the complainant is one of the key ingredients to be proved by the prosecution and the burden of proof is beyond all reasonable doubt. That the prosecution in the present case were talking about the offence of gang defilement meaning that they were obligated beyond all reasonable doubt to proof that the complainant was a minor. In view of the seriousness of the sentences imposed on those convicted of having committed defilement cases, and the eventuality of one's liberty being curtailed for long periods of time, a defilement case ought not and must not be decided on a balance of probability as that would be a travesty and great miscarriage of justice to an accused person.

14. Appellants cited the case of **Malindi Criminal Appeal No. 504 Of 2010 Kaingu Elias Kasomo vs. Republic.** where the Court observed as follows:

> "**Age of the victim of a sexual assault under the Sexual Offence Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim."**

15. In respect to age of the complainant herein, appellants submitted that the evidence that was tendered is questionable; that the only evidence produced to prove age is the Child Health Card but did not bear the official stamp and the same was incomplete as some parts were not filled; that the card indicated that the complainant's date of birth was 16th October, 1999 meaning that the complainant was 17 years old at the time of the offence in 2014. Further that the Court relied on the card in determining the age of the complainant yet the maker of the said document was never called to produce the same; that the trial magistrate ought not to have attributed any evidential value to the same as it amounted to hearsay.

16. Appellants further submitted that prosecution witnesses deliberately failed to produce the birth certificate which was always in their possession for their own selfish reasons of trying to hide the truth from Court and deceiving the trial Court into believing that the complainant was a minor at the time of the offence. They submitted that the true position is that the complainant's date of birth as per birth certificate tabled before High Court was 16th October, 1995 meaning she was 19 years old at the time of the alleged offence in 2014; that this is very crucial evidence which reveals the untruthfulness of the prosecution witnesses including the complainant who was the only crucial witness in the case being the victim. Appellants submitted that by complainant lying on her age, raises question on her credibility.

17. Appellants further submitted that penetration was never proved as the only evidence adduced was complainant's yet she is untruthful as evidence by evidence of age and the grandfather who was the first to find her after the alleged offence was not called to testify; further that very important documents were never produced in Court to assist the Court in reaching a just determination; that the note said to have been

written by the accused persons after the alleged act was said to have been taken to the police but the same was never produced in Court and nothing was mentioned by the witnesses on what the contents of the note were; further that, the lesso and the scarf which the appellants allegedly used to tie the complainant are said to have been presented to the police station yet they were never availed in Court.

18. Appellant's further cited **Criminal Appeal No.43 Of 2016. Alloyce Mumo Mwanzia Vs Republic [20171 eKLR)** where the Court was of the view that an assertion by a victim of defilement ought to be backed by some sort of physical examination to establish penetration with a view of sustaining a water tight case in the trial more so where there was no eye witness. That evidence adduced herein is the victim's word against that of the accused and if such proof was not necessary then any malicious person could accuse another of such an offence on the strength of the fact that his or her assertion could be taken as the uncontroverted evidence; that the Court held that penetration had not been proved and that it was unsafe to sustain the conviction.

19. Appellants submitted that there were also material contradictions in the evidence of the prosecution witnesses that goes to question their credibility. Counsel cited arears of contradiction as follows: -

> *a.* ***The P3 form filled and signed on 5/6/2014 by PW6 indicated that the complainant was 16 years old at the time of the alleged offence while the post rape care form filed on 3/6/2014 by PW7 indicated that she was 17 years old. The child health card also indicated that the victim was 17 years old at the time of the offence. The Birth Certificate on the other hand which was never produced at the trial court indicates that the victim was 19 years old at the time of the offence.***
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> *b.* ***At page 10, PW1 testified that she had a lesso around her waist and scarf on her head and that the perpetrators used the lesso to tie her hands and the scarf to cover her mouth while PW4, the officer from Menengai Police station testified that the complainant went to the police station and reported that she had been defiled at home on 03.062014 by three accused persons who blindfolded her and handcuffed her.***
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> *c.* ***PW1 the complainant told the court at page 10 that she was alone at home at around 11:30 am when three people came into the house and sat on the sofa and one told the other two to do it. On the contrary PW2 at page 16 told the court that the complainant told him what the accused persons found her in the kitchen and took her to the sitting room.***
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> *d.* ***PW1 testified at page 11 line 27 that she had never had any difference with the accused persons prior to that date while at page 23 PW4 the Investigation Officer testified that she said the 2nd accused person had been her teacher and had defiled her at an earlier date and therefore it was his 2nd time to do so.***
>
> *e.* ***PW1 at page 11-12 testified that she called her aunt and told her what had happened while upon cross examination at page 12, she stated that she called her uncle, who told her aunt to go home.***
>
> *f.* ***PW1 at page 11 stated that she was taken to Kabarak Hospital on Monday 2/6/2014, while the PRC form indicate that it was filled on 3/6/2014 at 4:30 pm at Kabarak Health Centre.***

20. Appellants cited the case of **Rankrishan Panoya Vs. Rep (1957) 339** where the Court of Appeal for Eastern Africa held that:-

> **"it is trite law that where the evidence is contradicted or inconsistent the court should not rely upon."**

21. In respect to identification, appellants submitted that the offence was allegedly committed on 1st June, 2014 at 11.30 am in a house belonging to PW2 where three men entered without knocking and submitted that this was an issue of identification as opposed to recognition.

22. Appellants submitted that if at all the complainant knew the accused persons, and one of them having been her tutor, then why didn't she give the names to the uncle in the first instance? Why did the uncle have to inquire to find out who had been seen going to the house if she had given them the descriptive features? And if the alleged perpetrators to the offence were not known to the complainant because if they were, then she would have given their names in her first report at [particulars withheld] AP Post. The appellants questioned how the complainant was only able to tell the names of the alleged perpetrators to the offence on 3rd June, 2014 when she made the second report at Menengai Police Station. That it was later alleged in the complainant's evidence that the accused persons were known to her and one of them even used to be her tutor yet she never gave their names when she first reported to the authorities.

23. Appellants further cited the case of **Kisumu Criminal Appeal No.159 of 1984 Alexander Nyachiro Moruga Vs Republic** where the Court of Appeal stated as follows: -

> **"In identification there should be no material discrepancy between the description given to the police and the one given to court".**

24. And submitted that there are very serious discrepancies between the evidence tendered in Court and the reports made to the authorities regarding description of the accused persons and the evidence of identification tendered by the prosecution witnesses was not conclusive as it was flawed and hollow.

25. On defence of *alibi*, the appellants submitted that the trial magistrate failed to take into account the defence of *alibi* raised by the appellants. That in respect to the first appellant **Evans Shem**, he told the Court that he was a student at Zetech College pursuing a course in Tourism. That at the time of alleged commission of the offence, him and his friend called **Avorio** had gone for sightseeing which was part of the course he was undertaking and came back at 2:00 pm yet according to PW1, she was allegedly defiled at 11:30 am; that his brother at page 45 line 13-14 states that on 1st June, 2014 they had a visitor called **Avorio** who left with his brother the 1st appellant and they were back home at 2:00pm and took lunch; and Avorio who testified as DW7 corroborated his evidence by stating that he was with the 1st appellant 1st

June, 2014 with whom they woke up together, did house chores, then left and went up the hill for a hike and were together for the whole day.

26. While the second appellant (**Onyango Sammy Juma**) in his sworn defence testified that at the time of the alleged offence, he was at Maseno University in Kisumu; that he was then in 2nd semester 3rd year and he produced a letter from Maseno University city campus (DExh.1) which confirmed that on 1st June, 2014, he was within the precincts of Maseno University in Kisumu and that he talked on phone with the police officer from Rongai AP post who told him to bring with him a letter of proof that he was away in Kisumu during the alleged commission of the offence which the 2nd appellant did and also availed DW2 who stated that he was with the 2nd accused person in school on 1st June, 2014 doing laundry and confirmed that the said accused person did not leave the school the entire day; that he also vailed DW3 who said that on the said date of 1st June, 2014 they were with the second accused person the entire day doing assignments in turns on laptop while others did laundry.

27. Counsel further submitted that DW4, the mother to the second accused person further testified that on 1 st June, 2014, she had travelled to Kisumu from Eldama-Ravine to visit her brother and the 2nd appellant had asked her to do some shopping for him; that she arrived in Kisumu at 4:00 pm and the 2nd appellant joined her the following day the 2nd June, 2014 at 7:00am when they spent the entire day together.

28. Appellants submitted that the evidence by the defence was never taken into account by the trial Court and no reason was given as to why the evidence was not considered and defence of *alibi* that was raised by the accused persons was never challenged by the prosecution.

29. Appellants cited **Criminal Appeal No.121 CA of Jane Nyamula Vs Rep (1933),** where the Court held that it is not enough only to set out a defence, but it must be considered in light of all evidence before the Court, and the Court has to explain why the defence is accepted or not accepted.

30. In conclusion appellants counsel submitted that the evidence tendered by the prosecution witnesses falls short of the required standard of proof, beyond all reasonable doubt, and the accused persons are entitled to an acquittal under **Section 215 of the CPR.**

RESPONDENT' S SUBMISSIONS

31. The state counsel submitted that the prosecution called a total of 6 witnesses who gave overwhelming documentary and oral evidence proving age, penetration and identification of the assailant being the ingredients of the offence herein.

32. In respect to age she submitted that the complainant testified that she was 17 years old; this was corroborated by PW2 her uncle who stated that she was 17 years old and PW3 the investigating officer produced health card as exhibit 3.

33. She submitted that the age of the complainant is an important ingredient of the offence of **defilement and cited the case of Kalungu Elias Kasono Vs Republic C.A Criminal Appeal No.504/2010** where the court stated as follows: -

> **"Age of the victim of a sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim"**

34. **Further that the P3 and PRC were produced as exhibit 1 and 2 respectively approximating the age of the complainant as between 16-17 years and** *cited the case of* ***Francis Omuroni –Vs- Uganda, Criminal Appeal No. 2 of 2000****, where the Court stated as follows: -*

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

35. She submitted that the health card that was produced before the trial Court emanated from a government health facility. The authenticity and the details in the health card were not challenged during cross examination by the appellants neither did the appellants raise any issue of the validity of the age of the victim and raising it now is an afterthought. She stated that in the absence of a birth certificate, the health card may be substituted to offer proof of age.

36. The state counsel submitted that on appeal, the accused persons produced a birth certificate alleging it was the complainant's and had not been produced at the trial Court.

37. She submitted that the appellants failed to disclose the following: -

a. *How they came to be in the custody of the certificate?*

b. *Did the accused persons follow due legal procedure of seeking a court order to retrieve the same from the Registrar of births?*

c. *Was there any official correspondence filed before the court indicating the accused persons had liaised with the Registrar of births?*

38. She submitted that upon verification after inquiries from their office, the Registrar of Births confirmed the certificate to be invalid due to the false entries and the document amounts to being an entire forgery in the eyes of the law; that the attempt by the accused persons to

present a counterfeit document to hoodwink the Court is duplicitous and a poorly orchestrated plot to circumvent the rule of law.

39. She submitted that the Court should caution itself from admitting this new evidence in the face of its glaring discrepancies. She urged Court to take into account the classic case of **Elgood Vs. Regina (1968) E.A. 274** where principles were laid down as follows: -

a. **"That the evidence that is sought to be called must be evidence which was not available at the trial.**

b. **That it is evidence that is relevant to the issues.**

c. **That it is evidence that is credible in the sense that it is capable of belief.**

d. **That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."**

40. Further that the learned **Judge Z. Chesoni** in **Wanje V Saikwa [1984] KLR 275** stated as follows:-

> **"The appellate court must find the evidence needful. It follows that the power given by the rule (rule 29 of the Court of Appeal rules) should be exercised sparingly and great caution should be exercised in admitting fresh evidence.''**

41. On penetration, the state counsel submitted that the element of penetration was proven at the trial court. The offence with which the appellants were charged was gang defilement contrary to **Section 10 of the Sexual Offences Act** which provide as follows: -

> **"any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life."**

42. She submitted that the accused persons aver that the charge sheet was defective and the offence of gang defilement is non-existent under the law but the Court interpreted the same in **Criminal Appeal 49 of 2017 Francis Matonda Ogeto v Republic [2019] eKLR:-**

> "**Under Section 10 of the Sexual Offences Act, the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist."**

43. She submitted that PW1 stated she was defiled by the accused persons, PW6 the doctor who produced the P3 noted that the injuries on the minor's private parts were consistent with penetration. She stated that PW6 was not the author of the P3 but laid the foundation before the trial Court on his competency to testify on behalf of the doctor who had filled the P3 as he stated he had worked with the author of the P3 and was familiar with his handwriting; and the accused persons did not object to PW6 testifying.

44. The state counsel further submitted that PW7 the doctor who filled the PRC physically examined the complainant and noted there was a broken hymen, lacerations on the labia minora and a foul smelling discharge and produced P3 as exhibit 1 and PRC as exhibit 2

45. On identification she submitted that PW1 reported that the incident took place around 11.30am and when the accused persons came into the house they did not conceal their faces; that PW1 immediately recognized the 2nd accused as she knew him well. He had been her tutor previously and pointed him in open Court addressing him by the name **Sammy Onyango**. She stated she had seen the 1st accused at the shopping centre on several occasions.

46. She submitted that PW2 sought out the 1st accused after description by PW1 and took him to their home where the complainant identified him. The 1st accused was identified a second time when he was arrested the following day and the complainant went to the station identifying him before PW4; that he 2nd accused surrendered himself to the police and was thereafter identified as well and PW2 testified that the accused persons before the Court were the persons who had been identified and arrested.

47. She submitted that PW4 the investigating officer confirmed the two accused persons were the same persons identified by PW1 and at the defense hearing, the 2nd accused admitted he had been the complainants tutor before the incident.

48. On allegations of grudge, she submitted that PW1 stated she harbored no grudge with the accused persons and the accused persons did not cross examine her on the same though at the defense hearing the 2nd accused stated the complainant had a grudge with him but did not give evidence of the claim.

49. She further submitted that the accused persons relied on *alibis* which were marred with conflicting particulars and contradicting testimonies from their witnesses; that DW2 and DW3 had no proof that they were with the 2nd accused on that particular date and DW4 the mother to the 2nd accused stated she only spoke to him on the phone that day but never saw him. She submitted that the accused persons

provided no proof that they were students at high learning institutions and where they were on the material day; that the accused persons' *alibi* were inconsistent in comparison to the prosecution witnesses who were convincing and credible. She urged Court to dismiss this appeal.

ANALYSIS AND DETERMINATION.

50. This being the first Appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind the fact that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first Appellate Court are set out in the case of **Okeno Vs Republic *[1972] EA 32*** where it was stated as follows: -

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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 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, (See Peters v. Sunday Post, [1958] EA 424.)"**

51. I have considered the grounds of appeal and evidence adduced in the lower court and find the following as issues for determination.

- **i. Whether the ingredients of the offence were proved beyond reasonable doubt**
- **ii. Whether the appellants defence was considered.**
- **iii. Whether the sentence was excessive and harsh**

(ii) Whether the ingredients of the offence were proved beyond reasonable doubt.

52. The appellants were charged with the offence of gang defilement contrary to **Section 10 of the Sexual Offences Act** which provide as follows: -

> **"any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life."**

53. Under **Section 10 of the Sexual Offences Act**, the ingredients of gang rape are: rape or defilement under the Act:-

a. **Unlawful sexual act committed in association with another or others or**

b. **Being in the company of another or others who commit the offence with common intention of committing the offence**.

54. This clearly mean a person may not have engaged in the act of defilement but was in company of another or others who engaged in the unlawful sexual act**.**

55. For gang defilement to be proved besides the above, the three ingredients of defilement being age of complainant, penetration and identification of assailant must be proved.

(a) **Age of the complainant**

56. PW1 in her evidence said she was 17 years old when she testified on 24th September 2014. As per the charge sheet, the offence was committed on 1st June 2014. Her age as per the charge sheet is 17 years. The prosecution in the trial Court produced PW1's immunization card as exhibits 3 which indicates PW1 was born on 16th October 1997. PW2 who was the complainant's guardian also testified PW1 was 17 years. The child health card produced by the prosecution at the time of the trial was not challenged despite the fact that the appellant had the benefit of being represented by an Advocate.

57. The appellant through an application dated 18th April 2018 introduced a copy of birth certificate certified by the County Civil Registrar of Kericho which shows she was born on 16th October 1995. The appellants' argument is that the trial magistrate erred in law and fact by failing to properly establish the age of the victim i.e through age assessment and/or birth certificate yet age of the victim was critical element to prove in respect to the offence of gang defilement/rape; and as per the copy of birth certificate produced she was 19 years.

58. PW4 the investigating officer in cross examination said the complainant has original birth certificate. The prosecutor applied for PW2 and PW3 to be called to produce birth certificate. The birth certificate was not produced in court.

59. I have seen and note that the birth certificate produced by the prosecution was certified as true copy of the original. It bears the names **CCT**. The health card bears the name **CC**. The mother's as per clinic card is **JC** and father **TC**. Mother's name in the birth certificate is **JMS**. There is variance in the names indicated in the clinic card and birth certificate. The birth certificate was not subjected to cross examination to determine its authencity but the clinic card was produced in Court and the appellants who were represented by an Advocate

never raised any challenge on its authencity. No explanation has been given as to why the appellants never sought to produce the birth certificate at the time or seek summon to issue to registrar of births and deaths to confirm record on age of the complainant. I note that the treatment card, P3 and PRC forms all indicate complainant's age as 17 years. I cannot therefore agree with the contents of the birth certificate introduced by the appellants. The appellants' submissions on age fail.

60. In the instance case the appellants were charged with gang rape/defilement contrary to **Section 10 of the Sexual offences act** which provides as follows

> **"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."**

61. In **Joseph Maina Mwangi Vs. Republic Criminal Appeal No. 73 of 1993,** the Court of Appeal held-

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."**

(b) **Prove of penetration**

62. **In respect to penetration, Section 2 of the Sexual Offences Act** defines penetration as:

> **'the partial or complete insertion of the genital organs of a person into the genital organ of another person."**

63. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** on the aspect of penetration held as follows:-

> "**In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.**"

64. PW7 a doctor at Kabarak Health centre examined PW1 on 1st June, 2014 and noted vaginal whitish discharge with foul smell, laceration on vagina walls and libia minora and broken hymen. She filled the PRC form. Pw6 testified and produced the p3 form as exhibit 1 and stated there was evidence of penetration as per the finding in the p3 form.

(c**) Identification of the perpetrator;**

65. It is the testimony of PW1 that it was on Sunday when she was doing her household chores and her aunty was away. At around 11:30 am three men walked into the house without knocking and sat on the sofa in the seating room. They tired PW1'S leso on her hands and her scarf was used to cover her mouth. She testified that the 2nd appellant **Sammy Onyango** unzipped his trouser, removed it put her to lie on the floor and inserted his penis into her vagina. After that he put her on the chair asked her to read a letter which they had asked her to read before the act then tied her to the chair and left. She said among the 3 men she knew one the second accused **Sammy Onyango** who is 2nd appellant herein. She said the 3 men took about 30 minutes in the house.

66. Second appellant confirmed that the complainant had been her student and that he had known her 3 months before the incident. He said he was last in OL Rongai in December 2013. His witness said he was his college mate in Maseno and they were in college on 1st June 2014. DW3 also said he was studying with second appellant in Maseno University and on 1st June, 2014 they were doing assignments together using a laptop in turns. He said second accused received a call that he was wanted by police for having committed an offence and he was forced to travel. DW4 his mother said he communicated with him on phone on 1st June, 2014 but they did not meet on that day though second appellant told him he was in college.

67. No evidence was however produced to confirm that second appellant and his witnesses studied in Maseno University and that on 1st June, 2014, they were in college as alleged.

68. I however note from the evidence on record that the complainant never gave 2nd accused/appellant's name to his uncle shortly after the accident; she stated that her uncle inquired who had been seen going to the house. She added that the 1st accused was arrested and she identified him when her uncle went home with them at 8pm.

69. The fact that the complainant never gave second appellant's name whom she knew and description of 1st appellant whom she had seen severally in the trading centre, raises question as whether she truly identified the two at the time of the incident. Why would the uncle inquire people who had been seen coming to their house if one of them was known to the complainant? Why wouldn't she give out the second appellant's name? Why did she wait until the suspects were arrested and taken to her aunt's house to identify them?

70. PW3 who received complainant's report at Ol Rongoi Police Post in examination in chief said that upon receiving report, he advised the complainant's uncle to take her to hospital and the following day, they went to accused persons' home on information from members of public. In cross examination he said that the complainant reported that she had been accosted by 3 men whose names she did not know; in re-

examination he said the complainant did not know their names but she could recognise them. The question that arise is, why did he rely on information by members of public if the complainant recognised the assailants. In re-examination PW3 said that the complainant did not know their names but she could recognise them yet PW2 the complainant’s uncle said the complainant gave him the second accused’s/appellant’s name. The question is, who was to be believed by the Court. The two contradicted themselves.

71. And in respect to accused 1, the complainant said she only knew one of the three suspects Accused 2 meaning she did not know the 1st accused. She later said she used to see the 1st accused in the shopping centre but had not spoken to him. There is no doubt that she contradicted herself in her own testimony. It is not clear whether she knew or identified the accused. And if it was identification, there is no indication that she gave description of the 2nd accused before he was taken to her uncle’s house after arrest. If it was identification, then identification parade should have been conducted to confirm whether the person arrested was the same one identified by the complainant. Even though the incident occurred during the day as per evidence adduced, the complainant in her testimony said she identified one of the 3 suspects but as observed above, she did not give his name until the uncle took him to his house in the evening. In cross examination she said 1st accused had been her tutor yet in her examination chief she had not identified him but only identified second accused. No identification parade was done in respect of first accused. In my view, the complainant’s evidence creates doubt on identification which should have benefited the 1st accused/appellant.

72. From the foregoing, there is doubt in evidence of identification of the perpetrators. This doubt should have gone to benefit the appellants herein. It is crucial for all ingredients of the offence of defilement to be proved in the offence herein. Failure to prove any one of the ingredients the charge cannot stand. I therefore allow this appeal.

73. Having found that there existed doubt on identification of assailants, I will not go into the appellants’ submissions as to whether defence *alibi* was considered.

74. **FINAL ORDERS:** -

1. **Appeal is allowed.**

2. **Appellants to be set free unless lawfully held.**

Judgment dated, signed and delivered via zoom at Nakuru

This 23rd day of September, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Cheloti Advocate for Appellant

Rita for Respondent