REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 94 OF 2019

MARK MAKOANI MUSYOKA *alias* PAUL.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. E. Muiru (PM) in Kilungu Principal Magistrate's Court Sexual Offence Case No. 26 of 2018 delivered on 14th may, 2019).

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 28th day of May 2018 at Ilima location, [particulars withheld] village, Kilungu sub-county within Makueni county, the Appellant intentionally caused his penis to penetrate the vagina of **ENK**, a child aged 12 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the said date and at the same place, the Appellant intentionally touched the vagina **ENK**, a child aged 12 years with his penis.

3. The Appellant was convicted on the main charge and sentenced to twenty (20) years imprisonment.

4. Aggrieved by that decision, he filed this appeal through the firm of Kyalo Muia advocates citing the following grounds.

a) That, *the trial Magistrate erred in law and fact by failing to observe that the court was duty bound to make an independent opinion in relation to the burden of proof and not to shift it to the Appellant as there was no credible evidence to prove penetration.*

b) That, *the learned trial Magistrate erred in law and fact in convicting the Appellant against the prosecution's evidence and when there was no evidence to connect the Appellant to commission of the offence.*

c) That, *the learned trial Magistrate erred in law and fact by convicting the Appellant when there was no corroboration on the evidence of the complainant and without warning itself of the danger of acting on the uncorroborated testimony of the complainant.*

d) That, *the learned trial Magistrate erred and misdirected himself in failing to find that the burden of proof in criminal cases is beyond reasonable doubt.*

e) That, *the trial Magistrate erred in shifting the burden of proof to the Appellant and finding that he had a duty to discharge to court.*

f) That, *the trial Magistrate erred in law and fact by failing to evaluate the evidence as a whole and as a result reached a decision which was insupportable having regard to the entire evidence adduced.*

g) That, *the learned trial Magistrate erred in law and fact by convicting the Appellant to twenty years without proof of the complainant's age.*

h) That, *the trial court erred in law and fact by not discrediting the evidence of the prosecution witnesses which was full of contradictions ad inconsistencies.*

i) That, *the trial Magistrate erred in law and fact by failing to consider the alibi defence.*

5. A summary of the case before the trial is that ENK aged 12 years testified on oath. She lives with her grandmother (Pw2). She stated that on 28th May 2018 around 6:00 pm she was from Kyambeke headed home, when she saw the Appellant whom she knew as a boda boda rider. He was carrying another person but he returned and offered her a lift. He took her past the road to her home to a place up the hill. While there he stopped and removed her from the bodaboda and forcefully removed her clothes, and even tore her skirt (EXB1). He also removed her pant and played sex with her.

6. She then went home and stayed until Thursday 31st May 2018 before going to hospital. 28th May 2018 was a Monday. She did not inform Pw2 about the incident. The matter was later reported to the police by ENK, Pw2 and Pw3.

7. In cross examination she said she had tried to alight from the bodaboda in vain as the Appellant held her leg. She bled a lot after the encounter the next day. The Appellant gave her Kshs.100/= and told her to inform no one. She however informed Pw3 who had asked her to confirm what he had heard.

8. Pw2 **JNM** is Pw1's grandmother. She said Pw1 disappeared from home on 28th May 2018 and returned at about 7:30 pm. She refused to tell her where she had been. The next day she woke up and left and same to Wednesday (*30th May 2018*). On this day, the Appellant came to her home with another boda boda operator and he was asking for forgiveness. The matter was reported to the police after Pw1's hospital visit. Again the Appellant's father and sister came asking for forgiveness. They asked for Pw1's father's number.

9. In cross examination she said when Pw1 returned home she was not happy and she did not check her clothes. She received reports from Pw3 (***PMK)*** and Pw4 (**JMM**) in respect of Pw1's movement on 30th May 2018 and findings. She learnt that the child had been going to hospital.

10. Pw3 **PMK** met Pw1 on 30th May 2018 at 9:00 am. He asked where she was headed to but she refused to talk to him so he called Pw2 and informed her. On Pw2's request he followed Pw1 and found her at Kyambeke clinic talking to a medic over a defilement.

11. Pw4 **JMM** said he had on 28th May 2018 6:30 – 7:00 pm met the Appellant carrying Pw1 on his motorcycle headed to Kyakatoni. Pw4 was on his motor bike headed to Kyambeke. Pw2 called him at 8:30 pm to inquire if he had seen Pw1. He explained to her what he knew. Later he met the Appellant at Pioneer shop and inquired about Pw1. On 30th May 2018 he learnt about the defilement from Pw2 and advised her to report.

12. Pw5 **EK** filled and produced the P3 form EXB1. Using the treatment notes and PRC forms (*which were not produced*) he found that the child had been defiled. This was on 1st June 2018.

13. Pw6 **No. [xxxx] Inspector Alice Muhigi** was at Kilome police station on 1st June 2018 when she received a report of defilement from ENK and Pw2. ENK explained her ordeal at the hands of the Appellant. She recorded their statements and took ENK to Kilungu hospital where a P3 and PRC forms were filled. Defilement was confirmed. She produced the skirt and pant of ENK (EXB1 and 2). EXB1 was blood stained.

14. When placed on his defence the Appellant gave a sworn statement and called three witnesses. He denied the charge explaining his movement on 28th May 2018. He picked Dw2 **GMM** at 10:00 am after ferrying a passenger to Nunguni. He brought Dw1 to Wote and waited for him upto 3:00 pm when he brought him to Kyambeke. He was again called by his sister Dw3 **MMM** to pick her at Mashokani area where she was working. He dropped Dw2 at 6:00 pm and left to pick Dw3. They took tea and left Mashokani at 7:30 pm arriving home at 8:20 pm.

15. He again went to drop another passenger then finally dropped Dw2 leaving his home at 9:00 pm. He said at the alleged time of incident he was with Dw3 and her boss and he never saw ENK. That Pw3 and Pw4 are fellow bodaboda men who are jealous of him for having very many customers. He also said Pw2 and Pw3 are not related as claimed. He added that despite the alleged treatment he never saw any documentary proof of the same.

16. In cross examination he said he did not know ENK and he had no personal grudge with Pw3 and Pw4.

17. Dw2 **GMM** gave similar evidence to that of the Appellant. He said the Appellant is his customer for over four years and he carried no passenger to Mashokani.

18. Dw3 **MMM** is an elder sister to the Appellant. She stated that on 28th May 2018 she had been called by her nanny over her sick child. She looked for the Appellant at 3:30 pm to pick her so that she could take her child to hospital. The Appellant was by then in Wote. He arrived in Mashokani at 6:45 pm. They left at 7:15 pm after the Appellant had taken tea. They arrived home at 7:50 pm and the Appellant told him of a passenger he was to take home. It was her evidence that it was not possible for him to defile a girl for 30 minutes and still pick her.

19. Dw4 **CK** was Dw3's employer. She confirmed Dw3's evidence of the Appellant coming to pick Dw3 from her place and tea was made for him. Later Dw3 called to tell her they had arrived home.

20. The appeal was canvassed by way of written submissions which were duly filed by both parties.

21. With regard to grounds **(a), (b), (c), (d)** and **(f),** learned counsel Mr. Kyalo for the Appellant submits that penetration was not proved by evidence. He submits that a broken hymen is not proof of penetration as it can be broken due to many other factors. He relies on **P.K.W –vs-**

Republic [2012] eKLR where the Court of Appeal expressed itself as follows;

> *"In their analysis of the evidence on record, the two courts below…..appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse? Hymen also known as vaginal membrane is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury and medical examinations. The hymen can also rupture when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics; there can also be a natural tearing of the hymen."*

22. He submits that the issue of blood oozing out of the vagina can be attributed to other factors like monthly menses which happens to girls in puberty. He contends that the evidence of penetration was not conclusively determined and cannot be said to have been sufficient corroboration in terms of section 124 of the Evidence Act.

23. Although not raised as grounds of appeal, the Appellant submits that there was noncompliance with section 77 of the Evidence Act and that the prosecution failed to procure essential witnesses to prove basic facts. He submits that the Post Rape Care (PRC) form and treatment notes were used to fill the P3 form and the defense objected to production of the P3 form as an exhibit because Pw5 was not the maker. He wonders why the prosecution did not avail the medical officer who initially treated the minor yet he was a known individual. He relies on **Chuka HCCRA 10 of 2017; Kenneth Mwenda Mutugi –v- Republic [2019] eKLR** where the Court held that;

> *"25. Going by the above decision, it is apparent that the production of the treatment chits at the trial (P exhibit 3) Post Rape Care Form (P Exhibit1) by the Investigating Officer at the trial infringed on the rules of evidence as stipulated under* ***Section 33*** *of* ***Evidence Act*** *because the Investigating Officer was not an expert in the medical field and therefore rendered the evidence hearsay and of little or no probative value."*

24. He submits that failure to call the medical personnel was prejudicial to him and would mean that the medical report lacked authenticity and should not be relied on to corroborate the case against him. It is also his submission that he was denied the opportunity to cross examine the witnesses on matters that arose from their findings.

25. With regard to grounds (e), (g), (h) and (i), the Appellant cites ***Criminal Appeal No. 504 of 2010; Kaingu Elias Kasomo –vs- R*****epublic** where the Court of Appeal stated that;

> *"Age of the victim of 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 cases 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."*

26. It's his further submission that there are contradictions and inconsistencies in the evidence of the Pw1, Pw2, Pw3 and Pw4. He contends that Pw1 is not a credible and truthful witness and her testimony should be discredited. He relies on the case of **Kimani Ndung'u –vs- Republic (1979) I KLR** where the Court of Appeal stated that;

> *"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."*

27. Counsel submits that the trial court rejected a cogent defense case and contends that the onus was on the prosecution to adjourn the proceedings so as to bring evidence to rebut his *alibi* but the trial court ignored that and held that witnesses could not be sent back simply because the accused person had come up with an *alibi*. He relies *inter alia* on the case of **Adedeji –vs- The State (1971) 1 all N.L.R 75** where it was held that;

> *"Failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the Tribunal and lead to the quashing of a conviction imposed."*

28. In conclusion, he submits that the prosecution case fell short of what could have justified a safe conviction in that it was not proved beyond reasonable doubt.

29. The appeal was opposed by the Respondent through learned counsel M/s Gitau. On grounds (**a), (b), (d), (e)** and **(f),** she submits that penetration was proved beyond reasonable doubt by both oral and documentary evidence. That the complainant testified that her vagina was penetrated by the Appellant using his penis and the panties that she was wearing on the material day were blood soiled and were produced as evidence. Further, that the evidence of the clinical officer (Pw5) was that the hymen was broken, the perforation was fresh and blood was oozing from the vagina.

30. She also submits that the Appellant was positively identified as the person who defiled the complainant. She cites *inter alia* the case of **Miller –vs- Minister of Pensions 1942 AC** where Lord Denning held as follows;

> *"It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of a doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course*

of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

31. On ground **(c),** Counsel submits that the complainant's evidence was corroborated by the medical evidence which showed that there was fresh perforation of the hymen and that the element of the perpetrator of the offence was corroborated by the evidence of Pw4 who testified that he saw the Appellant carrying the complainant on the material day. It is also her submission that the Appellant placed himself at the scene of crime on the material date and time. Further, she submits that section 124 of the Evidence Act does not make corroboration mandatory in sexual offences involving children.

32. On ground **(g),** she submits that the age of the complainant was proved to the required standard and that section 8(3) of the Sexual Offences Act stipulates a mandatory minimum sentence for a person convicted of defiling a child aged between 12 and 15 years. She submits that the evidence of the complainant and Pw2 was that she was born in October 2016 hence 11 years and 8 months at the time of the offence. She also submits that the medical documents indicate that the complainant was 12 years and contends that age may be proved by parents, guardians and observation.

33. On ground **(h),** she submits that the prosecution evidence was cogent, consistent and credible. She contends that even in cases where there are inconsistencies, they do not all amount to rendering the prosecution case as falling below the required standard of proof. She relies on **Munene –vs- Republic (2018) eKLR** where the Court of Appeal held that;

"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

34. Finally, on ground (**i**) she submits that although the Appellant raised the *alibi* defence early enough, he, in the same breath, admitted that he offered the complainant a lift on his *boda boda* on the material day and time. She submits that the *alibi* defence was thus displaced by the evidence of the witnesses who placed him at the scene.

Analysis and determination

35. It is now settled that the duty of a first appellate court is to scrutinize the evidence on record afresh, make its own findings and draw it's own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. In **Kiilu & Another –vs- Republic (2005) I KLR 174** the Court of Appeal stated thus:

(2) ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***

(3) 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 courts' findings and concussions' 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.

36. Having considered the grounds of appeal, the rival submissions and the entire record, it is my considered view that the only issue for determination is whether the offence of defilement was proved to the required standard.

37. Section 8(1) of the Sexual Offences Act defines defilement as:

"*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".*

Further **section 2** of the said Act defines penetration as:

"The partial or complete insertion of the genital organs of a person into the genital organs of another person".

Section 8(3) of the Sexual Offences Act under which the Appellant was also charged provides:

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

38. Considering the above provisions, the court finds that for a charge of defilement to be proved the following ingredients must be established:

i. Age of the complainant

ii. Penetration of the minor's genital organs.

iii. Identification of the perpetrator.

Mr. Kyalo raised the issue of contradictions and inconsistencies and I propose to deal with it as I address proof of the ingredients listed above.

Proof of age

39. This particular issue was well handled by the learned trial Magistrate who appreciated the importance of the age of the minor being established because of the penalty provision. Referred to is the case of **Francis Omuroni –vs- Uganda Criminal Appeal No. 2 of 2000; and JWA –vs- Republic (***Court of Appeal Nairobi***) Criminal Appeal No. 100 of 2013)**.

40. The trial court which saw and heard the complainant conducted a *voir dire* examination for her confirming she was a child of tender years. He referred to Pw2 who said the child was born in October 2006 and the P3 form (EXB1) which showed her estimated age as 12 years. ENK said she was born on 15th October 2006. The defence did not raise any issue about the age in both the lower court and in this appeal.

41. My finding is that the issue of age was settled and the minor's age proved to be 12 years as stated in the charge sheet.

Penetration of the minor's genital organ and identification of the perpetrator

42. ENK is a child aged 12 years. In her evidence in chief and in describing what happened to her this is what she told the court at page 12 lined 11-16:

> *"He removed my clothes and forcefully. He tore my skirt. I was wearing a brownish skirt which he tore. He also removed my pant. He forced me to sleep with him. He forced me into paying sex with him. After finishing, I went home. Stayed until Thursday, when I went to Kyambeke hospital."*

43. From this narrative, its clear that Pw1 did not explain to the court what was done to her in terms of the offence the Appellant was charged with. The court and prosecution have a duty to always ensure this is done and avoid assumptions being made by both of them. Upon evaluation of the evidence I have noted a number of inconsistencies and contradictions which I wish to highlight.

44. According to ENK she felt pain after the defilement and bled much. She did not wear the pant after being defiled but wiped herself with it hence the blood on it. She walked slowly back home and found her grandmother (Pw2) who saw her but did not see the blood. ENK contradicted herself on further cross examination by stating that the bleeding started in the morning after the incident. The offence is said to have occurred on 28/05/2018 hence the morning after the incident was 29/05/2018.

45. The clinical officer (Pw5) testified as follows;

> *"There were no physical injuries on her body. On examination of her genitals, the hymen was broken. There was blood oozing from the vagina. The perforation was fresh. From the injury on her vaginal area I concluded that the girl had been defiled."*

46. Pw5 examined the complainant on 01/06/2018 and filled the P3 form on the same day. On cross examination, he agreed that he relied on the outpatient card to conclude on the blood presence. He agreed that no blood was oozing at the time he examined her. It is noteworthy that the treatment notes from Kyambeke clinic were never produced in evidence hence quite obvious that Pw5's evidence on the presence of blood was hearsay.

47. ENK testified that she stayed home upto Thursday when she went to Kyambeke clinic. She stated that; *"I went for a check up on 31/05/2018. I had gone to the hospital to confirm whether I had engaged in sex."* On the other hand, her grandmother stated as follows; *"On that day being Wednesday, the child had left and had been headed to hospital."* Wednesday was 30/05/2018. These two witnesses were living in the same house hence it does not add up that they could not be consistent on the date that Pw1 visited Kyambeke clinic. Further, the absence of Kyambeke treatment notes makes it impossible for this court to know the exact date that the complainant went to the clinic.

48. It was also ENK's evidence that she did not go to any place on 29th and 30th but her grandmother had this to say;

> *"I do recall on the 28/5/2018, I was staying with my grandchild E. She had disappeared from home from morning. She came back late at around 7.30pm. I asked her where she was but she declined to inform me. The following day, she woke up and left. Wednesday, she again left."*

49. Firstly, the grandmother contradicted ENK about not leaving home on 29th and 30th May 2018. Secondly, the grandmother contradicted her own evidence that ENK had gone to Kyambeke clinic on 30th May 2018.

50. Further, ENK's testified that she met her uncle, PMK (Pw3), on Thursday and he was the first person she informed about her ordeal. The grandmother however said that Pw3 was just a neighbor. On his part, Pw3 testified that he met with ENK on 30/05/2018 at around 9:00 am and on enquiring where she was heading, ENK refused to talk to him.

51. Firstly, there is the question of whether Pw3 was an uncle or just a neighbor to ENK. Secondly, there is a contradiction on whether ENK and Pw3 met on wednesday or thursday, thirdly, Pw3 contradicted Pw1's account of not leaving the home on 30th, fourthly, if ENK refused

to talk to Pw3, how can Pw3 have been the first person to be informed yet she allegedly proceeded to the clinic and talked to the Medics? Further, the grandmother testified as follows;

> *"I was informed by PM who had seen her going to the hospital. Yes, P interrogated my granddaughter who informed him that she was going to the hospital."*

52. This is contradictory because Pw3's evidence was that ENK refused to talk to him. Further, ENK testified that during her encounter with Pw3, he told her that the Appellant had revealed the defilement in the market and he was therefore making an inquiry. From the evidence of Pw3 however, it does not appear that they had any other conversation after ENK refused to talk to him. Pw3 testified as follows;

> *"The case involves the daughter of NK. I met her daughter headed to Kyambeke at around 9:00 am. She was alone. I asked her where she was heading but she refused to talk to me. I called the grandmother via my mobile phone. I informed her that the granddaughter was therein. She was a school girl..."*

53. There was also the evidence of the grandmother to the effect that the Appellant visited her home to ask for forgiveness while in the company of another *boda boda* operator. From the evidence, the visit was on Wednesday, 30/05/2018. On cross examination, she said that the people who went to her home were; the Appellant, Nyamai and Mutia. This raises the question as to the number of people who visited her home to ask for forgiveness.

54. It is interesting to note that despite being at home at the time of the alleged visit, as per the grandmother's evidence, ENK did not mention it anywhere in her evidence in chief. In my view, that particular event was too conspicuous to escape mention by the complainant. It is also interesting to note that the visitors did not inform the grandmother why they needed the forgiveness. According to her, she found out about the offence at Kyambeke police station on Thursday, 31/05/2018.

55. Having critically analyzed the prosecution case, the inevitable conclusion is that ENK was not a truthful witness. Her evidence creates an impression in the mind of the court that she is not a straight forward person especially in light of the fact that the rest of the prosecution witnesses did not corroborate her evidence.

56. The medical evidence did not corroborate her account because the initial treatment notes from Kyambeke clinic were never produced yet Pw5 relied on them heavily to fill the P3 form. He appears not to have done his own examination. It is also noteworthy that even her grandmother painted her as a stubborn child who would leave home at her own will and Pw4 testified that the grandmother gave them a story of how the girl had disturbed her.

57. The presumption that arises is that the initial treatment documents were left out for being contrary to the prosecution case. As much as the prosecution has the liberty to determine the witnesses and exhibits to produce in a case, the circumstances of this case are such that the omission of medical personnel and documents from Kyambeke clinic was fatal to the prosecution's case. The reason is that ENK did not seek treatment immediately hence the need for these documents. In **Paul Kanja Gitari –vs- Republic (2016) eKLR** the Court of Appeal expressed itself as follows;

> *"The state of the evidence tendered with all its inconsistencies means that the Appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for proof of a fact. See section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the Court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case."*

58. It is noteworthy that the only exhibits produced by the prosecution were the P3 form, the torn skirt and the inner wear. Having discredited the medical evidence, the clothes, which were surrendered to the police approximately five days after the alleged offence, do not mean much on their own. In holding that penetration had been proved, the trial Magistrate expressed himself as follows;

> *"All in all, the evidence presented by the complainant which was corroborated by the medical evidence as well as the clothing tendered herein was indicative of penetration beyond iota of doubt. I do therefore hold the issue of penetration as established and proved beyond any shadow of doubt."*

59. My re-evaluation of the evidence however leads to the inevitable conclusion that penetration was not proved to the required standard.

60. There are other aspects of the prosecution case that raise questions in the mind of the court. For instance, ENK testified that at the time of boarding the Appellant's motor cycle, there was another pillion passenger. She painted a very dramatic picture of how she struggled with the Appellant as he sped away with her to *Iviani kwa mita* hill where he defiled her. She talked of how she tried to alight but the Appellant held her leg.

61. She also testified that there were people along the road but she did not scream because there was an alternative route to her home in that direction. She never said if they ever came to that alternative route. The evidence does not show that the pillion passenger ever alighted hence raising the question as what his exact role *(if any)* was. Was he an accomplice? If yes, why was he not charged? If he was not an accomplice, why didn't he help ENK?

62. It is intriguing that ENK returned home within 30 minutes after the ordeal and despite bleeding much, the grandmother did not notice the blood, nor the strange walking style despite her evidence that she was walking with her legs apart. It is also intriguing that a perpetrator of such a serious offence would reveal himself in the market and visit the victim's home to seek forgiveness, with no action being taken. Further ENK testified that the Appellant slept on her at a place which had soil and no grass but she was not injured at the back.

63. In addressing the concerns raised by the Appellant on this aspect of the evidence, the trial Magistrate expressed himself as follows;

> *"The claim by the defendant's counsel that the fact that the complainant was made to lie on the ground before the encounter and did not have an injury on the back was a proof that she was a liar cannot be true. One wonders from which school of thought such holding was based. There are people sleeping at Uhuru park every day on the ground with no injuries noted. People have slept on grass or ground before and no injuries have ever been noted."*

64. From the totality of the prosecution's case, I do not think that the concerns raised by counsel were idle. I am also of the view that there is a big difference between lying on the ground voluntarily and being forcefully pinned down.

65. Before the prosecution presented its case, the Appellant's counsel notified the court that the Appellant would raise an *alibi* to the extent that he offered a lift to the complainant on the material day and dropped her at the junction near her home at 6:10 pm. According to him, he was not with the complainant at 7:00 pm when the offence is said to have been committed.

66. It was Pw4's evidence that he is a boda boda operator and on 28th May 2018 at 6:30 – 7:00 pm he had met the Appellant at Mutitonini headed to Kyakatoni. The Appellant was carrying ENK. By 8:30 pm she had not reached home. He later met the Appellant who told him that him that he dropped ENK at Ntumbuthi. This was at 8:47 pm. It did not bother him until 30th May 2018 when Pw2 called him asking if he had seen the girl (Pw1) and what she had heard. He said he had seen her with a lady called K, who did not testify.

67. The investigating officer in this case did not visit the scene of the alleged defilement Iviani kwa mita to satisfy herself of the distance between the place and the complainant's home. Is it a distance she could have walked and reached home in 30 minutes given the condition she describes to have been in? Did she satisfy herself that there were no surrounding houses at Iviani? I ask this because ENK did not mention this ordeal to anyone, even upon reaching home. This is among others unanswered questions.

68. In his evidence in court the Appellant denied knowledge of ENK or having seen her on the material day. These witnesses (Dw2 – Dw4) also supported him on the tracing of his movements that day. By all means, that was a contradiction by the Appellant. From the judgment the trial Magistrate's analysis of the evidence appears to concentrate much on the defence case. The analysis must always be balanced.

69. The evidence of the defence becomes an issue upon the establishment of a watertight prosecution case. The trial court appears not to have noticed any of the glaring inconsistencies and contradictions in the prosecution case. Had he done that he would have arrived at a more balanced decision.

70. ENK was the key witness in this case. Her evidence if found to be reliable even in the absence of medical evidence could under section 124 of the Evidence Act be used to found a conviction. I have found ENK's evidence not to be reliable and forthright. The Court of Appeal in the case of **Kiilu & Another –vs- Republic (2005) I KLR 174** said this as such a witness:

> ***(4) The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person od doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.***

71. Pw2 said it all about ENK. She stated that even on the 28th May 2018 the girl had disappeared from home that morning only to return in the night and did not talk to her. The fact of Pw4 seeing the Appellant carrying ENK on his motorbike that evening *per se* is not sufficient proof of him being the defiler. He may or may not be.

72. In light of these glaring inconsistencies and contradictions in the prosecution case and the unreliability in ENK's evidence, I find that the prosecution case was not proved beyond reasonable doubt. The Appellant will get the benefit of that doubt. It follows that the appeal has merit and is allowed. The conviction is quashed and sentence set aside. The Appellant to be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 12th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge