REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 44 OF 2018

IN THE MATTER OF THE APPELLANT

KENNETH NZAE.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal against the Judgment of the Resident Magistrate Hon. Wandia in Criminal Case No. 54 of 2013 dated 23.7.2018)

JUDGMENT

Kennneth Nzae Randu, the appellant was duly charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The brief particulars were that between the month of May and June 2013 at [Particulars withheld] Village in Magarini, Kilifi County, appellant intentionally and unlawfully caused his penis to penetrate the vagina of **TTM** aged 15 years. He pleaded not guilty and after a full trial the learned Trial Magistrate made findings on guilty, conviction and sentenced him to serve 25 years imprisonment.

Being aggrieved with both conviction and sentence he has appealed to this court to have the orders quashed and set aside.

The factual and evidence background of the appeal

The complainant **PW 1 TTM** testified that prior to this defilement she used to take milk to the appellant under instructions from her parents. In the course of that assignment, the appellant who was also a teacher in the same school made love advances to her which culminated in both having sexual intercourse severally between the month of May – June 2013. This relationship where they engaged in sexual experience continued whenever the appellant had the opportunity to deliver milk to the house of the appellant.

The complainant who testified that she was aged 16 years old did not seem to mind the canal knowledge of the appellant. She clearly, gave evidence on how in every incident an opportunity presented itself appellant would make the request for sexual favors from her and without hesitation before leaving the house, appellant caressed her accompanied with penetrative sex.

Further even more serious, the complainant adduced evidence to throw some light that sexual contact with the appellant occasioned to her conception of which she alleges him to be responsible for it. Given her condition it followed from her testimony that her parents became aware of it subjecting her to an interrogation to reveal the person responsible for the pregnancy. In order to prove existence of the pregnancy the complainant and **Rose** the children officer proceeded to the hospital to carry out a pregnancy which on examination turned out to be positive.

On this basis the matter was reported to Marereni Police Station for further action. **PW 2 PMT.,** the father of **Complainant (PW 1)** testified that he used to send her to take milk to the appellant, a teacher in the same school where she was a standard five pupil. From PW 2 testimony, he later realized an observation that his daughter PW 1 was pregnant. The next step he took was to inform her mother **PW 3 – LM** to inquire and find out who impregnated the complainant. PW 3 – continued discussing the issue with PW 1 who revealed that the appellant was responsible for the pregnancy. At that time PW 2 and PW 3 told the court that they sought assistance from the headmaster of the school who in turn referred them to the police station.

PW 4 Sergeant Samwel Ngere a police officer attached to Marereni Station testified as the investigator of the offence which was reported by PW 2 and PW 3 in company of the complainant. In his investigations, PW 4 told the court that witness statements recorded from PW 2, PW 3 and PW 5 on the circumstances of the offence, he also issued the P3 to the complainant which was duly filled by **PW 5 – Ibrahim Abdullahi** a clinical officer based at Malindi Hospital. In his P3 Form PW 5 certified that **PW 1 - TM** had a ruptured hymen and laboratory test on pregnancy to turnout positive. The medical age assessment **Exhibit 4** produced on behalf of **Dr. Ariba** opined that complainant was aged 17 years old. PW 5 further produced P3 as **Exhibit 3** confirming the pregnancy to be 20 weeks old with an estimate time of conception stated to be around March 2013.

At the trial, the appellant gave detailed history of his teacher – student relationship with the complainant. He also explained that the complainant through a request made to her parents – PW 3**,** she was tasked to deliver milk to his house. The appellant also testified that other teachers in the school received milk during the same time being supplied by the complainant. He denied that at any one time he had sexual intercourse with the complainant as alleged by the prosecution witnesses. Further in his statement of defence, appellant testified that he was made aware of the pregnancy by the father of PW 1 when he visited the school. It was the appellant narrative that on diverse dates, especially over the weekends between May- June 2013 he was either absent from school or away in Nairobi. In support of this he produced bus fare receipts as **Defence Exhibits 2.**

According to the appellant, the whole saga on sexual assault and pregnancy of the complainant, has been fueled by the non-governmental organizations involved in child protection within Malindi Sub-County.

The next witness for the defence was **DW 2 – Mary Madia** who told the court that she was well known to complainant and her former teacher, DW 1. In reference to the pregnancy, DW 2 gave evidence that at one time the complainant had identified **Kelvin Lewa, Jackson Karisa, Mwero Kitsao** and **John Tune** as the ones responsible for it. On this issue, DW 2 was emphatic that the appellant had no sexual relationship with the complainant.

Further **DW 3 – RK** a teacher at [Particulars withheld] School where the complainant was a pupil and appellant his co – teacher testified as follows; that while in the school he came to learn of the complaint reported by PW 2 to the headmaster involving the pregnancy of the complainant allegedly caused by DW 1. As to the question who was responsible, DW 3 alluded to a document written by the complainant mentioning the appellant and other boys as the ones culpable for the sexual relationship whose outcome was the pregnancy.

DW 4 – MK as a teacher in the same School with the appellant testified that she had been assigned by the headmaster to conduct internal investigations regarding the complaint from the parents of PW 1. In her evidence DW 4 stated, that other men besides the appellant were also alleged to have had sexual intercourse with the complainant.

DW 5 – SPK identified himself as a teacher with [Particulars withheld] Primary School. By his testimony DW 5 stated that when this matter came up he did interrogate the complainant who denied that the appellant was responsible for her pregnancy.

With that the prosecution case and the defence case was considered by the Learned trial Magistrate when she reached a verdict of guilty, conviction and sentence against the appellant. In sentencing the appellant, a term imprisonment of 25 years was imposed.

The Law, analysis and determination

On appeal to this court the appellant raised 9 grounds as formulated in the memorandum of appeal.

> 1. ***That the honorable court the learned magistrate erred in law and facts by convicting the appellant against the evidence tendered by both the prosecution and the defence.***
>
> ***2. That the honorable, Magistrate erred in law not properly considering the defence evidence and thus the issues raised therein, thus prejudicing the accused/appellant.***
>
> ***3. That the honorable magistrate erred in relying on the birth certificate wherein was applied for, at later date while the date or birth thus failing to properly determine the age of the alleged victim which is necessary in this case.***
>
> ***4. That the learned magistrate erred both in fact and in law in heavily relying on the medical evidence which was not proved against the appellant yet there was mention of other could be players in the commission of the offence.***
>
> ***5. That the honorable magistrate erred in holding that age was conclusively proven when there was different years by way of birth certificate assessment and oral evidence.***
>
> ***6. That on identification of the appellant, the honorable magistrate erred in holding that he was positively identified creating the impression that it was necessary in proving the offence having regard of the fact that there was no evidence connecting the appellant to the act complained save the victim's own words against those of the appellant.***
>
> ***7. That the honorable, the learned magistrate erred in law and in fact in finding that it was safe to rely on evidence of the victim alone while the medical evidence had probative value as to the involvement of the appellant.***
>
> ***8. That the learned magistrate from the tone of the judgement was prejudiced against the appellant on the basis that he was the victim's teacher and failed to see that there was evidence sufficient to cast doubts on the entire case in order to let the appellant benefit from the said doubts.***
>
> ***9. That the honorable magistrate failed and erred in meting out an extreme severe excessive and unconstitutional sentence despite the mitigation tendered.***

I restate that though the appeal on the face of it is based on the nine grounds, the key issues are:

> ***(a). whether the prosecution discharged the burden of proof beyond reasonable doubt in relation with the offence of defilement.***

(b). whether the appellant defence managed to rebutt the prosecution case with regard to the ingredients of carnal knowledge.

Grounds

On this issue the learned counsel on behalf of the appellant submitted that from the evidence adduced by the prosecution balancing with the defence case, it is apparent the burden of proof was never discharged beyond reasonable doubt. Further, counsel contended that in view of the fact the complainant had multiple sexual partners it casts a doubt as to whether indeed the appellant defiled her on the stated time and dates.

In this respect, learned counsel urged the court to evaluate the evidence of DW 2 who was a very close friend to the complainant. Learned counsel submitted and cautioned that far from the positive pregnancy test it was incumbent upon the investigating officer PW 4 to carry out a DNA test. He thought it was important to trace the identity of the foetus to determine whether the semen was that of the appellant. The Learned counsel submitted and urged this court to find that the case was not proved beyond reasonable doubt.

Based on the above, the duty for the prosecution under Section 107 (1) (2) of the evidence Act was to proof that the charge of defilement as framed against the appellant established the following elements:

a) That the complainant in this case had been sexually penetrated by the appellant.

b) That at the time of commencing the sexual act of intercourse the complainant was aged below 18 years.

c) That the person who had carnal knowledge of the complainant was the appellant.

Under Section 2 of the Sexual Offences the genital organ of a male expected to penetrate that of a female is the whole or part of the penis for purposes of culpability of the offence of defilement. Further in the same section, penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person.

The prosecution which has the burden of proving by direct and or circumstantial evidence that there was defilement against the complainant must also proof that the act was intentional and unlawful. Under the provisions of Section 43 (1) an act is intentional or unlawful if it is committed on any of the grounds stipulated herein under:

a) in any coercive circumstances,

b) under false pretenses or by fraudulent means,

c) or in respect of a person who is incapable of appreciating the nature of the act which causes the offence.

d) Abuse of power or authority to the extent that the person in respect of whom an act is conducted is inhibited from indicating his or her resistance in such an act or his or her unwillingness to participate in such an act.

It follows on this ingredient the provisions on terms of Section 124 of the evidence Act on corroboration and attended proviso where a trial court can convict in absence of corroboration shall apply in equal measure.

From the evidence of the complainant which was believed by the learned trial magistrate, she accounted for her movements and occurrence of sexual intercourse with the appellant.

According to PW 1, the appellant would have her sit in the bedroom, start with foreplay, removal of her clothes and pushing his penis to have sex with her. The complainant was brutally frank that these episodes of carnal knowledge with the appellant continued unabated for several weeks whenever she delivered milk to his house. It did not seem to bother her until when she missed her periods which later was confirmed through medical examination by PW 5 that she was 20 weeks pregnant. This evidence of the complainant being uneasy caught the attention of her parents PW 2 and PW 3. It would appear from the record that PW 2, PW 3 and the children rights organization took the approach of having the culprit arrested and charged with defilement. The police at Marereni were alerted, and did investigate the incident and settled on the appellant as the main suspect.

In this instant case, there was thus direct evidence from complainant that her sexual organs commonly referred as vulva and vagina were penetrated by the appellant. This qualifies the sexual act to fall under Section 8 (1) of the Sexual Offences Act. As the degree of penetration on diverse occasions its manifested from complainant pregnancy test. According to her, the appellant first touched her before undressing the clothes to proceed and have sexual intercourse.

As stated Section 119 of the Evidence Act the court presumes occurrence of the events which led to penetration of appellant male organ to the complainant female genital involving caressing the external area, the clitoris and other vital sensitive parts. The prosecution evidence adduced by the complainant *prima facie* establishes this stark reality of the sexual experience by the appellant with the complainant.

The appellant defence in his trial besides his own testimony called four witnesses in support of his defence and in all each of them came out exonerating him from ever having carnal knowledge with the complainant.

The complainant described the scene of the crime in greater detail. The fact on opportunity would have been availed to the appellant to commit the sexual act was not denied by his witnesses. It is not in dispute that the complainant delivered milk on several occasions to the

appellant. That was the time according to the complainant, appellant resorted in engaging with her to have sexual intercourse. This graphic details of how the offence was committed remained consistent throughout cross-examination by the defence counsel.

The medical report by PW 5 firmly found that the complainant hymen was raptured. His evidence and confirmation that the complainant was pregnant positively determined that she had been sexually penetrated and through emission of semen there was fertilization of the ovary. With exclusion of the appellant witness testimony, the only evidence which ought to carry the day on what happened on the diverse dates is that of the complainant.

It was at that time when the complainant happened to be in the house of the appellant, carnal knowledge could have taken place. None of the four witnesses were present at the scene when the stated sexual act took place. That therefore raised the question as to the probative value of the defence in discounting the existence of a romantic relationship between the appellant and the complainant.

The following extract from the persuasive decision from the Supreme Court of Zambia in **Nzofu v The people [1973] ZR 287** the court said:

> ***"Mere opportunity alone does not amount to corroboration, but the opportunity may be of such a character as to bring in the element of suspicion. There is the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration."***

Was there, then corroboration of the complaint's evidence in absence of the DNA? So far as the events of the incident were put in perspective by the complainant are concerned it forms a chair within the link substantively implicating the appellant with the crime. Besides the complainant testimony by itself, the medical evidence proved penetration of the genital organ of the complainant. The by-product of it was not necessarily part of the elements of the offence.

In response to this the net effect is that the prosecution adduced credible, and truthful testimony to prove the commission of a defilement beyond reasonable doubt.

The second element set to be proven by the prosecution was that of age. It is trite that under the Sexual Offences Act age of the victim must be established by direct or circumstantial evidence from the complainant, parents/guardians or upon expert opinion who assessed the age of the victim.

The law on the principles to be applied by the court when dealing with prove of age is now well settled. This can be seen interalia from a number of cases decided over time on this issue. See the legal principles in the cases of **Alfayo Okello –vs- Republic 2010 eKLR.** The Law, in effect means that if there is no proof of age, a charge of defilement may stand dismissed.

Mr. Mouko, counsel for the appellant submitted and attacked conviction mainly that age was not satisfactorily proved. His complaint was that the P3 and Age assessment report put the age of the complainant at 17 years.

Further, counsel submitted that the testimony of the complainant and PW 2 asserted that the complainant was defiled at the age of 15 years. It was also counsel's assertion that the learned trial magistrate failed to deny and appreciate the inconsistences on the age of the complainant.

In this case, it looks to me that appellant counsel is placing emphasis on expert evidence without appreciating the testimony by the complainant, PW 2 and PW 3 on her age to be 15 years.

In my view of the matter I am unable to come to the conclusion that expert opinion should carry the day when considered alongside other primary evidence to prove a fact in a case. The court in **Pravin Singh Dhalay –vs- Republic Criminal Appeal No. 10 of 1997** held as follows:

> ***"it is now trite law while courts must give proper respect to the opinion of experts, such opinions are not, as it were binding on the courts and the courts, must accept them and such evidence must be considered along with all other available evidence, and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."***

In the present appeal, although the defence consistently took the position that age was not proved, I cannot accept learned counsel's formulation on grounds that the complainant (PW 1) categorically stated she was aged 15 years at the time of the offence. That position was corroborated by her father who testified as PW 3. The prosecution further evidence to assess the age of the complainant by the clinical officer was unnecessary. Moreover, the issue on age in this case had been proved by the primary evidence the complainant herself as corroborated by PW 3. From the record the court was referred to the birth certificate which contained the age of PW 1. It was therefore a case to be determined on that evidence alone and not that of Age assessment report.

I further hold the view and rightly so that in a bid to produce expert evidence and before a trial court can rely on it, Section 77 (3) of the Evidence Act ought to be complied with to the letter. The basis of admitting such evidence without calling, the maker has to be laid by the prosecution with a notice to the accused to reserve the right to demand for the expert to testify as to the contents of the document.

The test of admitting expert evidence was expressly sited by the supreme court of Canada in the case of **Republic –vs- Mohan (1994) 2SCR** where the court set out four factors to be considered with regard to expert opinion:

a) ***Relevance***

b) ***Necessity in assessing the trier of fact***

c) The absence of any exclusionary law and

d) A properly qualified expert.

It cannot be denied therefore that Section 77 of the Evidence Act makes provisions for the basis to have expert opinion be produced by another expert or witness upon cogent reasons to guide the court in its exercise of discretion. That did not seem to be case here. The prosecution expert evidence on age assessment failed the threshold requirement of the law.

The trial magistrate was therefore wrong in relying on the evidence of the expert in place of that of PW 1 and PW 3 without any express reasons for that finding of fact. I endorse the decision by **Mwilu J, (as she then was) SCJ** in **Hillary Nyongesa –vs- Republic Eldoret CA 123 OF 2009**. Although learned counsel made reference to it, he omitted to give effect to the principle that age may be proved by the testimony of the guardian/parent. In my view the guardian/parent or victim evidence should be interrogated in the first instance before resorting to medical examination assessment of age. It is also in line with the principles in **Nyongesa's case** complainant's evidence or her parents on age should not be rejected by the trial court without a proper basis and reasons to be recorded by the learned trial magistrate. To me that is primary evidence.

In my view on this issue on age of the complainant, the learned Magistrate erred in law and in fact in rejecting the evidence by PW 1 and PW 2 to prove the element on age. However, the misapprehension does not vitiate the findings as the direct evidence availed superseded that of the medical report.

I wish to emphasize that age in sexual offences is meant to adequately address the appropriate sentence. At the end of summing up his defence, the appellant never alluded to the fact that he had reasonable believe that the complainant was at the time aged over 18 years old.

The other significant ground in this appeal is in respect of the defence of alibi. The question therefore, is on review of the evidence the appellant properly disclosed the alibi defence to counter the prosecution case that he was elsewhere when the alleged offence is stated to have taken place. It is trite in our criminal justice administration that an alibi defence must meet two conditions for it to be admissible. a). it should be given insufficient time to allow the prosecution to investigate its reliability and credibility, b). it should also be given with sufficient full disclosure with better particulars to enable the law enforcement agency to meaningfully investigate or call evidence in rebuttal. **(R v Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145).**

The principles in the persuasive case by the Supreme Court of Uganda in **Bogere Moses & Another v Uganda SC Criminal Appeal No. 1 of 1997** the court held as follows:

> ***"Court must base itself upon the evaluation of the evidence as a whole. Where the prosecutor adduces evidence showing that the accused was at the scene of crime and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time. It is incumbent on the court to evaluate both versions Judiciously and give reasons why, the other version is accepted."***

Having considered the prosecution witness number 1, the testimony by the appellant and arguments by his counsel whether or not the appellant travelled out of his house on the two specific occasions attended to by the complainant has not been contributed by production of the fare receipts. In my respectful view it was vital for the evidence of (DW 1) to be corroborated in all material particulars given the watertight and velacity of the evidence by the complainant.

The case of the appellant all along relying on some documentary evidence whose source is questionable alone cannot exonerate him that there was no evidence that he committed the offence. The scene of crime was his house. The focus on the scene and the production of any evidence must show precisely that he was out of the precincts of his house. The appellant has cast aspersions as to the credibility of the complainant testimony on the chain of events which ultimately led to the institution of the charge of defilement against him. I note that the prosecution key witness who was the complainant was able to render cogent identification evidence in respect of the appellant to connect him with the commission of the offence. Though there is no burden of proof on the part of the appellant to proof his alibi defence, in the instant case, the prosecution did place him at the scene beyond reasonable doubt. In **Festo Androa Asenua v Uganda Cr. App No. 1 of 1998**

> ***"We should point out that in our experience in Criminal proceedings in this country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

This appeal also raises an importance question as to the test to be applied when assessing evidence having regard to Section 124 of the Evidence Act which provides that

> ***"notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

In the case of **Makungu v R [2003] eKLR** the Court of Appeal addressing itself to Section 124 (1) of the Evidence Act stated as follows on

the requirement of corroboration on sexual offences.

> ***"The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls and is an infringement of Section 82 of the constitution of Kenya had repeated but with similar provisions under Article 27 of the new constitution on equality before the law and non-discrimination*** which held that

> ***"corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with Section 82 of the old constitution, new Article 27 of the constitution 2010"***

This decision prompted the legislature to cause an amendment to the Act to provide for the proviso as outlined above for a conviction to be entertained against an accused person on evidence of a single witness. Save that the court must be satisfied that the child witness was telling the truth.

In **Chiha v R [1967] EA 722** The court stated:

> ***"The Judge should warn himself of the danger of acting on uncorroborated testimony of the complainant, but having done so, he may convict in the absence of corroboration of he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the court is satisfied that there has been no failure of justice."***

In the instant case I was asked by Learned counsel to discard the testimony of the complainant in view of the fact that there was no DNA carried out by the prosecution to proof the person who planted the seed which conceived the alleged child.

I have examined the charge, evidence from the both sides and subsequent matters did not directly affect the case against the appellant. The facts which the Magistrate found and dealt with in her Judgment which led to the conviction were on the proof of the offence of defilement.

The first test which the Learned Magistrate was faced with relates to whether the complainant evidence was credible and sufficient to justify a conviction.

Secondly, and in addition to that testimony if need be opportunity to commit the offence and other circumstances corroborates the complainant evidence.

In the full view of all the evidence before the trial court, the weight of the prosecution evidence carried the day. That the appellant defence failed to poke holes which could rebut occurrence of penetration and his involvement as the principal offender.

In interfering with this ground, this court is clothed with jurisdiction as illustrated in the case of **Mbogo –vs- Shah 1968 EA93** where the withheld:

> ***"A Court of Appeal should not interfere with the exercise of the discretion of a Judge. Unless it is satisfied that the Judge in exercising discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and same as a result there has been injustice."***

Finally, an important point to note in this appeal the appellant was a person of authority as a teacher in the school the complainant used to attend classes as a pupil. It is easy to see why a romantic relationship could flourish and be maintained unabated and its obvious the pregnancy scenario brought matters to the public attention to trigger police action.

The other question to consider is whether appellant was positively identified as the perpetrator of the crime. The Court of Appeal in **Maitanyi –vs- Republic 1986 KLR 198 – 201** considered this question on identification and laid down the principles that guide courts on this issues; thus:

> ***"Although the lower court did not refer to the well known authorities (Abdalla Bin Wendo & another –vs- Republic 1953 20 EACA 166)*** followed as ***Roria –vs- Republic 1967 EA 583*** it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition.

> ***"Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a simple witness but this rule does not lessen the need for testing with the greatest care. The evidence of a simple witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is needed is other evidence. Whenever it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that evidence of identification although based on the testimony of a simple witness can safely be accepted as free from the possibility of error."***

Applying the above principles, the circumstances in this case by no stretch of imagination can amount to a fabrication to warrant a finding that appellant was not properly identified as having committed the offence against the complainant.

There was a whole relationship created starting with teacher – student thereafter an opportunity was created by **PW 2** and **PW 3** when they

assigned PW 1 duties of delivering milk to the appellant house. So that if we were to reconstruct the chain of events, the picture one gets is that **(PW 1)** had the time, opportunity and enabling surrounding circumstances to positively recognize the appellant.

In the face of favorable evidence on recognition and the appellant's alibi defence that the court should have looked elsewhere to nail the perpetuators of the crime is neither here nor there absolutely.

The appellant identification is without a doubt free from error or mistake as he was no stranger to the complainant. The proposition that on most weekends he was elsewhere than at the scene of crime odds no iota evidence to controvert prosecution case. So far as this appeal is concerned I find no reason to differ from the findings of the learned trial magistrate on both conviction and sentence. This appeal is devoid of merit and is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE