



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 11 OF 2017**

**COLLINS ONYANGO ALIWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against conviction and sentence in Criminal Case***

***Number 286 of 2016 the Principal Magistrate's Court***

***at Bondo delivered by Hon. M.Obiero(PM)***

***on 24th January, 2017)***

**JUDGMENT**

**Background**

1. The Appellant herein **COLLINS ONYANGO ALIWA** has filed this appeal against his conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act and being in possession drugs contrary to section 3(1) (2) of the of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1999. The offences are alleged to have been committed on 1.1.16.

**The prosecution's case**

2. The prosecution called 8 witnesses in support of the charges. PW1 **Z.A.O**, the complainant in the first count stated that she was born on 1.7.00 and was 15 and 6 months years old. She recalled that on 1.1.16 at about 3.00 am, she was walking home from church with E and M. That she branched off to go to the toilet and while there heard the other girls screaming. That suddenly, someone who threatened to kill her if she screamed blindfolded her and held both her hands from the back and led her away. That when the blind fold was finally removed, she recognized her assailant as Collins, the appellant herein. That appellant led her to a bush where he defiled her. That she later managed to escape and went to the home of Samuel to whom he reported the incident. That Samuel escorted her home and she reported the incident to her mother who escorted her to hospital and to the police station where she reported the matter the following morning. She stated that appellant was from her village and he knew him before the material date. It was her evidence that there was moonlight on the material date and that she had also recognized appellant's voice.

3. PW2, M.A.O who was in company of complainant on the material night stated that after complainant went to the toilet, someone she did not identify passed near where they were. That when she talked to the said person and he did not respond, they screamed and ran away.
4. PW3, complainant's mother recalled that complainant returned home from church on the material night in company of one Samuel and she reported that one Collins had defiled her.
5. PW4, Samuel Akongo recalled that at 4.00 am on the material night, complainant went to his home and informed him that someone had defiled her. That he escorted complainant to her home.
6. PW5 PC Maritim testified that he was in company of PC Katani when they arrested appellant on 5.3.16 and upon searching him recovered from him some plant material suspected to be bhang.
7. CPL Ngaire, the investigating officer testified that upon investigating complainant's report, appellant was arrested and a plant material suspected to be bhang was recovered from him and he later preferred the charges herein against him. He produced complainant's certificate of birth, exhibit memo form and the bhang as PEXH. 2, 6 and 4 respectively.
8. PW7, a government analyst, testified that he received some plant material on 29.7.16 and after examination found that it was cannabis. He produced his report PEXH. 5.
9. PW8, a clinical officer examined complainant was examined on 1.1.15 and found that her hymen was broken. He produced complainant's P3 form as PEXH. 1.

### **The Defence Case**

10. In his sworn defence, denied the charges. He said he was arrested on 5.3.16 and charged with offences that he did not commit.

### **The Appeal**

11. Appellant was tried and found guilty of both counts, convicted and sentenced to serve 20 years imprisonment and one year respectively. The conviction and sentence provoked this appeal. In his petition of appeal filed on 30th January, 2017, appellant set out one (1) grounds of Appeal that the age of the complainant was not ascertained. In his submission filed on 19th February, 2018, appellant raised other grounds as follows:

- 1. That the learned trial magistrate did not conduct voire dire before taking the evidence of complainant on oath***
- 2. That medical evidence did not prove penetration***
- 3. That his identification was not free from error***

12. Appellant relied wholly on his grounds of appeal and submissions filed on 19.2.18. Ms. Odumba, learned State Counsel, opposed the appeal on the grounds that there was moonlight on the material night and that complainant had positively identified appellant as the one that defiled her. Counsel further submitted that complainant's certificate of birth proved her to be a minor while the P3 form confirmed that she had been defiled.

### **Analysis**

- 13 This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the

witnesses and have to give due allowance. (*See IssacNg'ang'a Alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 OF 2005*)

14. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

**a. Voire dire**

15. **Section 124** of the Evidence Act Cap 80 Laws of Kenya provides that:

*In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath he/she will be guilty of perjury. (Emphasis mine).*

16. Complainant's certificate of birth demonstrates that she was 15 ½ years old. She was for all intents and purposes not a child of tender years and the trial court was therefore under no obligation to conduct a *voire dire* examination in order to satisfy itself; 1) that she possessed of sufficient intelligence to understand the reception of the evidence; and 2) that she appreciated the need of telling the truth and importance of the oath.

**b. Medical evidence**

17. Appellant holds the view that penetration was not proved since there was no evidence of bleeding.

16 Penetration is defined in section 2 of the SOA as "*partial or complete insertion of the genital organs of a person into the genital organs of another person*".

18. The Act does not make bleeding a precondition for prove of penetration. The broken hymen, in my considered view is adequate prove of penetration.

**c. Identification of appellant**

19. It is on record that the incident occurred night and more particularly at about 2.00 am. Complainant testified that she knew appellant since he was from her village and that there was moonlight on the material night that enabled her to identify him. It was further her evidence that she had identified appellant's voice.

20. In the case of *Maitanyi –vs- Republic(1986) KLR 198*, the Court of Appeal stated:-

*“That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.*

21. This position was restated in the recent case of *John Muriithi Nyagah v Republic [2014] eKLR*, where the Court of Appeal held:-

*“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”*

22. It is on record that no voice identification was carried out and the moonlight alleged by the complainant was not tested as there was no evidence of its intensity and position relative to the appellant. If all these factors were brought to bear, the trial court would have arrived at a different conclusion.

**d. Recovery of the Cannabis**

23. PC Katani who was alleged to have been in company of PW5 when the cannabis was recovered from appellant was not called as a witness. In the case of **JUMA NGODIA v. REPUBLIC (1982-88)1 KAR 454**, the Court of Appeal held viz-

***“The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution.”***

24. No explanation was given for failure by the prosecution to call PC Katani to corroborate PW5’s evidence. Appellant denied the second count and ought to have been given the benefit of doubt.

25. In light of the foregoing, I have come to the conclusion that the prosecution did not prove beyond a shadow of doubt that the circumstances subsisting on the material night favoured an error-free identification/recognition of the appellant.

**Decision**

26. In the end, this appeal is allowed, the conviction quashed and the sentence set aside. Appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

**DATED AND SIGNED THIS 18TH DAY OF APRIL 2018**

**T. W. CHERERE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT SIAYA THIS 19TH DAY OF APRIL 2018**

**J.A.MAKAU**

**JUDGE**

In the presence of-

**Court Assistant -**

**Appellant -**

**For the State -**