REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 13 OF 2016

ALEX KOMBE NZAI.....1ST APPELLANT

JAPHET RANDU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(CONSOLIDATED AND BEING HEARD TOGETHER WITH)

CRIMINAL APPEAL NO. 14 OF 2016

JAPHET RANDU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 30 of 2013 of the Chief Magistrate's Court at Malindi – L. Gicheha, SPM)

JUDGEMENT

1. Alex Kombe Nzai (the 1st Appellant) and Japhet Randu (the 2nd Appellant) were the 1st accused and 2nd accused in Malindi Chief Magistrate's Court Criminal Case No. 30 of 2013. Each one of them had been charged with a separate count of gang defilement contrary to Section 10 of the Sexual Offences Act, 2006. At the conclusion of the trial the appellants were convicted and each one of them sentenced to serve 15 years imprisonment. Aggrieved by the conviction and sentence, the 1st Appellant filed Criminal Appeal No. 13 of 2016 and the 2nd Appellant filed Criminal Appeal No. 14 of 2016. Both appeals were later consolidated under Criminal Appeal No. 13 of 2016.

2. On 7th September, 2017 their counsel filed amended grounds of appeal as follows:

> **"1. The learned trial magistrate erred in law by assuming, without proof, the age of victim of the alleged offence (Wanjala v Republic [2012] 1 KLR 703 at 706) and (Musikiri v Republic [1987] KLR at p. 71, line 35-39**
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> **2. The learned magistrate erred in law by relying on physical evidence, to wit, the victim's alleged soiled clothes and mysterious hat; some of which, though marked for identification, were never produced in evidence and could not thus be relied upon in determining the issue of guilt or innocence in the case. Alternatively, the court erred in law in convicting the appellants on evidence that was not before it, instead of drawing an adverse inference under section 119 of the Evidence Act, in favour of the appellants, especially in light of the initial medical evidence which showed that the victim had neither bruises, nor bleeding on her genitalia; or soiled clothes on her (see Juma Ngodia v. Republic [1982-88] 1KAR 454 at 455, 8th paragraph from top)**
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> **3. The learned magistrate erred in law by holding that the defilement was proved beyond (reasonable) doubt by the production of the P3 Form, which was prepared by an officer who saw the victim over a week after the alleged incident; yet the initial medical evidence as well as the P3 Form showed evidence in favour of the appellants (see Musikiri v Rep. [1987] KLR 69, at P. 73, lines 30-39).**

4. The trial court, with respect, erred in law by convicting the accused persons of 'defilement' or 'Gang defilement', yet there was not an iota of evidence placing them at the scene of the commission of the alleged offence.

5. The trial court convicted the appellants of 'Gang Defilement', an offence not known to the law."

3. The appeal was canvassed by way of written submissions. Through their counsel, the appellants urged that the appeal be allowed. The first ground cited in support of the appeal is that the age of the victim which was a critical ingredient to the offence was not proved beyond reasonable doubt as was held by this Court (Dulu, J) in **Wanjala v Republic [2012] 1 KLR, 703**. That in finding that the complainant was a child, the trial court had referred to a birth certificate that was not produced. On this point, reliance was placed on the decision in **Musikiri v Republic [1987] KLR 69** where it was held that a birth certificate was better evidence than merely stating the victim's age. It was urged for the appellants that a birth certificate or an age assessment report ought to have been produced. The trial court was faulted for relying on a birth certificate that was not produced with the appellants stating that the trial court gave the exact date of birth yet the certificate of birth was not produced by the prosecution during the trial contrary to Section 65(1) of the Evidence Act and that the trial court made a presumption contrary to Section 119 of the Evidence Act.

4. The second ground taken up by the appellants was that the trial court misdirected itself by referring to evidence that was not produced such as the hat/cap. It was also pointed out that the victim's items of clothing marked for identification and the hat/cap allegedly recovered at the scene were never produced as exhibits and a negative inference ought to have been drawn from the prosecution's failure to produce the exhibits. Relying on the principle enunciated by the Court of Appeal in the case of **Juma Ngodia v Republic (1983-88) 1 KAR 454** that a trial court ought to presume that a vital witness who was not called by the prosecution without satisfactory reason may have given evidence unfavourable to the prosecution case, the appellants urged this court to find that the prosecution failed to produce the victim's clothes and the hat recovered at the scene as the same were not supportive of its case.

5. Thirdly, the appellants submitted that penetration was not proved. They submitted that PW1's evidence that upon penetration she was soiled with the perpetrators' discharge and she bled and the confirmation of bleeding by PW4 was not supported by the medical evidence. According to them, penetration is a matter of fact and the fact that the hymen was broken as found during examination did not of itself prove penetration.

6. Turning to the issue of identification, the appellants contended that PW2 had testified that it was dark and he could not see the person in distress and that the complainant did not give him the names of the assailants. Further, that the complainant never mentioned that she identified her attackers by their physical attributes such as their voices or the appearance of their clothing and that the time taken was too brief for her to have recognized her assailants as found by the court. Also, that there was no scene visit by the investigating officer to corroborate the evidence that there was sufficient light allowing for identification. The appellants further submitted that the arresting officer never recorded a statement and no explanation was offered as to why it took long to arrest them yet the complainant allegedly knew them. They questioned why the complainant who claimed to have known them had to get their names from one Zawadi who was not called to testify.

7. Asserting that they were charged for committing an offence unknown to the law, the appellants stated that Section 10 of the Sexual Offences Act created an offence known as gang rape and not gang defilement. Further, that the term **"in association with others"** used in that Section referred to more than two persons and the offence having allegedly been committed by only two persons eliminated them from the operation of that provision.

8. Responding to the appellants' submissions, the State urged the court to confirm the conviction and sentence stating that the prosecution proved the three ingredients being that the victim was a child; that there was penetration; and that the penetration was by the appellants. Reference was made to the decision in **Criminal Appeal No. 78 of 2008 FMN v Republic** in support of the submission. It was submitted that the P3 form indicated that there was penetration and the evidence placed the appellants at the scene of crime.

9. On the appellants' assertion that the charge was defective, the State urged the court to find this ground as an afterthought which is in any case curable by Section 382 of the Criminal Procedure Code. It was also submitted that Section 36 of the Sexual Offences Act which was said not to have been invoked by the court was discretionary and was even not raised at the trial.

10. On the issue of identification, the Respondent asked this court to consider that the trial court noted the presence of light bulbs, moonlight and the duration of the act in reaching its conclusion that the appellants were positively identified by the complainant.

11. The position of the Respondent is that the matter was investigated and raising the issue of the appellants' arrest at this juncture is a mere afterthought which ought to be disregarded.

12. According to the Respondent, the trial court considered the appellants' defences. Lastly, the Respondent called for the enhancement of the sentence to life imprisonment.

13. The case law relied upon by the Respondent was the decision of the Court of Appeal in **David Masese Mogaka v Republic [2015] eKLR** and the decision of this Court (Mrima, J) in **Dominic Ochieng Odoyo & another v Republic [2015] eKLR**.

14. This being a first appeal, this court has a duty of looking at the evidence afresh in order to reach its own independent conclusion, taking into account the fact that it did not observe the demeanour of the witnesses as they testified – see **Okeno v Republic [1972] EA 32**. Also as was held in **Chemagong v Republic [1984] KLR 611** and **Gunga Baya & another v Republic [2015] eKLR**, this court should also be guided by the principle that a finding of fact made by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles.

15. The 1st Appellant was in count 1 charged with gang defilement contrary to Section 10 of the Sexual Offences Act, the particulars being

that on 29th September, 2012 at [particulars withheld] Village, Magarini District in Kilifi County he, in association with the 2nd Appellant, intentionally and unlawfully caused his penis to penetrate the vagina of M.C.C., a child aged 15 years.

16. In count 2, the 2nd Appellant was charged with the same offence as that of the 1st Appellant, the particulars being that on the date and place mentioned in count 1, he with a common intention and in the company of the 1st Appellant penetrated the vagina of M.C.C., a child aged 15 years.

17. The appellants were also each charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act namely that if they did not commit the offence as charged in the main counts then each one of them intentionally and unlawfully touched with his penis the vagina of M.C.C. a child aged 15 years.

18. The prosecution called six witnesses. M.C.C. who testified as PW1 stated that she was 16 years old. On 29th September, 2012 she was in attendance at a funeral preparation function when at about 3.00 a.m. she went to answer a call of nature behind her brother's house. There was moonlight and light from bulbs powered by a generator. She had a skirt and a shirt. She felt some people touch her. The persons had approached her from behind and she was able to identify them. She had known them from before and even knew where they resided. She had known the 1st Appellant for about one month. He used to visit their home and so did the 2nd Appellant. According to PW1, although the appellants lived far from their house, she knew where they resided.

19. PW1 explained that the 1st Appellant who was the first to grab her held her by the throat and warned her not to scream. When the 1st Appellant released her she screamed and this time round it was the 2nd Appellant who held her by the neck. Katana removed her costume and biker. They then knocked her to the ground. The 1st Appellant told the 2nd Appellant to hold her down and he pinned her down by her soldiers as the 1st Appellant defiled her. She referred to the 1st Appellant as Katana. He went on for 20 seconds and left after discharging inside her. She was left bleeding staining her clothes in the process. That was her first sexual encounter and she felt a lot of pain. Her evidence was that Katana left with her pair of panties and bikers.

20. It was the complainant's testimony that when they loosed the grip on her neck a bit, she screamed and a boy named Kingi came. She informed him of what had transpired and he took her to her mother. The following day they reported the incident to one Peter Kenga, the Assistant Chief, who advised that she be taken to hospital and that she washes the clothes she wore during the defilement. They went to Sosoni Dispensary where she was given medication and referred to Malindi District Hospital where she was treated. The matter was then reported to the police who issued a P3 form to her but did not ask for the clothes she was defiled in. The complainant told the court about the perpetrators, who were arrested in January, 2013. She identified the treatment notes and the P3 form in court.

21. During cross-examination the complainant stated that the funeral activities were in respect of her deceased uncle. It was her testimony that the light was not bright from behind the house. She explained that although there were many people at the funeral when she screamed Kingi came alone as he was near where they were. She further explained that there was no one near the house and that there was a bathroom near the toilet. The toilet was near the forest.

22. The complainant further stated that when the perpetrators came she had started undressing. She made attempts to run towards the light but was knocked over. The 2nd Appellant held her legs while the 1st Appellant held her neck and defiled her. She stated that she had, while with her cousin, seen the 2nd Appellant but was not with her cousin when she was defiled.

23. According to PW1, she had known the 2nd Appellant for a month and that he used to visit them. She stated that it was her cousin who gave them his name. She also stated that the 2nd Appellant used to walk on the road near their home. At the same time she testified that the 2nd Appellant was on a Bajaj, a motorbike. Her evidence was that she had spotted the 1st Appellant with a hat at 7.00 p.m. and also saw him with the same hat during the ordeal. Her testimony was that the said hat was taken by the Assistant Chief but she could not tell why it was not availed as evidence.

24. PW2 Kingi Voti was on the material day at his uncle's funeral wake. At about 3.00 a.m. they decided to take a bath with his brother. They lit a fire to heat the water. When his brother had gone to look for a wash basin, he heard a scream from the direction where they had dug a toilet for use during the funeral. He explained that there was moonlight. Together with his brother, Sua, they carried a lit piece of firewood but did not see the person screaming. They then heard some noise and he threw the piece of burning firewood in the direction of the noise. He then heard people running and a girl emerged stating that she had been raped and that she knew the perpetrators. He identified the girl as PW1. He identified in court the skirt and shirt she wore on the material day. He also stated that it was dark and he could not see much. He further testified that he took the girl to her mother.

25. Cross-examined, PW2 stated that he was behind the house and when he heard the screams he went and alerted his friends. He had previously seen PW1 at his uncle's place. Further, that on the material day he did not see her head to the toilet and that he was alone when he heard the screams. His evidence was that he never went to the scene which was in the forest. Further, that although he went to the forest he did not reach the place where the incident occurred. He expounded that he failed to go to the scene as his brother did not have his shoes on and he could not go alone. His evidence was that the complainant came walking towards him and he assisted her but he did not see the perpetrators. He also confirmed that there were many people at the funeral and that the offence took place on 23rd at about 3.00 a.m. He further stated that he did not know the people who defiled the complainant.

26. PW3 Peter Yeri Kombe told the Court that he was an Assistant Chief and on 29th September, 2013 a lady by the name Sidi reported to him that her child had been defiled. He escorted them to hospital for first aid but not to the police station.

27. When cross-examined he stated that the complainant was bleeding but he did not see the blood. The complainant told him she had been defiled and she knew the people who had defiled her. He denied telling the complainant to wash her clothes. He stated that he did not visit

the scene of crime. He further stated that a hat was recovered at the scene and taken to the police but there was no marking on it to show that it belonged to the 2nd Appellant.

28. PW4 S.C.T. the mother of the complainant testified that on 29th September, 2013 she was asleep in her house when at about 3.00 a.m. she was woken up by her daughter and a young man called Kingi. Her daughter who was in tears told her that she had been raped by two men. Kingi explained that he had saved the complainant by throwing a stick when he heard her alarm and two people ran away. PW4 did not know the names of the persons who had defiled her daughter. She checked her private parts and found the same bloodied.

29. When cross-examined, PW4 stated that when PW1 was brought over she had sand all over her body and at the scene the sand appeared disturbed showing their was commotion. The clothes had soil and were stained with blood. She denied that the chief told them to wash the clothes. She also denied picking a hat at the scene stating that Kingi picked the same and brought it after she had visited the scene. She further stated that she did not recall the material date but she did report the incident to the police. In addition she stated that the funeral was at her neighbour's place. The neighbor was also a relative. Her testimony was that the toilet was near the forest. It was her evidence that her daughter named her attackers.

30. PW5 Ibrahim, the clinical officer who examined PW1 testified that she had initially been treated at Sosoni Dispensary and at Malindi Hospital. He examined her on 9th October, 2012 by which time she had changed her clothing. Upon examination he noted tenderness on the right side of her neck, broken hymen, reddish vaginal discharge, pus cells but no spermatozoa. He concluded that there was penetration. He produced lab results and treatment notes from Malindi Hospital.

31. During cross-examination PW5 stated that they do not perform DNA testing and that at the time of examination PW1 was in stable good condition and her upper lip was swollen. According to him, the injury on the neck was indicative of a struggle as PW1 claimed that force was used. PW5 told the court that the complainant's clothes were not taken to him.

32. PW6 Corporal Machangani Sahi was the investigating officer in the matter. The witness testified that on 26th June, 2012 at about 12.00 a.m. five people including PW1 were escorted by administration police officers to the Gender Office at Malindi Police Station. PW1 reported that she was defiled by one man as another blocked her mouth. She recorded the report and escorted her to the hospital. She also issued her with a P3 form and recorded the statements of the witnesses.

33. Upon cross-examination, PW6 stated that the complainant was traumatized when they made the report. She stated that the girl's clothes were never taken to the police station and that although there was talk about a recovered hat, the same was also not taken to the police station. According to PW6, the medical examination confirmed that PW1 was defiled. Further, that the suspects ran away but were arrested with the assistance of the Assistant Chief. The witness did not visit the scene of crime. PW6 stated that the appellants were charged as they were identified by the complainant.

34. In his defence the 1st Appellant stated that on the material date there was a funeral at their neighbour's place which he attended with his friends. They used a motorbike and arrived there at about 9.00 p.m. After viewing the body they sat down and he slept by the motorbike. They had agreed to leave by 1.00 a.m. and at the said hour his friend woke him up and they left for home arriving at 2.00 a.m. On 12th January, 2012 he was summoned by the Assistant Chief together with his friends. The administrator asked them if they had attended a funeral and showed them the hat saying that it was his. The 1st Appellant stated that although he liked wearing hats the one shown to him was not his. He denied knowledge of the incident.

35. The 2nd Appellant stated that he was a 20 year old student in Form 2. On the material date he received the news that his friend had lost his father. He obtained permission from the school principal and proceeded home where he informed his parents and a friend about the sad news. They borrowed a motorcycle from a teacher and left for the funeral wake at 8.00 p.m. arriving there at 9.00 p.m. They viewed the body and went and sat on a bench. The 1st Appellant went and slept by the motorcycle. At 1.00 a.m. they left the wake for their home arriving there at 2.00 a.m. According to him, nothing untoward transpired during the period they were at the wake. He told the court that he had a meeting the following day hence did not attend the burial. When they closed school he was told the Assistant Chief had summoned him. When he answered the summons, the Assistant Chief enquired if they had attended the funeral wake. He showed him a hat claiming that it belonged to the 1st Appellant but he denied it. The Assistant Chief also claimed they had raped a girl which he denied but they were nevertheless arrested and charged in court.

36. The issues to be resolved in this appeal are whether or not the complainant was defiled; whether there was common intention to defile the complainant by the appellants; whether the appellants were convicted of an offence known by the law; and whether the sentences should be enhanced.

37. Section 10 of the Sexual Offences Act under which the main counts were framed provides that:

> **"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."**

38. In a criminal trial, the duty is upon the prosecution to prove the ingredients of the offence charged.

39. Although the prosecution used the term gang defilement and not gang rape, persons who commit gang rape or defilement fall within the net of Section 10 and the submission by the appellants' counsel that the appellants were charged for an offence unknown to the law does not hold sway.

40. What the prosecution needed to prove was that defilement was committed by either of the appellants in association with the other. Indeed the offence of gang rape can be committed by two or more persons. The appellants' submission that for gang rape to occur the perpetrators must be more than two is therefore without merit. The offence is committed when **"any person... in company of another or others... commit the offence of rape or defilement ..."**

41. The starting point would therefore be to consider whether the ingredients of defilement were proved by the prosecution. The offence of defilement is a creature of Section 8(1) of the Sexual Offences Act which states that:

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

42. The offence of defilement is comprised of three ingredients: the victim must be a child; there must be penetration; and the penetrator is the accused person.

43. A child is defined by Section 2 of the Children Act, 2001 as a person below the age of eighteen years. The charge puts the age of the victim at fifteen years thus bringing her within the category of human beings under the age of eighteen years. She was hence a child at the time of the commission of the alleged crime.

44. When PW1 testified on 25th March, 2013 she stated that she was sixteen years of age. The offence is alleged to have taken place on 29th September, 2012. The trial court found her to be a child holding that:

> **"I have no reason to doubt she is a minor. This is confirmed by her birth certificate. She was born on 5/10/97 meaning she was about 15 years when she was defiled."**

This was a finding of fact. A perusal of the record does not support this finding. No birth certificate was produced or at least marked for identification.

45. In **Chemagong** (supra) and **Gunga Baya** (supra), the Court of Appeal held that a finding of fact by the trial court ought not to be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles. The trial court based its finding on the question of the age of the victim on evidence that was not placed before it hence entitling this court to interfere with that finding.

46. It has been held by the Court of Appeal in **Stephen Nguli Mulili v Republic [2014] eKLR** that although prove of age is an ingredient of defilement, **"proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."**

47. As already stated, the complainant told the court that she was sixteen years at the time she testified almost six months after the alleged offence. The estimated age entered for her in the P3 form was 15 years although PW5, the clinical officer who examined her, was not asked to offer an explanation as to how he arrived at that conclusion.

48. Although the complainant was in high school at the time of her testimony, this fact cannot be used to conclude that she was under eighteen years as the appellants were also in high school when they testified almost one year after the crime and they were both in their twenties.

49. In **Stephen Nguli Mulili** (supra) the Court of Appeal stated that:

> **"From the facts of the present case we note that the complainant gave testimony that she was 13 years at the time of the offence. PW2 and PW3 corroborated the same. The *"Diagnostic HIV Testing and Counseling Patient/Client Card", the "General Out Patient Record"* and the P3 form, which were all presented as exhibits, stated the complainant's age as 13 years. Therefore, applying the law to the facts of the present appeal, we are satisfied that the complainant's age was proved to the required degree. This view is fortified by the fact that during trial the defence did not question the age of the complainant as offered before the court."**

50. However, in the circumstances of the case before me, the basis upon which the clinical officer formed the opinion that the complainant was fifteen years was not explained. PW4 who is the mother of the complainant and who would have corroborated the evidence of age did not mention the age of the complainant in her testimony. There was no age assessment report prepared and presented to the court. Considering the possibility that people in this region go to school in their adulthood, I would be hesitant to conclude that the fact that the complainant was a child was proved beyond reasonable doubt.

51. Much as the appellants did not query the evidence on the age of the complainant, the law remains that it was upon the prosecution to prove beyond reasonable doubt that the complainant was a child.

52. However, there is a possibility that rape was committed. Rape as defined by Section 3(1) of the Sexual Offences Act, does not require proof of age. The section provides that:

> **"A person commits the offence termed rape if –**

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind."

53. The complainant's testimony was that she was held by the neck, felled and pinned to the ground as the assailants had their way with her indicative of lack of consent on her part. However, having been charged with defilement, it would be unjust and prejudicial to the appellants were they to be found guilty of rape. I say so because they were not afforded an opportunity to offer a defence unique to rape namely consent.

54. Was there evidence of penetration? The testimony of PW1, PW4 and PW5 pointed to penetration. There was also the production of a P3 form and treatment notes from Sosoni Dispensary and Malindi Hospital. PW1 testified that she was stripped of her innerwear and penetrated causing her to bleed thus staining her clothes. The clothes were however not produced in evidence. PW1 also testified that the Assistant Chief told her to wash the clothes. The Assistant Chief (PW3) and the complainant's mother (PW4) however denied the complainant's claim. However, PW4 claimed to have examined the complainant and saw the blood and the stained clothes. The treatment notes from Sosoni Dispensary, where she was taken on the same day, at day break, indicate that on examination of the genitalia there was no bleeding. This also contradicts the notes from Malindi Hospital which talked of a reddish discharge. The evidence is thus confusing and contradictory.

55. On the other hand, it must be noted that bleeding is not a criteria for proving penetration and neither is the presence of spermatozoa; though this may, if present, assist to track the perpetrator. In **David Masese Mogaka v Republic [2015] eKLR** the Court of Appeal opined that:

> **"It is therefore not necessary, as the appellant argued, that presence of spermatozoa be established for the offence to be complete. We uphold the submission by Mr. Kiviyha for the respondent that the offence of rape was indeed proved. In any case according to Section 124 of the Evidence Act, it was sufficient for the trial magistrate to proceed to convict on the evidence of the complainant upon being satisfied that she was a truthful witness."**

56. It is noted that the trial magistrate applied the proviso to Section 124 of the Evidence Act stating that the truthfulness of the complainant was believeable as she **"appeared intelligent and mature during voire dire proceedings and also understood the importance of speaking the truth."** The record however shows some inconsistences in the testimony of PW1 namely the sufficiency of the light as contradicted by PW2; the bleeding as contradicted by the treatment notes from Sosoni Dispensary; the information that she was directed to wash her clothes as contradicted by PW3 and her mother; and the length of time it took to apprehend the appellants. I am indeed aware that unlike the trial court I did not have the benefit of seeing and hearing the witnesses as they testified. However, the record shows that the trial court may have misapprehended the evidence or adopted contradictory evidence. In the circumstances I am entitled to interfere with the findings of fact by the trial court.

57. Were the appellants the culprits? PW1 claimed that the appellants were solely responsible for the act. She testified that she was attacked from behind, held by the throat and the 1st Appellant warned her not to scream. When released she screamed and this time the 2nd Appellant held her neck while Katana, whom she identified as the 1st Appellant, removed her innerwear before they pinned her to the ground. Her evidence was that she was able to identify them because there was light from the moon and bulbs powered by a generator. She however, admitted at cross-examination that the light was not bright where the offence took place and the encounter lasted twenty seconds. PW2 testified that at the material time it was dark and he could not see much. He in fact carried a piece of lit firewood to go and investigate the distress calls he had heard. He did not see but heard people running upon throwing the firewood in the general direction of the noise.

58. It is not in doubt that defilement or rape requires a close encounter between the attacker and the victim and chances for identification are high. However, the prosecution never led evidence on the circumstances leading to the identification of the assailants by the complainant.

59. In **Wanjiku v Republic [1990] eKLR**, the Court of Appeal stated that:

> **"It was held in Abdullah Bin Wendo and Another vs. Republic 1953 Volume XX 166 and Cleophas Otieno Wamunga vs Republic (Criminal appeal No. 20 of 1989) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witnesses who testified that they could identify the appellant in the circumstances of shock and fear could easily be mistaken because the duration of the observation was short."**

60. In **Abdalla Bin Wendo** (supra), the Eastern Africa Court of Appeal held that:

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

61. In reaching her conclusion that the appellants were correctly identified, the magistrate held that: **"I cannot forget to warn myself of the risk of convicting on the basis of the evidence of one witness especially a minor, but as I have stated I am satisfied that her evidence was truthful..."** The trial court further held that PW1 informed PW2, PW3 and PW4 about her attackers and they were known to her, **"were her neighbours and had even met during the day time."** She concluded that **"[t]here is no reason given why she would implicate**

them."

62. A closer look at the evidence of identification discloses that the complainant stated that she saw the 1st Appellant at 3.00 p.m. and at 7.00 p.m. donning the hat which was apparently left at the scene. The hat was however never produced in court although PW3 claimed it was taken to the police station. PW6 stated that she never received any hat. PW2 claimed PW4 found it while PW4 denied finding the hat instead saying that PW3 is the one who found it. The hat was never produced in court and the trial court did not rely on it, as alleged by the appellants. However, the failure to produce the hat as exhibit dented the prosecution case.

63. There was no explanation offered as to why the complainant referred to the 1st Appellant as Katana. This raises doubts as to whether she actually identified the 1st Appellant at the scene of crime as alleged.

64. In view of the evidence of PW2, and considering that the scene was said to be in a forest, it would be difficult to conclude that there was sufficient light which the complainant could use to identify her attackers.

65. There are other factors that creates a lot of doubts in the prosecution case. Although the complainant testified that she knew her assailants and where they resided and had informed the Assistant Chief and the police of their names, it beats logic that they were only apprehended the following year on 13th January, 2013 as per the charge sheet. PW6 claimed that they went underground but there is no evidence on record that the police visited their schools or homes in an attempt to apprehend them. Defilement is such a serious crime that it calls for prompt action by the police. If indeed the appellants had gone underground, how does one explain their action of responding to the summons by the Assistant Chief? The appellants in their testimony told the court that the Assistant Chief summoned them. PW3, the Assistant Chief did not testify in detail as to how he arrested the appellants. PW3 appeared to be a very reluctant witness.

66. I have said enough to demonstrate that the prosecution case was clouded by a lot of doubts. In such circumstances the benefit of doubt ought to have gone in favour of the appellants. I thus allow the appeal, quash the conviction and set aside the sentences meaning that the appellants are set free forthwith unless otherwise lawful held.

Dated, signed and delivered in Malindi this 25th day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT