



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**(DEFILEMENT)**

**CRIMINAL APPEAL NO. 14 OF 2017**

**(CORAM: R. E. ABURILI – J.)**

**JOSHUA ONYANGO SEWE.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against both the conviction and the sentence dated 26.1.2017 in Criminal Case No. 791 of 2015 in Principal Magistrates Court Bondo Law Court before Hon E. N. WASIKE – S.R.M.)*

**JUDGMENT**

1. By a Petition of Appeal filed in Court on 1.2.2017 the Petitioner **JOSHUA ONYANGO SEWE** challenges the conviction and sentence meted out on him in **Bondo P.M. CR. Case No. 791 of 2015 Republic versus Joshua Onyango Sewe**.
2. In the said trial Court, the Appellant/Petitioner herein was found guilty of **defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006**.
3. It was alleged that on the 13<sup>th</sup> day of July, 2015 at around 0100 hours within Siaya County, intentionally caused his penis to penetrate the vagina of GA a Child aged 15 years.
4. The Appellant pleaded not guilty and the Prosecution called 4 witnesses to prove its case. The Appellant who was the Accused gave sworn testimony denying the offence.
5. The trial Court found the Appellant guilty and convicted him accordingly. After mitigations by the Appellant which the trial Court considered, he sentenced the Accused/Appellant to serve 20 years imprisonment.
6. Being dissatisfied with the said conviction and sentence, the Appellant filed his petition of Appeal on 1.2.2017 setting out 3 grounds of appeal namely:
  1. **That the trial Court failed to observe that age was not sufficiently proved.**
  2. **That the trial Magistrate's Court erred in law and fact by relying on the non-corroborative(sic) evidence of witnesses,**
  3. **That I cannot recall all that transverse (sic) during the trial hence pray for the trial proceedings to assist raise sufficient grounds.**
7. In the prayers sought, the Appellant urged this Court to allow his appeal and set him at liberty, set aside the sentence and quash the conviction and 2. Habeas corpus. The Petition was dated 30.1.2017.
8. At the hearing of the appeal the Appellant appeared personally unrepresented and prosecuted the appeal through his written submissions which he urged the Court to adopt maintaining his innocence. He also presented an amended grounds of appeal containing 8 grounds namely:
  1. **That the trial Court too erred in law by proceedings to hear and determine the case which was based on defective charge sheet;**

2. **The learned trial Magistrate misdirected himself by admitting and considering the evidence of PW1 without considering first whether the witness was telling the truth under Article (sic) 124 of the Evidence Act;**
3. **The trial Magistrate erred in law by failing to observe that the conditions at the scene of crime could not warrant a positive identification by the use of a mobile phone flash light;**
4. **The learned trial Magistrate erred in law by admitting contradicting evidence from the Prosecution witnesses as regards to what transpired on the material night;**
5. **The learned trial Magistrate erred in law and in fact by allowing the production of exhibits 3 (9) (b) yet the chain of custody as not (sic) established and the connection with the offence was not established;**
6. **The learned trial Magistrate erred in law by denying the Appellant his unlimited right to have the Prosecution witnesses statements before the commencement of the matter.**
7. **The learned trial Magistrate erred in law by shifting the burden of proof to the Appellant as evidence in the second issue for determination in the judgment.**
8. **The learned trial Magistrate erred in law and in fact by failing to consider the defence raised by the Appellant.**

9. This being the first appeal, this Court is obliged to re-assess and re-evaluate the evidence and record of the trial Court and arrive at its own independent conclusion bearing in mind the fact that it did not have the advantage of hearing and seeing the witnesses as they testified before the trial Court.

10. PW1, GAO (name withheld for legal reasons) testified on oath that she was born on 5.5.200. She identified her birth Certificate No. [.....]. She stated that she was a student at [Particulars Withheld] Primary School (full name withheld) in class 8. Further, she testified that she knew the Accused **Joshua Onyango Sewe** who was a herdsman in their area.

11. She recalled that on the night of 13.7.2015 she was studying and felt sleepy in the house. At around 1.00 a.m. she heard someone open the door and enter the house where she was. He took the phone which belonged to the victim's mother and flashed its light. The victim saw the person and recognized him. He was carrying a knife and she identified him to be the Appellant herein. He told her that he would kill her if she made noise.

12. The Appellant used the knife to cut her skirt and pant and undressed himself then he defiled her. She did not scream. He inserted his penis in her vagina and after defiling her he left and locked the door. At 4.00 a.m. the victim called her mother and told her to switch on lights so that she could continue studying and her mother inquired from her as to what had happened. The victim feared to divulge what had happened to her due to the threats by the Appellant. She however later disclosed to her mother what had happened to her. She was escorted to Akala hospital where she was examined and given medication. She also received treatment at Kombewa Hospital. The matter was reported to the Police Station. She identified her treatment notes shown to her. She also identified her torn red skirt and a green petticoat. She narrated to the Police who visited her home of what had transpired. She was later issued with a P3 form which was filled in hospital. She identified the P.3. The Accused was traced and arrested. She identified him in Court.

13. In cross-examination by the Appellant, PW1 stated that the door had been locked but that the Accused tactfully opened it. She stated that their house had two doors and that she saw the Appellant in the house.

14. She also stated that the phone which he picked was on the table she was studying from. She maintained that the Appellant had a knife in his hand.

15. She reiterated her testimony in chief and stated that she was telling the truth. She stated that she had thrown her clothes outside.

16. PW2 WA (full name withheld) testified on oath that she was PW1's mother and that PW1 was born on 20.5.2000. She identified the birth certificate for PW1. She stated that she knew the Appellant who lived in their neighbourhood.

17. PW2 recalled that on 13.7.2015 at around 4.00 a.m. she was sleeping and PW1 was in the sitting room when PW1 woke-up PW2 and asked PW2 to switch on lights as PW1 wanted to read. PW1 then told her that someone had entered the house, taken the phone, lit his torch and cut her skirt and petticoat and slept with her. That the person had a knife and that she knew the person who was called Joshua Onyango. She identified the clothes in Court. In the morning, PW2 escorted PW1 to Akala Dispensary where she was medically examined and given drugs. The Doctor gave her a letter and she went and informed the Village Elder who advised her to go and report the incident to the Police. On 21.8.2015 the area Assistant Chief and the Police went to her homestead and told PW1 to record her statement. PW2 later also went and recorded her statement.

18. In cross-examination by the Appellant, PW2 maintained that the offence took place on 13.7.2015 and that she made a report on 14.7.2015. She also stated that she was sickly that is why the Police went to her home on 28.8.2015. She stated that the Appellant's behavior was known in the village.

19. She stated that she was asleep and that the Appellant threatened PW1 with a knife. She stated that the Appellant usually walked around with a knife. She maintained that she was telling the truth. She stated that the Police went and took Possession of the torn clothes but that the pant was thrown in the toilet.

20. PW3 testified on oath that he was P.No.64636 PC Mike Yego attached to Ndori Police Patrol Base, performing general duties. That on 21.8.2015 he received information from Members of the Public that a girl had been defiled on 13.7.2015 at Kitambo Village.

21. Accompanied by P.C. Katana and Mr. Omondi the area Assistant Chief, they proceeded to Kitambo Village at the Complainant's home where they found her mother whom they interrogated and she informed them of what had transpired on the material night, handed over to him the clothes that the girl was wearing when she was defiled which he produced as P.Ex. 3 (a) and (b).

22. He then went with PW1 and her mother to the Police station where he recorded their statements, issued her with a P.3. Form which was filled by the doctor and returned to him. He also produced birth certificate S/N.[.....] for PW1 as P ex 1. That on 29.8.2015 PW3 and P.C. Katara proceeded to Kitambo Village where they arrested the Appellant and the Complainant went and identified him.

23. In cross-examination, PW3 stated that he arrested the Appellant at Kitambo Village. He stated that the incident was not reported earlier but that PW1 was treated the following morning after the incident.

24. PW4 Jared Obiero Opondo testified that he was a Clinical Officer in-charge of Rera Sub-County Hospital and that he had examined PW1 who alleged to have been defiled on 13.7.2015 by a person known to her and filled the P3 form on 25.8.2015. She was 15 years old, in fair general condition. On examination in detail, he found that she had a partially healed injury on the neck and on the medial aspect of the thighs. The probable weapon used was blunt. On genital examination, he found PW1 with a recently broken hymen with a vaginal discharge. Laboratory tests showed presence of pus cells, syphilis test negative, HIV-Negative, pregnancy test – Negative. She was placed on prophylaxis and antibiotics and painkillers. Counselling was done. Injuries were classified as grievous harm. He concluded that PW1 was defiled. She had been treated prior to his examination, at Akala Health Centre before she was referred to Siaya County Hospital. The witness produced treatment book, P3 form as Exhibits.

25. In cross-examination, PW4 answered that he worked at Rera Sub-County Hospital. That initially he worked at Siaya County Referral Hospital. Further, that the victim knew the person who defiled her.

26. On being placed on his defence, the Appellant gave sworn statement and called two witnesses Florence Akothe Onyango DW2 and CO.

27. According to the Accused's sworn statement of defence, he stated that he hailed from Ramba and a farmer. He recalled that on 13.7.2015 in the morning he went about his normal duties and at around 10.00 a.m. his mother went to fetch water and on her return she found him taking tea, she asked him whether he had heard of what had happened. She narrated to him that someone had gone to Owino's home and raped a girl. When he asked her whether there were people in that home, she answered in the affirmative she told him that the incident took place at night and that when people woke up, they found the door open.

28. That he left the issue at that until 24.8.2015 when he attended Court over a different matter and saw the Assistant Chief. When he walked out of Court to inquire about his matter, the Assistant Chief told him to go to the Prosecution Office to inquire and in no time, he was arrested by a Police Officer Mike Yegobut that the State Counsel protested at the action but Yego could hear none of it. The Appellant was escorted to the Police Station at Bondo at 11.00 p.m., later escorted to Ndori Patrol Base and placed in cells. He called his wife and explained to her his predicament. The wife went to Ndori Police Station and she informed him that the Police were saying that he had defiled a girl. The following day he was escorted to Aram Police Station and charged in Court. He denied committing the offence.

29. DW2 Florence Akoth Onyango, the Appellant's wife testified on oath and stated that her husband had attended Court and at 2 p.m. he called her and told her that he had been arrested on allegations of having raped somebody. She denied being aware of the rape.

30. DW3 CO a standard 8 pupil at [Particulars withheld] Primary School testified that on 24.6.2016 the Accused told them that he had been arrested and charged with the offence that they did not know.

31. The trial Magistrate after considering both the Prosecution and defence case in detail framed 3 issues for determination namely:

- 1) Whether the ingredients of the offence facing the Appellant had been as established.**
- 2) Whether the Appellant had put up a sustainable defence.**
- 3) Whether the available evidence would lead to a conviction or acquittal of the Appellant.**

32. On whether the ingredients of the offence had been established, the trial Magistrate found that the offence of defilement contrary to section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 had been proved in that:

- 1) There was evidence by PW1 and PW4 that there was penetration of PW1's vagina as shown by a recently broken hymen.**
- 2) On the age of PW1, he found that the birth certificate produced showed that she was born on 5.5.2000 hence she was 15 years as at the time of being defiled.**
- 3) On identity of the perpetrator, the trial Magistrate found that the PW1 had known the Appellant prior to the incident and was able to identify him using a flashlight which enable her to see and identify him.**

33. He also observed that PW1 sounded confident and appeared believable in her evidence.

34. On the issue of whether the Appellant had established as sustainable defence, the trial Court found that the Appellant's defence lacked in substance and credibility and that it did not sound believable hence not sustainable.

35. On whether the available evidence would convict or acquit the Accused, the trial Court found that the Prosecution availed credible consistent and firm evidence that fully established ingredients of the offence of defilement, which evidence was not discredited by the defence hence the evidence proved the guilt of the Appellant beyond reasonable doubt that he committed the offence with which he was charged.

36. The trial Magistrate proceeded to convict the Appellant and after considering his mitigation, he sentenced him to serve 20 years imprisonment.

37. It is the above judgment that is subject of this appeal. The Appellant in support of his appeal filed his written submissions denying any involvement in the offence and setting out six points namely:

**I. Identification:**

38. Here, the Appellant submitted that as the offence took place at night, there was no sufficient light to warrant positive identification of the defiler. That the intensity of the mobile phone's flashlight was not established at all and that PW1 never indicated the manner in which the light was being flashed to enable as clear vision in the said darkroom. That as the light emanated from the Assailant, the PW1's evidence could only have made sense if the room was painted white or other reflective colour, to facilitate the illumination of the entire room.

**II. On time and observation:**

39. It was submitted that there was no voice identification in the alleged scene of crime hence the time under observation by PW1 by the aid of the alleged source of light should have been a very important piece of evidence for consideration, given that the intensity of the said source of light was never established. That the trial Court was never told of whether the light was on throughout the incident or for a short period. That the victim never mentioned the position of the light during the alleged sexual intercourse.

40. **On inconsistencies and gaps**, the Appellant submitted that there was no reason or justification for the delay to report the incident to the Police, which was done only after 3 weeks.

41. Further, that it is inconceivable that the incident took place in a house which had many occupants yet none of them, including PW2, the victim's mother, did not see or hear what transpired.

42. On **Section 124 of the Evidence Act as read with Section 19 of the oaths and Statutory Declarations Act**, the Appellant submitted that the trial Court failed to observe the provisions of the above cited law during the hearing of PW1's evidence. That PW1 was a minor aged 15 years old and therefore she should have been subjected to intelligence analysis and knowledge of the meaning of an Oath before being allowed to give evidence.

43. On contradictory Evidence, it was submitted that there are grave contradictions on the date of arrest. That whereas PW3 alleged that the Appellant was arrested on 29.8.2015 at Kitambo Village, 3 days after the Appellant had been arraigned in Court, on 26.8.2015; the charge sheet shows that the Appellant was arrested on 25.8.2015, which three dates were contradicted by the Appellant in his sworn defence statement; where he stated that he was arrested on 24.8.2015 at Bondo while attending another Court matter. That the defence evidence was supported by DW2 and DW3 who stated that the Appellant was arrested on 24.8.2015.

44. On defence not being duly considered it was submitted that the trial Court failed to indicate how he arrived at the conclusion that the Appellant's defence statement, which remained unchallenged by the Prosecution Evidence, was not sufficient to support his acquittal. He therefore submitted that the failure to consider the Appellant's defence statement occasioned a miscarriage of Justice and that it led to unsound conclusion by the trial Court.

45. The Appellant urged the Court to allow his appeal.

46. In opposing the Appellant's appeal the Senior Principal Prosecution Counsel Mr. Okachi submitted that there was no error in both the conviction and sentence and that the trial Court considered evidence on record and correctly considered mitigations put forth by the Appellant before sentencing him.

47. It was further submitted that the Court considered the victim who was defiled as proven by the documents produced.

48. The Prosecution Counsel submitted that the offence of defilement is heinous and traumatizing to the community at large and the victim hence the sentence and conviction were sound. He urged the Court to uphold the Judgment of the Lower Court.

49. In a rejoinder, the Appellant submitted that the Court should help him out as he never committed the offence. Further he urged the Court to reduce his sentence should it find him guilty.

**DETERMINATION:**

50. I have carefully considered the appeal as filed and amended by the Appellant, and the opposition by the Respondent together with the submissions and arguments supported by the case of **Arthur Mshila Manga Vs. R [2010] eKLR**.

51. In my humble view, the issues that emerge for determination in this appeal are as framed by the Appellant in his well-articulated written submissions which appear to have been drafted by an expert in legal matters either as a Paralegal or an Advocate.

52. But before delving into the said issues, it is first and foremost important to appreciate the cardinal principle of Criminal Law which is, that the Prosecution is under an obligation to prove each and every ingredient of the charge facing an Accused Person, beyond reasonable doubt.

53. Under the **Sexual Offences Act**, the main elements of the offence of defilement are as hereunder:

**(i) The victim must be a minor;**

**(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute.**

54. Partial penetration will suffice. The above ingredients of defilement must be proved by the Prosecution beyond reasonable doubt before a Court can convict an Accused person.

55. Therefore the question that begs answers is whether the Prosecution discharged this burden of proof as required by law.

56. According to the Appellant, the Prosecution did not prove that he was the person who defiled the victim because there was no sufficient light to enable her identify the defiler as the offence took place at night and that the light from the torch was not sufficient unless the room was painted white or reflective colour to illuminate the whole room given that the torch light emanated from the direction of the assailant and not the opposite.

57. On the part of the Respondent, they maintained that the conviction of the Appellant was sound on sufficient evidence adduced beyond reasonable doubt.

58. Besides the testimony of the victim of the crime, there was no other evidence linking the Appellant to the crime. The Complainant Victim who was said to be aged 15 years old testified on oath that she was alone in a room on 13.7.2015 studying when she fell asleep and was awakened by someone opening the door and entering the house. The said person took a phone which was her mother's phone from her study table and flashed it. She was able to see the person whom she recognized as the Appellant. He was carrying a knife. He then threatened to kill her if she made noise. He used the knife to cut her skirt and pant. He then undressed and defiled her by inserting his penis in her vagina. She did not scream. After he was done he left the room and locked the door. This was at about 1.00 a.m. At 4.00 a.m. she called her mother and told her to switch on the lights so she could continue with her studies. Her mother asked her as to what had happened but she feared telling her because of the threats she had received.

59. PW2 the Victim's Mother testified that PW1 was her daughter and that on 13.7.2015 at about 4.00 a.m. she was sleeping while PW1 was in the sitting room. PW1 woke her up and asked her mother to switch on lights as PW1 wanted to read.

60. On switching on the lights, PW1 told PW2 that someone had come to the house, taken the phone, put it on and cut her skirt and petticoat and defiled her. The person had a knife. She named the person as Joshua Onyango, the Appellant herein. The torn clothes were produced by PW3 the investigating Officer.

61. PW2 escorted PW1 to Akala Dispensary wherein she was examined and treated. This is as per the treatment notes produced in Court showing that on 13.7.2017 the victim was received and examined and treated at Akala Health Centre for defilement.

62. However, this Court's observation from the said treatment notes is that it was reported to the medical personnel and it was recorded that "The Child was reaching at night when at around 4.00 a.m. realized that someone had drugged her and raped her. The clothes had been ripped off.

O/E: Patient declined spendlum

Stamped

13.7.2015."

63. Later, the said exhibit shows that the patient was send to the laboratory for urinalysis, PDT, Hb, VDRL, PITC and HBV and on the following Page 3 the results were given as:

**1) U/A - few pus cells seen**

**2) PDT - Negative**

**3) Hb - 11.8 g/c/**

**4) VDRL - Negative**

64. She was referred to PSC for Counseling and put on PEP and Emergency contraceptives besides the medication and referred to Kombewa for Investigation and Management.
65. Later on 20.7.2015 she went back to hospital complaining of a headache and RDT was found to be positive. She was given medication.
66. What clearly emerges from the initial treatment notes is that it is recorded that the victim who was accompanied by her mother to hospital refused to be physically examined by the doctor and only accepted to go to the laboratory.
67. Furthermore, the report she gave to the hospital is that she realized at 4.00 a.m. that she had been drugged and defiled. She did not state that she was defiled by a person she knew or that she identified the defiler.
68. In addition, the minor was only physically examined on 24.8.2015, over one month & 13 days by Jared O. Opondo at Siaya District Hospital, wherein he found her with a healed neck injury resulting from struggling. This injury was never disclosed to Akala Health Centre on 13.7.2015 or on 20.7.2015 when the patient was attended to. Similarly, the injuries to the thighs were never seen on 13.7.2015 or on 20.7.2015 because she refused to be physically examined. On the latter date, the victim was found to have had a recently broken hymen and discharge through the vagina.
69. Whereas there is no dispute that the victim was defiled as shown by the P3 form filled on 25.8.2015 and whereas it is not in doubt that she was aged 15 years as per her Birth Certificate No. [...] issued on 26.11.2013 showing her date of birth as 5.5.2000; this Court fails to understand why the minor and her mother never gave information to the Hospital that PW1 was defiled after being drugged and/or stating that she was defiled by a person known to her.
70. Further, this Court fails to understand why the PW2 whose daughter had been defiled refused to have her examined on 13.7.2015 to establish whether as at that moment penetration could be established as the attack had taken place only a few hours earlier.
71. Further, this Court has not been told why PW2 did not report the matter to the Police until 24.8.2015 vide OB No.24.8.2015 which was one month and 12 days after the incident, for action to be taken against the perpetrator of the offence.
72. In addition, whereas PW1 stated that she did not tell her mother of what had happened to her that night, PW2 testified that when she asked PW1 what had happened, and PW1 told her that someone had defiled her.
73. PW4 did not explain to the trial Court the implication of the patient's refusal or declining physical examination or spendium and/or what that phrase meant.
74. According to PW2, after PW1 was treated in hospital, she was given a letter which she took to the village elder who advised her to go and report to the Police. She did not report to the Police and albeit she states that on 21.8.2015 the Police and area Assistant Chief went to her home and recorded their statements, the P3 form shows that a report was made to the Police on 24.8.2015.
75. In cross-examination, PW2 stated that she was sickly that is why the Police sent to record their statements from her home and on 28.8.2015 not 21.8.2015. By that time, the pant had been thrown in the toilet.
76. PW3 does not disclose the person who reported the incident to him on 21.8.2015 which prompted him to proceed to the Complainant's home to interrogate her. He arrested the Appellant on 24.8.2015 at his home.
77. The evidence of PW3 materially differs from that of PW2 on when the report was made to the Police since the P3 form shows a report was made on 24.8.2015 whereas PW2 says it was on 14.7.2015 in her cross-examination and that the Police went to her home on 28.8.2015. However, in her examination in Chief she says the Police went to her home on 21.8.2015.
78. In my humble view, here is a cloud of doubt hanging in the Prosecution evidence as to whether the victim identified her defiler or whether she was drugged and defiled therefore she could not identify or recognize her assailant.
79. Any doubt in the Prosecution case ought to go to the benefit of the Accused person.
80. The victim stated that she knew the Appellant as he was from their area. However, as correctly submitted by the Appellant, there are material inconsistencies and gaps in her evidence as described above.
81. It was not upon Appellant to sufficiently prove his innocence. It was upon the Prosecution to prove their case against the accused person beyond reasonable doubt. In my view, the evidence tendered by the prosecution fell short of the threshold of beyond reasonable doubt. There was only probable evidence.
82. Albeit the Appellant claimed that **Section by the 124 of the Evidence Act and Section 19** of the Oaths and Statutory Declarations Act were not complied with, the view of this Court is that **Section 124 of the Evidence Act** is only applicable if the only evidence is that of the victim. In this case the other evidence of defilement is that of PW4. Section 124 does not require that the other evidence must be that of an eye witness for it is most unlikely that one would be brave and defile a child in Public or in the presence of witnesses. The trial Court believed PW1 and recorded his observation on record.
83. However, there is reasonable doubt as to whether the Complainant was actually defiled by the Appellant in view of the initial report to hospital that she was drugged and defiled at 4.00 a.m. and not at 1.00 a.m.

84. There was no credible evidence clearly placing the Appellant at the scene of the crime which took place at night and the only light allegedly illuminating the room was phone light whose brightness was not given.

85. I find that the evidence on record does not link the Appellant irresistibly with the commission of the offence without leaving or suggesting any other conclusions without which, circumstantial evidence loses its probative value. See **Sawe Vs. R. (2003) KLR, 364** where it was held:

***“In Order to justify on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the Accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on.” As was held in John Mutua Munyoki V R [2017] eKLR by the Court of Appeal, “The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence of the suspect is on the Prosecution, and always remains with the Prosecution. It is a burden which never shifts to the Party Accused.”***

86. In this case, the trial Court held that the defence put forth by the Appellant was not sufficient to support his acquittal which in my humble view, was shifting the burden of proof to the Accused person to prove his innocence.

87. From the evidence of PW2 and PW4, it clearly emerges that the Complainant did not willingly connect the Appellant to the offence. That is, in my view, the reason why the Police only visited PW1 & PW2's home after receiving information from third Parties over one month from the date of the offence and secondly, the reason why PW2 could not prevail on her daughter to let the medical officer examine her genitals only a few hours after the defilement.

88. There was no independent evidence to corroborate PW2's testimony that she was sickly that is why she did not go to the Police to report the matter leading the Police to go to her home to interrogate her and the Complainant of what had happened.

89. The inconsistencies in the Prosecution witnesses in my humble view, rendered conviction of the Appellant unsafe, having regard to the circumstances of the case.

90. The trial Court should have considered the contradictions and inconsistencies which are not minor. They go to the root of the Prosecution case to determine whether the Complainant and her mother were credible and truthful witnesses.

91. Albeit the trial Court felt that the Complainant minor was truthful, given this Court's observation that she and her mother were unwilling to report the matter to the Police until 1 month and 12 days later when the Police visited them at their home on 21.8.2018, this raises doubt as to the credibility of the complainant and her mother and therefore creates doubt in the mind of this Court as to whether the trial Court's assessments of the Complainant was correct. The trial Court in my view misapprehended the testimonies of PW1 and PW2 when he stated that the Complainant went to report to Ndori Police Station. This was against the testimony of PW1 and PW2 that the Police came to their home on 21.8.2015 and in cross-examination, stated that the Police came on 28.8.2015 and further that she made a report on 14.7.2017, of the incident which occurred on 13.7.2015. The trial Magistrate found the Complainant to have sounded confident and appearing believable in her evidence and was satisfied that she correctly identified the assailant to be the Appellant.

92. The trial Court did not find that he was satisfied that the minor was telling the truth. Sounding confident and appearing believable is not the same as telling the truth. No reasons were recorded for what pointed to the truth telling by the Complainant.

93. In my view, the Appellant's conviction was based on mere suspicion that he had committed an offence of defiling the victim minor. Suspicion and speculation can never be the basis of a conviction of an Accused person. I say speculation because PW2 stated: “we know your behavior in the village. You usually walk around with a knife.” In **Mary Wanjiku Gichira Vs. Republic Cr. Appeal No. 17/1998 the Court of Appeal held that “suspicion, however strong cannot prove a basis for inferring guilt which must be proved by evidence. Before a Court of Law can convict an Accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the Accused's freedom and at times life.”**

94. In my view, the evidence of defilement was present but as to whether it was the Appellant that defiled the Complainant, the evidence was of mere suspicion and not cogent enough to found a sound conviction.

**95. For the above reasons, I find and hold that the trial Court erred in holding that the evidence on record proved the guilt of the Appellant beyond reasonable doubt, in the circumstances. I am of the view that the trial Court did not carefully evaluate the evidence before him before arriving at the above conclusion.**

**96. Accordingly this appeal is merited. It is hereby allowed, the conviction of the appellant Joshua Onyango Sewe is hereby quashed, the sentence meted out on him set aside and the Appellant is set at liberty forthwith unless otherwise lawfully held.**

Dated, Signed and Delivered at Siaya this 27th day of November, 2018.

R.E.ABURILI

JUDGE

In the presence of:

The appellant in person:

Mr Okachi Senior Principal Prosecution Counsel for State

CA: Brenda and Modestar