REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 132 & 133 OF 2015 (*CONSOLIDATED*)

EMMANUEL ONDIEKI ONESMUS…….....1ST APPELLANT

WYCLIFFE OGETO ONKOBA……...2ND APPELLANT

VERSUS

REPUBLIC……...…RESPONDENT

(Being an appeal from the conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 2183 of 2009 delivered by Hon. Khaemba, SRM on 11th August, 2015).

JUDGEMENT

BACKGROUND

The appellants, Emmanuel Ondieki Onesmus and Wycliffe Ogeto Onkoba were separately charged with **defilement** contrary to **Section 8 (1)** as read **with Section 8 (3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 20th of May, 2009 at [particulars withheld] at Kibera within Nairobi Province, intentionally and unlawfully committed an act which caused penetration of a penis into the vagina of S.C.C, a child aged 15.

The appellants were also separately charged in the alternative with **indecent act** with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 20th of May, 2009 at [particulars withheld] at Kibera within Nairobi Province, intentionally and unlawfully committed an indecent act on S.C.C, a child aged 15 years.

The appellants were convicted in the main charges and each sentenced to serve 25 years' imprisonment. They were dissatisfied with both the conviction and sentence. Their consolidated grounds of appeal which are similar are as follows;

1. ***That the elements of defilement were not proved.***

2. ***That the brother of the complainant gave questionable testimony in court.***

3. ***That Articles 25 (c) and 50 (2) (a) of the Constitution of Kenya were violated.***

4. ***That the medical report adduced in court was altered and therefore flawed.***

5. That Section 200 of the Criminal Procedure Code was not complied with.

6. That vital witnesses were not called.

7. That the charge sheet was defective.

8. That the trial court disregarded the alibi defence of the 1st appellant.

9. That the mode and manner in which the 2nd appellant was arrested was tainted with doubt.

10. That the evidence of the bite mark on the shoulder of the 2nd appellant was inconclusive.

SUBMISSIONS

1st Appellant's submissions

The 1st appellant's submissions were filed by M/s Musyoki Mogaka Advocates on 31st March, 2017. Learned counsel, Mr. Omari was in attendance for the party. He submitted that both **Articles 25 and 50(2)(a) of the Constitution** were violated in that the 1st appellant was not accorded his right to a fair hearing, specifically to be presumed innocent unless the contrary is proved. He singled out the failure to call key prosecution witnesses amongst them the investigating officer.

Secondly, he submitted that the age of the complainant (PW1) was not proved. His contention was that both PW1 and her father gave contradicting dates on when she was born. Besides, a Birth Certificate was not adduced which was the only piece of evidence that would have ascertained and confirmed the oral evidence of the witnesses.

Thirdly, counsel submitted that the medical evidence was flawed. He pointed to the failure to adduce DNA results which would have been the only link between the 1st appellant and the offence. In this regard, he pointed out that DNA examinations were conducted on various items including the appellant's saliva, blood sample and pubic hair. In addition, his clothes were also taken for examination as well as PW1's bloodstained clothes. Unfortunately, the results of the DNA were not produced in court for reasons that were not explained.

Fourthly, counsel submitted that **Section 200(3) of the Criminal Procedure Code** was not complied with. In this respect, he submitted that the 1st appellant had wished that the trial be heard *de novo* when succeeding magistrate took over. However, the magistrate overruled him, thus denying him a right to a fair trial which included to recall the witnesses who had earlier testified. It was the counsel's submission that the failure to comply with this provision rendered the trial a nullity. The case of **Rebecca Mwikali Nabutola vs Republic [2012] eKLR** was cited in support of this submission.

Fifthly, counsel submitted that the 1st appellant was not properly identified so as to link him with the offence. He cited that the evidence on record was that PW1 was pulled by the appellant to his house when it was dark and conditions for identification were not conducive. He submitted that although PW1 was known to the 1st appellant, owing to the difficult identification circumstances, she could have been mistaken on his identity. The cases of **Wanjohi and 2 others vs Republic [1989] KLR 415, R vs Tanbul and others [1976] 3 ALL ER 549, Patrick Owino Okumu vs Republic [2016] eKLR and Elizabeth Waithiegeni Gatimu vs R Cr. Appeal No. 50 of 2012** were cited in support of this submission. Sixthly, counsel submitted that vital witnesses and exhibits were not produced. Counsel referred to a Sergeant Ngáno to whom the offence was first reported by PW2. Counsel reported that this was a critical witness in establishing whether he knew a man by the name 'Manu' who was said to defiled PW1. The observation was made in light of the fact that the said Sergeant Ngano was in charge of the constables and was therefore expected to know the junior officers working under him. Another witness who was omitted was a Corporal Waweru who was the investigating officer to whom the DNA results

were given. Counsel emphasized that the failure to call such crucial witnesses and evidence gave an inference that if the witnesses had been called they would have adduced adverse evidence for the prosecution. The cases of **Bukenya vs Uganda [1972] EA 548** and **Charles Kibara Muraya vs Republic Cr. Appeal No. 33 of 2001(Nyeri**) were amongst the cases cited in this regard.

Seventhly, counsel submitted that the charge sheet was defective. In this respect, he submitted that the evidence adduced did not support the charge. He referred to the evidence of PW1 who testified that she knew the 1st appellant by the name 'Manu'. In contrast, he was not referred by the same name in the charge sheet. Further, it was the submission of the counsel that the evidence adduced disclosed the offence of gang-rape yet the appellant was convicted for the offence of defilement.

Finally, counsel submitted that on the whole, no evidence was adduced linking the 1st appellant to the offence but the 2nd one Wycliffe Ogeta Onkomba by the bite marks inflicted on him by PW1. He urged the court to critically re-evaluate the evidence and more specifically that the failure to call the investigating officer entirely weakened the prosecution's case. He urged that the 1st appellant be set free.

2nd Appellant's submissions.

The 2nd appellant filed his submissions on 6th April, 2017. They are in all respects identical to those of the 1st appellant.

RESPONDENT'S SUBMISSIONS.

Learned State Counsel M/s Sigei opposed the appeal. She submitted that the elements of the offence of defilement were proved. Penetration was proved by the evidence of the complainant and corroborated by both PW4 and 6 who were the medical officers who examined her. The age of the complainant was ascertained to have been 15 years at the time of the incident by herself and her father who testified that she was born on the 13th of March, 1994. PW6 who produced the medical report from Nairobi Women's Hospital also gave her age as fifteen years.

On identification, Learned Counsel submitted the 1st appellant was known to PW1 as 'Manu' and she regularly borrowed compact discs (CDs) from him; a claim that the 1st appellant did not deny. PW1 had also previously seen the 2nd Appellant within the GSU camp. This therefore meant that the threshold set was to confirm recognition of both appellants which she sufficiently did. Besides, there was sufficient street lighting from the point the 1st appellant pulled PW1 towards his house. Further, the 2nd appellant was identified with the bite marks inflicted by PW1 as she tried to free herself.

Counsel also submitted that the alibi defence put forward by the wife of the 1st appellant was full of contradictions. The wife of the 1st appellant, DW3, claimed to have been in the house at the time of the alleged incident but this was doubtful as the 2nd appellant also lived with them. Counsel submitted that it was not possible for the three of them to share one bed in a bedsitter.

Counsel poked holes in the defence put forward by the 2nd appellant as a mere denial as he confirmed having been arrested at Kencom although he denied knowing the lady who lured him into the hands of the police. She submitted that the role of the lady was only to convince the 2nd appellant to wait for her at Kencom because they previously knew each other. There was therefore no flaw in the manner in which the 2nd appellant was arrested.

Counsel added that the failure of the investigating officer to testify did not prejudice the prosecution case as the necessary evidence was adduced in court which sufficiently established the case.

On the claim of failure to comply with **Section 200(3)**, learned counsel submitted that the same was followed as attested by the proceedings when both Honorable Khaemba and Nyakundi(Mrs) took over the

conduct of the trial. Counsel submitted that the court declined to have the matter heard *de novo* on good grounds.

On production of the medical report, counsel submitted that the same was properly adduced in court by PW6 who was an expert witness in the medical field. The production therefore conformed to **Section 77 of the Evidence Act.**

Lastly, learned counsel submitted that the charge sheet was not defective. The charge as drafted properly disclosed the offence and the particulars of the same. It clearly outlined the elements of the offence that the prosecution was required to prove. On sentence, counsel submitted that although the law provided for a minimum sentence of 20 years, the enhanced sentence of 25 years imposed was justified because of the pain and suffering the injury occasioned to PW1.

EVIDENCE

In total, the prosecution called 9 witnesses. It was the prosecution case that **PW1, S.C.C** who was the complainant was aged 15 at the time of the incident. On the 20th of May, 2009 at around 7:30 p.m., she was escorting her friend B, back to his home within [particulars withheld] GSU Camp while alongside her brother (PW3) when the 1st appellant grabbed her hand and dragged her to his house. She knew him as "Manu" and that he was a GSU officer. PW3 was walking ahead of her with B a couple of meters ahead when he heard his sister say, "leave me alone." PW3 asserted that the only person he saw on the road was the 1st appellant and was certain it was he who was talking to his sister. PW3 headed back home and left his sister behind. She resisted this confrontation. The neighbors saw as well. While in the house of the 1st appellant, the 2nd appellant entered the house. PW1 had seen the 2nd appellant before but did not know him. She knew the 1st appellant as Emmanuel or "Manu" a GSU officer whom she had severally exchanged compact discs with. The 1st appellant threw her onto the bed, pulled down her blue trousers and panties but left her white sweater on and proceeded to rape her while the 2nd appellant held her legs. She screamed and this is when the 1st appellant fled leaving the 2nd appellant behind who proceeded to remove his trousers and defile her as well. She pleaded with him to stop but he refused. She managed to bite his right shoulder after which she dropped to the ground as the 2nd appellant got dressed and left. Her sweater, panties and trousers were all stained with blood some of which oozed from her private parts. She wore her clothes and returned home between 9 and 10 p.m. where she met her father, PW2 whom she was afraid of telling what had just happened since he asked her where she was.

PW3 had since told his father that he left his sister with Manu but did not give further description of the man as he was sure that his father would not be able to identify him. On confrontation with his daughter, PW2 told his daughter to return to where she came from. He stormed off and went to Sergeant Ngano's house to inquire on who "Manu" was. The Sergeant was in charge of constables in [particulars withheld]. Although he did not know the identity of the man right away, he promised to ask his colleagues and have more information the following morning. On returning home and finding PW1 restless and enquiring on the same, she showed him her sweater which had blood stains on one sleeve while crying. Said she would speak to a Mama I instead of him to explain what had happened. PW2 called Mama I immediately and she came the following morning. PW1 narrated to Mama I that she was defiled by a GSU officer who was known to her as well as the officer's cousin. Mama I proceeded to call PW1's mother.

PW2 went back to the house of PW8 who had since discovered that "Manu" was an officer whose full name was Emmanuel Ondieki. They both went to Emmanuel's house and found him with the 2nd appellant, Wycliffe Onkoba. They questioned him if he knew PW1 which he confirmed. He added that she had been to his house the previous night to borrow compact discs as she always did. They left him and they proceeded to the house of PW2 to get an account from PW1 on what transpired while in the company of Corporal Langat and Poyo. She narrated the whole ordeal to PW8 and PW2 after which they all went to the house of PW7, CIP Samuel to report the matter. While there, the 1st and 2nd appellant were summoned and questioned by PW7 on the incident. PW1 was called and she identified both the 1st and 2nd appellants as the ones who defiled her the previous evening.PW7 took the identification card of the 1st

appellant and asked him to return to his quarters.

Thereafter, PW1's mother together with Mama I took PW1 to Nairobi Women's Hospital while PW2 went to report the matter at Kilimani Police Station. At the hospital, PW1 was taken to theatre where she was operated on. PW1 had a deep incision at the introits with active bleeding as well as a 1st degree tear at 6 o'clock. A medical report in this regard was produced by PW6.

On the 22nd of May, 2009, PW8 was notified by the 1st appellant that the 2nd appellant had fled. On the 24th of May, 2009, PW5 was instructed to arrest a suspect in the City Centre. He was accompanied by a couple of GSU officers and a lady who was said to be a friend of the suspect who would be used to lure him. The 2nd appellant was accordingly arrested around Kencom. He was escorted to him to Kilimani Police Station where it was noted he had a bite mark on one of the shoulders as narrated by PW1.

PW4, Dr. Kamau was the Police Surgeon who examined both the 2nd appellant and PW1 on the 26th and 28th of May, 2009 respectively. On the 1st appellant, he found a human bite mark on his right shoulder. On PW1, he found a stitched wound on the under part of the vagina at the interiors. Her hymen was not intact. He also confirmed that her blood stained panties as well as her pair of trousers and sweater had been sent to the government chemist on the 31st of May, 2009 by PW9. PW9 on the other hand took their blood and pubic hair samples for DNA analysis. She handed the results over to the investigating officer. Upon compilation of the evidence, both appellants were charged accordingly.

After the 9 prosecution witnesses testified, the court ruled that the Appellants had a case to answer and each was put on his defence. Both Appellants gave sworn statements of defence.

DW1, the 1st appellant testified that on 20th May, 2009, he left work at 6 p.m. and passed by his house to have a change of clothes. He proceeded to the mess to play a game of pool. Amongst the persons he played the pool with was one Benson Chege. He stayed there up to 9.00 p.m. His wife was in the house. At about 10 p.m, as he and his wife were asleep when PC Oduga, CPL Langat and SGT Koech went to his house and informed him that a girl by the name M was alleging that he had defiled her. He used to see the girl within the camp but he denied he defiled her. On the following day he was summoned to the office of CIP Samoi where he found him with PW1. He was asked if he had committed the offence and he once again denied. On the 22nd of May, 2009, he was summoned by Chief Inspector Samoi who was in the company of OCPD, Kilimani Police Station. They accompanied him to his house where they collected his bed sheets, a pillow case as well as the clothes he was wearing. He was thereafter charged accordingly.

DW2, the 2nd appellant testified that on the 20th of May, 2009, he was working on a nightshift at a hotel in Ngara. At the time, he was putting up in the house of the 1st Appellant. He arrived in the house at 7.30 a.m. whereupon he found the 1st Appellant's wife in the house who informed him that the 1st appellant had been summoned by his boss over an incident that happened in their house the previous night. Thereafter, some GSU officers including the officer in charge of the camp arrived. They took him to the latter's office where he was interrogated on the incident in the presence PW1 and the 1st appellant. He denied he committed the offence. He was released and he reported back to work until 22nd May, 2009 at 12.00 p.m. He began another shift at work relieving a colleague who had a sick child. He worked continuously until the morning of 24th May, 2009 when he left for town. At about 2.00 p.m. he was called by a lady to meet her at Kencom area. On arrival, he found a lady, two GSU officers and two police officers who were in civilian clothes. He was arrested, escorted to Kilimani Police Station and charged accordingly. DW2 went on to state that a day after his arrest he and the 1st appellant were taken to Nairobi Women's Hospital where their blood, saliva and pubic hair samples were taken for DNA analysis.

DW3, Rose Katweri, the wife of the 1st appellant testified that on the 20th of May, 2009 she was sleeping in the house as she was unwell. At about 10 P.M., some officers went to their house claiming that the 1st

appellant defiled a certain lady called M in their house. She denied that the incident took place. She confirmed that the police took away some bed sheets, a pillow case and clothes belonging to the 1st appellant.

DW4, Benson Chege, a friend of the 1st appellant recalled playing pool with him on the night of the 20th of May, 2009. He testified that did not know where the 1st appellant lived and that he left the mess at 9.00 p.m.

DETERMINATION

This being the first appellate court, its duty is to re-evaluate the evidence and come up with its independent findings. It should however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See the case of **PANDYA V. REPUBLIC [1957] EA 336**.

I have carefully analyzed and examined the entire evidence on record and the submissions by the appellants and respondent. I have deduced the issues for determination to be whether the elements of the offence of defilement were proved, whether the appellants were granted a fair trial, whether **Section 200 (3) of the Criminal Procedure Code** was complied with, whether the charge sheet was defective and whether vital witnesses and exhibits were produced in court.

On the first issue for determination, the offence of defilement is defined under **Section 8 (1) of the Sexual Offences Act** as:

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

From the definition, the key element that must be established is **'Penetration'** which is defined under **Section 2 of the Sexual Offences Act** as:

> ***'… the partial or complete insertion of the genital organs of a person into the genital organs of another person…'***

So, was penetration established? It was the evidence of PW1 that the 1st appellant forcefully removed her trousers and proceeded to defile her while the 2nd appellant held her legs apart. She proceeded to scream after which the 1st appellant fled the room and the 2nd appellant proceeded to defile her as well. She bit him on his right shoulder to deter him from continuing. On getting home, she was scared of telling her father as she cried and requested to speak to Mama I instead. This was corroborated by PW2, 4 and 6. PW1's oral evidence was corroborated by the medical evidence attested by the Medical examination report (P3 form) produced by PW4. The form authored by the Police Doctor showed that PW1 had a stitched wound on the under part of the vagina at the interior and her hymen was not intact. The stitched wound was a result of her operation at the Nairobi Women's Hospital as brought out in the report produced by PW6, Dr. Adan but prepared by a DR. Muhombe (deceased). It indicated that PW1 had a deep incision at the introits with active bleeding. This led to a surgery that revealed a tear at 6 o'clock. Ultimately, penetration was adequately established.

The age of the complainant was also established by the evidence of PW2, her father who stated that she was born on the 13th of March, 1994. The medical report produced by PW6 as well as the P3 Form produced by PW4 corroborated the evidence. It is true that no birth certificate was adduced to show the precise date of birth of PW1. But age must never be proved by documentation alone. Oral evidence as well as common sense are means by which age may be demonstrated. In the case of:

Uganda v. Mwebaze Wilber [2005] UGHC 16*, it was held that:*

> ***"As far as the age of the victim is concerned, it is trite law that the best way of proving age of a child is by producing a duly certified birth certificate coupled with evidence of identification. In***

the absence of a birth certificate, age can be proved by any admissible evidence. [A]ge can also be determined by observation and common sense: See Uganda Vs James Byakatonda; Criminal Session Case No. 205/1994 per Berko J(as he then was).”

As such PW1's father was best suited, in the absence of a Birth Certificate to prove the complainant's age. He sufficiently did so.

The identification of both appellants remained the puzzled issue that this court required to determine. This is not because it was hard to analyze the evidence and arrive at a finding. It is an issue that is discerned clearly from the way the investigations were conducted. A compilation of the entire evidence has led me to deduce that this was a case that was destined to fail. Whereas it is easy to conclude that by virtue of PW1's evidence that she was previously known to the appellants that identification was by recognition, the court must bear in mind that one piece of evidence cannot be applied in isolation of other evidence the prosecution chooses to call. For instance, it is evidently clear that the investigators were clear that a DNA sampling of both appellants would have nailed them. Consequently their blood, saliva and pubic hair samples were taken. Likewise, from the house of the 1st appellant bed sheets, a pillow case and the clothes he wore on the fateful night were also taken for DNA examination. From the testimony of PW9, it is clear that the results of the DNA sampling were received from the government chemists and handed over to the investigating officer. What is most surprising is the fact that the investigating officer did not testify and no explanation was given for this crucial omission. In the absence of this witness, a keen investigator would have ensured that a government analyst who did the DNA sampling testified with a view to establishing that the appellants were indeed linked to the offence.

Another observation is that one Mama I to whom the report of defilement was first made by PW1 was never called as a prosecution witness. It is also not clear whether she recorded a statement with the police. She was accompanied to the hospital by PW1's mother to whom she informed of the incident. She too was not lined up as a prosecution witness. It is gainsaid that their evidence would have told of the secret PW1 was afraid of disclosing to her father. Their testimonies would have been good corroborative evidence of that of PW1.

Another very vital witness, one B the boy PW1 and her brother, PW3 are said to have been escorting on the night the 1st appellant is said to have pulled PW1 to his house was omitted in the prosecution witnesses' line up. He held one most vital piece of evidence; that of corroborating the evidence of PW3 that it is the 1st appellant who pulled PW1 to his house. In as much as PW3 testified in this respect, it is suffice to note that he did not immediately on arrival to their house inform their father, PW2 that he had left PW1 with the 1st appellant. Therefore, only B would have confirmed that indeed the 1st appellant was within the vicinity when the incident occurred. After all, he was the boy walking hand in hand with PW3 and as such, he was a witness of what PW3 entirely had to say.

With the above observation, it leaves me to conclude that that any evidence linking both appellants to the offence was circumstantial. I say so because it is clear there was no eye witness who saw what transpired thereby leaving the testimony of PW1 against no other. And as I make this observation, I am alive to the fact of PW3's testimony that he heard PW1 say that 'Manu'(as the 1st appellant was known) should leave her alone. But the prosecution evidence was and confirmed by the 1st appellant that, both he and PW1 were not strange fellows. PW1 not only knew him as Manu but both so often exchanged CDs. Indeed PW1 frequented the house of the 1st appellant to borrow the CDs. It can then be concluded that the two were acquaintances, if not good friends. It is no wonder on this material night, the 1st appellant stated that PW1 had gone to his house to borrow CDs as usual. This level of affinity between the two was further demonstrated by PW3 who finally told their father, PW2, that he had left PW1 with Manu. PW2 was not surprised and he in fact told PW1 to go back to where she came from. In addition, PW8 did testify that PW1 was used to disappearing.

Back to the evidence of PW1, she testified that after she arrived in the 1st appellant's house, the 2nd appellant arrived shortly afterwards. The 2nd appellant held her as the 1st appellant defiled her. After she

screamed, the 1st appellant fled leaving the 2nd appellant defiling her. The question that follows is; who really saw that PW1 was pulled to the 1st appellant's house so as to ascertain that he defiled PW1? The answer is obvious, that none. And so, very little evidence links him to the defilement. Therefore, the only other evidence that would have nailed him was through the DNA sampling, of the samples taken from him, the clothes collected from his house and PW1's clothes. As I noted earlier, the examination was done but the results withheld for reasons best known to the investigators. As it is now settled law, the failure to call crucial evidence may lead the court to conclude that had the evidence been called, the same would have been adverse to the prosecution case. See **Bukenya & Others vs Republic 1972 EA 548** in which it was held that;

> ***(a) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(b) The court has the right and duty to call the witnesses whose evidence appears essential to just decision of the case.***
>
> ***(c) When the evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tendered to be adverse to the prosecution.***

As rightly pointed out in the case of **Charles Kibira Muraya v R** (supra), the more serious the charge, ***''the heavier the burden of proof on the prosecution'',*** this is serious case which the investigators were obligated to take seriously. The contrary was the norm for reasons I restate were aimed at subverting justice.

In addition, the failure to call the afore stated vital evidence obviously lends credence to the defence (1st appellant's) case that the defilement was never committed in the house of the 1st appellant in the presence of his wife and that he had sufficiently explained his whereabouts on the material night. I would then confidently conclude that the circumstantial evidence against him was not strong enough to found a conviction against him.

I now delve into the evidence linking the 2nd appellant to the offence. I need not repeat myself on issues relating to the DNA sampling as the same was deliberately omitted to subvert justice. But amidst the obvious subversion of justice, one thing PW1 remained steadfast in was that he bit the right shoulder of the 2nd appellant in an attempt to flee herself. An excerpt of her evidence was as follows;

> ***"… He started raping me and I screamed but he was not letting me go and no one was coming so I bit him on the shoulder. The right shoulder (points) I then moved and pushed myself and I fell from the bed…"***

She also testified that she told the police that she bit the right shoulder of the 2nd appellant. The 2nd appellant was examined by PW4, Dr. Kamau of police surgery who had this to say;

> ***'' On 26/5/09 I was busy with one Mr. Cliff Otego a suspect. He had a human bite on the interior aspect of his right shoulder. It was about 6 days after. He had not been treated. Yes, it such kind of injury that occurs during sexual intercourse.***
>
> ***….Yes the accused had a human bite. A human bite has its own characteristics rather than saying a knife and with experience you would not miss it. The pattern of human bite is quite different from other injuries or even bites from an animal. The identification of the marks is unique. It is round with marks of the teeth.''***

The 2nd appellant countered this by stating that in court at the trial, the court looked at his shoulders and observed that it was uncertain what had caused the mark on his shoulder. It was at the point PW1 testified that the court noted;

‘’ …shoulder mark not clearly seen’’

It is noteworthy that PW1 testified on 26th October, 2009, five months after the incident. PW4 on the other hand examined him only six days after the incident when needless to say, the bite mark would be clearly visible. Furthermore, PW4 spoke from an expert point of view and was categorical how human bite marks are identifiable from other types of bite marks. It could not hence have been a coincidence that PW1 narrated how she bit the 2nd appellant on the right shoulder and the bite marks were found on the said shoulder. Of course some witnesses for instance PW5 talked of the marks being on the left shoulder but those were minor discrepancies that did not oust the consistent evidence of the most crucial witnesses. Besides, by his admission, the 2nd appellant had been within the [Particulars Withheld] GSU Camp where he was putting up with the 1st appellant. I have no doubt in my mind that the circumstantial evidence of the bite mark squarely placed the 2nd appellant at the scene of crime. He must have defiled PW1.

The other issue raised by the appellants is the inadequacy of the medical report. They referenced to Page 36 Line 18 of the proceedings where PW6 was being cross-examined by Mr. Mogaka, Counsel for both appellants at the time. The witness stated as follows;

> ***“…Yes I said there was active bleeding. I was <u>interpolating</u> the report. It said ‘deep laceration on the interacts with blood’. I was not adding I was trying to explain. Dr. Muhombe is the one who saw the patient. She prepared the report…”***

The defence submitted that the word interpolating means adding information and would therefore deduce that the report was altered by someone else other than the author. However, the definition of the word in the Black’s Law Dictionary is **‘to insert words in a complete document’**. In light of this and the subsequent words of PW6 who said she was only interpreting the document and not altering it, it is conclusive that the document was not altered in any way and was admissible for the purpose it was adduced. Furthermore, the doctor who produced it did so on behalf of Dr. Mohombe who was then deceased. Further, the appellants did not raise any objections as to the authenticity of the document.

On the second issue of determination, the defence submitted that the trial court failed to abide by the provisions of **Article 25 (c) and 50 (2) (a) of the Constitution**; the <u>right to a fair trial</u> and the <u>right to be presumed innocent until the contrary is proven respectively</u>. The defence pointed out that the investigating officer failed to honor court summons and deliberately failed to call crucial witnesses. I have already noted that this is a matter of concern to this court. I have also gone to great lengths in pointing out which crucial witnesses I think were deliberately left out. There was a clear hand in the police trying to cover their own. This is probably further explained by the length of time the trial took as the same commenced on the 25th of May, 2009 and judgment was passed on the 11th of August, a period of six years. At this stage though the duty of the court is to reevaluate the evidence on record and arrive at its own finding. I have accordingly found the 2nd appellant culpable.

The third issue for determination is on submission that **Section 200 (3)** of the **Criminal Procedure Code** was not complied with**.** The same provides thus;

> ***(3) Where a succeeding magistrate commenced the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”***

The appellants contend that when the matter was taken up by Hon. Khaemba from Hon. Karanja, the appellants were not explained to their rights under the provision. They relied on the case of **REBECCA MWIKALI NABUTOLA V. REPUBLIC [2012] eKLR**. They also referred to the proceedings at **Page 42 Paragraph 2** where Hon. Nyakundi(Mrs) who was the Principal Magistrate at the time made a ruling as follows;

> ***“I have gone through the record. Application to recall PW1 was made on 11th of December 2009***

but the court did not give directions on it. The next application was made on the 14th of April 2010 by Counsel holding brief for Mr. Mogaka then; but the trial magistrate then declined to allow the application and directed that the case proceeds…On the 15th of July 2010, the hearing proceeded with two witnesses. Counsel did not raise the issue of recalling witnesses then or even on the 17th of August 2010 when the matter was heard...there is an indication from the prosecution that PW1 and PW2 cannot be traced. I would find that the application by accused is not being made in good faith and the same cannot be granted in the circumstances described by the prosecution…"

The court did assert the reasons as to why the witnesses could not be recalled, their unavailability. Further, at page 73 of the proceedings, Hon. Khaemba noted as follows;

"Mr. Mokili: It is Mr. Mogaka's request to have the case proceed from where it had stopped.

Court: The decision is to be made by the accused persons.

Section 200 (3) of the Criminal Procedure Code explained to the two accused persons.

Accused 1: Case to proceed from where it had stopped.

Accused 2: Case to proceed from where it stopped."

It is clear that the respective succeeding trial magistrates complied with Section 200(3). As the provision clearly outlines, the only mandatory requirement is for the court to explain to the accused his right under the provision. Whether the court will accede to the request depends on the circumstances of the case. As Hon. Nyakundi(Mrs) did, the case would not have been heard *de novo* due to the unavailability of witnesses. This ground of appeal cannot then succeed.

The 4th issue for determination is whether the charge sheet was defective. The appellants submitted that the trial ought to be declared a nullity because the evidence adduced established the offence of gang rape as opposed to that defilement. It has already been established that the elements of defilement against the 2nd appellant were sufficiently established. Had this court found that the 1st Appellant too participated in defiling PW1, I would have arrived at a finding that the offence proved was that of gang rape as opposed to defilement. The court would then have invoked **Section 179 of the Criminal Procedure Code** in substituting the offences accordingly as gang rape is an offence cognate to that of defilement.

The 1st appellant in addition submitted that the charge sheet was defective because it did not refer to him by the name "Manu", the name PW1 identified him with. This name was introduced by PW1 because she knew him as such. As noted elsewhere in this judgment, the issue of how PW1 knew the 1st appellant was not contested as both were close friends. Therefore, had this court found him culpable, the fact that the name was not used in the sheet would have been immaterial in arriving at the final decision. This ground of appeal thus fails.

The next issue for determination is whether the failure to call vital witnesses and adduce essential exhibits rendered this trial a nullity. I have already addressed myself on this issue. In fact, the failure to call crucial evidence is the sole contributor to the collapse of the case against the 1st appellant. I add that with respect to the 2nd appellant either the arresting or the investigating officer was a crucial witness to the prosecution case. None was called and I believe with a view to muddle the case. Be that as it may, the court has crystalized all available evidence and found the 2nd appellant culpable for reasons afore stated. It follows then that his defence could not bail him out and the learned trial magistrate properly dismissed it.

In the result, I find that the case was not proved to the required standard against the 1st appellant. His appeal succeeds. I quash the conviction and set aside the sentence. I order that he be set free unless otherwise lawfully held.

However, the prosecution proved the case against the 2nd appellant beyond all reasonable doubt. His appeal thus fails. I uphold both his conviction and sentence. In so upholding the sentence, I take into consideration that the enhanced sentence was due the vicious manner in which the defilement was orchestrated. Precisely to state, PW1's private parts were torn leading to a surgery and stitching. This must have caused a lot of pain and suffering to her, a trauma she will live with for the rest of her life.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY, 2017.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of;

1st Appellant present in person.

Mr. Omari for the 2nd Appellant.

Miss Sigei for the Respondent.