

Paul Machu Ekai (PW4), assisted in apprehending the appellant after he was pointed out by the complainant's mother.

P.C. Reuben Koros (PW5), investigated the case and thereafter preferred the present charge against the appellant.

In his defence, the appellant denied the charge and said that he was arrested while at his aunt's home and taken to Kakuma police station where police officers attempted to extract money from him before they could release him. He was later taken to court where he was shocked to hear the charges made against him. He contended that he was not identified by the complainant as the offender nor was there any evidence of sexual assault. He said that he was not examined by a doctor and that the police only relied on the evidence of other witnesses.

In convicting the appellant, the learned trial magistrate relied on all the foregoing evidence. He believed the evidence presented by the prosecution witnesses and disbelieved that which was presented by the appellant.

The learned trial magistrate was of the view that the appellant's defence was without truth and an afterthought.

Being dissatisfied with his conviction and sentence by the learned trial magistrate, the appellant filed the present appeal on the basis of the grounds contained in his petition of appeal. His complaint is essentially that he was held in police custody for a long period of time and that the evidence against him was contradictory and insufficient. Further, his defence was overlooked by the learned trial magistrate without good reasons.

The appellant represented himself at the hearing of the appeal and relied on his written submissions to fortify his grounds of appeal. The state/respondent was represented by the learned prosecution counsel, **Mr. Chelashaw**, who raised no objection to the appeal on grounds that the alleged identification of the appellant by the complainant's mother (PW2) was unreliable as she did not have the opportunity to properly see and recognize the appellant.

It was the view of the learned prosecution counsel that the appellant could have been mistakenly identified.

Despite the respondent's concession, the duty of this court is to revisit the evidence and draw its own conclusions having in mind that the trial court had the advantage of seeing and hearing the witnesses.

Having re-visited the evidence hereinabove, it is the opinion of this court that the appeal is clearly merited for reasons that, firstly, contrary to what the complainant (PW1) and her mother (PW2) stated, there was no evidence to establish defilement or even attempted defilement. The medical report (P3 form) was utmost in favour of the appellant. Secondly, even if defilement or attempted defilement had been established, the evidence that the appellant was the person responsible for the act was insufficient and unreliable.

The offence occurred in difficult circumstances, it was not clear from the complainant and her mother whether there was any light at the scene and from what source. Further, the complainant indicated that she was unable to identify the assailant since she only saw a person running away after she cried out loudly. Her mother did not clearly state how she was able to see and recognize the appellant. If as indicated by the complainant that the culprit ran away no sooner had she cried out, then it was not possible for the complainant's mother to see and identify him because she was awakened by the complainant's scream and it was at that juncture that the culprit ran away. The complainant's mother did not even have the slightest opportunity to see and identify the culprit. Therefore, her alleged identification of the appellant was most likely an error.

For the foregoing reasons, this court must find that the appellant's conviction by the learned trial

magistrate was not safe. Consequently, this appeal is allowed. The appellant's conviction is quashed and the sentence set aside.

The appellant shall forthwith be released unless otherwise lawfully held.

[Delivered and signed this 14th day of May, 2013.]

J.R. KARANJA.

JUDGE.