REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NOs.405 & 406 OF 2009

(Consolidated with)

CRIMINAL APPEAL NO.404 OF 2009

JON CARDON WAGNER …………..………………..1ST APPELLANT

FEDHA NYAMWERU ………………………………..2ND APPELLANT

JUDY NYAGUTHIE ……………………..…………….3RD APPELLANT

(From original conviction in Cr. Case No. 1017 of 2008 of Chief Magistrate's Court at Nairobi by T. N. Ngugi (Mrs.) - Principal Magistrate)

JUDGEMENT

The 1st appellant was charged with three principal counts of defilement under section 8(1) as read with section 8(4) of the Sexual Offences Act No.3 of 2006. He was also charged with three alternative counts under section 11(1) of the Sexual Offences Act. On the other hand, the 2nd and 3rd appellants were charged and convicted on two counts of child prostitution contrary to section 15(a) of the Sexual Offences Act No.3 of 2006. The 1st appellant was sentenced to 15 years imprisonment on each count and sentenced ordered to run concurrently. The 2nd and 3rd appellants were sentenced to 10 years in jail for each count. The sentence was ordered to run concurrent. All the appellants were aggrieved by the conviction and sentence made on 11th September 2009 by the trial court hence this appeal. The 1st appellant set out 51 grounds of appeal while the 2nd and 3rd appellants each put up 11 similar grounds of appeal against conviction and sentence. For purposes of clarity and simplicity, the appeals were consolidated and argued in a concise manner by the advocates for the appellants.

It is clear from the records that the prosecution called 25 witnesses in support of their case while the defence called a number of witnesses in support of their case. It will be impossible for this court to rehearse and recount the entire evidence tendered before the trial court. However, this court shall endeavour to rehearse, re-evaluate, analyze and determine all the pertinent issues that were placed before it for discussion and determination. In doing so, it is essential to take account of what the 25 witnesses stated before the trial court.

The first prosecution witness was Dr. Ketra Muhombe, stated that on 24th July 2008, she wrote a report of N.K . whose date of birth was given as 1995. The complainant informed her that she had been sexually assaulted in April 2008 on a date she could not remember. The assault occurred in Loresho and described the perpetrator as a white man. PW1 confirmed that she had difficult times in getting answers from the said victim. She however confirmed the victim was eloquent and the same time crafty and evasive before giving an answer. It is the evidence of PW1 that the said victim had a history of sexual assault. On examination, she formed the opinion that the victim had been defiled on several occasions.

On 17th June 2008, PW1 also attended to G.W who had also been brought by officials from Women Rights Awareness Programme. The victim gave her age as 14 years and stated that she had been sexually assaulted by a *mzungu* in his house. The said victim also informed the doctor that she had been there with her younger sister and that they were both drugged at the time of the sexual assault. PW1 further stated that she had been informed by the persons accompanying the victim that a first report was made at Mwiki Police Post. On examination of the 2nd victim the doctor formed an impression of defilement against the complainant. The said victim also informed the doctor that she was defiled on 5th June 2008 in a *mzungu* house.

PW2 G.W, the complainant in count 1, stated that on 5th June 2008 she went to Mwiki with L.W who is her friend. On the same day, a lady who is described as Mark's mother informed her that she would take her to a place to work. Together with another lady by the name Wavinya, they boarded matatu No.48A. On alighting from a matatu, she was informed by the two ladies that she would sleep with a man. When she wanted to escape, she was allegedly stopped by a watchman and the two ladies. She was then handed over to a white man who sprayed something on her face and she immediately became unconscious. On gaining her consciousness, she found a man on top of her. She tried to scream but the man applied something on her making her to lose consciousness. Later she found herself at the sitting room being dressed by two ladies. She said she was also given beer which made her drunk. After the ordeal they all went back to Mwiki and on reaching home she shared her ordeal with L.W. On 8th June 2008 she went to Mwiki police Post to make a report but nobody took her serious. The following day she shared her story with a church lady who reported the matter to the area chief. In her evidence, PW2 confirmed that she took police to the white man's house and that he was arrested and taken to police custody. She also confirmed that it is her and L.W who showed police the white man's house. She further stated that she could not tell what happened to Wavinya and Mark's mother since they were not charged with any offence. The witness also confirmed the area where she was defiled was strange to her.

Under cross examination from the defence counsel, the witness had this to say;

"When 1st accused was arrested, it is the police who took me to the place where he was arrested… yes WRAP officials were present when 1st accused was arrested."

PW3, L.W is the complainant in count 2 that was preferred against the 1st appellant. She contended that PW2 informed her that she was taken to a white man by Mark's mother and Wavinya on the day they went together. She also contended that she was taken by Wavinya, Mark's mother and another lady to a white man's house. She described the third lady as fat, dark, lose skin on the belly and small buttocks. On reaching the place, she was told she would sleep with a white man. The *mzungu* then came and sprayed something on her face. Later she found herself bleeding from her private parts. She contended that after leaving the house, they all went to Gikomba for shopping as they were given money by the *mzungu*. PW3 was allegedly left in a bar in Mwiki and she was later taken by a bar maid to her house.

PW3 in her evidence stated as follows;

"Later I was asked if I can taken them to the white man's house. We went with police and I showed them the place. We went with G.W and police officers."

The witness also identified the 2nd appellant through an identification parade.

PW4 N.K . is the complainant in count 3. She said that in November 2007, a lady by the name Faith picked her and informed her whether she wanted a white man to be her sponsor. Together with another lady by the name Jacqueline, they went with her to the white man's house. She was allegedly blindfolded and sexually assaulted by the white man. He then gave her Kshs.8,000/= which they all shared. The same night her grandmother found her bleeding from her private parts but no immediate report was made to the relevant authorities. She took time to inform her immediate relatives, teachers and even her grandmother. When her grandmother discovered, she did not immediately report the matter to the police.

PW5, I.A is the grandmother to N.K .. She contended that on 7th July 2006, the complainant disappeared from the house without her knowledge. On inquiring from N.K as to her whereabouts, she was told that Faith had taken her to a white man who raped her.

PW6 Loise Wanjiru is the head teacher M [PARTICULARS WITHHELD] Primary school and contended that on 21st August 2008, N.K reported to her of having been sexually harassed during school holidays. She then reported the incident to the assistant chief of the area. On 12th June 2008, the Chief took the girl to Nairobi Women Hospital for check-up and examination. She confirmed that the whole process was driven by officials from WRAP.

PW7 Elizabeth Muhia is an assistant chief and stated that on 30th May 2008 she received a report from PW6. She then took the child to Nairobi Women Hospital for examination and medication. She also reported to FEMNET network who took the child to hospital. However, she confirmed that she never reported the matter to the police station.

PW8 Peter Ombasa is the District Children's Officer Kasarani Division. He testified that on 12th June 2008, two girls went to his office accompanied by the area assistant chief on allegation of having been sexually assaulted. The two girls were PW2 and PW3. The girls informed him that they were defiled by someone they thought they knew. After interviewing them, he decided they were children in need of care and protection. He then took them to a place of safety. He also called WRAP officials who confirmed that they could give the two girls a temporary shelter. He contended that he never reported the matter to the area police.

PW9, Margaret Muthoni Wahome is the Assistant Chief Mwiki sub-location and who received a report from two children accompanied by two women alleging that the two girls were being offered to a white man in Westland by two women in Mwiki area. That the white man was sleeping with the two girls and were being given money. The two girls showed her the two ladies and she immediately arrested them. She then took the two ladies to Mwiki Police Post for further investigation. Later she learnt that the two ladies had been released. She also confirmed that the ladies she arrested are not the ones before court.

PW11, Peter Gicharu Gichangi is from Men for Gender Equity an NGO that is concerned with human rights abuses. He stated that on 24th June 2008 he received a call from Women Rights Awareness Programme (WRAP) who told him that they were sheltering two girls aged 13 and 14 years who were alleged to have been abused by a certain white man. The two girls were PW2 and PW3. The following day he allegedly obtained P3 forms which he took to Dr. Kamau for filling. He agreed to go and identify the place where the two girls were abused. He contended the two girls pointed out a place opposite Muthangari Primary school. He then went to the nearest police station to make a report. The 1st appellant was then arrested by police officers from Muthangari Police station.

PW12 Rebecca Musisi, a social worker with Women's Rights Awareness Programme received a report on 12th June 2008 from Children's Officer Kasarani who requested her for temporary shelter for two minors. She then took the minors to their offices and gave them a temporary shelter. She allegedly reported the matter to Mwiki Police Post vide OB No.16 of 11th June 2008. On 17th June 2008 the two girls were taken to Nairobi Women Hospital for medical examination and medication. She confirmed the medical report and the p3 forms were handled without police involvement.

PW16 CIP Agnes Kunga contended that on 28th July 2008 she conducted an identification parade where L.W identified the 2nd appellant. On 29th July 2008 she conducted another parade where N.K . identified the 3rd appellant.

PW17 PC Josphat Kenei stated that on 27th July 2008 while on patrol duties along Luthuli Avenue in the company of another police officer, they approached by a gentleman by the name Thuku who wanted THEM to arrest a lady wanted at Muthangari Police Station. The said person pointed out the 2nd appellant and he immediately arrested her and took her to Muthangari Police station.

PW18 PC Amos Ole Tiren stated that on 28th July 2008 the OCS Muthangari introduced him to Mr. Gichangi so that he could arrest a lady he wanted for some criminal charges. Together with other police officers, he arrested the 3rd appellant in a house within Uthiru area.

PW21 PC Caroline Kanimukur is one of the investigating officers in this case and her evidence is as follows: On 26th June 2008 she was informed by the OCS Muthangari that there was a case of defilement within the area. The OCS wanted her to escort him so that he could arrest one of the suspects. Together with 5 police officers they left the station and proceeded to a house near Muthangari Primary school. She said they were directed to the said house by persons in a white car that was in front of them. On reaching the gate, two girls, two female adults and two male adults came out of the car and directed them to a house. She also found media personnel were at the gate. The owner of the house came out and the girls pointed him out as the person who defiled them. The 1st appellant was arrested and taken to Muthangari Police Station. She then proceeded to record statements from the two girls and the person arrested. After receiving the statements, she charged the 1st appellant with the counts subject of this appeal. She confirmed the two girls were PW2 and PW3. She also gave an outline as to how a criminal complaint is to be handled;

(1) You must book the complaint in an OB book.

(2) Name of the complainant,

(3) Contact of the complainant

(4) Type of complaint,

(5) Description of the alleged culprit by name or by features.

In her view the process was not followed and that there were no initial report concerning the 1st appellant or connecting him with the alleged defilement. On the issue of the first report being put in the OB book, she contended the purpose was to form the basis of arrest. She also confirmed no report of defilement was made at Mwiki Police Post. She contended that what follows after receiving the complainant, is the investigation which focuses on the complaint of the complainant. The witness in her evidence stated that normally police investigate a complainant independently and impartially. Further she said that she was placed by her seniors to take the suspect to court immediately. It is important to quote part of her evidence;

"I did not have the opportunity to investigate this case due to the pressure from the media, WRAP officials and my seniors….it is strange that the accused was recording a statement in respect of a complainant he was not aware of."

On the issue of the P3 form, she confirmed the documents were given to the OCS by WRAP officials. There was no police officer who accompanied the complainants at the time when the p3 forms and other medical documents were filled. The witness contended the reasons for ensuring a police escort is to ensure that there is no tampering with the report and results. The purpose is meant to protect the integrity and support the case of the prosecution. The witness further contended;

"I find it strange that nobody sought the assistance of police to accompany the children to Nairobi Women Hospital…If I had the opportunity of thoroughly investigating this case that material would have been important for my investigation….The P3 forms did not bear the stamp of any police station leave alone Mwiki where it was allegedly issued from. It looks like the P3 form is from un-official source….When the girls gave me their statements they did not know the place where they had been defiled. The information could not have come from the girls."

PW22 CIP Julius Ikamati is in charge of Mwiki Police Post and stated that on 12th June 2008 he perused the OB and was informed there were two ladies brought in for interrogation in connection with child trafficking. He then instructed one of his officers to investigate the incident. On 17th June 2008, the officer investigating the case informed him that he had contacted the assistant chief to come to the Station and record a statement but since then the assistant chief had not done so. And since the two ladies had overstayed in cells he released them unconditionally. According to him there was no report of defilement that was made in respect of any of the parties subject of this appeal. He confirmed that there was no report that had been made by Mr. Gichangi at Mwiki police Post as stated by him. There was no P3 forms issued to any of the complainants. He contended that the P3 forms do not indicate the OB numbers and the date of the incident. The stamp of the station was missing. He was of the view that the P3 forms before court could have been forged or manufactured elsewhere. A P3 form assists the complainant in evidence of the complaint raised. It is possible someone have committed an offence of forgery. He also confirmed that the ladies arrested at Mwiki are not 2nd and 3rd appellants.

PW23 Cpl Charles Suter from Muthangari Police Station partly conducted investigation of this case. He confirmed that the P3 forms did not originate from Mwiki Police Post and that they were not authentic. He stated the P3 forms were brought by Mr. Peter Gichangi and WRAP officials. He could not tell how the said officials were handling Government documents. He also confirmed that N.K .'s report was brought or made nine months after the alleged incident. No reason was given why they kept the report that long. He also said that the N.K . said the offence took place at Loresho in 2007 on a date she could not remember. In his investigations he discovered there were many mistakes in the case and that there were a lot of contradictory statements by the complainants. In his evidence he stated that police never had time to investigate the case fully since WRAP officials and FEMNET conducted the main investigations themselves. He contended the purpose why he took the appellants to court was for truth to be known, the police are not blamed in the light of publicity by the media and public demonstrations.

PW24 Dr. Zephaniah Kamau said that on 25th June 2008 he was brought G.W and L.W for purposes of filling and completing the P3 forms. He also completed the P3 form of N.K . on 29th July 2008.

The above is a reflection of the evidence tendered by the prosecution. The 1st appellant denied the charges and put forward an alibi defence that he could not have had the opportunity to commit the alleged offences that were preferred against him. The 2nd and 3rd appellants also denied the charges and pleaded for innocence. The trial court analyzed the evidence but nevertheless convicted the appellants on the grounds that the evidence was sufficient and overwhelming against the appellants.

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. It is not the function of the court to merely scrutinize the evidence to see if there is some evidence to support the prosecution case. The court must analyze the whole evidence and make its own findings and draw its own conclusion. The trial court had the opportunity and advantage of hearing and seeing the witnesses thus some considerations are left for that advantageous position which is only available to the trial court.

The first ground of complaint relates to the amendment of the charge sheet by the trial court. It is uncontestable the trial court unilaterally and without affording the 1st appellant or the prosecution the right to be heard amended the charge sheet at the time of writing the judgement. Mr. Kilukumi learned counsel for the 1st appellant submitted that in amending the charge sheet, the trial court acted illegally, unlawfully and denied the appellant protection of the law and the due process as enshrined in our Constitution. He contended that section 214 of the Criminal Procedure Code is couched in mandatory

terms. A charge sheet can only be amended before the close of the prosecution case. And there is no lawful authority vested on subordinate court to amend the charge sheet thereafter. Mr. Kilukumi also contended that the amendment of the charge sheet at the stage of writing the judgement, gravely prejudiced the 1st appellant for he was convicted not on the charges he was tried upon but on freshly drawn charges to which he did not have the opportunity to respond. He contended the magistrate was not entitled to make a new case other than that put forward by the prosecution. Mr. Kilukumi also contended that the blatant violation of section 214 of the CPC by an experienced judicial officer yields to the inference that the court was determined to reach a particular verdict irrespective of legal provisions that may have been considered by the trial court as obstructive.

It is important to find out whether the complaints raised by the appellants is borne out of the records and the judgement tendered by the learned trial magistrate. After analyzing the evidence in detail, the trial court was confronted as to the issue of whether the ages of the complainants were correctly and specifically proved by the prosecution. The trial court was also confronted with the question whether the 1st appellant was charged under the correct provisions of the law. In answering the questions by the defence, the trial court rendered herself in the following manner;

"On the charges against the 1st accused person, under Section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. Its true the age of the complainants is given as 13 years and 14 years. Its also true that there was no age assessment report however there is no dispute as to the age of the complainants and in any case the evidence of Dr. Muhombe PW 1 clearly indicate the age of the complainants, and if the complainants were aged 13 and 14 years at the time of the offence then the right section would be section 8(1) as read with section 8(3) and not 8(4). However the misdirection's in the charge has not prejudiced the 1st accused person since the particulars of the offence are clear and adequate to inform the accused person of the offence he has been charged with. The defect is curable under the Criminal Procedure Code and has not occasioned failure of justice and its amended accordingly."

It is clear that the trial court decided to amend the charges against the 1st appellant at the time of writing her judgement. The trial court amended the charges after confirming that there was material defect in the charges subject of her determination. The court acknowledged the grave defect and proceeded to amend the charges. The court confirmed that the 1st appellant was charged under section 8(1) as read with section 8(4).

Section 8(1) defines what amounts to defilement. On the other hand, section 8(4) creates an offence of defilement committed with a child between the age of 16 and 18. And any person found guilty under section 8(4) is liable upon conviction to imprisonment for a term not less than 15 years. The essential ingredients in a charge under section 8 is that the age of the child is of paramount and fundamental importance. The importance is created because the section gives a specific and mandatory sentence for each category of defilement committed against a child. The trial court acknowledged that **there was no age assessment report** but went further and stated that **there was no dispute as to the age of the complainants**. That was central to the amendment undertaken at the time of writing the judgement. The question is whether the court had jurisdiction to amend the charges against the 1st appellant at the time of writing the judgement. And secondly whether the amendment resulted or occasioned a miscarriage of justice in respect of the rights of the appellant or whether the 1st appellant lost a legitimate right or expectation. In law, a power cannot be exercised without giving the person to be affected by the decision a reasonable opportunity to be heard. Beyond doubt, an order which infringes a fundamental freedom is in violation of the principles of natural justice. No man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is given to him. If a person suffers prejudice as a result of breach of natural justice, he is entitled to intervention of the court.

As stated, section 8 of the Sexual offences Act makes a conscious and specific penalty, according to the age of the child. An accurate assessment of the age of the child is a material factor in charging, convicting and sentencing. In amending the charge, the trial court is required to comply with the provisions of section 214 of the CPC which states as follows;

"214(1) Where, at any stage of a trial before the close of the case for the prosecution it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge necessary to meet the circumstances of the case:

Provided that-

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

I am alive the fact that the trial court has jurisdiction to amend the charge sheet in so far as the requirement of section 214 is complied. The trial court acknowledges that there was no age assessment but proceeds to amend the charge to read section 8(1) as read with section 8(3). The trial court also states that there was no dispute as to the age of the complainant and the evidence of Dr. Muhombe (PW1) indicates the age of the complainants. This argument is difficult to accept because Dr. Muhombe did not assess the age of the complainant. Her duty was to examine the existence of sexual violence. According to Dr. Ketra Muhombe, N.K .'s date of birth was given as 1995 while G.W and L.W gave their respective ages. The doctor did not carry out an age assessment in order to establish whether the three complainants were aged 13 and 14 years. I therefore think the trial court completely misapprehended the evidence of Dr. Muhombe. The trial court goes further and says that if the complainants were aged between 13 and 14 years at the time of the offence, then the right section would be section 8(1) as read with section 8(3) and not section 8(4). Was there a basis for such a conclusion or determination in the absence of any documentary or direct evidence in respect of the age of the complainants? The trial court goes further and says that the misdirection in the charge sheet has not prejudiced the 1st appellant since the particulars of the offence are clear and adequate to inform him of the offence he has been charged with. She also says the amendment has not occasioned failure of justice. With greatest respect, I do not understand how the trial court arrived at the determination as to whether the 1st appellant will be prejudiced or had been prejudiced by the amendment.

Clearly, while it is perfectly proper and indeed desirable to amend charges especially when there is a minor defect, it is important to establish whether the court has jurisdiction to do so. In this case, the issue of the age of the complainant were material elements in all the evidence given by the prosecution witnesses and it was one which must have been within the knowledge of the persons giving evidence. If it was demonstrably untrue that the age of the children was contrary to what was stated in the charge sheet, the value of the evidence as a whole is destroyed and cannot be relied upon. Moreover, it is essential to ensure that the amendment does not prejudice the accused persons. And definitely it would result in grave injustice if the appellants had no opportunity or input in so far as their defence is concerned.

I reckon that section 214 is couched in mandatory terms. A charge sheet can only be amended before the close of the prosecution case and on giving ample opportunity the accused. In a situation where a charge sheet is amended after the accused person had offered his defence, then it is likely to result in miscarriage of justice. It can also be safely stated the said court had no legal power or authority to amend the charges after the close of the prosecution case. In **Yongo vs Republic 1983 KLR 319** the Court of Appeal held;

"1. The court has power to order an amendment or alteration of the charge provided;

(i) The court calls upon the accused person to plead to the altered charge.

(ii) The court shall permit the accused person if he so requests to re-examine and recall witnesses.

(iii) It is a mandatory requirement that the court must not only comply with above conditions but it shall record that it has so complied."

In **Chengo vs Republic 1964 EA 122** it was held;

"An amendment of the charge at a late stage of trial cannot be said to be made without prejudice."

In **William Sebugenyi vs Republic 1959 EA 411** it says;

"That owing to the late stage at which the charge was amended, injustice was caused to the appellant."

In **Mohamed Bashir vs Republic 1950 KLR page 88** it was held;

"When an amendment to a charge is made during the hearing of an inquiry and the accused was not asked to plea to the substituted charge, the charge was declared a nullity."

In my opinion section 214 of CPC permits a court to amend the charge at any stage of the proceedings before judgement subject to the conditions therein set out. This is to be implied from the words **'at any stage of the trial'** which occur in sub-section (1). The trial court is required to ask the accused person or his advocate whether any of the witnesses is to be recalled or whether any additional witness is to be called. It is also clear in my mind that a trial court is not entitled to make a new case other than that put forward by the prosecution unless the same is a minor cognate offence.

The regular and orderly progression of matters before court including all acts and events between the time of commencement and the entry of judgement, is usually regulated in order not to prejudice the rights and interests of the parties. It is a safeguard or protection meant to ensure the accused person does not raise a violation of his rights by an omission resulting from failure to comply with the relevant provisions of the law. It has been contended and rightly so that where an amendment is made after the close of the prosecution case, it is likely to be prejudicial and in violation to section 214. It is also an expression that section 214 of CPC has not been complied.

In **Republic vs Johal** it was held;

"The longer the interval between arraignment and amendment the less likely it is that the amendment can be made without injustice."

In case of **Njuguna vs Republic 2007 2EA 370** it was held;

"Failure to inform an accused person of his right given to him by the law is not a procedural irregularity which can be cured under the provisions section 382 of the CPC."

It is clear that the 1st appellant was charged under section 8(1) as read with section 8(4), he defended himself and gave his defence with a legitimate expectation that everything had and could be taken into consideration in arriving at a decision. In my view he could only be convicted and sentenced under that section. The law is that no one shall be convicted and punished for an offence which was not clearly punishable when he was charged and tried. That is a matter deep in the whole spectrum of the trial. The rationale and the logic of amending the charges at the time of writing the judgement when the 1st appellant had no opportunity to reply or contest is not clear to me. I therefore think the 1st appellant was justified in attacking the amendment undertaken by the trial court at the stage of writing the judgement. In granting the 1st appellant bail, I held as follows;

"The matter which to my mind is relevant in this case is that where the power to be exercised by a judicial officer involves a charge against a person who is eventually convicted the person can be said to be prejudiced if he had no knowledge or reasonable expectation that he would be convicted

under a different section than the one in which he gave his defence. One may argue a person who was exposed to a situation where he is convicted for a charge in which he did not give his defence may have lost a legitimate expectation or right. The point I am making is that it is a common principle in every case which has in itself the character of judicial proceedings that the party against whom a judgement is to operate should have an opportunity of being heard. In Campel v Child 1832 2C & J it was held;

"Here is a new jurisdiction given, a new authority given: a power is given to the Bishop to pronounce a judgement and according to every principle of law and equity, such judgement could not be pronounced and if pronounced could not for a moment be sustained unless the party in the first instance had the opportunity of being heard in his defence which in this case had not and not only no charge is made against him which he had an opportunity of meeting, but he has not been summoned that he might meet any charge."

In R v University of Cambridge 1723 93 ER 698 the Court of Kings bench held;

"Even God himself did not pass sentence upon Adam before he was called upon to make his defence."

It is the case of the applicant that the charges that were preferred against him were substantially amended without his notice and knowledge by the trial court, therefore he lost a legitimate right or expectation by reason of the trial court unilaterally and bilaterally amending the charges that were preferred against him. The law is that if the order in question adversely affects the rights of an individual, the party is entitled to a notice and the notice must be clear, specific and unambiguous. In my understanding the object of a notice is to give opportunity to the individual concerned to present his case of defence and if the party is aware or made aware of the charges or allegations, then he cannot be said to be prejudiced simply because it was not brought to his attention. It is important to show that the person had no knowledge that he would be convicted for charges different than the ones in which he gave his defence and as a result suffered prejudice. I know that whether a person has suffered prejudice is a question of fact and law and depends on the circumstances of the case. I also appreciate that notice must be given to an individual who would be affected by the outcome of a decision and that he must be accorded a reasonable opportunity before he or she is convicted for charges in which he did not give his defence."

The second issue raised by Mr. Kilukumi is that the essential element of the crime of defilement under section 8 was not established by the prosecution. It is essential to establish that the victims were under the age of 18 and secondly there was penetration which is legally defined as partial or complete. Punishment for the offence depends on the age of the child. I agree that the two elements or ingredients of the offence must be proved beyond reasonable doubt before a verdict of guilty can be pronounced.

It is contended that PW2 and PW3 did not in their testimony mention at all that their respective private parts were penetrated by the 1st appellant. PW2 testified that in so far as it is material that she found a man on top of herself. PW3 testified in so far as it is material, I found myself bleeding from my private parts. PW4 contended that the 1st appellant penetrated her through her private parts.

Dr. Zephaniah Kamau examined the three alleged victims of defilement on 25th June, 2008 and 29th July 2008. He contended that PW2 had no physical injuries and that her external genitalia was normal and that the hymen was absent. At the time of examining PW3 he also found no physical injuries and her external genitalia was normal. He also made the same assessment against PW4. Dr. Zephaniah did not find any scientific finding that any of the alleged victims had been penetrated. The only other medical doctor who examined the victims is Dr. Ketra Muhombe who carried out the medical examination on PW2, PW3 and PW4. She formed the impression of defilement on the basis of the history given to her by the alleged victims. According to Mr. Kilukumi that was not an independent and scientifically established fact because the said doctor came to the conclusion because the victims gave, a history of sexual assault.

PW14 Dr. Samuel Njenga testified that it is possible that these kinds of injuries can be caused by other factors. Mr. Kilukumi therefore posed a question whether an impartial and dispassionate analysis of the

medical evidence presented to the trial court yields to only one inference that the alleged victims were penetrated by the 1st appellant. He contended that there was no medical evidence to prove penetration of the alleged victims by the 1st appellant. It is significant to note that PW1 told court that PW4 was crafty and evasive. The doctor had difficult time in getting information and answers from her. As rightly pointed out by Mr. Kilukumi, the trial court did not factor in the craftiness and the evasive nature of the victims in assessing what weight should be attached to their testimony.

It is also clear Paul Waweru Kangethe testified that there was no scientific material to sexually link the 1st appellant and PW2 or PW3. Accordingly, there was no independent evidence to link the 1st appellant with the alleged defilements.

The second issue which is of fundamental importance is the age of the complainants. Mr. Kilukumi contended that none of the complainants or any of the prosecution witnesses produced birth certificates or any other evidence as proof of the age of the complainants. In essence, no age assessment was placed before the trial court. It was therefore contended by Mr. Kilukumi that there was no basis on which the trial court could determine whether or not any of the alleged victim was a child and if so the exact age.

In my view that was an extremely important factor in determining the sentence to be imposed against the 1st appellant. When the question of age is material in a criminal proceeding, production of birth certificate or other relevant direct evidence is essential. In my opinion the non-production by the prosecution of age assessment evidence of the complainant, is a material defect. As earlier stated the trial court acknowledged that there was no age assessment report but contended that there is no dispute as to the age of the complainant because the evidence of PW1 clearly indicates the age of the complainant. She goes further and states that if the complainants were aged between 13 and 14 years at the time of the offence, the 1st appellant should have been charged under section 8(1) and 8(3). With the greatest respect to the trial court, Dr. Ketra Muhombe did not carry out an age assessment but merely indicated what the victims told her. In law you cannot draw an inference without first eliminating every other reasonable hypothesis and ensuring that there were no other co-existing circumstances which would weaken or destroy the inferences. There is at least a sufficient strong possibility that the age of the complainants was not established. This is together with the complete absence of evidence that could be expected to support the complainants' evidence as to their exact age.

In the case of *Abdi Saran Abdi vs Republic Criminal Appeal No.82 of 2008* it was held;

"The failure to adduce age assessment evidence in respect of an alleged defilement victim, amounted to inadequate evidence necessary to sustain a conviction."

It is therefore clear in my mind that age assessment must be substantiated by birth certificate or direct evidence which is reliable in so far as the age of the complainant is concerned. Age of the victim is a matter of fundamental and significant requirement in law under the Sexual Offences Act.

The other issue that was raised by the appellants is that the trial court did not faithfully, impartially, objectively, dispassionately and rationally analyze the evidence tendered at the trial as a whole to determine the criminal culpability of each of the appellants. Mr. Kilukumi contended that the prosecution case is premised that the 2nd and 3rd appellants supplied or availed to the 1st appellant the three complainants. It was contended that the 2nd and 3rd appellants were initially arrested at Mwiki Police Post. It is contended that the trial court failed to appreciate that several witnesses testified that the two ladies in court were not the ladies arrested at Mwiki Police Post on allegations that they took PW2 and PW3 to a white man's house in Westlands.

It is clear from the evidence of PW9 and PW22 that the two ladies linked with taking PW2 and PW3 to a white man's house in Westlands, were not the 2nd and 3rd appellants. PW9 after being given information by the two victims arrested two ladies and handed over to Mwiki Police Post. She confirmed that the two ladies before court were not the ones she arrested.

PW15 testified the ladies arrested at Mwiki Police Post in connection with two complainants namely PW2 and PW3, were not the 2nd and 3rd appellants. Mr. Kinyanjui learned counsel for the 2nd and 3rd appellants strongly complained that the trial court did not give any significance to that testimony whose effect is to delink the complainants from the 2nd and 3rd appellants and consequently the 1st appellant.

Cpl Charles Suter PW23 told the trial court that he was aware of the two ladies arrested at Mwiki are not the 2nd and 3rd appellants in this case. That was reinforced by PW22 CI Julius Ikamati who allegedly released the two ladies. The investigating officer PC Caroline also told court that the two prisoners were Jane Wavinya and Joyce Nyaguthie Mwangi. There is no mention of the 1st, 2nd and the 3rd appellants. It is contended that the approach of the trial court was erroneous and deliberately suppressed and ignored any evidence which was favourable to the appellants.

The nexus between count 2 against the 1st appellant and count 5 against the 3rd appellant is obvious. The prosecution case is that the 3rd appellant supplied L.W (PW3) to the 1st appellant. The question that was posed by the defence is when that was done. Was it 7th June 2008 or 1st June? As rightly pointed out by Mr. Kilukumi there was no evidence tendered at the trial to prove that PW3 was ever at the premises of the 1st appellant on 1st June 2008 or at any other material date. Taking into account the testimony that the 2nd and 3rd appellants were not the persons arrested in connection with the episodes in question, a reasonable doubt arises as to whether L.W was at any date in the premises of the 1st appellant.

The other issue raised by the appellants is that the trial court abdicated its judicial role and selectively and in a most unfair manner disregarded any evidence in favour of the 1st appellant. The trial court forgot that the role of criminal investigation officers is not to procure conviction by any means. It is alleged the police officers involved in arresting and investigating the complaints gave evidence which was favourable to the defence. The officers were Caroline Kanimukur, PW21. CIP Julius Ikamati, PW22 and Cpl Charles Suter, PW23. It is contended that the golden line running through their testimony was that there was no formal complaint of defilement in the police records, the procedure for reporting and investigating complaints was not followed, the arrest of the 1st appellant was un-procedural, pressure was inserted on investigators, thorough independent and conclusive investigations were not carried out. PW21 and PW23 contended that the complainants were unreliable. The P3 forms were not authentic but forgeries without any police stamps. In essence the cumulative effect of the evidence tendered by the investigators at the very best cast doubt as to the guilt of the appellants. It is contended by the defence that the trial court instead of evaluating judiciously the effect of the testimony by the police officers, took the view that the officers **did their best to attack their own case and went out of their way to highlight the weakness** in the prosecution case. It is further contended that such remarks displays a highly partisan approach to the evaluation of the evidence.

It is of course a well settled principle of law that before an appellate court can nullify a judgement on the ground of bias, there must be proof to the satisfaction of the court that there was a real likelihood of bias as would be sufficient to vitiate the proceedings or adjudication. As to what real likelihood of bias will suffice, in this regard, one has to be guided by common sense and by certain legal principles which the courts have from time to time laid down as applicable in this type of cases. It is contended the trial court instead of evaluating the testimony of police officers took the view that the said officers did their best to attack their own case and went out of their way to highlight the weaknesses in the prosecution case. It is the contention of the defence such remarks display a highly partisan approach to the evaluation of evidence.

In the case of ***Grace Moikera & 4 others v Republic 2006 KLR*** it was held;

"Another complaint was that the magistrate in her judgement poured skeptical scorn on the appellant's case. We agree that the judgement is open to criticism in this respect. Sarcastic and denigratory remarks in relation to the defence have no place in a judgement. A dispassionate approach and clear findings of facts are more indicative of a judicial approach and do not lay the

magistrate open to a charge of possible bias."

In my view, it is not the function of a trial court to merely scrutinize the evidence to see if there is some evidence to support the prosecution. It must analyze the whole evidence and make its own findings and draw its own conclusion to avoid complaints of being biased against one side. It is difficult to define what amounts to bias but the court can rely on some findings made by the trial court as a positive indication that the court did not distinguish between evidence and speculative assertions. It is not the role of the court to make negative and skeptical scorn against the case of the accused persons. It is also important to understand that you cannot draw an inference without first eliminating every other reasonable hypothesis and ensuring that there were no other co-existing circumstances which would weaken or destroy the inference or bias or the weight to be attached to a particular witness. As to what amounts to bias, I can do no more than cite the case of ***R v Camborne Justices exparte Pearce (1955) 1 Q B 41*** where it was held;

"By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on a reasonable grounds and was reasonably generated but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

In my view objections cannot be taken to everything which might raise a suspicion in somebody's mind. It is not something that raises in somebody's mind that is enough to cause an order or judgement to be set aside. There must be something in the nature of real bias.

It is certainly not disputed that the present case is not one in which the trial court can be said to have any proprietary or pecuniary interest, far from it. The facts are not clearly consistent with this view. However, it must be frankly said that the law is not altogether clear, though, one may discern from the many decided cases one cardinal principle, which is justice should not only be done but should manifestly and undoubtedly be seen to be done. In my view nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. To favour one side unfairly at the expense of the other is a ground for creating suspicion. The reason is plain enough, justice must be rooted in confidence and confidence is destroyed when the likeminded people go away thinking that the judge was biased. I would go a little further by saying that without necessary imputing any malice or misconduct on the part of the trial magistrate, the failure to give due weight to the evidence of the three police officers who exonerated the appellants, can only be reasonably explained on the grounds that the trial court was anxious to convict the appellant. This anxiety would also in my view explain the way she amended the charges against the 1st appellant. In this kind of atmosphere can it be honestly said that the appellants did have a fair and impartial trial? I do not think so.

The law is that it is not the duty of the trial court to go beyond the scope of the evidence adduced and adjudicate on a matter which was not raised by the prosecution and answered by the defence. The remarks by the trial court that the three police officers **<u>did their best to attack their own case</u>** and **<u>to highlight the weaknesses in the prosecution case is a matter of grave concern</u>** in terms of whether justice was done to the appellants. If a material element in an evidence and one which must have been within the knowledge of the person giving the evidence is demonstrably untrue the value of the evidence as a whole is destroyed and cannot be relied upon. I think therefore the reference was a most unfortunate one and is capable of prejudicing the appellants' case. This was a grossly improper remark. There was no evidence whatsoever that the appellants were in any way responsible for the way the police acted in terms of giving evidence before the trial court. If the three police officers were prompted by the urge to speak the truth, the trial court was duty bound to accept their evidence as against the prosecution and in favour of the appellants.

The evidence of PW21, PW22 and PW23 is that there was no prior report of defilement at Muthangari Police Station or at Mwiki Police Post, the 1st appellant was arrested before the complainants wrote their

statements, that the arrest and investigations was largely coordinated and carried out at the instance and instigation of third parties, that there was no description of the alleged culprits by names or by features by the complainants, that no person accompanied the three complainants at the time of filling the P3 forms and at the time of examining them at Nairobi Women Hospital, that the P3 forms were not supplied by any of the police stations that were related or connected to the investigation of the matter, that the police officers did not have opportunity to investigate the matter due to pressure from the media, third parties and senior police officers, that the whole investigations were not carried out independently and impartially. In short the three officers poured a lot of defects and weaknesses on the prosecution case which would have been inferred in favour of the appellants.

There is no evidence to show the said officers were in any way compromised in the way they tendered their evidence before the trial court. One thing is clear that none of the police officers were declared as hostile witnesses who had given favourable evidence in favour of the appellants or who have diverted from their original written statements so as to say their evidence was discredited or amounted to giving false information. From the facts and the evidence tendered, it is clear the three police officers only narrated the events as they were aware and brought to their attention. It was therefore wrong on the part of the trial court that they did their best to attack their own case. In any case if they did their best to discredit their own case, it is not the role of the court to assist any party or fill loopholes left in the case of the prosecution. There was no material on the record on which the magistrate could properly hold that the three police officers were at fault. I therefore think there was no substance in the comments against the three police officers.

The other ground raised by the appellants is that they were convicted on contradictory, inconsistent and incredible evidence. They contended that the trial court did not consider the litany of contradictions which were material to the prosecution case. Mr. Kilukumi and Mr. Kinyanjui for the appellants contended that the evidence of the three complainants was not consistent, reliable, dependable and truthful. It is contended that in an endeavour to cover up the contradictions between previously recorded statements and oral testimony, the trial court opined that; ***"a statement to the police is a summary of facts and in any trial there are bound to be some discrepancies"***.

The law is that if a witness had formerly said or written the contrary of that which he testifies, unless a satisfactory reason is given for having done so, his evidence should not have much weight except to show that he or she is not a credible witness. In this case PW1 Dr. Muhombe informed court that it would be surprising that the girls went shopping in Gikomba after the incident. That must have been a traumatic experience, emotionally and physically. The evidence on record is that the victims walked across town for 14 kilometres and the trial court did not factor the views expressed by the doctor in assessing or determining whether the complainants were truthful witnesses.

PW2 G.W stated in her statement to the police she left home to go to church yet before the trial court the reasons for leaving home was said to pick her clothes from Mwiki. She told police she never sought permission before she left home. In court, she testified that she sought permission. She also told court that she was in police vehicle when the police went to arrest the 1st appellant, yet the police officers testified she was not in their vehicle. Her allegations of being sprayed at the *mzungu's* residence was not recorded in her police statement. She also alleged that Mark's mother beat her with a hockey stick. In court she denied ever telling that to police. She also denied telling the police that she had been defiled between 1st and 16th June 2008. She also lied about the time she dropped out of school as well as her academic performance.

PW3 L.W told the court that the police left out of her statement the aspect of going to church with PW2 and described the statement as incorrect. She disputed the accuracy of her statement to the police as whether she was at the sitting room when she was allegedly sprayed with a substance and insisted that it was done at the door. She also told court that she told police at Mwiki what she had done and what they recorded, an assertion completely refuted by police officers from Mwiki who produced documentary evidence at the police station.

PW4, N.K . by her own admission lied to her grandmother. She contended that she was defiled at

Loresho. She also told court that she took Kshs.3,000/= out of Kshs.8,000/= allegedly given to her by the white man. Under cross examination she admitted that she told her grandmother that Faith took all the money. She admitted that she told the doctor she was defiled in April 2008 yet the charge sheet stated diverse dates between 1st November 2007 and 31st November 2007. Her statement to the police made reference to Sunday November 2007 while she testified November 2006 is the correct day. She was examined, according to her testimony, seven months after the incident. In any case, PW1 described PW4 as crafty and evasive. In my view therefore, had the trial court approached the evidence of PW1, PW2, PW3 and PW4 with the usual circumspection and caution it would have been most reluctant to convict on the basis of such evidence. The trial court also would have been slow to find the three complainants were truthful witnesses. Taking into account the discrepancies between the previously recorded statements and oral testimony of the three complainants, there was no legal justification in accepting their testimonies as truthful.

In this case there was no eye witness to the three alleged defilements. The victims were under legal obligations not do anything or say something which could cast aspersion on their credibility. In *Ndungu Kimanyi vs Republic (1979) KLR 282* it was held;

"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."

Mr. Kilukumi learned counsel of the 1st appellant submitted that none of the victims satisfy the minimum standard requisite for the acceptance of evidence. He also contended that a judicial officer is obligated to give reasons why he found witness credible and truthful. In this case the trial court did not give any reasons why she found PW2, PW3 and PW4 credible notwithstanding the contradictions and inconsistencies in their testimony.

In ***Omuroni vs Republic (2002) 2 EA 508*** it was held;

"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."

The above decision clearly defines or sets the parameters that have to be followed or established before a particular witness can be said to be a witness of truth or otherwise. It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision. Furthermore, there is ample and uncontroverted evidence that the three complainants were not witnesses of truth. There is evidence from PW8 and PW10 that PW2 and PW3 wanted other girls to leave school so as to engage in other businesses. PW8 stated that PW2 and PW3 told him that they were being sexually abused by being offered to men at costs. He stated that they never told him which men they had been offered to. There is also evidence that the complainants may have been exposed to sexual assault by persons who were not before court. It was contended and I agree that the trial court did not pay sufficient attention to the testimony of PW8 and PW10.

It is also clear that PW2 G.W testified that PW3 L.W was working at Hunters Bar. PW8, on information supplied to him by PW2 and PW3, authored a letter which indicated that the two girls were being offered to men in Westlands. The 1st appellant was not at all material times residing at Westlands. A pertinent

question is to whom were these girls taken to if their story is to be believed? That was a question which was not answered by the prosecution and which was not addressed by the trial court in convicting the 1st appellant.

Another issue raised by the appellants is that there was massive intermeddling with the investigations and the prosecution of the case. The power to prevent and detect crime including investigations is vested in the Kenya Police. A prosecutor is required to produce all evidence whether favourable or unfavourable to his case.

It is the contention of the appellants that whilst ordinary citizens and NGOs such as WRAP, MENGEN and FEMNET are undoubtedly entitled to participate in the elimination and suppression of crime, in so doing they must eschew from doing anything that would compromise the due process and a fair trial which is constitutionally guaranteed to all accused persons.

There is no doubt that the 1st appellant was arrested at the full glare of the electronic and print media when no complaint of defilement had been recorded by those charged with responsibility of investigations. It is also clear that by the time the 1st appellant was recording a statement with the police, the alleged victims were simultaneously recording their statements. The investigators acknowledged and confirmed that pressure was brought to bear upon them, such that the investigations were not conclusively carried out before the 1st appellant was arraigned in court. It is clear that important and critical documents such as the P3 forms were being handled by persons who are not authorized to do so leading the police officers who testified to deny their authenticity and origin.

In my mind a time is unlikely to come when anyone will ever be able to say that perfect fairness has been achieved once and for all. However, it is important to protect the process of the administration of justice from interference and intermeddling by third parties. The prosecution must be firmly on the driver's seat when a complaint is made in respect of any crime no matter who is involved.

In this case, the three police officers who were directly concerned with the matter expressed grave difficulties in the management and the control of the case. They blamed their superiors for not giving directions and they also blamed third parties who were directing police as to the circumstances and mode of investigations. There was a departure from the central principle which is that there must be independent and impartial investigations. Such a departure is a ground for concern and would damage a significant aspect of public interest in the administration of justice. In my view, the role of third parties must be restrained, measured and carefully tailored for the just process in the whole matter. In truth, of course, almost all prosecution evidence is or is intended to be damaging to the prosecution. However, it is important to guard against express interference in order to achieve one goal which is to fix the accused persons. It is impossible to overrate the importance of keeping the administration of justice from interference, participation, direction, guidance, control and manipulation which is likely to raise suspicion of unfairness. In such circumstances, the question that arises is whether the appellants enjoyed their rights or were deprived their basic rights by virtue of the facts the investigations were being driven and conducted at the behest of third parties. It is reasonable to say that there was no impartial, fair, professional and objective investigations devoid of vested interests designed to attract publicity.

There is here, I apprehend substantial and well founded allegations of real likelihood of bias or lack of control on the part of the police in the manner the investigations, charging and trial was conducted. No doubt the conduct of police in this matter was imperceptible and unconscious. However, nothing is to be done which creates even suspicion that there has been an improper interference with the course of justice. As I cannot say with any degree of certainty that justice was done in the manner the investigations was carried out. The evidence of PW21, 22 and 23 leaves no doubt that PW11 and PW12 played a major role in framing and implicating the appellants in the charges subject of this appeal. All this shows beyond any doubt that the conduct of the prosecution and the circumstances surrounding the gathering of evidence was orchestrated and designed to hinder a fair and just investigation by the police. I am therefore impelled to say that I do not think that there was a proper and an impartial investigation that

resulted in the charging and the trial conducted against the appellants. It was perfectly a case of third parties deciding what the police ought to do. The police distanced themselves from the main and crucial documents such as the medical examination report and the P3 forms. In the absence of any eye witness, who may have witnessed the alleged defilements against the three complainants and in the absence of any legitimate and genuine documentary evidence to support the alleged defilement, there is therefore no basis to convict the appellants.

The trial court was of the view that the evidence of PW2, PW3 and PW4 was corroborated by material facts like the medical examination report and P3 forms produced before court. With the greatest respect, the prosecution themselves contested the veracity, validity, authenticity, originality, the legitimacy and the genuineness of the said documents. If PW21, PW22 and PW23 attacked and concluded that the documents could not be relied upon. In my view, a material which is contested cannot form a basis of corroboration. I agree with the trial court that the law allows that a conviction can be entered on the evidence of a single witness, but I must add that the parameters and threshold of such a basis has not been met by the evidence of the three complainants. I do not think PW2, PW3 and PW4 were witnesses of truth as contended by the trial court. With the greatest respect, the three witnesses readily and more than once changed their testimony about the dates and other pertinent issues concerning the alleged defilements. It is clear none of them mentioned Lavington as the place where they were defiled. Some talked of Loresho while others talked of Westlands. I do not understand how PW2 and PW3 were able to trace and direct police to the house of the 1st appellant in Lavington when they did not know the location of Westlands, Loresho and Lavington. That was a question which was supposed to be addressed and determined by the trial court. It is third parties who directed police to the house of the 1st appellant. It is also clear that it is third parties who led police in arresting the 2nd and 3rd appellants.

The evidence of PW17 is that on 27th July 2008, they were approached by a gentleman by the name Thuku who wanted to arrest the 2nd appellant. The 2nd appellant was allegedly arrested from Luthuli Avenue after she was pointed out by the same gentleman who did not give evidence.

The evidence of PW18 is also that he arrested the 3rd appellant from Uthiru area after she was pointed out to him by Mr. Gichangi (PW11). It is not clear why the 2nd and 3rd appellants were arrested since there was no prior report of their involvement in the alleged crimes that were preferred against them. The only evidence that connected the 2nd and 3rd appellants to the charges subject of this appeal is the identification parade conducted on 28th and 29th July 2008 by PW16 CI Agnes Kunga. It is alleged that in both instances PW4 N.K . identified the 2nd and 3rd appellants. It is not clear as to how PW4 identified the 2nd and 3rd appellants when there was no prior report either giving the names or descriptions fitting the two appellants. The trial court was of the view that PW4 was able to identify the two appellants by recognition, since she knew the 3rd appellant and had seen the 2nd appellant several times after the event. With the greatest respect to the trial court, if PW4 had known or seen the two appellants, then there was no basis for the identification parade conducted by PW16. It was worthless exercise and had no value in law.

In my opinion it is not difficult for a genuine complainant to be mistaken on the issue of identity and it is not unknown for a complainant to be actuated by malice. Applying these principles and bearing in mind that PW2, PW3 and PW4 took considerable time before making a formal complaint or report, it is possible for them to make a false identification. One could expect that a report was made to the police at a time that was reasonable after the alleged defilement and that at the first opportunity the complainants stated that they had recognized her assailants or persons who assisted them and gave a description of them, which description was a reasonably accurate one of the accused persons. It suffices to say there is no evidence of the surrounding circumstances consistent with the complainants' evidence either of the alleged defilement or of the identity of the assailants or conspirators.

Now, having critically examined and re-valued all the evidence on record, I have no doubt that the appellants were wrongly and improperly convicted. I make a determination that the prosecution did not prove its case beyond reasonable doubt. It is clear that the trial court made fundamental errors and

misdirection which goes to the root of the conviction entered against the appellants. The findings and the conclusion drawn by the trial court was not supported by the evidence tendered by the prosecution. It is impossible to know or establish whether any of the defilements was committed by the 1st appellant. There is no shred of evidence connecting the appellants with any of the charges. It is clear from the evidence that the whole matter was acted in a poorly rehearsed manner. The melodramatic events was plotted by third parties and given to the prosecution to act in a poor manner. I therefore think the strong criticism by the learned counsel for the appellants was well merited. It is difficult to understand how and why the appellants were convicted on the disjointed evidence tendered by the prosecution. The net effect is that none of the 25 prosecution witnesses connected the appellants to the charges subject of this appeal. I find it strange that the trial court convicted the appellants despite the fact that there were glaring contradictions, discrepancies and inconsistencies in the prosecution case. There were many loopholes on the prosecution case which the trial court did not consider. There are fundamental and legal issues raised by the appellants, worthy of an acquittal. I think the whole matter was a poorly rehearsed play. The game was poorly planned and staged by the prosecution. Consequently, the grounds placed by the appellants are well and truly merited.

On sentence, the 1st appellant was sentenced to 15 years imprisonment. As stated earlier, the appellant was charged under section 8(1) as read with section 8(4). However, the trial court amended the three counts to read section 8(1) as read with section 8(3). Making it worse the trial court convicted the 1st appellant as charged. It is therefore difficult to understand whether the 1st appellant was convicted under the original charges or the amended charges.

In conclusion, this court finds the conviction and sentence against the three appellants was made against the weight of the evidence tendered by the prosecution. Consequently, appeals allowed, convictions quashed and the respective sentences against the appellants are hereby set aside.

Dated, signed and delivered at Nairobi this 22nd day of March 2011.

M. WARSAME

JUDGE