REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 24 OF 2020

OKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgement and sentencing in Kaloleni Sexual Offences Case No. 19 of 2018 delivered by Hon. L. N. Wasige (PM) on 4th May 2020)

Coram: Justice Reuben Nyakundi

Mr. Alenga for State

Mr. Kilonzo for the Appellant

JUDGEMENT

OKK, the appellant was indicted for the offence of defilement contrary to section 8(1) as read with section 4 of the Sexual Offences Act. He was tried in a trial whereby the State through the Director of Public Prosecutions summoned attendance of six witnesses.

At the end of the trial appellant was convicted and sentenced by Hon. Wasige (PM) to a term imprisonment of 5 years. He appealed to the High Court hence this appeal based on the following grounds:

(1) That the learned trial magistrate of the subordinate court erred in both fact and law in unreasonably, injudiciously and wrongly finding that the prosecution had proved its case beyond reasonable doubt thereby convicting and sentencing the appellant.

(2) That the learned trial magistrate erred in law and in fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the appellant and in convicting him against the weight of the evidence adduced.

(3) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant on PW1's evidence which was coached, coerced and lured to give incriminating evidence against the appellant.

(4) That the learned trial magistrate of the subordinate court erred in law and in fact by failing to acknowledge that the complaint attending the charges and criminal prosecution was as a result of animosity existing between the family of the complainant and that of the appellant.

(5) That the learned trial magistrate erred in law and in fact in failing to find and rule that there was no cogent, substantial, credible and direct evidence connecting the appellant to the offence of defilement and committing an indecent act with a minor.

(6) The learned trial magistrate erred in law and in fact by failing to consider the evidence of the clinical officer PW3 who in his evidence did not find any bruises, discharge or spermatozoa in the complainant (PW1) and further could not conclude whether the penetration was recent or not hence grossly misdirecting herself in making a finding that the complainant was defiled by the appellant.

Brief background to the charge against the appellant

It was alleged that on the 7/6/2018 at unknown time at [particulars withheld] village the appellant intentionally and unlawfully committed an act which caused his, male genital organ commonly known as *"the penis"* to penetrate the female genital organ, positively referred to as a vagina of ZM a child aged 17 years.

In his appeal the appellant was represented by learned counsel Mr. Kilonzo while Mr. Alenga, the Senior Prosecution Counsel appeared for the respondent. Mr. Kilonzo, who had a right to begin submitted that the prosecution's case on conviction fell below the required standard of proof of beyond reasonable doubt on prove of the critical elements forming the charge of defilement. Learned counsel main concern was the fact of the learned trial magistrate failure to re-appraise the evidence to take note of the inconsistencies and contradictions which be devilled the witnesses to render both legal and evidence burden of proof not discharged. Learned counsel pointers of inconsistencies were on the testimony of (PW1) the victim of the offence, and the clinical officer's findings who testified as PW3. Learned counsel was in respect of the piece of evidence by PW1 that she had sexual intercourse with the appellant for the first time unreliable. The presumption in which learned counsel submissions manifest was lack of bruises or lacerations to the vagina on penetration. However, according to learned counsel that was never the positive findings made by the clinical officer in the documented observation captured in the P3 form. Learned counsel cited the case of **Dominic Kibet v R [2013] eKLR** more specifically on the existence of gaps in the strands of evidence in the prosecution case to proof the existence of the offence of defilement as required in law.

In support of the appellant's case, learned counsel drew attention of this court to the authorities and principles in **Martin Charo v R [2016] eKLR** on coached evidence of a witness acting under pressure from her parents or guardians. Learned counsel further submitted that the prosecution case failed to proof existence and non-existence of the crime committed for reason that a crucial witness was never summoned to testify at the trial court. This was in reference to one B a close friend to the victim having spent some time with(PW1). For this legal proposition learned counsel cited the case of **Bukenya v Uganda [1972] EA 549, Said Awadh v R [2014] eKLR, Ernest Ashindu v R [2019] eKLR**. In his view, learned counsel submitted that there was over-reliance on the testimony of the complainant, inspite of her not being a credible witness.

On the other hand, learned Senior Prosecution Counsel for the respondent supported the decision on conviction and sentence of 5 years against the appellant. He submitted that the learned trial magistrate did not make any errors in her findings that the charge was proved beyond reasonable doubt. Learned Prosecution Counsel contended that the evidence by PW1 was sufficiently corroborated with that of PW3 who examined her and filled the P3 form. Learned Prosecution Counsel argued that there were no contradictions or inconsistencies of evidence between PW1, PW2 or any other witness to adversely affect the outcome of the judgement. Besides, the failure to call B, significantly was not material evidence at the time to disapprove the cogency and credibility of the testimony given by PW1. Learned counsel prayed to this court to dismiss the appeal for lack of merit.

Having considered the appeal and submissions by both learned counsels, it is now the singular duty of this court to determine the appeal.

DETERMINATION

I remind myself that this is a first appeal and therefore both issues of fact and law are to be considered against the impugned judgement. Its trite that the first appellate court has to satisfactorily re-examine, or re-evaluate the evidence to entitle it to draw its own inferences and conclusions on the matter. This duty however is to be approached with caution for the court must bear in mind that there is a valid judgement of the trial court carefully weighed, considered and grounded on the evidence of witnesses and defence case.

When the question arises which witness is to be believed rather than another and that question turns on manned demeanor, the appeals court must be guided by the impressions made by the trial magistrate who saw the witnesses, which the appellate court has no advantage of seeing or hearing. For this duty and precedent setting principles, (See the case of **Shantilal M. Ruwala v R [1957] EA 570, Pandya v R [1957] EA 336).**

In the instant appeal though the appellant counsel has attacked the judgement of the trial court based on six grounds in his memorandum of appeal, the real question is whether the prosecution satisfied the ingredients of the offence of defilement beyond reasonable doubt. It's all laid bare in the case of **Dominic Kibet v R [2013] eKLR** that **"to proof defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."**

The standard of proof in all these ingredients is that of beyond reasonable doubt as was stated in the cases; **R v Subordinate Court of the First Class Magistrate at City Hall Nairobi Exparte Youguider Pall Sermick [2006] 1 EA 3330, Mwaura & Another v R [1980] KLR 127 [1976 – 80] 1 KLR Mbugua Kariuki v Re [1976-80] 1 KLR 1085**. In the later authority, the Court of Appeal held: **"That the burden of proof remains on the State throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.**" (See also Text on **Criminal Law by William Musyoka 2nd Edition Law Africa at pg 72)**.

The ingredients as addressed in the **Kibet case (supra)** have to be tested against the impugned judgement by the court in compliance with the principles in **Pandya and Rawala cases** (**supra**) on the jurisdiction of the first appellate court.

Herein the first crucial ingredient becomes that of penetration. In this regard **section 2 of the Sexual Offences Act** defines penetration **"as the partial or complete insertion of the male genital organ to the genital organ of a female."** In the widest sense of the definition genital organ includes the anal orifice and therefore setting the record straight that penetration ought not to be insertion of the penis to only the vagina of the female victim.

At the trial on this ingredient the prosecution adduced evidence of the victim **(PW1) ZM**. In her testimony (PW1) told the court that she is still a student in Form III born on 19/5/2001 thereby bringing her age at the time of trial to 17 years. In support of this (PW1) produced a birth certificate which PW4 relied upon to charge the appellant with the offence of defilement instead of rape.

According to PW1 on the material day she was sent home for lack of school fees, instead she decided not to go home but spent some time at her friend's house on the 3rd to the 6th June 2018. Her errands did not stop there as she passed through the appellant's rented house at Kaloleni on 7/6/2018. Further, PW1 admits staying at the appellant's house on the night of 7/6/2018. It was during that time she had sex with the appellant which resulted in the indictment and conviction following the complaint made to the police by PW4. As stated by PW1 at the time of visiting appellant she had changed from her school uniform to home clothes which she procured at Mtwapa. The clothes were later to be recovered from appellant's house and produced as exhibit 2. In support of the surrounding circumstances of the offence. Additionally, PW1 stated in the trial that its only on arrival at school she was interrogated by the Deputy Principal on her whereabouts for the past few days resulting her absence from school. That is how the matter was to be reported to Kaloleni Police Station who in turn issued the P3 form and PRC form. On examination there was a presumption that indeed (PW1) had been sexually assaulted.

The next witness called by the prosecution was that of **PW2 – M**, the mother of the victim. In her testimony, she stated that the appellant is their neighbor and in the year 2016 he received credible information that PW1 had an intimate love affair with the appellant. The issue was discussed between them as a family with a caution to PW1 to end any relationship with the appellant. That PW1 had taken the warning seriously, but on the second incident of 8/6/2018 he received a phone call from the school of PW1 that she had not attended school for some days. The matter was kept alive by the school on inquiry of her whereabouts, but fortunately PW1 incident with the appellant ended up being reported to the police station.

Further, the prosecution called in the evidence of **PW3, Mwangito**, the clinical officer who on examination of PW1 filled the P3 form. According to PW3 testimony on medical examination of PW1 there were no bruises, no hymen or any other lacerations to the genitalia and the pregnancy test was also negative. The P3 and PRC form was produced in evidence as exhibit 5 and 6 respectively.

PW4 – J evidence was to the effect of identifying the victim as a student in the school where she teaches. PW4, recalled on reflection that during the period under review on 3/6/2018 all students with fees balances were sent home to make good the payment. It happened that PW1 having been sent home spend more days without any report whether she was able to get the school fees or not. As seen from the record, PW1 appeared in school on the 8/6/2018 and with information at their disposal, the administration informed PW2. On arrival of PW2 at the school it was agreed that the matter be reported to the police.

The value of **PW5** evidence was the assistance she rendered in arresting the appellant and have him escorted to Kaloleni police station. PW5 came to know of the incident through a telephone call by the school administration who were in need of assistance to apprehend the appellant as the main suspect of the crime.

The last witness was **PW6 – Sgt. Hadija**, the investigating officer from Kaloleni Police Station. It was her evidence that after the report was received from the complainant, she was referred to the hospital for a medical examination. According to PW6 the results of the medical examination showed no positive signs of bruises, lacerations, though, the hymen was missing. PW6 told the court that she visited the scene where she recovered the victim's clothes. The recovered exhibits and photos documenting the scene were all admitted in evidence to further add to the ingredient of defilement and positive identification of the appellant.

The appellant in his defence denied the offence only acknowledging to be known to the victim as his cousin and that they are also neighbours within the village where they live. According to the appellant, even both families enjoyed cordial relationship, including his father and the father of the victim engaged in joint business. On the alleged date of the offence 7/6/2018 the appellant told the court that the victim (PW1) visited him at his rented premises leaving a bag of clothes. That immediately, thereafter she left for Mtwapa and all he knew the victim had gone back to school. Thereafter, the appellant testified that it came to pass until the principal summoned him in connection with the offence allegedly committed against PW1. He denied vehemently any sexual intercourse with the victim as alleged in her testimony. It was also the defence of the appellant that the events of the alleged material day could be corroborated by the evidence of DW2 – N.

From the testimony of DW2, he told the trial magistrate that he is a schoolmate to the appellant and they co-share the rental premises at [particulars withheld]. Though they have rented separate rooms, but share common activities like studying and having meals together. It was the evidence given by DW2, to the effect that on 7/6/2018 on coming home from school they met with (PW1) waiting at the door of the appellant. Further he saw appellant welcome in (PW1 who had in her possession a bag. It did not take long according to DW2; he once again saw the appellant escorting PW1 out of the homestead. He recalled that the two on entry to the house lasted about five (5) minutes and the appellant was seeing off the victim PW1 who left for another place.

The question that I must determine is whether from the testimony of the witnesses there is sufficient evidence to prove beyond reasonable doubt that there was penetration in this case. According to the findings by the learned trial magistrate on penetration she relied on the evidence of PW1 and the medical evidence of PW3 on the missiing hymen. The learned trial magistrate was also of the view that PW1 graphic details on what happened was so convincing and truthful incapable of being destroyed by the defence side of the story.

In the instant case to begin with the following facts are undisputed. The appellant and victim seems to have known each other prior to the date of the incident. Infact the appellant on oath told the court that PW1 to the best of his knowledge is related to him as a cousin. That both families are neighbours and at one time engaged in common business enterprises.

From both the appellant and victim evidence on the 7/6/2018, they apparently met at the house of the appellant at Ngoni. The appellant and the victim are both school-going students though not in the same institution. Their point of departure is in regard to the allegation on defilement of the victim when she went to the appellant house, without any invitation or knowledge of the appellant as stated in his defence. It would appear that in all of the consequences of a criminal act that was alleged to have taken place, this was to me a single identifying witness evidence to proof penetration. I am asking myself whether on 7/6/2018 the appellant penis penetrated the vagina of the victim, as founded by the learned trial magistrate in her judgement.

To begin with the law on a single identifying witness is now settled as reducible from the principles in **R v Turnbull v R [1976] 3 ALL ER 549 and Maitanyi v R [1986] KLR 198**. What was the court to look for is whether the victim was mistaken or being untruthful with regard to the ingredient on actual penetration of her genitalia? Here there is no dispute as to the victim having visited the house of the appellant on

or about 5 pm on the 7/6/2018. But did the prosecution prove occurrence of sexual intercourse. Essentially, the learned trial magistrate believed the evidence given by the victim and that in her view it was corroborated by PW3, the clinician who confirmed that PW1's hymen had ruptured.

Most important to the credit on the medical examination there were no tears, bruises or lacerations to the victim's genitalia. That examination was done soon thereafter the inquiry and the victim reporting the incident to the police seemingly under coercion by the school administration and PW2. In this case the victim never informed her parents, the teachers or the police in advance where she had been all those days. It is significant to note that immediately she finished her errands, it did not occur to her the need to inform the parents or report to the police.

The next question which goes alongside with the first one on proof of penetration is whether the ruptured hymen finding made by the clinical officer was conclusive enough to find the appellant guilty of defilement in absence of any other concurrent credible evidence. The answer to me is to be found in a plethora of cases where courts have spoken strongly on this issue of ruptured hymen and proof of defilement. In **John Mutua Muyoki v R [2017] eKLR**. The Court of Appeal in this regard held as follows;

> **"Therefore, in order for the offence of defilement to be committed, the prosecution must approach each ingredient beyond reasonable doubt. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration."**

On the other hand, it is trite that in defilement or rape cases trial courts have to consider the nature of the evidence in consonant with the proviso under **section 124 of the Evidence Act**. The strength of the authority in **Mohamed v R [2008] KLR and Jacob Odhiambo v R** observed that the court must satisfy the criteria that the victim told the truth and must record the reasons for such believe. In trials of this nature offences of defilement are usually committed in total privacy and secrecy. Even so, the prosecution duty is to prove directly or circumstantially that the victim has been defiled.

In the persuasive case from the **South African Court in S v Trainor [2003] 1 SACR (SCA)** the court stated:

> **"A conspectus of the evidence is required evidence that is reliable should be weighed alongside such as may be found, to be false independently, verifiable evidence, if any should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated as most corroborative evidence if any."** Similarly, in **Vokere v R [2014] SCCA 41 Domah J** held **"judicial appreciation of evidence is a scientific rationalization of facts in their coherent whole, not a forensic dissection of every detail removed from its coherent whole."**

A closer look at the testimonies of PW1 and PW3 shows no corroboration to proof of the element of penetration by the appellant against the victim (PW1). All the evidence does is to show that PW1 was chased from school to go home and collect the fees balance. However as confirmed from PW2's testimony the mother to (PW1) she never went home as instructed by the teachers, but instead spent a couple of days at the house of one B. As stated earlier, in that trial, PW1 who had changed from school uniform to home clothes on her own motion visited the appellant presumably to spend a night with him. She further told the court that some of her clothes were left behind in that particular house of the appellant. Hence, it is clear that from the date PW1 was chased from school due to fees balance she never went to her parents to seek assistance. The flipside of the coin however is that this means the investigating officer ignored vital leads or even crucial witnesses like B whose crucial evidence had something to do with disapproving the defence statement. There are parts of PW1 narrative that are not reliable which distorted the cogency of her testimony. I believe, that she had reason to exaggerate and embellish evidence to distance herself from the guilty conscious of not having been in school or reported back on time as directed by the Deputy Principal.

In fact, PW2 learnt from the school teacher that she had not been attending classes, and was therefore required to explain the reasons for her absence. In particular, the fact that the victim never communicated with her parents on being sent home and failure to report the incident to the police or parents immediately after the sexual act sufficiently puts her motive into question. The exercise of assessing evidence involves the trial court considering the whole tapestry or the scope on nature of the evidence to both narrations.

I am aware as a fact and point of law that under section 143 of the Evidence Act an accused person can be convicted on the basis of uncorroborated evidence. However, that uncorroborated evidence must be obtained in circumstances that do not create sufficient doubt as to the commission of the offence. In the instant case keeping in view with divisibility of credibility of evidence she had never been in the appellant's house before as independently rebutted by the appellant's testimony and DW2 a neighbor and school mate to the appellant. There is evidence that the victim and her parents had personal knowledge of existence of bromance love relationship with the appellant but did nothing to prevent, save at the time when the school Deputy Principal came to the picture. One possible view of the facts, is that the victim on this particular date was never defiled but due to coercion and duress from her school teachers and the parents a report had to be made to the police, anyway to cover up for her delinquent acts. Her evidence viewed from the prism of section 2 of the Sexual Offences Act. On penetration the prosecution must lead evidence to show that there was some degree of penetration into the female organ of the victim designed naturally and biologically for that purpose.

In the instant case there is an assertion that was recounted by PW1 that she had sexual intercourse on the night of 7/6/2018 with the appellant.

But thereafter on the 8/6/2018 she left his house and as PW2 and PW4 testimonies firmly confirmed she attended school normally as expected of her as bonafide student. As a matter of fact, PW1 was medically examined by PW3 at Mariakani Sub-County Hospital and no clinical findings were responsive to the material charge of defilement to support her claims.

Why do I say so, that evidence on rupturing of the hymen has no connection with defilement of PW1 with the appellant? Her testimony left several questions still unanswered. For example, did the appellant undress the victim forcibly before the sexual act? If that is so, where is the evidence from the victim? How did this whole act of sexual intercourse begin and conclude? Did the victim visit the appellant to spend a night with him or on arrival he pushed her into the bed and started having sex in the course of that 5 minutes? There are crucial strands of evidence missing from PW1 testimony on oath. Was she forced to leave her clothes at the house of the appellant? For example, if her story on the previous relationship with the appellant was true, what was so special on this day to make it possible for them to engage in sexual intercourse.

At the outset it should be noted in addition to the above that the victim witness reliability is burdened with the following concerns: The first concern is her effort to report the facts fully and honestly and misperceived events. Secondly, whether there are reasons she appeared to distort the recalled perceptions and events. On refocus of facts, a perusal of the victim evidence in chief and cross examination suffers from impediments to accuracy and inadequate acuity of perception defects in the recollection or recitals of events. At the heart of her testimony is the assertion that she had been a girlfriend to the appellant since 2015 but during that period they practiced celibacy until 7/6/2018 when the first sex act took place. To some extent finely appraising the proffered character evidence, there is distinctive curiosity on lack of explanation as to the change of circumstances for a call for action to have sexual intercourse on the material date of 7/6/2018.

Taken as a whole and the tell-tale experiential signs of penetrating a virgin to ordinary observers could have produced some resemblance of harm to the vulva and vagina at the time of coitus. Regrettably, for the victim, medical examination by PW3 cast doubt on the cherished assumption that she had her sexual intercourse for the first time on the alleged date as framed in the indictment. Specifically, one basic question deserved analysis by the trial court. To what extent are the prior facts and circumstances surrounding the offence entail dishonesty to evenly impeach the credibility and reliability of a witness.

A solid argument in this case ought to be made on the distinguishing features noted in PW1's testimony and the medical examination prognosis in terms of PW3 testimony as documented in the P3. In this regard, the court in **People v Sandoval 314 N.E 2nd 417 – 18 [N.Y 1974]** stated:

> **"Evidence prior specific, criminal, vicious, or immoral conduct would be admitted, if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility to the extent however, that the prior commission of a particular crime of specified vicious, or immoral acts significantly revealed a willingness or disposition on the part of a particular victim or defendant voluntarily placed himself or herself in the advanced of his or her individual self-interest a head of the interests of society, proof thereof may be relevant to suggest his or her readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity."**

The potential of the victim bluntly lying and having falsehood believed in so far as the allegations on defilement are concerned can be traced from her conduct with effect from the 3/6/2018 when instructed by her teachers to go home to come up with the fees balance. Did, she inform the parents about the school order? Did she go home after expulsion from school due to fees balance? Was there an explanation why she did not visit the appellant on any of the days except the last day? Did she not admit of having gone to Mtwapa, where new clothes were bought to wear in exchange of school uniform? But even, then whom was she with from the 3/6/2018 to the 7/6/2018 allegedly when she found herself at the house of the appellant? What was her motive to buy informal wear at the time when expected to be in school?

On the other hand, in my judgement my understanding of the term penetration as defined under section 2 of the Act does present two scenarios. First partial vagina penetration or complete insertion of the male penis to that genitals. Therefore, vaginal penetration under the Sexual Offences Act occurs when the penis or other body part enters the vulva or between the labia majora, which is the outer part of the female genital organ.

At least the court has to receive evidence to determine whether penetration was partial or complete in the peculiar circumstances of each case to establish penetration; under our jurisdiction. In essence, it was not proved whether the sex act so far as the offence is concerned was committed with a partial or complete penetration of the victim genitals.

It is also trite that sexual assault charge can be proven beyond reasonable doubt solely with credible victim testimony as no corroboration is mandatory required to establish the elements. Although corroboration is not required, where available, it strengthens the victim's testimony given the persistence of rape or defilement myths. That is why the right to a fair hearing and due process in criminal law protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged with. Accordingly, I am persuaded that in sexual offences there should be no probabilities or preponderance of evidence on whether the penetration was partial or complete insertion of the 'penis' to the female genitals. The risk of factual error must as a consequence lack vital evidence impair the verdict against the standard of proof on existence of a fact under section 107(1) of the Evidence Act. Therefore, the prosecution must establish from the victim testimony evidence of sensory details, such as, swellings, bruises, any post act injury, what the victim heard, gagging, lacerations, abrasions, removal of clothes by the victim, or offender, saw tasted, physical feelings or even smelled, use of condoms or not. In addition, whether it was partial or complete penetration; which I consider to be highly relevant and necessary to constitute the ingredient of the crime.

In this case it was more convenient for the prosecution to act on the presumed fact of the recovered clothes of the victim from the appellant's house to consider culpability and commission of the crime. The physical evidence may be of course provide a rational connection between the victim presence and accused opportunity to commit the sexual act, but still the crime remains penetration not presence at the scene or recovery of the physical evidence.

Presence tell us only that the appellant was there and very likely played a part in the unlawful scheme. But presence tell us nothing specific act that carries rational or reasonable inference that he was there to engage in the sex act with the victim. The presumption could be upheld only if the victim evidence stood the test of a rational connection with the offence.

In my view where the inference is so strained as not to have a reasonable relation, to the circumstances of life as we know that it's not competent for the court to create it to find conviction for the accused there should be an acquittal. The failure of the trial court to expressly test the single identifying witness of the victim to the level of proof as constitutionally required to warrant standard of beyond reasonable doubt to a moral certainty of correctness of inference can indeed prejudice the appellant. Some of the key characteristics itemized above that can be probative evidence of penetration were substantially lacking from the victim testimony. It's a cardinal constitutional principle that the presumption of innocence under Article 50(2) (a) of the Constitution is not overcome by a probability that the appellant committed the offence.

I also believe that under **section 48 of the Evidence Act** PW3, was possessed of scientific and medical knowledge on examination of PW1 (victim) to establish the sex organs normally referred to as the vulva and vagina were actually penetrated into between the night of 7/8/2018 to qualify the act of carnal knowledge. There was no such evidence by PW3 except alluding to a ruptured hymen.

Apart from the victim stating that she had sexual intercourse with the appellant, there was no evidence whether it was partial or complete penetration of the genitals as postulated under **section 2 of the Act**.

It's has argued anatomically that the vulva consists of the external genital area and includes the clitoris and other vital sensitive nerve receptors whereas the vagina on the other hand is a soft tissue tube which extends downwards and forwards from the cervix of the uterus to its eternal opening at the vulva. (See **You and Your Health Vol 2 New Edition Shnyock Harduye pg 433)**.

I am of the view that the evidence of the victim in all material aspects is in general terms that couldn't factually prove penetration beyond reasonable doubt. Infact from her testimony there is no evidence whatsoever on how the appellant penetrated her sexual organs.

The prosecution may prove its case directly or by circumstantial evidence of a single witness, and it need not exclude every reasonable hypothesis of innocence. However, I dare say that all efforts should be made to remove any doubt to the trial court when evaluating the evidence to make a case of beyond reasonable doubt. The element of presentation of all of the evidence is crucially important, in the common law tradition to generate a tailored fit to support the prosecution respective hypothesis.

If one considers the victim testimony, and the defence statement in rebuttal, this is one case in which it was necessary to marshall up the evidence of one B. There is the ultimate question whether the victim spent a night at the appellant's house or at B's place. The strange fact is that though this witness had vital information, the prosecution for some reason elected not to call her as a witness.

The key-stone principle on this legal proposition was considered in **Bukenya & Others v Uganda [1972] EA 549** a decision which the court held that:

> **"The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent the court has the right and the duty to call any person whose evidence appears essential to the just decision of the case where the evidence call barely is adequate the court may infer that the evidence of uncalled witnesses would have tendered to be averse to the prosecution."**

In the instant case, the evidence of B would have shed light on the allegations of defilement made by the victim in light of the insufficiency of medical evidence. Additionally, it is clear that the evidence cast a doubt to the credibility and veracity of the victim evidence in alleging that she spent a night at the appellant's house.

As posited by the defence, the victim hardy spent more than five minutes at the house of the appellant for any meaningful sexual intercourse to have taken effect. The evidence by the prosecution which mischaracterize the testimony of the victim and excluding the medial evidence is of a nature that would not establish penetration beyond reasonable doubt.

Regarding the complaint by the victim that the appellant defiled her the allegation could not have succeeded first of all without the learned trial magistrate giving sufficient reasons why she believed her testimony. Relying on the decision of **Kyiaf v Wono [1967] GLR 463** the court made the following observations:

> **"It must be observed that the question of impressions or convincingness are product of credibility and veracity, a court becomes convinced or unconvinced, impressed with oral evidence, according to the opinion it forms of the veracity of witnesses. Ac court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole evidence of that witness and the other evidence on record."**

Again with respect to the findings by the learned trial magistrate and the cautionary principle in **Ruwala v R and Pandya v R**, the question I ask myself is whether the evidence of the victim can pass the test of credibility, based on her past antecedent when one combs the evidence, it reflects a witness who is likely to be classified as a witness with propensity of dishonest. Why do I say so, her initial assessment was to leave school for her parents' home to collect the balance of the school fees due and owing. That being the case she did not, but instead travelled to Mtwapa, purchased some clothes, changes her school uniform and opted to spend some days in a friend house. Although, it's not clear, whose house, she was accommodated, it emerged that on the 7/6/2018 she saw it fit to visit the appellant without his consent. She proceeded to carry a bag with some clothes to create an impression to the effect that she was with the appellant.

In view of her evidence and the alleged circumstances, there are gaps to the admitted evidence. Why she decided to deliberately leave clothes in that house? Unfortunately, that justification does not come out clearly from her testimony. Going further with her evidence at no time did she inform her parents of her whereabouts with effect from the 3/6/2018 to the 7/6/2018 when the mother received a telephone call regarding her absence from school. In so far as her conduct is concerned, it does appear that the reason may be of leaving clothes at the appellant's house was to save face in the event she is confronted by the head teacher or her parents on her whereabouts since expected from school to go and secure fee balance.

In my considered view, again and again I ask myself did the victim really have sexual intercourse with the appellant on the 7/6/2018? In order to appreciate that there is serious doubt.

Based on the evidence one has to evaluate the prosecution case as a whole and the plausible explanation given by the appellant in his defence. If I juxtapose the victim evidence with that of the clinical officer (PW3) the chain on causation is broken in view of the fact that the hymen rupture was not fresh.

The other strands of evidence as analysed earlier was non-responsive one may ask the question why did the learned trial magistrate find it difficult to appreciate the testimony by the appellant which cast serious doubt on the commission of the crime. Being at the scene is one thing and the evidence on any such penetration taking place is another matter whole together. It is from this perspective that there are real fears for me to conclude that the appellant unlawfully and carnally knew the victim on 7/6/2018 as pressed upon the court by the prosecution witnesses.

As I rest these observations it's not lost on me that the court has no advantage of seeing witnesses as did the trial court, but the benefit of it all can be traced to the record my judgement should not be blurred for reason of lack of that benefit of not hearing and evaluating the demeanor of witnesses. In the case of **R v Baker [2010] EWCA CRIM 4**, the **Lord Chief Justice** remarked thus:

> **"We emphasize that in our collective experience, the age of a witness is not determinative on his or her ability to give the truthful evidence. Like adults some children will provide accurate testimony and some will not. However, children are not miniature adults but children and to be treated and judged for what they are, not what they will in years ahead grow to be."**

Thus in **Jenctons v HMA [2011] HCJAC SCL 927 Lord Clarke** went on to say as follows on credibility and reliability:

> **"It is important to have in mind that while questions of credibility and reliability are said often to shade into each other, they are distinct concepts. A witness may come across as entirely credible but, on reflection, be held to be unreliable. A person who is credible is one who is believed. A person who is reliable is one upon when trust and confidence can be placed on credibility may be judged on the evidence, whereas reliability may be only capable of being addressed having regard to the various traced record."**

The appellant took issue with the evidence on unlawful act and in distinguishing each piece and shreds of evidence which allegedly sustained a conviction for the offence.

On evaluation and scrutiny of the evidence with the greatest care on appeal there are sufficient reasons to interfere with the impugned judgement, I think like the learned judges in **Chanya and Another v R CRIM Appeal No. 9 of 2007 Honourable Chipeta J** of Malawi as he then was that: **"Criminal law; it should always be recalled, thus, on the noble principle that it is better to make an error in the sense of wrongly acquiring a hundred guilty men than error by convicting and sending to an underserved punishment one innocent soul."**

I note that the prosecution had a prima facie case on the burden of proof but the appellant did present rebuttal evidence sufficient to move the case back into a state in which there was enough conflict in the evidence for a reasonable tribunal to disagree with the outcome of convicting the appellant of the charge of defilement. For a full understanding of the rebuttal defence, one has to re-appraise the testimonies by the appellant as materially corroborated by DW2 who happened to be at the scene of the alleged crime.

Given these features of the case, the failure of the prosecution to call other evidence serve as a basis for the learned trial magistrate to draw an adverse inference against the prosecution to cast reasonable doubt in favour of the appellant. Secondly, in drawing an inference or conclusions from the facts proved.

In the instant case, regard ought to have been accorded to the inconsistences and contradictions in the nature of the evidence of PW1 which as a whole lacked corroboration from either medical evidence or proof on recovered clothes which apparently, placed the appellant squarely at the scene of the crime. The learned trial magistrate without due consideration to the defence gave more weight to PW1's assertions in contrast of appellant and his witness who explained suspicious things at his house. At the time he did so in a so strong tactical evidence to push back the case to the prosecution. It may be largely, that the evidence was largely circumstantial but the actual facts as existed were explained by the appellant and his witness.

The issue here on appeal is that the learned trial magistrate erred in drawing unfavourable conclusions from the recovery of the clothes which were voluntary left with the appellant, in his custody, circumstances which were clearly stated in his defence. With respect, I find it profoundly logical to say that the prosecution evidence on weighed scales appeared to be enveloped, strong and cogent network of inculpatory facts which reasonably collapsed on the compellability of the appellant defence. I am persuaded that the issue of identification in this case is distinguishable for non-proof of penetration. It would be unsafe to consider that issue on any other basis if as a consequence and for the reasons alluded to, I conclude that the criminal conduct of the appellant cannot be supported by any watertight evidence.

I do not consider the burden of proof as having been discharged beyond reasonable doubt as postulated in **Miller v Minister of Pensions [1947] ALL ER 373, "That degree is well settled. It needs not to reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave the only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."** to secure a verdict of guilty and a conviction against the appellant. To that extent, the appeal succeeds and appellant set free unless otherwise lawfully held for any reason brought to the attention of the court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Alenga for the State

The Appellant