REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.68 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. E. Ominde – CM

delivered on 29th April 2016 in Makadara CM. CR. Case No.772 of 2015)

MAKOY MADHAK DEEK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Makoy Madhak Deer was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 3rd March 2016 in Embakasi Division within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of S C, a child aged five (5) years. He was in the alternative charged with the offence of **committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same date and in the same place, the Appellant unlawfully and intentionally touched the vagina of S C (hereinafter referred to as the complainant), a child aged five (5) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the main count of **defilement** and was sentenced to serve life imprisonment.

The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his identification was not sufficiently established to warrant a conviction. He faulted the trial court for failing to consider his *alibi* defence. He was aggrieved by the fact that the trial court shifted the burden of proof to the defence before convicting him. Lastly, he faulted the trial court for relying on the prosecution evidence, which according to him, did not establish his guilt to the required standard of proof. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, Mr. Nyaunchi appeared for the Appellant. Ms. Aluda, the Learned State Counsel represented the Respondent. They both made oral submissions.

Mr. Nyaunchi submitted that the Appellant was not positively identified. He averred that PW2 testified that she saw the Appellant wearing a yellow jacket but this jacket was never availed in court as an exhibit to confirm that PW2 was referring to the Appellant. He argued that the testimony of the complainant that the Appellant spoke to her in Swahili and English was misleading as the Appellant could neither speak Swahili nor English. He contended that there was no identification parade to identify the Appellant as it is required under the law. Further, that there was no description of the Appellant by the prosecution witnesses. He submitted that there was no medical evidence tendered in court to prove the Appellant's culpability.

The learned counsel further submitted that the trial court did not consider the Appellant's *alibi* defence. He postulated that the Appellant produced two witnesses, DW2 and DW3 who were with him the whole day and at the time the offence is alleged to have been committed. He relied on the case of **Victor Mwendwa Mulinge v Republic [2014] eKLR.** He posited that the trial court shifted the burden of proof to the Appellant. He stated that the burden of casting doubt on the *alibi* evidence lies with the prosecution but in the present case the trial court shifted the burden to the Appellant by discrediting the defence witnesses before considering the prosecution's case. He asserted that PW8 and PW10 did not conduct competent investigations. He explained that PW10 did not visit the scene of crime to take samples and the fact that, the yellow jacket that PW2 alleged the Appellant was wearing was not recovered, the description of the Appellant was not recorded in the first report that he made to the police, that an identification parade was not mounted, that the children mentioned by the complainant were not

interviewed and lastly, that no DNA report was done to establish that it was indeed the Appellant who was the perpetrator of the alleged offence. Finally, the learned counsel submitted that there was no medical evidence adduced to connect the Appellant to the alleged offence.

Learned Counsel for the State, Ms. Aluda opposed the Appellant's appeal. She made submissions to the effect that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. According to learned State Counsel, all essential elements requiring proof beyond reasonable doubt in the offence of defilement were proved. She submitted that the prosecution led evidence during trial to show how the Appellant sexually assaulted the complainant. She contended that prosecution witnesses adduced consistent and corroborated evidence. She averred that the complainant positively identified the Appellant. She submitted that the offence was committed at daytime at 4.00 p.m and that PW2 witnessed the alleged incident. She argued that an identification parade was not necessary as the Appellant was arrested immediately after the sexual assault. It was her submission that the evidence of the complainant was corroborated by the prosecution witnesses, more so evidence from the Post Rape Care (PRC) form and the Medical Report that confirmed that indeed the complainant was sexually assaulted. Further, that the *alibi* defence was displaced by the prosecution's evidence which placed the Appellant at the scene of crime. It was her submission that the Appellant defiled the complainant. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court, so as to arrive at its independent determination on whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful of the fact that it never saw nor heard the witnesses as they testified and therefore cannot give an opinion regarding the demeanour of the said witnesses (see **Okeno -vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the main charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The facts of the case are as discerned by the court are as follows: The complainant, S C, was at the time a child aged five (5) years. Her age was confirmed by PW7, who produced a Post Rape Care (PRC) form indicating that the complainant was born on 25th August 2009. The PRC form was produced as ***Prosecution's Exhibit No.5.*** At the material time, the complainant was a pre- unit three pupil at [particulars withheld] School. She gave unsworn evidence after a *voire dire* examination was conducted by the trial court. It was determined that she was competent enough to answer questions put to her. According to her testimony, on 3rd March 2015 at about 4.00 pm, she was at home in Embakasi. She was playing outside with her friends when the Appellant called her. The Appellant took her to the backyard where clothes are usually hang to dry. The Appellant then told her to remove her clothes. He also removed his clothes. She testified that she was wearing a white vest, a purple T-shirt, a blue skirt, black tights, pink panty and pink closed shoes. The Appellant was wearing a red coloured inner wear. The Appellant then put his penis in her mouth and as a result she chocked and vomited.

The Appellant then asked the complainant to get down and he inserted his penis in her anus after which the Appellant ejaculated. After the incident, the complainant wore her clothes and went on to sit on the stairs. She told PW3 about the incident and later narrated the same to PW4 who informed the complainant's mother about the incident. Afterwards, she went to PW5's house and told her what the Appellant had done to her. She further told the court that PW5 asked their house help to bring her a change of clothes nonetheless she did not change her clothes but changed them at the hospital. She affirmed that her mother, PW6 was absent when the incident took place. It was her testimony that she knew the Appellant well prior to the incident and that he used to live on the ground floor, house number two, in the same block. The complainant was taken to hospital for treatment and examination. She later recorded a statement at the police station.

PW2, Rachel Muthoni Mwangi testified that on the day in question, she was making tea for her child who had just come back from school. While at the kitchen, she saw the Appellant at the corner of the block. The Appellant was kneeling on one knee with the complainant. She went to the dinning window for a better view. The Appellant stood up as well as the complainant. They both wore their clothes and the Appellant left the scene leaving the complainant there. The Appellant entered into a house and then came out with DW2. The Appellant was wearing a black jacket with a yellow colour and DW2 had a checked shirt. Immediately, she ran and informed a security guard, PW3 about what she had witnessed. PW3 asked her to accompany him so that she could show him the Appellant. They run and found him leaving through the main gate but PW3 managed to block the Appellant and DW2 from leaving. She informed PW4 who was the supervisor. PW4 examined the complainant and noted a white discharge from her private parts.

PW4 called the mother of the complainant who was away and informed her about the incident. She went back to her house to attend to her children. She told the court that later at 6.00 pm she was called by PW3 so that she could inform the chairperson of Court No. 565 about what she had witnessed. She narrated that at the scene of the crime; she found many people who looked like the friends of the Appellant. They were shouting demanding to know what she was saying about the Appellant and out of fear she went back to her house. On cross-examination, she testified that she used to live in Court No. 525, House No.30 at gate D and she had never seen the Appellant before. Further, that her Block is across the Block where the Appellant allegedly defiled the complainant and it was approximately 20 metres away. She further told the court that the complainant was wearing a blue jeans skirt, stripped blouse and navy blue tights. Later, she went to Embakasi Police Station where she recorded her statement.

PW3, Bernard Nyanumba, a security guard was then working for a Security firm by the name Gilly's Security & Investigation. Among other duties, he was guarding the gate and patrolling Court No.525. On the material day, he was attached to [particulars withheld] Estate. He testified that at about 5.00 pm, he was patrolling the estate at Court No. 525. He met PW2 running towards his direction. He was informed by PW2 that a certain Sudanese wearing a jacket had raped a child of Court No. 525. He asked PW2 to accompany him so that she could identify the person. They found the Appellant and DW2 leaving through the main gate where he stopped them. PW4 intervened and asked PW2 to identify the child who she alleged had been raped. PW2 called the child. PW4 then examined the complainant and determined that indeed she had been defiled. In cross-examination, he told the court that there were no wrangles between the Sudanese nationals and the residents in that estate. He wrote his statement at Embakasi Police Station the following day.

PW4, Eunice Nabalanyo Barasa, a supervisor in a security firm called Gilly's Security & Investigations testified that on the material date she saw PW3 trying to stop the Appellant and DW2 from leaving. Upon inquiry, she was informed that the Appellant had raped the complainant. She asked PW2 to show her the complainant. She saw her. She asked the complainant what the Appellant and DW2 had done to her. The complainant pointed at the Appellant and said that the Appellant ejaculated in her mouth and anus. She examined the child in a bathroom in the company of PW2 where she observed semen in her anus area and on her panty. She alerted her seniors and the management at [particulars withheld] Estate about the incident. The police were alerted but before they arrived the Sudanese people in that area had

gathered in big numbers at the gate and they were conversing in their language. In cross-examination, she told the court that it was PW5 who accompanied the complainant to the police station. The Appellant was arrested by Police. She recorded her statement the following day at Embakasi Police Station.

PW5, Irene Kapa Githinji Chege testified that on the day in question she was on her way to Embakasi from work when she received a call from PW6 informing her that she had been notified by a security guard that the complainant had been defiled. PW6 asked her to handle the matter on her behalf because she could not get there in time. When she arrived at the gate she found a commotion, she inquired from PW4 about what was happening. She was informed that a Sudanese had defiled the complainant. She took the complainant into her house because she wanted to know what had transpired without interference from the crowd that was forming outside. The complainant narrated what had happened to her. It was exactly what she said in her testimony. PW2 also told her about what she had witnessed. Her husband reported the matter to the police station and came back with police officers who were in a private black car. The Appellant was arrested. The complainant was also taken to the police station and afterwards the personnel from Medicines San Frontiers (MSF) picked her for medical examination. She accompanied the complainant to the police station. She left the complainant and her parents at the MSF. She recorded her statement on the following day at the Embakasi Police Station.

PW6, M K testified that on the material date she was in town when she received a call from PW3. PW3 told her that her child, the complainant was raped by the Appellant. She was in shock. She called her neighbours Diana but she did not respond to her call. She then called PW5 and told her what she was told by PW3. PW6 told PW5 to handle the matter on her behalf because she was stuck in a traffic jam. Later, she called again and PW5 informed her that she had already called the police. She went straight to the police station where she found the complainant, PW5, police officers and her husband. Later, they were handed over to MSF doctors'. While there, the complainant was examined and treated. The doctors then told her that she could then change the complainant's clothes and she was given a brown khaki envelope where she was instructed to put the complainant's changed clothes. She told the court that the panty was sky blue in colour; the child also had faded blue tights, a blue jeans skirt, and white T-shirt with pink and purple drawings on the front.

PW7, Selina Nyambu, a clinical officer attached with Medicine's San Frontiers (MSF) testified that she examined the complainant on 3rd March 2015. She recorded that the genitalia of the complainant had external fresh bruises seen on both labia minora. She observed that no injuries or abnormal discharge was on the vagina. She further noted that the hymen was pink, central with fresh tear at six o'clock knot. The anal genital was normal. The clothes particularly the pant was stained with blood. She did not see any spermatozoa. However, she told the court that the absence of spermatozoa did not mean that the child was not sexually assaulted. She prepared the PRC form and the Medical Report which she produced as ***Prosecution's Exhibit No. 5*** and ***6*** respectively.

PW8, Joseph Ologe attached at Embakasi Police Station testified that on the material date he received a call from the OCS Embakasi who asked him to join the C.I.D officers who were headed to [particulars withheld] Estate. When they arrived, they went to Court No. 565 where they learnt that the Appellant was about to be subjected to mob justice as he had been accused of raping a child. He told the court that the Appellant could have been subjected to mob justice. They rescued him. They tried to interrogate the Appellant but he could not understand English or Kiswahili. The Appellant was taken to the police station in the company of DW3 who acted as his translator. The complainant was also taken to the police station where the Appellant was handed over to the duty officer and the complainant to MSF personnel.

PW9, Dr. Kizzie Shako attached at Police Surgery examined the complainant on 9th March 2015.On examination, she found that the complainant had normal genitalia but the labia minora were bruised, swollen and tender. Further, the hymen was bruised with tears at 7 and 3 O'clock respectively. She documented her findings on a P3 form which she produced as ***Prosecutions Exhibit No. 7.***

PW10, Eunice Kilonzi attached at Embakasi Police Station was the investigating officer in this case. She told the court that she noted that the Appellant could not speak in English but he could understand. She accompanied the complainant and PW6 to MSF where the complainant was examined. In her statement, she told the court that the complainant told her that the suspect told her to remove her clothes in English but when she interrogated the Appellant she established that he could not speak English but he could understand. She attested that she did not take any specimen from the Appellant and no specimens were taken to the Government Chemist for analysis because the doctors at the MSF told her that there was nothing in the urine. Further, that she wrote to the court through prosecution seeking that the Appellant to be remanded for further two days to allow for examination but that did not happen. She further testified that she picked the clothes that the complainant was wearing from PW6 at the police station. She charged the Appellant with the offence of **defilement.**

When the Appellant was put on his defence, he denied committing the offence. He told the court through a Dinka interpreter that on 3rd March 2015 he spent the whole day watching movies and wrestling with DW2 and DW3 and only left the house of DW3 at 4.00 pm to play football with DW2. From the house of DW3 they went straight to their house to pick the ball and shoes and then left for the field. It was his testimony that on the way to the field, they did not observe any children playing outside. When they were leaving the gate, they were stopped by PW3. DW2 explained to him that they had been blocked because he was accused of rape. It was his testimony that he did not see the complainant. He told the court that he was illiterate and neither spoke nor understand Kiswahili or English. However, the trial court noted that the Appellant in two instances did not wait for interpretation but responded questions put to him immediately and in English. It was also his testimony that in the three months he had stayed in [particulars withheld] Estate, he had never seen any children in that area. Further, he told the court that he used to live on ground floor but could not tell the house number as he was illiterate. He pleaded his innocence.

DW2, Gum Mabor testified that on the material date he spent the whole day with the Appellant and DW3 and at no such time did the Appellant leave his sight. He told the court that they used to live in Court No. 565, House No.2 in [particulars withheld] Estate but on that day he was in House No. 49 in the same court in the house of DW3 where they spent the whole day watching movies and wrestling. At about 4.00 pm, he asked the Appellant to accompany him to a where he usually played basketball. So they proceeded to House No.2 to change clothes. According to him, the Appellant did not leave his sight even when he was changing his clothes in the other room. He further told the court that when they were about to leave for the game, they were stopped by PW3, who according to him, did not tell them why they had been blocked from leaving. They went back to the house but the Appellant refused to go in because neighbours were starting to form a crowd. He told the court that the neighbours started threatening them. He called DW3. DW3 went with the Appellant to the police station but he could not go with them as he could not fit in the boot of the police private vehicle. He followed them to the police station where he recorded his statement. In cross-examination, DW2 confirmed that there were children in that area. He further told the court that they were the only Sudanese living in Block 565, House No.2 on ground floor. Further, that their house had a backyard and that someone in an upper

house could see clearly what was going on in their backyard. He attested that the house of DW3 was three courts away and that it took only one minute for one to walk from DW3's house to their house.

DW3, Malwak Marian testified that at the material time he lived in [particulars withheld] Estate Court No. 293, House No.49. He told the trial court that he spent the whole day in his house. He testified that the Appellant and DW2 came to his house at 8. 30 a.m. and only left at 4.00 pm when DW2 wanted to go and play basketball in the field. He told the court that in less than 10 minutes after they had left, he received a call from DW2 who informed him that they had been stopped at the gate. He joined them immediately. He inquired from PW5 what had happened. He was told by PW5 that the Appellant had sexually assaulted the complainant. He attested to the court that they were all physically different and there was no way one could confuse them. The Appellant was arrested. He accompanied him to the police station to act as his translator because the Appellant could neither understand nor speak Kiswahili or English.

For the prosecution to establish the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, it must prove three elements of the charge: that there was penetration, the identity of the perpetrator and finally the age of the victim.

In the present appeal, the Appellant was aggrieved that the identification of the Appellant as one of the ingredients to prove defilement was not proved to the required standard of proof beyond any reasonable doubt. He averred that an identification parade was not conducted as it was required under the law. Further, that the yellow jacket that PW2 alleged the Appellant was wearing was not produced in court to confirm that indeed PW2 was referring to the Appellant. The Appellant was further aggrieved that the prosecution witnesses did not give the description of the Appellant in their statements. In response, the prosecution submitted that there was no need for identification parade as the Appellant was arrested immediately after the occurrence of the incident.

In the case of **John Mwangi Kamau v Republic [2014] eKLR** the court held that identification parades are meant to test the correctness of a witness's identification of a suspect. In the present appeal, this court has come to the determination that an identification parade was unnecessary. The complainant testified that she knew the Appellant well prior to the incident and even told the court where the Appellant used to reside which was also confirmed by the Appellant, defence witnesses and the prosecution witnesses. The complainant told the court that the Appellant lived on the ground floor at House No.2. Her evidence was further corroborated by an eye witness PW2. PW2 witnessed the whole incident. She testified that when the Appellant was done defiling the complainant, he entered in House No.2 in ground floor and came out of the house together with DW2. They then walked towards the gate. Immediately, PW2 ran to inform PW3 who in turn stopped the Appellant and DW2 from leaving. The supervisor of the security guards, PW4 intervened as she wanted to know what had happened. She was informed by PW2 that the Appellant had sexually assaulted a child. PW2 was asked by PW4 to identify the child who she was alleged to have been defiled; she called the complainant. PW4 asked the complainant to identify who had sexually assaulted her. She pointed at the Appellant. From the evidence on record, it is clear that there was no bad blood between the complainant or her family and the Appellant. The complainant in her testimony told the court that Sudanese people were good people and that is why she responded when the Appellant called her. **Section 124** of the **Evidence Act** states that:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth***

The evidence of the complainant was corroborated by PW2 and all prosecution witnesses. The evidence of the prosecution witnesses who were at the scene corroborated the testimony of the complainant and PW2 regarding who the perpetrator of the sexual assault was. Be it as it may, even if the evidence of PW2 was absent, the complainant positively identified the Appellant when she was asked by PW4 to identify her assailant.

This court is satisfied that the evidence of the prosecution witnesses in regards to identification of the perpetrator of the offence was cogent, vivid and consistent.

The Appellant was further aggrieved that the trial court did not consider his plausible *alibi* defence. In response, the prosecution submitted that the *alibi* defence was displaced by prosecution by placing the Appellant at the scene of the crime. The court of appeal in **Victor Mwendwa Mulinge vs. Republic** ***[2014] eKLR*** held thus***:-***

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs Republic this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."***

This court has come to a determination that the *alibi* defence adduced by the defence witnesses was inconsistent and thus it was not of such strength as to shake the strong evidence of the prosecution which placed the Appellant at the scene of the crime. The defence witnesses testified that the Appellant could not understand English and that he was illiterate. However, the trial court in two instances noted that the Appellant did not wait for interpretation but went ahead to answer questions put to him in English. The Appellant further told the court that in the three months he had lived in [particulars withheld] Estate, he had never seen children in that area. However, DW2 told the court that children were conspicuous in that Estate. The Appellant told the trial court that when they were about to leave the gate to play football, they were stopped at the gate by PW3 who informed them that the Appellant was being accused of raping a child, however, DW2 insisted that PW3 did not inform them why they were blocked from leaving the gate. Further, the Appellant told the court that he did not see the crowd

that had gathered as a result of the allegations of rape against him. However, his testimony was contradicted by his witnesses and the prosecution witnesses who testified that indeed people had gathered in that compound. This court notes that the evidence of the defence witnesses was doubtful and did not shake the strong evidence that was adduced by the prosecution witnesses.

The medical reports produced by PW7 and PW9 confirmed that the complainant had been sexually assaulted. According to PW9, when she examined the complainant she had bruises on her labia minora. It was swollen and tender. The hymen was bruised with tears. The complainant had earlier been seen by PW7 Selina Nyambu, a clinical officer working with MSF. She examined the complainant on the same day. She observed fresh bruises on both labia minora. There was a fresh tear on the hymen. The complainant's pant was blood-stained. She was of the opinion that indeed her examination had established that the complainant had been sexually assaulted. This court therefore holds that the prosecution did establish to the required standard of proof that indeed the complainant was penetrated. This medical evidence, coupled with that of the positive identification of the Appellant establishes to the required standard of proof that the Appellant was the one who sexually assaulted the complainant. Another element of the charge which was established was the age of the complainant. The medical reports established that the complainant's age was five (5) years at the time of the sexual assault. PW6 M K, the mother of the complainant testified that the complainant was five and a half ($5^1/_2$) years old at the time of the sexual assault. According to **Section 8(2)** of the **Sexual Offences Act,** if the prosecution establishes that the victim of the sexual assault is less than eleven (11) years, then the perpetrator, if found guilty shall be sentenced to serve life imprisonment.

The evidence adduced by the Appellant in his defence did not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses.

The upshot of the above reasons is that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed it was the Appellant who had sexually assaulted the complainant. The custodial sentence imposed on the Appellant was legal. The Appellant's appeal against conviction and sentence therefore lacks merit and is hereby dismissed.

DATED AT NAIROBI THIS 17TH DAY OF JULY 2018

L. KIMARU

JUDGE