REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 57 OF 2011

M N……..……APPELLANT

-VERSUS-

REPUBLIC…….....…….RESPONDENT

(Appeal against conviction and sentence in the judgment in Nanyuki Senior Principal Magistrate's Court Criminal case No. 2801 of 2009 delivered on 1st April, 2011)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8(1)** of the **Sexual Offences Act No. 3 of 2006**; according to the particulars of the offence, it was alleged that on the 21st day of June 2009 at [particulars withheld] village in Laikipia North District within Rift Valley Province, the appellant intentionally and unlawfully committed an act of penetration to the female genital organs of one S G a girl aged 12 (twelve) years. He was convicted as charged and sentenced to 20 years' imprisonment; it is this conviction and sentence that the appellant has appealed against in this Court. I understand his grounds of appeal which he subsequently incorporated in his written submissions to be as follows:-

1. The learned magistrate erred in law and in fact when he relied on the prosecution evidence that the appellant was positively identified by his voice at the locus in quo;

2. The learned magistrate erred in law and in fact in convicting the appellant based on inconsistent and uncorroborated evidence;

3. The learned magistrate erred in law and in fact in convicting the appellant on a charge that was not proved beyond reasonable doubt; and,

4. The learned magistrate erred in law and in fact in rejecting the appellant's defence and shifting the burden of proof from the prosecution to the defence.

At the hearing of the appeal, the appellant relied on his written submissions in which he attempted to expound on these grounds of appeal. In particular, he urged that the alleged offence having been committed in the night and without any evidence as to the conditions of lighting at the time, the circumstances under which he was identified were unfavourable. He submitted that the complainant could not have recognised him by his voice as she alleged in her testimony because she never gave any evidence as to tone or the nature of the voice of her assailant or the particular words that were spoken. The appellant cited the case of **Maitanyi versus Republic (1986) KLR 198** where the Court of Appeal was of the view that a fact may be proved by the testimony of a single witness but that the evidence of such a witness must be tested particularly where it concerns the question of identification and especially

in those circumstances where the conditions favouring identification are difficult.

The appellant also urged that the evidence of the complainant, her mother **(PW2)** and her school head teacher **(PW4)** was inconsistent; according to him, the delay by the complainant in the making of the report of assault merely because the head teacher of her school was away raised doubts whether the offence was committed on the material date or at all; it was the appellant's position the complainant could have reported the case to any other teacher at the school. The appellant also took issue with the complainant having been escorted to hospital for treatment before her case was reported to the police.

The age of the complainant, so the appellant submitted, was also not proved; her mother alleged that she was born in 1996 and thus according to the appellant, the complainant was thirteen and not twelve years old when the offence is alleged to have been committed. In any event, so he urged, there was need for a birth certificate or medical evidence to prove the exact age of the complainant.

It was also the appellant's submission that the learned magistrate disregarded his defence without any reason and in particular his evidence on how he was arrested and the prosecution evidence that he escaped from the law enforcement agents after committing the offence. According to him, the learned magistrate should have considered his explanation that being from the Maasai tribe, the appellant was all along in the bush looking after animals when he is alleged to have been a fugitive.

The state opposed the appeal. On the question of identification, Ms Maundu, the learned counsel for the state submitted that the appellant was related to the complainant and both lived in the same manyatta (which is a kraal-like home of several huts); according to counsel, it was not thus difficult in these circumstances for the complainant to recognise the appellant's voice when she heard it.

Counsel also urged that though the learned magistrate relied on the evidence of a single witness on recognition, the witness was honest, truthful and credible. Again though the appellant alleged that a grudge existed between him and the complainant's mother, there was no evidence of such grudge and the appellant's allegations of this grudge were a mere afterthought as they were not raised at any time he cross-examined the prosecution witnesses.

As for the complainant's age counsel argued that there was indeed some inconsistency as to whether the appellant was aged twelve or thirteen but that such discrepancy was not fatal to the appellant's conviction. Counsel relied on the decision of the Court of Appeal (Githinji, Karanja, and Mwilu JJA) in **Criminal Appeal No. 169 of 2014 Moses Nato Raphael versus Republic** where it was held that as long as there is evidence that the victim is below 18 years, the offence of defilement is established. She urged also that this Court can still call for further evidence on the age of the complainant at this appellate stage should need arise.

In order to appreciate the appellant's and the learned counsel's submissions, it is necessary to look at the evidence alluded to at the trial afresh; it is only upon the evaluation of such evidence that this Court can conclude whether the trial court's findings of fact can be upheld and ultimately, whether the decision to convict and sentence the appellant is impeachable. As always, the appellant is entitled to such fresh re-examination and evaluation of evidence in the first appellate court, which this Court is one, except that in taking this course I have to be cautious that much as I may come to a different conclusion from that of the trial court, it is only the latter that had the advantage of seeing and hearing the witness; it is an advantage because by seeing and hearing the witnesses, the court of first instance was able to appreciate the demeanour or disposition of the witnesses and such other elements of evidence that are associated with the physical presence of a witness in the witness box. The Court of Appeal for East Africa alluded to this legal obligation to evaluate the evidence afresh on the one hand and to be cautious of its deficiencies on the other hand in in **Okeno versus Republic (1972) EA 32** where it was said:-

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there***

was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).

The trial record shows that the complainant was in her family hut on the night of 21st June, 2009; apart from her four younger brothers, none of the adult members of the family was in the hut. Her mother is said to have gone to Ngerendare and apparently she had not come back. The door to this hut was not latched but was secured by some kind of a stick or wood. At about 8 pm, the appellant together with one Kayok Nangunye are said to have removed the stick and gained entry into the hut; they told everyone else to get out except the complainant whom they held back and slumped her on her mother's bed. Kayok then undressed her, covered her mouth and held her firmly on the bed as the appellant proceeded to defile her. Once he was done, the appellant in turn covered the complainant's mouth as Kayok proceeded from where the appellant left and defiled the complainant. The complainant testified that though the sexual assault was painful and infact she bled when she was assaulted she could not scream because her assailants covered her mouth.

According to the complainant she recognised the appellant's and Kayok's voices as they talked; she at least heard them tell the complainant's siblings to get out of the house and also when they ordered her to lie on her mother's bed. Both are people she knew before because the appellant was her father's brother or her uncle and at one time he lived with the complainant's family; the family also shared a manyatta with the appellant and Koyak.

Once the appellant and Koyak left, the complainant went to look for her siblings whom she found behind their hut; she showered the following day and went to school.

Although the complainant was assaulted on 21st June, 2009, it was not until the 24th June, 2009 that she reported the assault to her head teacher, **M M K (PW2)**; the explanation given for the apparent delay in raising her complaint was that Kalalu was not in school on the two days that the complainant could possibly have alerted her of what she had been through. When the complainant's complaint was brought to her attention, Kalalu took the complainant to the police station and also escorted her to the hospital for treatment. She retained the complainant in school where the complainant remained with the rest of the students who were boarding at the school.

It was Kalalu's testimony that the both the complainant and the appellant were her students although the appellant dropped out of school in 2006. She confirmed that she had been away from school from 21st June, 2009 and only reported back on 24th June, 2009 and that it is on this date that the complainant reported to her that she had been defiled by the appellant. She noticed that the complainant had difficulties in walking and therefore she took her for treatment at a health centre in Doldol and later made a report to the police at same place. She later took up the complainant and accommodated her together with the rest of class eight pupils who were then boarding at the school.

The clinical officer **Kigen Bonan (PW3)** examined the complainant on 24th June, 2009; his findings were that the complainant was still in pain particularly in the abdomen; her thighs were tender; there was a pus discharge from her vagina; the labia was bruised and the cervix was inflamed. There was also a foul-smelling discharge from the uterus indicating that there a bacterial infection. The complainant's hymen was also broken.

The complainant's mother, **M G (PW4),** testified that the complainant was her second born daughter and that she was born in 1996. She left for Nanyuki on the morning of 21st June, 2009 and only went back home the following day. She did not find the complainant at home and upon enquiry, she was told by K who was one of her children, that she had not come back since she left for school the previous day. After four days she went to school to find the whereabouts of her daughter; she met **Kalalu (PW2)** who informed her that her daughter had been defiled by the appellant and Kayok Nanyunge. She got to talk to

her daughter who told her that indeed she had been 'raped' by the appellant and Koyak Nanyunge. The appellant was her husband's brother while the Koyak was described as a neighbour. According to her, by defiling her daughter, the appellant was passing a message that the complainant was not of her husband's blood and therefore was not related to the appellant. She admitted that the complainant together with K were born before she got married to the appellant's brother.

The police officer who arrested and investigated the complainant against the appellant, police constable **Samuel Kimiei (PW5)** testified that the appellant was brought to the police station on 9th December, 2009 on allegations that he had stolen stock but this complaint against him was settled amicably between those who were complaining against him and the complainant himself; however, when the officer checked his records, he noted that there was another offence the appellant was alleged to have committed in June, 2009. He summoned the complainant and her mother who identified the appellant as the person who had assaulted the complainant before.

Police constable **Eunice Muthoni (PW6)** received the complainant's complaint on 24th June, 2009; the complainant, according to this officer was brought to the hospital by **Kulalu (PW2)** and the complainant's mother **(PW4).** She referred them to Doldol hospital where the complainant was treated and P3 form filled. The appellant, according to the officer, escaped and only resurfaced on 19th December, 2009 when he was arrested on the allegations of theft of stock.

The appellant gave an unsworn testimony and said that he was arrested on 11th December, 2009 when he came back home from the grazing field; it was alleged that he had stolen a goat but while at the police station the police told him about the complaint which had been made against him much earlier. He denied anything to do with that complaint and claimed there was a grudge between him and the complainant's mother; in his view, he was framed up.

Coming back to the law, **section 8(1)** of the **Sexual Offences Act** under which the appellant was charged reads as follows:-

> **8. Defilement**
>
> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

My understanding of this piece of legislation has always been that before a conviction can be sustained the prosecution must prove at least two critical elements which, in my humble view, define this offence; the first of these elements is the act of penetration and secondly, the age of the victim.

> "Penetration" as a term of art is defined under **Section 2** of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

There was evidence, which in my view, was overwhelming, demonstrating that there was insertion into the complainant's genital organs in the manner described under **section 2** of the **Act.** The complainant herself testified that she was defiled by two men on 21st June, 2009. When she was eventually taken to the hospital, it was established upon medical examination that indeed she had recently been sexually. As a matter of fact, she was still in pain arising from that assault when she went for medical examination. The clinical officer's (PW3's) findings that the complainant's thighs were tender; that there a pus discharge from her vagina; that the labia was bruised and the cervix was inflamed; and that there was also a foul-smelling discharge from the uterus indicating that there a bacterial infection all pointed to the fact that the complainant's genital organs had been penetrated into; if that was not enough then the rapture of her hymen dispelled any lingering doubts on whether there was penetration as understood under **section 2** as read with **section 8(1)** of the **Act.**

According to the information in the P3 form, the weapon suspected to have occasioned these injuries was described as a "a blunt object"; I reckon that if it to be so described, a man's genital organs would fall

into this category weapons for purposes of sexual assaults. Suffice it to say, that the medical evidence proving that the complainant was sexually assaulted was not controverted and to this extent I would agree with the learned magistrate that the prosecution proved beyond peradventure that there was penetration of the complainant's sexual organs.

That said, the next question is whether the penetration amounted to defilement. As noted penetration of one's genital organs *per se* does not culminate into the offence of defilement as understood under **section 8(1)** of the Act unless the victim is proved to have been a child at the material time; now, as to who a 'child' is in this context, is not a question whose answer is left to speculation: he or she is defined under **section 2** of the **Children Act Cap. 141** as any human being under the age of 18 years. This definition has been adopted by the Sexual Offences Act by dint of **section 2** thereof.

Of importance to note here is that, under the Sexual Offences Act generally and under **section 8(1)** thereof in particular, one cannot talk of a "child" without reference to the age of the subject. And to the extent that age is a vital component in the offence of defilement, proof of penetration is not of itself a sufficient proof that an offence under **section 8(1)** of the **Act** has been committed; the prosecution must go further and demonstrate, beyond reasonable doubt, that penetration involved a human being who, in the words of **section 2** of the **Children Act,** is under the age of 18 years; it follows that without proof of age there is no proof of the offence of defilement under **section 8(1)** of the Act and a conviction which disregards this aspect of evidence would, in my humble view, be unsafe.

Going back to the trial record, the only evidence on the complainant's age is what the complainant herself and her mother said in their testimony; the complainant testified that she was aged 12 as at 19th May, 2010 when she testified while her mother's evidence was that she was born in 1996 implying that the complainant was 14 when her mother testified on 15th September, 2010. None of the two witnesses was clear in which month the complainant was born; if the complainant was 12 years in 2010 then the offence was committed when she was probably 11 years but if she was aged 14 as her mother suggested then she was 13 when she is alleged to have been defiled.

Counsel for the state urged the court to ignore this inconsistency in the evidence on the age of complainant as a minor discrepancy which could not vitiate the charge against the appellant. I do not share the counsel's view first for the reasons I have given on the need to prove, beyond reasonable doubt, the age of a victim inorder to establish the offence of defilement as defined under **section 8(1)** of the Act. Secondly, and equally important is the understanding that punishment of an offence of defilement under **section 8(1)** is intricately intertwined with the age of the victim of a sexual assault. The severity of the sentence to be meted out upon conviction of an offence under **section 8(1)** of the Act is directly proportional to the age of the complainant or the victim of the assault; for instance if it is true, as the complainant herself suggested in her testimony, that she was aged eleven then the appellant faced a mandatory life sentence in prison but if according to her mother she was thirteen at the material time then he could only be imprisoned for a minimum of twenty years. The inconsistency in evidence on the age of the complainant is therefore not a mere discrepancy which the court can overlook and proceed on the presumption that the complainant was of a certain age rather than the other; proof of age to the required standard is as much important in sentencing the a convict under any of the provisions in which the various sentences have been prescribed under **section 8 (2),(3)** and **(4)** of the Act as it is in establishing that the offence of defilement was committed under **section 8(1)** of that Act. In my very humble view, looking at the evidence of the complainant and her mother, it cannot be said with any certainty that the complainant's age was proved beyond reasonable doubt.

A question may be asked, what does proof beyond reasonable doubt entail in proof of age where such proof is necessary in establishing an offence under **section 8** of the **Act?** Assuming that the complainant and her mother were consistent in their statements as to the age of the complainant, would their word of mouth be sufficient proof?

In the two Court of Appeal decisions that I have come across, and where this issue has arisen, the Court of Appeal is of the view that the word of mouth alone irrespective of whose mouth the word is coming from is insufficient and proof of age in a trial of an offence under **section 8** of the Act demands some sort

of documentary proof. The Court, sitting at Kisumu in **Criminal Appeal No. 164 of 2009**, **Dennis Abuya versus Republic** held that an **"estimated age"** indicated by a clinical officer in a P3 form cannot be held to be sufficient proof of one's age. The learned judges (R.S.C. Omolo, J.W. Onyango Otieno, J.G. Nyamu JJA, as they then were) said:

> ***There is a P3 form in the record before us and it shows that on 26th June, 2007, the appellant's "Estimated age" was eighteen years. By "estimated age" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at that date he was said to have committed the offence.***

In that appeal, the appellant had been convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act** and the issue that arose in the appeal was whether having been so convicted the appellant ought to have been committed to a borstal institution rather than imprisoned for life. For reasons given in the Court's judgment, an excerpt of which has been reproduced above, the learned judges allowed the appeal and remitted the case to the High Court with the direction that the Court calls for evidence establishing the appellant's age.

The point here is that the age indicated in a P3 form as "the estimated" age of either the victim or the culprit of a sexual offence is not a conclusive proof of that particular person's age; there is need for evidence ascertaining *conclusively* a person's age whenever the question of his or her age arises.

The importance of ascertainment of age in sexual offences was also alluded to by the **same Court in Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic.** At page 7 and 8 of its decision, the Court of Appeal had this to say:-

> ***Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.***

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

> ***In its wisdom, Parliament chosen to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.***

The court concluded that ***"prove of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars***".

Coming back to the evidence in the trial against the appellant, it has been noted that apart from what the complainant and her mother said there was no documentary proof of any sort that the complainant was aged eleven or twelve (as indicated in the particulars in the charge sheet) or thirteen. The closest the

prosecution came to providing documentary proof in this case was the production of a P3 form in which the "estimated age" of the victim was indicated. As noted, the Court of Appeal in **Dennis Abuya versus Republic (supra)** frowns upon such estimates as conclusive proof of one's age; I suppose the rationale is this: If one has to spent a substantial part of his life in prison because of committing an offence where the age of his victim is an essential ingredient, there must be substantial proof of the victim's age leaving no doubt in the mind of the trial court that the victim was of a particular age prescribed by law.

Ms Maundu for the state brought to my attention the decision by the Court of Appeal **Criminal Appeal No. 169 of 2014 Moses Nato Raphael versus Republic** (supra) and submitted that as long as there is evidence that the victim is below 18 years, the offence of defilement is established. In that case the Court had this to say:-

> ***On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwany v. R, Mombasa Cr. Appeal No. 364 of 2010 where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age which actually is the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.***

I have read the whole judgment from which this excerpt is derived and as far as I can see no reference was made to any of the decisions I have cited and which emanate from the same Court of Appeal; perhaps if those previous decisions had been brought to the attention of the Court in the ***Moses Nato Raphael*** case (supra) it would have given its reasons for any sort of departure from its previous decisions on this question of age in sexual offences. In the absence of such reasons, I am persuaded to follow those previous decisions that emphasise that proof of age is not only necessary in sentencing but that it is equally important in establishing the offence of defilement under **section 8(1)** of the **Sexual Offences Act**; those decisions commend themselves to me as representing the proper interpretation of the law.

Counsel for the state urged me to call for evidence on the age of the complainant should I find that it was not established at the trial to the required standard. If I was satisfied that it had been proved beyond doubt that the appellant was the complainant's assailant, I would have been prepared to take that path and invoked **section 358** of the **Criminal Procedure Code, Cap 75** which allows this Court to take further evidence or order such evidence to be taken whenever circumstances so demand; that section states as follows:

> ***358. Power to take further evidence***
>
> ***(1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.***
>
> ***(2) When the additional evidence is taken by a subordinate court, which court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.***
>
> ***(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.***
>
> ***(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.***

However, I find there were material inconsistencies in the prosecution witnesses' evidence whose net

result cast doubt on whether the appellant was the person who assaulted the complainant and therefore taking further evidence either by this Court or the court below may not serve any useful purposes.

To begin with, the complainant testified that she was assaulted on 21st June, 2009 but that it was only on 24th June, 2009 that she reported the matter to her head teacher (PW2); the teacher took her in on this latter date and from then on the complainant joined the rest of the boarding pupils. This would imply that the complainant must have been going back to her home after school between 21st January, 2009 and 24th January, 2009 when she became a boarder.

The complainant's mother (PW4) on the other hand, was only away on 21st June, 2009; she testified that she came back home the following day which obviously was the 22nd June, 2009. She did not find the complainant at home and one of her children whom she identified as K told her that the complainant had not come back from school the previous day. If the complainant's mother's version of events is correct, it means that the complainant was not even at home on 21st June, 2009 when she is alleged to have been defiled; if she went to school on the morning of 21st June, 2009 and never came home, she could not possibly have been in the same home on the same date at 8 pm when she is alleged to have been defiled.

This then leads to another question: If the complainant disappeared from her home on 21st June, 2009, where was she between that date and 24th June, 2009 when she was eventually admitted as a boarding student in her school. Is it not possible that the complainant could possibly have been assaulted elsewhere and probably by somebody else other than the appellant and one Koyak Nangunye?

It is also curious to note that even after she was told that her daughter had not come back home from school, the complainant's mother did not take any immediate step to find out what could have happened to her daughter or where she could be until four days later when she went to the complainant's school.

Again, taking her at her word, if the complainant's mother visited the complainant's school four days after the 22nd June, 2009, the earliest date she could have met the Kalalu, the head teacher (PW2) was on 26th June, 2009. It is on this date that Kalalu told her that her daughter had been defiled and that she had already taken her to hospital for treatment and reported the matter to the police; it is also on the same date that she got to talk to her daughter who informed her that the appellant and his colleague had sexually assaulted her. However, the evidence of police constable **Eunice Muthoni (PW6)** in this regard contradicted that of the complainant's mother and the evidence of **Kalalu (PW2);** according to Muthoni, both **Kulalu (PW2)** and the complainant's **mother (PW4)** brought the complainant to the Doldol police station on 24th June, 2009 when they went to report and register the complainant's complaint. If the complainant's mother was not at the police station on 24th June, 2009 together with Kulalu as they both suggested in their evidence, then it is obvious that the police constable was not truthful when she stated that both these witnesses reported the matter on the material date and on that score the credibility of her evidence is also cast in doubt.

One other question which I think was not properly interrogated at the trial was that of identification of the appellant, assuming that the complainant was in their house on 21st June, 2009; according to the complainant the appellant and his companion ordered everybody to get out of house. The complainant's brothers are said to have complied and left the house leaving the complainant behind with her tormentors. None of these children was called to testify and perhaps corroborate the complainant's testimony. I note that one of the children, identified by her mother as K, told her that the complainant had not come back home on 21st June, 2009. If K was one of the children in the house and could relay such crucial information to his mother, there is no reason why he could not be called to testify particularly on the events of the night of 21st June, 2009 if at all the complainant was in the house at the material time. In the absence of these children's evidence, the complainant was left as the only witness who recognised the appellant. I am minded that while it was open to the trial court to accept the complainant's evidence, it was equally incumbent upon it to examine that evidence carefully and only act upon it after it was satisfied that such evidence, being evidence of recognition, was free from possibility of error. In **Wamunga versus Republic (1989) KLR 424** it was held at page 426 that,

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

In the case against the appellant, the only evidence against him was that of recognition, but I am not satisfied that the learned magistrate examined this evidence carefully as he ought to as to come to the conclusion that the appellant was the complainant's assailant. Although the age of the children in the hut at the material time was not indicated, the complainant's mother's evidence showed that at least one of them could possibly testify and if that is the case, his testimony would have removed any doubt of whether he had also heard the appellant's voice or voices of the appellant and Koyak. In my humble view the surrounding circumstances in which the appellant is said to have been recognised were not interrogated to any detail.

For the reasons I have given, I am bound to conclude that the appellant's appeal is merited and I am persuaded to allow it. Accordingly, his conviction is quashed and sentence set aside. He is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 8th day of July, 2016

Ngaah Jairus

JUDGE