



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME, J.J.A)**

**CRIMINAL APPEAL NO. 21 OF 2018**

**BETWEEN**

**JOSEPH HARE MUMBA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

appellant simply denied the charges against him and claimed that BK had produced a false birth certificate. Nonetheless, the trial court was convinced that the prosecution had established that the appellant had defiled BK and convicted him on the main count. The trial court went on to impose a penalty of 15 years imprisonment against the appellant.

7. Aggrieved by his conviction, the appellant preferred an appeal in the High Court which was dismissed by a judgment dated 15<sup>th</sup> November, 2016. It is that decision that has provoked this second appeal wherein the appellant faults the two courts below for relying on the evidence of a single identifying witness to convict him.

8. At the hearing of the appeal, the appellant appeared in person and relied entirely on his written submissions which were on record. According to him, his conviction was based solely on visual and voice recognition. Calling into question the identification evidence, he started off by submitting that the incident allegedly occurred at 10:30p.m. rendering the prevailing circumstances difficult for a positive identification. Besides, BK never gave any evidence with regard to the source of light, if any, which enabled her to identify the perpetrator. Additionally, she did not give the description of the perpetrator to the police raising doubt if she really had a good impression of her attacker.

9. Equally, the evidence of voice recognition did not remedy the situation either. This is because no evidence was led as to the exact words uttered by the appellant by which BK was able to recognize him. The appellant summed up by saying that the two courts below erred by not weighing the evidence of the single identifying witness to ensure that her evidence was safe to warrant his conviction. To that extent, he referred to the case of **Abdullah bin Wendo vs. R [1953] 20 EACA 166**. He urged us to set aside his conviction.

10. Mr. Isaboke, Senior Prosecution Counsel, opposed the appeal; he contended that the visual and voice recognition was watertight taking into account that the appellant was well known to BK. Further, the incident took about two hours, eliminating any chance of a mistaken identity. Counsel added that the prosecution had proved BK's age at the material time to be 17 years old. In his view, the fact that the incident was reported to the police about one month later did not derogate that the prosecution had established its case against the appellant. In the end, he urged us to dismiss the appeal.

11. We have considered the record, submissions made by the appellant and counsel as well as the law. Our role as the second appellate court was succinctly set out in **Karani vs. R [2010] 1 KLR 73** as follows:

***“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”***

12. With the confines of mandate in mind, it is trite that for a conviction for the offence of defilement to occur three elements need to be established, that is, penetration of the victim, age of the victim and identity of the perpetrator. See **Section 8** of the **Sexual Offences Act**.

13. Penetration of BK was proved by her own evidence as well as the medical evidence by Ibrahim who confirmed that her hymen was missing. As for BK's age, the two courts below considered the appellant's objection to the effect that there was no sufficient evidence to establish BK's age. The two courts held that Kenga's evidence with respect to BK's date of birth coupled with BK's child health card produced in evidence proved that at the material time BK was 17 years old. We concur with that finding.

14. Of concern and the crux of this appeal, is whether the appellant was positively identified as the offender? It is common ground that the only evidence in that respect was that of BK's. It was BK's evidence that she had known the appellant, who was a neighbour, prior to the incident, a fact which was not denied by the appellant.

15. Be that as it may, where the only evidence against an accused person is that of identification, such as in this case, a court should be careful to ensure that such evidence is cogent to warrant conviction of the accused person otherwise a miscarriage of justice may arise. The rationale for such caution is due to the fact that in as much as a witness may be truthful he/she can be mistaken when it comes to identification of a perpetrator due to a number of reasons. See **Richard Mwaura Njuguna & another vs. R [2019] eKLR**.

16. The manner in which such caution should be taken was succinctly discussed by this Court in **Joseph Onyikwa Nyariki vs. R [2019] eKLR** as follows:

***“How does a court exercise such caution? In Tetu Ole Sepha vs. R [2011] eKLR this Court while considering identification evidence aptly observed that the usefulness of such evidence and the weight to be given to it is a factual and credibility matter in each case. It follows therefore that the trial court which has the privilege of observing the demeanour of witnesses as they testify should first determine the credibility or truthfulness of a witness. This will definitely determine the weight to be attached to his/her evidence. Secondly, the court will consider whether the circumstances that were prevailing at the material time were conducive to ensure positive identification.”***

See also **Benson Mugo Mwangi vs. R [2010] eKLR**.

17. Was the above caution taken into account with respect to BK's recognition evidence? We believe it was. This is because the trial court, which had the opportunity of observing the witnesses as they gave their evidence, found BK to be a truthful witness and we see no reason to depart from that observation. See **Nelson Julius Karanja Irungu vs. R [2010] eKLR**. The trial court also observed, and rightly so, that despite the incident occurring at night it took a period of almost two hours, that is, from the time the appellant went to BK's house and took her to his house up until he defiled her. Moreover, during the incident BK was in close proximity with the appellant, who was well known to her, thus negating any possibility of a mistaken identity. Further, contrary to the appellant's contention, BK named him as the perpetrator to

her mother and the police.

18. In as much as it is important for evidence to be led with regard to the exact words upon which a suspect is recognized, we, like the two courts below, are satisfied that in the circumstances of this case that BK was familiar with the appellant's voice. Our position is fortified by the case of Yaa Baya vs. R [2017] eKLR wherein this Court expressed:

*“With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the appellant, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the conditions prevailing at the time of the recognition were favourable...”*

19. Accordingly, we find that the identification of the appellant as the perpetrator was positive and free from error. As a result, we find that his conviction and sentence for the offence of defilement was sound in law. It follows therefore that the appeal herein lacks merit and is hereby dismissed.

**Dated and delivered at Malindi this 20<sup>th</sup> day of March, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**