IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 37 OF 2016

BETWEEN

JALI KAZUNGU GONA ………… APPELLANT

AND

REPUBLIC …………………….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 23rd November, 2012 ***in H.C.CR.A No. 84 of 2011****.)*

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JUDGMENT OF THE COURT

1. This is a second appeal against the appellant's conviction for the offence of defilement. As such, the Court ought to remain alive to the fact that by dint of ***Section 361 (1)*** of the ***Criminal Procedure Code***, its jurisdiction is confined to matters of law only. In the same vein, this Court has stated severally, that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown to have demonstrably acted on wrong principles in making the findings. This much was restated by this Court in ***Alvan Gitonga Mwosa vs. Republic [2015] eKLR.***

2. The brief circumstances surrounding this appeal are that on 21st October, 2010 at around 3:00 p.m. while BP, a girl child aged 15 years old, was by the seashore at [particulars withheld], she was stopped by an unknown man but she chose not to pay attention to him. Suddenly, the man brandished a knife, dragged her next to a big stone and forced her to lie down. He proceeded to undress and defile her. Meanwhile, **Stephen Kahindi Kazungu** (PW3) who was fishing about 10 meters away saw the said man who he recognized as **Jali Kazungu Gona** (the appellant) in the process of defiling BP; both the appellant and BP were well known to him.

3. After the ordeal, BP went to her grandfather's house and took a bath before heading back home. She didn't share with anyone what had happened. Apparently, four days later, on 25th October, 2010 BP's mother was informed about the incident by one Samuel and she shared the news with her husband, **Z B F** (PW2). Together they confronted BP with the news and she broke down narrating what had transpired. Z then went looking for Stephen who confirmed that he had witnessed the appellant defiling his daughter. The matter was reported at Kilifi police station on the same day. On 26th October, 2010 BP was examined by **Dr. Malik** (PW5) who filled in the P3 form. As per his observation, the minor's hymen had been

broken.

4. A couple of months later, on 6th January, 2011 the appellant was arrested by members of the public and brought to the police station. He was arraigned and charged before the Senior Resident Magistrate's Court with the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(3)*** of the ***Sexual Offences Act***. The particulars of the offence were that on 21st October, 2010 at [particulars withheld] area in Kilifi County, the appellant committed an act which caused penetration of his genital organ namely penis into the genital organ namely, vagina, of BP a child aged 15 years old.

5. Put on his defence, the appellant denied committing the offence and claimed that he had been framed by Stephen who held a grudge against him on account of a debt of Kshs.1,500.

6. Faced with the foregoing evidence, the trial court was satisfied that the prosecution had proved its case against the appellant. The appellant was thus convicted and sentenced to 20 years imprisonment. Aggrieved with that decision, he preferred an appeal in the High Court which was dismissed by a judgment dated 23rd November 2012. He is now before this Court attempting to take a second bite of the cherry with this second appeal which is premised on the grounds that-

> ***a. The learned Judge erred in law by upholding the appellant's conviction based on unsatisfactory identification evidence.***
>
> ***b. The learned Judge erred in law by failing to appreciate that the complainant who was 15 years old did not give her evidence on oath.***
>
> **c. The learned Judge erred by failing to appreciate that there was a discrepancy as to the date of the incident.**
>
> **d. The learned Judge erred in law by failing to consider the appellant's defence.**

7. At the hearing of the appeal, the appellant appeared in person while Mr. Eugene Wangila, Senior Prosecution Counsel, appeared for the State.

8. The appellant in his written submissions argued that his conviction was not based within the parameters of the law. Expounding on the same, he submitted that an identification parade ought to have been conducted in as far as the complainant was concerned. This is because she had testified that she did not know the appellant prior to the incident. In the absence of the identification parade, her identification of the appellant at the trial amounted to a dock identification with no probative value. To buttress that line of argument he placed reliance on this Court's decision in ***Oluoch vs. Republic*** ***[1985] eKLR***.

9. Besides, Stephen who claimed to have recognized the appellant during the incident, he did not report the incident let alone give a description of the appellant to the police. In fact, he was categorical in his testimony that he was not the one who led the police to arrest the appellant. According to the appellant, these circumstances impeached the credibility of that witness.

10. The appellant submitted that it was rather suspicious that the complainant did not inform anyone of the incident but only opened up upon being confronted by her parents. He also stated that the inconsistency as to the age of the injuries in the complainant's testimony and the P3 form clearly indicated that she could have been defiled by someone else other than him. On one hand, the complainant stated that she was defiled on 21st October, 2010 and she was examined on 26th October, 2010. On the other hand, the P3 form which was filled on 26th October, 2010 indicated the age of injuries as 2 days. On those grounds, the appellant urged the Court to allow the appeal.

11. On his part, Mr. Wangila, learned Senior Prosecution Counsel submitted that the identification evidence was sufficient to warrant the appellant's conviction, and that the complainant's evidence was corroborated by that of Stephen who recognized the appellant during the incident. He urged the Court to

dismiss the appeal.

12. We have considered the record of appeal, the grounds of appeal, submissions by counsel and the law. It is not in dispute that BP had been defiled as evidenced by the doctor's testimony that her hymen had been broken. What is in issue is the identity of the perpetrator.

13. The evidence against the appellant was one of identification. In ***Wamunga vs. Republic*** ***[1989] KLR 424*** this Court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated: -

> **"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".**

14. Bearing in mind this need for circumspection, we entertain some doubt as to whether or not the identification evidence tendered at the trial court amounted to a positive identification of the appellant as the perpetrator. To begin with BP was clear that she did not know the appellant prior to the incident hence, it was crucial for the veracity of her identification of the appellant to be tested through an identification parade. For the reason that identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in ***John Kamau Wamatu & another vs. Republic*** ***[2010] eKLR***. Unfortunately, her identification of the appellant at the trial as submitted by the appellant amounted to dock identification. In that regard, we reiterate the findings in the decision of this Court in ***Ajode vs. Republic*** ***[2004] eKLR*** which expressed that:-

> **"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."**

15. In addition, Stephen who claimed to have seen the appellant defiling BP never reported the incident or gave a description of the appellant to the police or to BP's parents. In his evidence, he simply stated during cross examination that-

> ***"I personally saw you but did not do anything. I do not know when you were arrested."***

This adds to the uncertainty as to the veracity of the identification evidence. We say so because as observed by this Court in ***Maitanyi vs. Republic*** ***[1986] KLR 198***:-

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid or to the police…… If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description."***

As a result, several questions arise- under what circumstances was the appellant arrested by the members of the public? Who pointed him out as the perpetrator? Why was he arrested 3 months after the incident if indeed he was well known?

16. Similarly, it is not clear from the record how the said Samuel who allegedly reported the incident to BP's mother learnt about it. We find that there were gaps in the identification evidence which raised doubt as to whether the same was safe to justify the conviction of the appellant.

17. The onus is always on the prosecution to prove its case against the accused person on a standard beyond reasonable doubt. Lord Sankey expressed that fundamental principle many years ago in his famous speech in ***Woolmington vs. DPP [1935] UKHL 1*** where he said:-

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."** Emphasis added.

18. In the end, we are convinced that the evidence of identification was not properly tested by the two lower courts. Had the evidence been thoroughly tested and analyzed we doubt whether the lower courts would have come to the same conclusion.

19. Having pronounced ourselves as herein above, we deem it unnecessary to delve into the other grounds of the appeal raised herein. Accordingly, we are satisfied that this appeal has merit. We allow it, quash the appellant's conviction and set aside the sentence meted out to him. The appellant shall therefore be released forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 2nd day of November, 2017.

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