



REPUBLIC OF KENYA



**KENYA LAW**  
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**PMW v Republic (Criminal Appeal E017 of 2022)  
[2023] KEHC 18667 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18667 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL E017 OF 2022  
SC CHIRCHIR, J  
MAY 31, 2023**

**BETWEEN**

**PMW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both the conviction and sentence arising  
from the Judgment of Hon. V. Ochanda (SRM) in S.O NO. 24 of 2016  
at the chief Magistrate's Court in Muranga delivered on 24/5/2022)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of defilement of a girl contrary to section 8 (1)(4) of the sexual offence Act No. 3 of 2006.( The Act)
2. The particulars of the offence are that on 22<sup>nd</sup> December 2015 at [Particulars withheld] village within Murang'a county, the accused intentionally and unlawfully caused his penis to penetrate the vagina of AMK, a child aged 15 years.
3. In the alternative, he faced a charge of committing an indecent Act with a child contrary to section 11(1) of the Act
4. At the conclusion of the trial, he was found guilty of the main charge and sentenced to 20 years imprisonment. He was aggrieved by the Judgment and consequently filed this petition of Appeal.

**Grounds of Appeal**

5. In his amended petition of Appeal, the Appellant has set out the following grounds:



- a). The Honorable Court erred in failing to note that the Appellant's inalienable right to fair Trial as espoused under Article 50 (2)(c), (j) & (k) of the constitution were violated during the course of the trial.
- b). That the learned Magistrate rendered the trial fatally defective by relying on extraneous evidence, not remotely related to the matter, in the course of rendering its judgment
- c). That the trial magistrate erred in failing to note that the charge sheet was fatally and incurably defective contrary to provision of section 214 of the Criminal Procedure Code
- d). That the Honorable court erred in relying on the government analysis report of questionable providence and propriety to found the Appellant conviction
- e). The learned magistrate erred in failing to note the glaring material contradictions that riddled the evidence adduced by the prosecution.

### **Summary of the evidence at the Trial Court**

6. PW1 was the complainant. She told the court that on 22/12/2016, they were at [Particulars withheld] in Murang'a. On that day her parents were moving houses from [Particulars withheld] to Kahuro. The time was 7pm. That her mother told her to go to P's house together with two of her siblings GKU and N, who were 7 and 4 years old respectively. That the Appellant went to her home to help the complainant's parents pack household items but later came back. She spent the night at the Appellant's house.
7. She stated that at about 11.00 pm while she and other children were sleeping in the sitting room on the floor, the Appellant came and told her to go to his bedroom but she refused. That he put a blanket in her mouth and removed her skirt, her biker and her under ware and raped her. she stated that he held both her hands above her head, spread her legs using his legs and raped her. She claimed that he entered her private part using his private part and when he was done, he threatened her not to tell anyone. She went home the following morning.
8. She further stated that in the course of the year, when she was being admitted in [Particulars withheld] Girls school, a routine pregnancy test showed that she was pregnant. she stated that she never slept with any boy before and after the rape.
9. She was taken to hospital by her mother and she informed her that the Appellant had raped her. She was taken to the police where a report was made and a P3 form issued. She stated that she knew Appellant by name (P) since he had been their neighbor and that she had known him for a year.
10. She recalled that on 1/12/2016, she was asked to provide blood sample although she did not know why. She later learnt that it was for DNA. She stated that she has a one-year-old child known as FW.
11. She reiterated that she lives with her mother who is her guardian and that she doesn't live with her biological mother.
12. On the date of the incident, she told the court that her parents had told her to take the younger children to the Appellant's house as they were disturbing them in the work they were doing. They found the Appellant in his house, together with the house girl and his child. She stated that later, she was left with N at p's but her mother later came for him but she was left her behind. She further told the court that she was not sure what time the house girl left but she recalls that P came and the lights were off. That he put the blanket in her mouth and that they struggled but he held her hands and used his legs



to spread her legs apart and that she is not sure if he wore protection. She stated that her baby was born full term on 9<sup>th</sup> September 2016.

13. PW2 was the guardian of the complainant. she recalled that on 4/2/2016 about 10.00 am, she took the complainant for medical test as she was due to join form one. That when the results came out, she was found to be pregnant. she informed her that P, their neighbor, defiled her at the time they were moving house.
14. She recalled that on the day they were moving, she had told the complainant to go to Appellant's house with the children; that the Appellant came to her home to help them pack and when they were done, she went to get her 2-year-old. Her 5-year-old had come back home. She tried waking up PW1 but she could not wake up and she left her sleeping.
15. When she got to know that the complainant was pregnant, she told the pastor who told her to go to the police. At the police station, they were given a P3 form which she produced in evidence together with the pregnancy test Results.
16. She stated that she knew Appellant as they were neighbours for about 2 years and that they had had a good relationship before. She stated that PW1 gave birth on 4<sup>th</sup> September 2016 to baby PW
17. They were later told to provide samples for P.W and later the police informed them that the test showed that the Appellant was the father.
18. On cross examination, she testified that she is a guardian to the complainant and that her biological mother lives in Gatanga . she was helping raising her and that she took her in when she was a young child. She further stated that the Appellant has his own children and she did not know he was capable of doing "such things".
19. PW3 examined the complainant and filled the p3 form on 5/2/2016. She confirmed that the complainant was 3 weeks pregnant at the time of examination. On examination, the external genitalia were found to be normal, and the labia was intact, there was no bleeding or laceration and the hymen was not intact, meaning that sexual intercourse had occurred.
20. On cross examination, she stated that she could not tell the exact date when the sexual intercourse or conception took place but she was informed by the complainant that she was assaulted a month before she came to hospital
21. PW4 was the investigating officer in the case. He recalled that on 5/08/2016 while on duty at the station, the complainant was brought in by her mother and one Anthony Kariuki to report a case of defilement which allegedly happened on 22/12/2014 at about 0100 hours. He booked the report in the Occurrence Book (OB) and referred the victim to murarinjas hospital upon issuing them with the P3 form. She reported that she was defiled by one PMW. They brought the P3 back to the station which indicated that the complainant was pregnant. He obtained the birth certificate that confirmed the complaint was 15 years. He summoned the accused to the station and he was charged with the offence of defilement.
22. He further told the court that blood samples were obtained from baby FW, the complainant's and that of the Appellant. He prepared the memo form and the samples were taken to the government chemist for DNA test. He received the DNA report from the government chemist that showed there was 99.99 + 99 chances of the Appellant being the biological father of the baby. He produced the memo dated 22/12/2015 as and the DNA report .



23. On cross examination, he told the court that he arrested the accused at the AP offices located at the Governor's Residence, where he had earlier been summoned to. He did not have the occurrence book in court. He recorded the statements of victim, the guardian and the accused but did not record any statement from the Appellant's wife.
24. The witness denied that there was any tampering with the DNA results. He stated that the government chemist was presented with the memo and the samples and the result was sent back in duplicate.
25. The defence then demanded for the OB and Lab report and the witness was stood down in order to avail the OB. PW4 never returned to the court and PW5 took the stand instead.
26. PW5 told the court that he took over the investigation from PW4. He told the court that PW4 had retired and that was the reason why he had taken up the case. He did not know why PW4 was stood down.
27. On being put on his defence, DW1 recalled that on 23/12/2015, he was at Muririnjas rehabilitation center; That complainant's family was moving house and he went to assist them. He testified that after the exercise, he went back to the rehabilitation center then to his house at about 3 am. He told the court that his wife was on the night shift and that his house help, his child and that of the neighbour's were spending the night at his house. He said that he went to the bedroom and his wife returned at 6.00 am. That their neighbor came to pick the complainant and and Koome. He left for work at 6.00 am.
28. On the evening of 1/7/2016 he was informed that he was wanted at Kahuro police station. On arrival, he was informed that he stood accused of having had sexual intercourse with the complainant on 22/12/2015. He was arrested and charged. He told the court that he had had disagreement with the with the complainant's guardian , PW2 and they were not on talking terms. He alleged that the DNA samples were done by a close friend to the complainant and that he did not trust the process in which it was done.
29. DW2, testified that she was a nurse practicing at Gitari dispensary. She stated that the accused was her husband and that on the 22/12/2015, she was at home with her husband. However, on the night of 23/12/2015 she was at work. She recalls that on 23<sup>rd</sup> December 2015, the neighbors were shifting houses and that her husband had gone to assist them while she worked the night shift. In the morning when she got back home, she found the complainant in the house. She said they had some differences with the complainant's family. She also had issues with the delivery date of the child. she alleged that the birth ought to have been on 3/8/2016 and not 16/9/2016 if indeed the child had been conceived in December 2015.
30. She also pointed out that the minor left hospital with no bruises or any bleeding. she told the court that her husband did not defile the complainant. She alleged that the week the neighbor's shifted, they came to know that the complainant wanted to procure an abortion and she therefore suspects that the complainant was already pregnant.

### **Appellant's submission**

31. The appellant submitted that his right to fair trial was violated during the trial proceedings. He cited the fact that he was not supplied with the Lab report and the OB Extract. He submitted that failure to be supplied with the occurrence book curtailed his ability to adequately prepare a defence. He also complained that he did not cross-examine PW4, whose testimony, he claims, was crucial as the witness is the one who produced the birth certificate, the Exhibit Memo and the Government Chemist Report.



32. It is the Appellant's further submission that the court's judgment was based on extraneous evidence that did not relate to the matter at hand and therefore its propriety, correctness and regularity should be called to question. He makes specific reference to page 1 and 2 of the trial Court's Judgment.
33. On the defectiveness of the charge sheet, he states that the charge sheet stated that the alleged offence occurred at a place called [Particulars Withheld] village in Muranga while PW1 stated that the incident took place at [Particulars Withheld] in Muranga. With regard to the dates of the alleged defilement, he submits that different dates were given by the prosecution witnesses; That while Pw1 gave 22/12/2015 and 22/12/2016 as being the date of defilement, the investigating officer alleged that it happened on 22/5/2015 and PW4 gave the date as 22/12/2014. He submits that those were among the material contradictions in the evidence and should lead to the invalidation of the charge as per section 214 of the Criminal Procedure code.
34. On the chain of custody of the DNA samples, the appellant's submission is that whereas he submitted his sample on 22<sup>nd</sup> November 2016, the complainant submitted themselves on 1<sup>st</sup> December, 2016. He further points out that whereas PW4 Pc Jonathan Charo testified that he took the samples and transported them to the government chemist, the report shows that it was prepared by No.62617 CPL Obobo. He questions the entire process of handling the samples and the custody of the of the sample from 22<sup>nd</sup> November 2016 until 2<sup>nd</sup> December 2016. He further questions the date that the results were received due to the fact that while Exhibit 5 indicate that DNA Results were received on 2<sup>nd</sup> December 2016, the report indicates 1<sup>st</sup> December 2016
35. On grounds of material contradiction in the evidence he submits that material discrepancies were capable of unsettling the verdict delivered as it goes to the core of the case. He argues that the expected delivery date did not correspond to the evidence produced and that the alleged scene of crime was different from the one referred to in the evidence. He further contends that all the Evidence other than that of PW1 was hearsay, which cannot be relied upon to base a conviction.
36. He submitted that the incident is indicated to have occurred at diverse times which could not be reconciled. He asserts that the discrepancies cannot be wished away and they should be resolved in his favour. He relied on the case of John Mutua Musyoki vs. Republic (2017) e KLR and Ndungu Kimanyi vs. Republic (1979) to buttress his submission on how the court should treat contradictions and inconsistencies on the prosecution's case.

### **Respondent's submissions**

37. It is the Respondent's submissions that the prosecution proved its case to the required standard; that the three ingredients of defilement set out in section 8(1) of the Act were proved. that the age of the complainant was proved by way of a birth certificate which showed that the complainant was born on 28/07/2001. This meant that she was 15 years and 5 months at the time of the defilement.
38. The Respondent argues that the testimony of the complainant proved defilement. It is further submitted that the DNA test proved that the Appellant was the father of the complainant's baby thus proving that there was penetrative sex between the Appellant and the complainant.
39. On identification, it is submitted that the Appellant were neighbours with PW1 and PW2 and hence knew each other before.
40. On the alleged defect on the charge sheet, the Respondent submits that there was no variance between the evidence and the charges. It is pointed out that the errors such as the place of the offence could have been a recording error on the part of the court; That recording the place as "[Particulars withheld]" instead of "Muriranjás" is an error that does not amount to variance of the evidence. Regarding the



date of the offence, it is the Respondent's submission that the date in the charge sheet which was given as 22/12/2015 was the same date given by the complainant in her testimony and that the date recorded as 22/12/2016 instead of 22/12/2015 is a typographical error which he submits does not change the substance of the evidence.

41. On the appellant right to fair trial, it is submitted that although the occurrence book was not produced, lack of it did not go into the root of the case and does not negate the fact that the complainant was defiled.
42. On the allegation that the Judgment was based on extraneous evidence, the respondent submits that a portion of page 1 of the judgment must have been inserted erroneously, and it is merely a clerical error. The respondent relies on section 382 of the Criminal Procedure Code which provides that unless the error in the judgment has occasioned a failure of justice, the order or sentence of a court shall not be reversed.
43. On the alleged material contradictions in the evidence, it is argued that there was no major inconsistency in the testimony given by any of the witness and that any minor inconsistency is not fatal to the prosecution case. The Respondent has relied on the case of Ndolo Musyoki Vs. Republic (2022) e KLR in this regard
44. It is further submitted that on the issue of expected date of delivery, the date is not an exact science, and that it was clear that the child was delivered on 4/9/2016. On the allegation that the evidence of PW1 was not sufficient the respondent's response is that the same was sufficient within the context of section 124 of the *Evidence Act*.

#### **Determination**

45. This being the first appellate court, I am guided by the principles in David Njuguna Wairimu v Republic [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and satisfy itself and come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may reverse those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
46. In my view the following are the issues for determination:
  - a). Whether the Charge sheet was defective.
  - b). whether there were discrepancies and inconsistencies on the prosecution's Evidence
  - c). Whether the integrity of the DNA test was compromised
  - d). Whether the Appellant's right to fair Trial was violated.
  - e). whether the trial Magistrate relied on extraneous evidence not related to the matter.
  - f). Whether the offence of defilement was proved beyond reasonable doubt



### **Whether the charge sheet was defective**

47. The Appellant has pointed out that there are variations between the particulars of the charge and the evidence presented. He points out that the place and date of the offence differ from what was presented in evidence. I have perused the record. The charge sheet reads “ Muririnjas” while it has been variously indicated as “ Moi Ranches” or “Muriranjas” in the proceedings. It appears to me to be a recording error on the part of the magistrate. It has not affected the substance of the case and neither as it caused any prejudice to the Appellant.
48. The other alleged defectiveness is on the date of the offence. According to the charge sheet, the offence was committed on 22 December 2015. This is the date given by the complainant in her evidence. PW5, the investigations officer gave the date of 22/12/2014 while PW5 stated the date as 22/5/2015. The date given by the complainant is the one on the charge sheet. The other variations in my view, are issues of contradictions on the witness’s testimonies or a recording error on the part of the court. This would then go into issues of contradictions which should raise the question of the effect on the prosecution’s case, not a defect on the charge sheet. I also notice that save in the case of PW5, the date of 22<sup>nd</sup> December is constant. The variation is only in the year. The variation in my view could have been a typographical error. Pursuant to the provisions of section 382 of the criminal procedure code , they have not in any way occasioned a failure of justice.

### **Whether the prosecution’s case is full of inconsistencies and discrepancies**

49. The Appellant has submitted that the prosecution evidence was full of discrepancies and contradictions. He has pointed out for instance that as regards the date of the incident, the Complainant gave different dates, that is 22/12/2015 and 22/12/2016; the investigating gave on 22/5/2015 and while PW4 alleged that it happened on 22/12/2014. They submitted that those were among the material contradictions in the evidence and should lead to the invalidation of the charge sheet pursuant to the provisions of section 214 of the Criminal Procedure Code.
50. Another contradiction the Appellant has pointed out is that, while PW4 testified that he took the samples and transported them to the government chemist, when it was produced in evidence, the DNA report indicate that the samples were delivered by No.62617 CPL Obobo. He questioned the entire process of handling the samples, including who was in possession of the sample from 22nd November 2016 until 2nd December 2016. He further questions the date that the results were received because Exhibit 5 states they were received on 2nd December 2016 yet the report indicates it was received on 1st December 2016.
51. The Appellant contends that the above contradictions go into the substance of the case and was fatal to the prosecution’s case.
52. Thus the contradictions pointed out is in respect of the date and place of the offence and the question of who delivered the samples to the Government chemist.
53. Have the aforesaid contradictions caused any prejudice to the Appellant? I think not. In the case of Joseph Maina Mwangi v Republic, Criminal Appeal No. 73 of 1993 the Court of Appeal held that “In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the CPC viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”



54. The variance on the place of the offence have been sufficiently explained by the Respondent and am persuaded that it was a recording error on the part of the trial court, as the words “[Particulars Withheld] Ranches” could have sounded as “ maririnjas” to the Magistrate. On the dates of the incident, it again does not go into the substance of the case. The variance on the timings between the one indicated in the charge sheet and the evidence does not affect the substance of the charge. Indeed, as per section 214(2) of the Criminal procedure code, the charge sheet did not need an amendment.
55. It is also important to point out that the date given by the complainant tallies with what is in the charge sheet. The other varying dates was given by the other witnesses. This court also takes judicial Notice of the fact that the gestation period for humans is 9 months. Baby F.W was born on 4<sup>th</sup> September 2016, and would mean the conception falls around the date given by the complainant and not 2015 or 2014 given by the other witnesses.
56. I therefore find that the contradictions did not affect the substance of the case.
57. On the alleged contradictions on the handling of the DNA samples, the same touches on the integrity of the DNA samples and therefore I will address myself to it in the next paragraph.

### **Whether the integrity of the DNA Test was compromised.**

58. The Appellant’s complain in this regard is that the results were tampered with and there is contradiction on who delivered the samples to the Government chemist, that the maker of the report was not called, and the person who prepared it was a friend of the complainant. The Appellant therefore concludes that the integrity of the test had been compromised.
59. I find that there was no evidence at all presented to the court on the alleged tampering of the DNA samples by any person. There was equally no evidence to prove that there was any friendship between the complainant and the person who carried out the test. The Appellant has made these allegations without any effort to submit any proof. These two complains without any basis and I dismiss them outrightly.
60. The mere fact that the maker of the report was not called to produce the report does not render it inadmissible since it was produced by the investigating officer and it was signed and dated by the maker. The report was also produced in the lower court without any objection from the Appellant. This complain is equally without merit and I dismiss it.
61. On the chain of custody of the samples, the high court in the case of Patrick Kihara Mwangi vs Republic (2015)e KLR drew a distinction between the handling of Drug samples and Genetic material. On the need to establish the full chain of custody on drug samples v.v genetic material, the court stated: “It is true that the prosecution did not establish the full chain of custody of the DNA samples from the point of extraction to analysis. According to PW4 the DNA samples were received from PC Korir Kibet of Njabini station on 13/6/2008. This police officer was not called to testify and neither did the clinical officer who extracted the specimens. Be that as it may, the Appellant admits that his samples were taken.....In much as the prosecution failed to call PC Kibet and the clinical officer who took the samples, I think the report by PW4 and the Appellant’s admission in many ways renders this omission less significant in this case , as opposed to say, a case where drugs samples are extracted and taken to the Government chemist. The need to establish a clear chain of handling in such a case is borne out of the fact that the risk of substitution of drugs is high and that, what eventually reaches the government chemist may not be the extracted sample. That is the danger the courts guard against by insisting on a clear chain of handling samples..... In a case like this one before us, any substitution would show up in the DNA profiling and would have been detected by the analyst. This is because unlike a drug



sample, the DNA sample is from a specific identifiable individual and no two persons share similar DNA structure....”

62. In the above cited case, as in the present case, the Accused had admitted that the DNA samples were extracted, any tampering with the samples would have therefore showed up in the results. In any case if the Appellant sincerely believed that the samples or results had been tampered him, he had the right to request the court for a repeat test. The record shows that no such request was made. The DNA Report was produced by a person who was familiar with the person who had made the report and the Appellant did not raise any objection to the said production in any event.
63. On the question of who delivered the samples to the Government chemist, drawing analogy from Patrick kihara’s case (supra), any tampering would have shown up on the results and the question of who among the two officers delivered the samples to the Government chemist should not be a major consideration.
64. It is my finding therefore that the integrity of DNA was not compromised.

#### **Was the Appellant’s right to fair trial violated?**

65. The specific right referred to is the right under Article 50(2) ( c), (j) and (K). That is to say the rights of an accused person to: to have time and adequate facilities to prepare for trial, to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence and to adduce and challenge evidence.
66. The Appellant has specifically addressed himself to Article 50 (2) (j) and (k), where he complains that he was denied access to the OB Extract, and he did not get a chance to cross- examine one witness. The Respondent asserts that the OB extract, even though it was not produced as an Exhibit was availed to the Appellant as per their request. The respondent has referred the court to line 8-9 at page 27 of the proceedings. From the record, it is evident that the report was given to the Appellant. The Respondent further argues that the said document was extraneous as far as their case was concerned, but was availed nevertheless.
67. I find the argument by the Appellant in this regard to be without merit. The document was not part of the prosecution’s evidence. *The constitution* refers to the “Evidence the prosecution intends to rely on”. As pointed out by the Respondent, the OB was not among the documents that the Respondent relied on. The document was extraneous to their case. At the very least, failure to avail a document which the prosecution never relied on cannot constitute a violation of the right to fair trial.
68. What about failure to cross – examine PW4 the investigation’s officer the Appellant cross-examined the PW4 but the witness was stood down before the cross-examination was complete. Thus, it is not true to suggest that there was no cross- examination of Pw4 at all. Indeed, he answered questions regarding the arrest of the Appellant and the alleged tampering of the DNA samples. During the next scheduled hearing, PW5 stepped in for PW4, but the Appellant did not question him on the OB. Again, I find that failure to complete the cross-examination of thPW4 ca not constitute the violation of the right to fair trial.

#### **Whether the Trial court relied on extraneous Evidence**

69. The Appellant has taken issue with part of paragraph 4 of page1 of the Judgment which clearly shows that the court seems to have lifted some pieces of evidence that have no bearing in this case and attributed it to the complainant. What is significant to note however is that, this portion of the evidence was not considered for purposes of analysis and determination by the Trial court.



70. The analysis of PW1 Evidence begin from the last paragraph of page 6 of the Judgment to line 16 of page 7. It is clearly evident that the magistrate was referring to PW1's evidence as recorded in pages 9 to 12 of the proceedings, and not to the extraneous evidence that was referred to in the opening paragraphs of her Judgment. Contrary to the Appellant's assertion therefore the magistrate did not rely on the alleged portion of the evidence to arrive at her decision. It would appear to me, to be a case of clerical error on the part of the magistrate. To the extent that this extraneous evidence was not used in arriving at the determination of the lower court, there was no miscarriage of justice. This ground is also dismissed.

### **Was the case proved Beyond reasonable doubt**

71. Section 8(1) and (3) of the Act provides as follows: -

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

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

72. In *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are; ‘...identification or recognition of the offender, penetration and the age of the victim.’

73. The age of the victim was not in dispute as PW1 produced the complainant's birth notification which showed her date of birth as 28/07/2001. She was therefore 15 years, 5 months old at the time the offence was committed.

74. On penetration, section 2 of the *Sexual Offences Act* defines penetration as-

“The partial or complete insertion of the genital organs of a person into the genital organs of another person”

75. PW 1 narrated the events of that night. The relevant portion of her evidence went as follows: “we slept with the house girl in the table room, I don't know when she left. At that time P came, it was dark.... He put a blanket in my mouth, I did not choke, I could not scream. I struggled but he held my hands. He held my hands with his hands, he used his legs to spread my legs... he said that if I tell anyone, I will face the consequences....”.

76. Section 124 of the *evidence Act* allows the court to convict on the uncorroborated evidence in cases of sexual offences as long as the court is satisfied that the victim is telling the truth and the court records reasons for such belief. I have no reason to doubt PW's testimony on what transpired. Her testimony remained firm at cross-examination. The Appellant, much as he denied the defilement, admitted that the complainant spent the night in his house. His evidence also tallies with that of the complainant on the fact that her parents were set to move houses and the Appellant had at some point gone to help the complainant's parents to pack. Am not convinced that the complainant would be truthful on the other two events of the material day, only to lie about the issue of defilement. The complainant demonstrated consistency in her testimony and I have no reason to disbelieve her.

77. A DNA test was also done on the complainant's baby, born about 9 months later which identified the Appellant as the father. In the case of *WLN Vs Republic*(2021)e KLR, the court held: “... of great evidentiary importance, however, is that in criminal cases, defilement or rape, DNA result that prove a person to be the biological father of a child conceived through defilement is proof of penetration by



the person so found to be the biological father of the child”. Thus, the complainant’s testimony was not only credible but it was also corroborated by medical evidence. Am satisfied that penetration was proved.

78. The third ingredient in the offence of defilement is the identity of the perpetrator. PW1 and PW2 testified that the Appellant was their neighbor, they therefore knew each other well. Indeed, it was the evidence of PW1, PW2 and the Appellant himself that the Appellant had earlier in the day gone to the complainant’s home to help them pack their household items for purposes of an intended move. Thus, both the complainant and the Appellant knew each other well and so were their respective families. This was therefore a case of identification by way of recognition. Indeed, identification of the Appellant was a non- issue in the trial court or this Appeal.
79. I have considered the Appellant’s defence in which he alleged that the charges were motivated by a feud between the two families. However, it was the evidence of the Appellant and his witness, (DW2), that on the material day, the Appellant had assisted the complainant’s family to pack their household belongings. This gesture was one of friendship or at least a cordial relationship between the two families and certainly not enmity. This defence of pre-existing enmity is completely implausible.
80. It is my finding therefore that the case was proved beyond reasonable doubt.
81. I have not been asked to address the issue of sentencing in this Appeal. However, it suffices to state that the sentence is the minimum prescribed by law and the same is hereby upheld.

In conclusion the entire Appeal fails and the same is dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF MAY 2023.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Susan- Court Assistant

Appellant- present

Mr. Michuki for the Appellant

Ms. Muriu for the Respondent.

