



REPUBLIC OF KENYA



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**JMM v Republic (Criminal Appeal E053 of 2021)
[2022] KEHC 14695 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E053 OF 2021
MW MUIGAI, J
OCTOBER 27, 2022**

BETWEEN

JMM APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the conviction and sentence of Life Imprisonment by
Hon. E.W Wambugu (SRM) on 11th day of August 2021 at Kithimani)*

JUDGMENT

Background

1. The Appellant was charged with two counts and an alternative Count before the Principal Magistrate's Court at Kithimani in Sexual Offences Cause No 61 of 2019, Republic vs JMM.
2. On count I, the Appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006 the particulars of the offence being that the Appellant on the December 16, 2019 at around 2100 hours at Matuu Township in Yatta Sub-County within Machakos County, intentionally caused his penis to penetrate a vagina of ENM a child aged 11 years.
3. On the alternative Count, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the same Act the particulars being that the Appellant on the December 16, 2019 at around 2100 hrs at Matuu Township in Yatta Sub-County within Machakos County, intentionally touched the vagina of ENM a child aged 11 years with his penis.
4. On Count II, the Appellant was charged with offence of Deliberate transmission of HIV contrary to Section 26(1) (b) of the same Act the particulars being that the Appellant on the December 16, 2019 at around 2100 hrs at Matuu Township in Yatta Sub-County within Machakos County, having actual



knowledge that he was infected with HIV intentionally had carnal knowledge which he ought to have reasonably known was likely to lead to ENM being infected with HIV.

5. On December 18, 2019, a plea of not guilty was entered on all the counts based on the Appellant's answer to the charges.

Viva Voce Evidence

6. PW1, EK stated that on December 16, 2019 PW2 was missing but found near PW1 business stall opposite [Particulars Withheld] Club in Matuu. According to PW1, her other children had told her that PW2 had gone to her aunt's place but PW1 stated that she went twice to PW2's aunt place but she did not find PW2. According to PW1, PW2 told her that she had abdominal pains. She stated that she gave pain killers. That PW2 slept in pain and when PW1 went to check PW2 in the morning, she found PW2 had blood stains on her clothes. PW1 stated that she called PW2's father to find out from PW2 what happened. It was PW1 testimony that PW2 told her father that on December 16, 2019 a man had requested her to assist in carrying a sack near St Paul Academy but when PW2 went to assist, the man got hold of PW2 and raped her. PW1 stated that PW2 knows that person and so they went to check the man at MR where they asked the Manager to allow them speak to the man. They got hold of the man and took him to their house. According to PW1, PW2 identified the man. PW1 stated that they went to report at Matuu police station where they were referred to Matuu Level 4 Hospital where the assailant and PW2 were examined.
7. PW1 stated that the doctor confirmed that PW2 was defiled. She stated that accused had not showered and the dirt was still on him. According to PW1, on examination by the doctors, the accused was found to be HIV positive and so PW2 was given preventive medicine and referred to Machakos Level 5 hospital for further treatment due to the serious injuries. She stated that PW2 was operated, treated and a scan was done.
8. PW1 stated that the person in the dock was the one who was arrested and she knew him as the man lived in the same plot with PW1's sister. She stated that PW2 was 10 years old and she had PW2's Child Health Care Card with a date of birth as August 1, 2008. PW1 stated that she had no grudge with the accused person. According to PW1, her child has healed.
9. In cross-examination by the accused person, PW1 stated that PW2 was defiled by the accused person on December 16, 2019 at 9 pm when she found her child was missing. She stated that she found her child at 11pm. PW1 stated that PW2 told her that she was at her aunt's place. According to PW1, the accused person told PW2 not to report to anyone. PW1 stated that the accused and his wife lived in the same plot with PW1's sister. According to PW1, the scene was in a bush near St Paul Academy. She stated that she spoke to the accused's person employer and described the person she was looking for who worked at [Particulars Withheld] Resort. According to PW1, she realized that she knew the accused person when PW2 described him. According to PW1, there were no other male tenants in that plot. She stated that she had not seen the accused person with PW2 before nor had he heard him speak to PW2 before. PW1 denied that PW2 was not defiled in her house. She denied that she had fabricated her evidence against the accused person. She denied that she is looking for a husband since she is married.
10. PW1 stated that PW2 was 10 years old at the time of the offence. According to PW1, at the time of identification, they had the accused and another employee from MR. She stated that PW2 identified the accused person as her assailant. According to PW1, the accused person had refused to go with them when he saw PW1 and her sister. She stated that PW2 was tested and found HIV negative.



11. Voire Dire Examination was conducted on PW2 who stated that her name is EN. That she was 10 years old a student at [Particulars Withheld] Primary School in Class 3. She stated that she attended Catholic Church where they are taught memory verses but stated that she did not know what it means to swear by the bible. She stated that she was in Court.
12. The Trial Magistrate held that upon examining PW2, the Trial Magistrate found that PW2 was oriented in place but did not understand the duty of speaking the truth and meaning of oath. The Trial Magistrate directed that PW2 would give unsworn evidence.
13. PW2 EN (minor) stated that on December 16, 2019 she was in a stall where she was putting potatoes in a sack. She stated that the accused asked her where her mother was and she stated that her mother had gone to purchase rice. According to PW2, the accused asked her to go assist him carry a sack. She stated that they went to the lower part of St Paul where the accused removed her skirt and trouser and the accused removed his trouser. PW2 stated that the accused did 'Tabia Mbaya' to him by raping her. She stated that it was at 9pm in a thicket where the accused strangled her and she could not scream. According to PW2, after the accused raped her, the accused told her to dress up and warned her against telling anyone or else the accused would kill her.
14. Pw2 further stated that she knew the accused person since the accused worked at [Particulars Withheld]. According to PW2, she told her mother that she was at her aunt's place and in the morning she told her father that she had been raped by someone. She stated that the person was brought to the house by her father and aunt. She stated that person denied yet he was the one. She stated that the man who raped him is the one on the dock. PW2 stated that she had differed with the accused. According to PW2, the accused used to visit another man in their plot. She stated that she had not talked to the accused before.
15. In cross-examination by the accused person, PW2 stated that the person who did tabia mbaya to her is called J. She stated that she knew her face and was in court. She pointed the accused person. She stated that 3 of her siblings saw the person who called her. According to PW2, the accused was passing when he came to the store and asked where PW2 mother was. She stated that she had not talked to the accused before but the accused asked her to go assist to carry a sack. She stated that she went with the accused upto St Paul Academy, it was PW2 testimony that it was near a bush near [Particulars Withheld] where she was raped. According to PW2, the accused lied to her that he knew her mother and they were to carry a sack and bring it to PW2 mother's stall. She stated that she told her father in the morning what had happened. According to PW2, the accused used to live with Mama M who had 3 children. That one of the children is in class 8. According to PW2, her aunt used to live in the same plot with Mama M. She stated that she did not know the accused at the time when he called her but afterwards.
16. According to PW2, she saw the accused's face the next day in the morning since at the stall it was dark and she could not see the accused's face well as they were using a hurricane lamp. According to PW2, the scene was dark. She stated that the accused did not hold her hand at the stall but when they had gone further down. She stated that she did not know the accused's name but she used to him pass by. She stated that she knew the accused by his face as she had seen the accused person for a long time. According to PW2, where her aunt lived there were no other men but only used to see the accused in the plot. She stated that the accused told her to remove her clothes and she removed.
17. PW2 stated that her mother told her that he was called J. According to PW2, she has never been done 'tambia mbaya' before. She stated that she did not know what the accused wanted to do when she told her to remove her clothes and after she removed, the accused raped her and thereafter escorted her to an iron roof church. According to PW2, she lied to her mother because the accused told her that he



- would strangle her if she told her mother. She stated that after the accused was brought, they were taken to hospital.
18. In cross-examination by court, PW2 stated that the stall they had a hurricane lamp. She stated that she did see the accused that night when the accused requested her to assist in carrying a sack. She stated that M, A and M saw the accused at the stall.
 19. In re-examination by accused person, PW2 stated that as they were passing a shop which had an electric light she saw the accused's person face.
 20. PW3, MW stated that the next morning he found PW2 clothes had blood stains and blood was oozing from her private parts. According to PW3, PW2 told him that a young man who used to stay near her aunt's house went and told her to assist him carrying a sack of vegetables for her mother but the young man took her to the bush, removed her clothes and raped her. He stated that PW2 told him that she could identify the man. PW3 stated that he called PW2's aunt called W whom he went with to [Particulars Withheld] Club where that person was working and the child pointed at that person. According to PW3, they found the child at 9 pm. He stated that when her mother found PW2, she was returning home. According to PW3, he did not see the accused on the day of the offence. He stated that PW2 is 13 years old.
 21. In cross-examination by accused person, PW3 stated that the child spent the night at home. He stated that he learnt that PW2 was raped the next day. That it was the child who told him what had happened. He stated that the child was 13 years old. According to PW3, the child was not defiled in his house. He stated that the child's mother knew the accused. He stated that child described him to her mother. It was PW3 testimony that he did not know accused person. He denied that he recorded that they had arrested Baba C.
 22. PW4, EWK stated that PW2 told her father that Baba C who lived in the same plot with PW4 had asked PW2 to assist him carry a sack. She stated that PW3 came out and asked her if she knew Baba C. PW4 stated that she knew the accused and that the accused person's wife sells scrap metal. She stated that she identified Baba C at [Particulars Withheld] Resort when they were all called. According to PW4, she did not witness the act. She stated that she had no grudge with the accused person.
 23. In cross-examination by the accused person, PW4 stated that PW2 was found at 10pm. She stated that PW2 told them that the accused had called her from the stall to assist him carry a sack. It was PW4 testimony that PW2 told her that she was defiled by Baba C who used to live in the same plot with PW4. She stated that she identified the accused person after PW2 told her it was Baba C. According to PW4, the child is 12 years old. She denied that they did not arrest another suspect and released him. She stated that they arrested the accused person and took him to PW1 home where PW2 identified the accused person as the perpetrator. According to PW4, PW2 could not go to [Particulars Withheld] due to her injuries.
 24. PW5, Force No xxxx Corporal Lucy Nabun stated that she was the investigating officer herein. She stated that on December 17, 2019 at 0800 hrs she received a report from EM who was with her daughter, sister and husband who had arrested JM on allegations of defilement. She stated the complainant's mother said that the suspect called the complainant who followed him since the complainant knew the accused person and pulled the complainant into a thicket, ordered her to remove her clothes and defiled her.
 25. According to PW5, the accused was examined and found to be HIV positive. She stated that she recovered the complainant's soiled blue panty, grey skirt, beige soiled biker which had blood stains. She also recovered a grey and blue trouser. According to PW5, the clothes were removed at the hospital in



- Matuu. She stated that the complainant had worn the clothes on the date of the offence. She stated that she re-arrested the suspect at the station.
26. According to PW5, the victim was born on May 7, 2008. She stated that she was 11 years old. She stated that she had a Child Health Card. It was PW5 testimony that she visited the scene on December 25, 2019 after the complainant had been discharged from the hospital. She stated that the victim and her parents took her to the scene behind [Particulars Wi] where the complainant showed her the bushes. According to PW5, the scene is about 300-400 meters from the stall belonging to complainant's mother. She stated that area is bushy behind xxxx.
 27. On cross-examination by the accused person, PW5 stated that she did not take photographs of the scene but medical evidence, complainant's testimony and clothes prove that the complainant was defiled. She stated that she preferred Count II pursuant to the medical examination as the accused intended to infect the complainant since he is HIV positive. She stated that the evidence of the complainant and the other children confirmed that the accused is a perpetrator although the other children are young hence could not come to court. She stated that the complainant knew the accused person and had identified him. According to PW5, the accused was present when she recovered the clothes from the complainant. She stated that complainant explained how she was defiled.
 28. PW6, Benjamin Mainigi, a Clinical Officer working at Matuu Level 4 Hospital stated that Dr Ephantus Mwangi whose signature is appended on the complainant's and accused's P3 Forms examined ENM who was 10 years old at the time. It was PW6 testimony that the complainant's clothes were stained with wet and dry blood. The complainant's vagina had 3 tears on the 5th, 6th and 7th O'clock extending to the anal splinter and had leakage of the urine in the vagina due to the tear. According to PW6, the genital area was soiled with blood. It was PW6 testimony that urine examination showed a lot of blood cells but syphilis and HIV test came out negative. PW6 stated that the accused person was in fair general condition upon physical examination. He stated that the urine test was okay and syphilis test was negative but HIV test was positive.
 29. According to PW6, the injuries sustained by the complainant were as a result of forced penetration. He stated that the HIV status of the accused person posed a risk to the complainant.
 30. On cross-examination by the accused person, PW6 stated that the complainant's clothes had blood stains since she was bleeding. He stated that the complainant had no disease but the accused was found to be HIV positive.

Ruling on Case to Answer

31. The Trial Magistrate considered the evidence of the six prosecution witnesses and held that the prosecution had established a case against the accused person. Pursuant to Section 211 of the [*Criminal Procedure Code*](#), the Trial Magistrate placed the accused person on his defence.
32. DW1, JMM stated that he is a cook in a hotel. According to DW1, he understood the charges he was facing. He stated that he heard the evidence from the prosecution witnesses but doesn't understand the act he was charged with. According to DW1, on December 16, 2019 he stayed with his wife and children in the house. He stated that on December 17, 2019 at 5.00 am he went to work at [Particulars Withheld] Resort and at around 8.00am, PW1, E, PW4, EW, M and another lady came to his work place. According to DW1, E whom they lived with in the same plot called him. He stated that E used to abuse his wife and children and one time he found Eunice holding a knife against his wife hence DW1 decided to vacate the plot to avoid conflict. According to DW1, while vacating the plot, E told his wife that they would see what she can do. He stated that E colluded with the landlady to find that DW1 had an electricity bill of Kshs 5,000/- which he ended up paying to be able to move out of the plot.



33. According to DW1, if he committed the offence the complainant would have been infected. He stated that he is HIV positive and cannot infect another person deliberately. He stated that his health is deteriorating since he cannot be able to access the medication.
34. On cross-examination by Mr Opundo, the Appellant stated that he was not living in the same plot with the complainant's mother. He stated that the complainant's mother had no differences with his wife. He stated that he had differed with Eunice. He stated that he was HIV positive. According to the Appellant, the complainant did not say he knows him. He stated that E held a knife against his wife. According to the Appellant he was home with C, M, M who are his children and wife. He stated that he would not call C since she was his daughter and his wife who was embarrassed of the Appellant's HIV status.
35. In a further cross-examination, the Appellant stated that his wife was embarrassed when the Appellant's HIV status was disclosed in Court.

Trial Court Judgment

36. The Trial Magistrate found that the defence of fabrication was baseless. As for the defence of alibi, the Trial Magistrate found no sufficient evidence to prove the defence as no witness was called to support his case. The Trial Magistrate found that the Prosecution had proved the main count and second count against the accused person beyond reasonable doubt.

Sentence

37. Upon considering the Appellant's mitigation, the Victim's Impact Report, the effect of the offence on the victim and the HIV status, the Trial Magistrate opined that the Appellant had robbed the victim of her innocence and self-confidence.
38. The Trial Magistrate sentenced the Appellant to life imprisonment and 15 years imprisonment on Count I and Count II respectively which the Trial Magistrate ordered to run concurrently.

Petition of Appeal

39. Aggrieved by the Trial Court judgment, the Appellant has appealed against his conviction and sentence on the following grounds:-
 - (1) That the Learned Magistrate erred both in law and facts in reaching a conviction on defilement while the elements of the same were not proved as required by the Act.
 - (2) That the Learned Magistrate erred in law by failing to observe that the prosecution case contained contradictions and inconsistencies thus contrary to Section 163 of the *Evidence Act*.
 - (3) That the Learned Magistrate erred in law by failing to observe that the evidence relied upon by the prosecution fell too short of the certainty required in law in cases of this nature.
 - (4) That the Learned Magistrate erred in law in failing to observe that the provision of Section 169(1) of the Criminal Procedure Code was contravened.
 - (5) That the Learned Magistrate erred both in law and facts when he refuted my defence without giving reasons as to why and without clear points of determination.
40. The Appellant has urged this court to allow his appeal by quashing the conviction and set aside the sentence.



Appellant's Submissions

41. In this appeal on behalf of the Appellant, it has been submitted that the conviction against the Appellant was unsafe for breach of a fair and impartial trial process contrary to Article 50(2) (g) and (h) of the Constitution. According to the Appellant, the Trial Court had an obligation to inform him of his right to an advocate of his choice before the onset of the trial and after pleading to the charges but the Trial Magistrate failed to do so. Reference was made to pages 14 of 74 lines 11-14 of the Trial Court proceedings where the Appellant lamented that he was not ready for the trial and is seen to be requesting for an advocate to enable him prepare well. Reliance was placed on the case of HO vs Republic [2020] eKLR on the proposition that Article 50(2) (g) imposes a duty on the trial court to inform the accused person on the right to choose an advocate of his own choice to represent him/her. Reference was also made to the case of David Njoroge Macharia vs Republic [2011] eKLR and Karisa Chengo & 2 Others vs Republic [2015] eKLR on the proposition that the seriousness of the offence or gravity of the sentence to be imposed is critical to warrant informing the accused person of the right to a legal representation. According to the Appellant, the sentence 'to be informed of this right' under Article 50(2)(g) is mandatory hence it was prejudicial to the Appellant's right to fair trial and it matters not that the Appellant was able to cross-examine the prosecution witnesses.
42. It has been submitted that the key ingredients of the offence were not proved. According to the Appellant, the minor, PW2 stated that she was 10 years old but PW3 stated that PW2 was 13 years old. It has been submitted that the documentary evidence from the clinic relied upon by the Trial Court is prone to be doctored to suit the whims of the Prosecution. According to the Appellant, age assessment ought to have been carried out to be able to determine the right sentence to be meted. Reliance was placed on the case of Omus Kiringi Chivatsi vs Republic [2017] eKLR on the need to assess the age where there is conflicting versions of the minors age.
43. It has been submitted that penetration was conclusively established through the evidence of PW6 but the question remains whether the injuries in question were committed by the Appellant?
44. The Appellant asserts that he was not positively identified as the perpetrator due to the following grounds;
 - a. The minor could not see the Appellant's face well since it was dark at night and in a thicket despite the only source of lighting being a hurricane lamp. Reference was made to the case of Maitanyi vs Republic (1986) KLR 198 and Michael Mutisya Mwen vs Republic [2019] eKLR regarding the intensity of light essential in testing the accuracy of evidence of identification.
 - b. PW2 evidence at pages 23 of 47, lines 13-24 and 25 of 74, lines 3-17 of the Trial Court proceedings denotes that the Appellant was stranger to PW2 and prone to mistaken identity.
 - c. PW2 did not mention 'Baba Catherine' despite PW4 stating that PW2 told her father of Baba Catherine at pages 37 of 74, lines 1-4 of the proceedings.
 - d. The seizure of the Appellant by PW1 and PW3 and forced identification was a ploy to fix the Appellant because of grudge between the Appellant with PW4 as observed in page 38 of 74, lines 15-16 in the proceedings.
45. Reliance was placed on the cases of Waita Munyoki vs Republic [2018] eKLR, Francis Muchiri Joseph vs Republic (2015) eKLR and James Omondi Onyango vs Republic (2014) eKLR.
46. According to the Appellant, the Trial Court did not consider inference of facts which show the possibility that the Appellant might have been fabricated upon the present charges such as the evidence



- of PW4 who openly intimates to have slapped the Appellant as shown in page 37 of 74, lines 13-14 of the proceedings. According to the Appellant, he was arrested and implicated with the present charges out of mere suspicions hence he deserves a benefit of doubt on these allegations.
47. Regarding the medical evidence, it has been submitted it was not corroborative of the charges since the Appellant was found not to have any infection upon conducting the urinalysis test as per the evidence of PW6 at page 52 of 74, lines 16-18 of the proceedings. Reliance was placed on the case of *Gabriel Gatonye Gakunga vs Republic [2019] eKLR*.
 48. According to the Appellant, the minor's evidence was obtained by coercion and fear of being beaten. Reference was made to PW1 evidence in page 17 of 74, lines 16-18 and 21 of 72, line 14 and PW2 evidence in page 25 of 74, line 1-3 of the proceedings.
 49. It has been submitted that the minor cried in court not because of the sexual assault but because of her mother's continuous beating at every opportunity.
 50. Reliance was placed on the cases of *Paul Kanja Gitari vs Republic [2016] eKLR* and *John Mutua Munyoki vs Republic [2017] eKLR*. The Appellant has urged the Court to find that the evidence of the minor did not meet the threshold under Section 124 of the *Evidence Act* hence not safe to rely on it to convict the Appellant. It has been submitted that there are doubts as to the Appellant's positive identification.
 51. It has been submitted that there are inherent contradictions and inconsistencies on the face of the record of the proceedings which create doubt as to the culpability of the Appellant. According to the Appellant, PW1 stated that she found the minor at 11pm at page 20 of 74, lines 17-18 of the proceedings while PW3 stated that she was found at 9 pm. According to the Appellant, it cannot be shown whether or not the minor was known to the perpetrator prior to the commission of the assault in question. It has been submitted that the minor stated that the assailant was unknown to her but the medical evidence show that the minor was allegedly defiled by a person known to her. It has been submitted that PW1 lied to court that there were no other male tenants yet PW2 stated that in page 25 of 74, lines 17-18 of the proceedings that there were other men living there. Reliance was placed on the case of *Onubugu vs. State (1985) 1 NWLR*.
 52. Regarding the failure to call critical witness, it has been submitted that the 3 minors who were with PW2 were not availed in court to testify. Reliance was placed on the case of *Bukenya & Others vs Uganda* and *Daniel Kipyegon Ng'eno vs Republic [2018] eKLR*.
 53. The Appellant has urged this court to allow his appeal, quash the conviction and set aside the sentence.

Respondent's Submissions

54. The Prosecution has submitted that the evidence of PW2 was beyond a shadow of doubt that the Appellant defiled her. According to the Prosecution, PW2 evidence was corroborated by the testimony of PW1 and PW6. It has been submitted that PW6 testified that the victim's vagina had 3 tears on the 5th, 6th and 7th O'clock extending to the anal splinter. That PW2 had leakage of urine in vagina due to the tear and the genital area was soiled with blood. According to the Prosecution, the urine examination showed a lot of blood cells. Reference was made to the P3 Form (PEXH 4) which proves that the victim was defiled beyond reasonable doubt.
55. According to the Prosecution, medical examination on the Appellant established that he was HIV Positive and he being fully aware of his HIV status went ahead to defile the victim despite the risk involved.



56. It has been submitted that the age of the victim was proved by the Child Health Care Form (PEXH 5) where it was indicated that she was born on May 1, 2008. According to the Prosecution, the victim was 10 years old.
57. As to whether the Trial Court failed to observe the contradictions and inconsistencies of the Prosecution case, the Prosecution submits that it availed direct and documentary evidence. According to the Prosecution, the testimony of PW2 was well corroborated by the testimony of PW1, PW3, PW4, PW5 and PW6. The Prosecution asserts that there was no inconsistencies or contradictions. Reliance was placed on the case of *Richard Munene v Republic [2018] eKLR*.
58. It has been submitted that the Prosecution relied on evidence that is cogent which could not be shaken by the evidence of the Appellant hence the Trial Court was right to determine that the Appellant was guilty of defilement.
59. It has been submitted that the Trial Court convicted and sentenced the Appellant to life imprisonment hence the judgment is in accordance with Section 169(1) of the Criminal Procedure Code.
60. According to the Prosecution, the wife and children of the Appellant were never called to corroborate the Appellant's defence of alibi hence the cogent evidence from the prosecution witnesses remain unchallenged.
61. It has been submitted that PW2 properly identified the Appellant as she knew the Appellant very well having lived in the same plot as neighbors. Reliance was placed on the cases of *Peter Musau Mwanzia vs Republic [2008] eKLR* and *Wamunga vs Republic (1989) KLR 424* on the proposition that identification must be favorable and free from possibility of error for it to be the basis of a conviction.
62. The Prosecution has urged the court to uphold the Trial Court conviction and sentence.

Determination

63. The Court has considered the Record of Appeal, Memorandum Grounds of Appeal and written submissions filed on behalf of respective parties in this Appeal.
64. This Court being the 1st Appeal Court, its duty is as set out in the case of *Okeno vs Republic [1972] EA 32* as follows:-

' An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala Vs R (1957) EA 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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.'

65. The Trial Magistrate convicted and sentenced the Appellant for the offence of defilement and deliberate transmission of HIV to PW2. According to the Trial Magistrate, there was no sufficient evidence to support the defence of fabrication and alibi. The Appellant assert that the Trial Magistrate refuted his defence without giving reasons. According to the Appellant, the elements of the offence were not proved as required by the law.



66. In the prosecution case, six witnesses testified while in the defence case, only the Appellant testified. The Trial Magistrate was convinced by PW2 evidence that the Appellant defiled her. According to the Trial Magistrate, the Appellant robbed PW2 innocence and self- confidence. The Appellant assert that he is not the person who defiled PW2 since he was not positively identified as the perpetrator.
67. Based on the grounds of appeal and evidence on record, the two issues that emerge for determination are as follows:-
- a. Whether the Appellant’s right to fair trial under Article 50(2) (g) (h) of the Constitution was violated?
 - b. Whether the Prosecution proved its case against the Appellant beyond reasonable doubt?

Whether the Appellant’s right to fair trial under Article 50(2) (g) (h) of the Constitution was violated.

68. The Appellant contends that the Trial Court had an obligation to promptly inform him of his right to an advocate but it failed to do so. According to the Appellant, it was not safe to convict him for the offence when his right to legal representation has been infringed. It has been submitted that the Trial Court ought to have informed him before the onset of the trial and after plea taking.

69. It is therefore necessary to set out in verbatim the Trial court proceedings herein. On December 18, 2019, the charges and every element thereof were read in Kiswahili language to the Appellant. The Appellant denied all the charges and a plea of not guilty on all counts was entered by the Trial Court.

70. On September 8, 2020;
Hon EW Wambugu (SRM)
Ms Wamuyu

I have two witnesses
Accused

I am not ready. I have gone through my witness statements. I find the case is serious. I pray for an advocate or I be given time to prepare well.

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Ms Wamuyu

I object. Documents were supplied a long time ago. He had time to appoint an advocate and go through the statements. The case is serious and involves a minor who with time is likely to forget. It is a delaying tactic since he has seen the witnesses. If the court is inclined to grant an adjournment, I pray for witness expenses and a far off date for them to prepare.

Court

Accused is not fully prepared for the hearing. Hearing adjourned to September 23, 2020.

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September 23, 2020

Hon EW Wambugu(SRM)

Ms Wamuyu

I have 3 witnesses.



Accused

I am ready.

Court

Confirmed for hearing.

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EW Wambugu(SRM)

Later at 11.50 am (in camera)

Hon EW Wambugu (SRM)

Accused present.

Interpretation Swahili.'

PW1, female adult, Christian duly sworn in states in Kiswahili

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71. The right to fair trial is non-derogable. Article 25 (c) of the CoK provides that:-
25. Fundamental Rights and freedoms that may not be limited
- Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited.
- (c) The right to a fair trial; and
72. The Supreme Court in *Petition No 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] eKLR* in regard to the right to a fair hearing under Article 50 of the CoK stated as follows: -
- ' The right to legal representation under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.'
73. Article 50(2)(g) and (h) of the CoK provides as follows;
- (2) Every accused person has the right to a fair trial, which includes the right—
- (a)
- (g) To choose, and be represented by, an advocate, and to be informed of this right promptly;
74. Section 43 of the *Legal Aid Act*, No 6 of 2016 provides as follows;
- A Court, before which an unrepresented accused person is presented, shall –
- a. Promptly inform the accused of his or her right to legal representation;
- b. If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
- c. Inform the Service to provide legal aid to the accused person.'
75. It was stated in the South African Court by Goldstone J in *S vs Radebe; S vs Mbonani 1988(1) SA 191 (TPD)* that: -



A general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice.

76. Musyoka J in *Vincent Obulemere vs Republic [2022] eKLR* had this to say;

' 8. Did the trial court comply with the requirements of Article 50(2) (g) (h) of the *Constitution*? The primary duty of the court in the two provisions is to inform the accused person of his right to legal representation. In one case, the court informs or communicates the right and leaves it to the accused to do whatever he chooses with respect to the communication. In the other, depending on the charge and severity of sentence, there is further obligation to assess whether substantial injustice is likely to occur, and to take the further step of informing the accused of the possibility of an advocate being allocated to him at State expense, subject to him applying for it. The court should also take the further step of getting in touch with the national legal aid service in that behalf. The duty to inform the accused person of his right to legal representation applies with respect to all criminal offences, whether serious or minor, and the right to an advocate being assigned at State expense would apply in limited cases, where the offence is serious and the sentence severe, or the case is complex, or the accused person is indigent, or substantial injustice is likely to occur. See *Republic v Karisa Chengo & 2 others [2017] eKLR*.'

77. The key words under Article 50(2) (g) and Section 43(supra) are 'to be informed promptly of the right'. According to the *Black's Law Dictionary* the term promptly means;

' As soon as reasonably practicable under the facts and circumstances at the time.'

78. In this case the Appellant took plea without an advocate on December 18, 2019 and court entered a plea of not guilty on all counts. It was on September 8, 2020 when the Appellant informed court that he was not ready to proceed with the hearing since after going through his witness statements, he established that the case against him was serious.

79. The Court notes at page 17 of 74 of the Trial Court Judgment the Appellant prayed for an advocate or time to prepare well. The Prosecution Advocate, Ms.Wamuyu objected to the Appellant's request on the basis that the Appellant had time to appoint an advocate and gone through the statements but the Court adjourned the hearing to September 23, 2020 on the basis that the Accused was not fully prepared for the hearing. On September 23, 2020 when the matter came up for hearing, the Prosecution advocate was ready with 3 witnesses while the Appellant stated that he was also ready and



the Trial Court confirmed the matter for hearing. At 11.50 am the hearing proceeded in the presence of the Appellant who cross-examined each of the prosecution witnesses. On being placed on his defence, the Appellant elected to give sworn statement and call his wife as a witness.

80. The Court notes that when the case came up on September 23, 2020 for hearing, the Appellant intimated to court that he was ready to proceed with the hearing. No doubt the charges against the Appellant are serious for they attracted severe sentences. However the record show that the Appellant didn't have any difficulties to proceed with the hearing. Based on the Court proceedings, the Appellant did not intimate to court of whether he had difficulties in finding or hiring an advocate rather his request was that the case was serious. The record shows that he was granted adjournment to September 23, 2020 to prepare for the trial and/or get legal representation. The Appellant had gone through the witness statement and when the matter came up for hearing on September 23, 2020 he was ready to proceed with the hearing. The Court notes that when the hearing proceeded, the Appellant did not request at any other point of the trial for an advocate. Article 50 CoK provides for the Accused person to have an advocate of his choice and to be informed of his right but it is not mandatory for all felonies legal representation to be provided by the state.

81. This Court associates itself with Gitari J in *JMC vs Republic [2018] eKLR* where the Judge held that:

' Legal representation has financial implications and that is why the sub-article is worded the way it is. The accused must first choose to be represented by an Advocate. This would show that he has the requisite financial means to hire an Advocate. If he brings this to the attention of the Court, it informs him promptly of his right to have legal representation Article 50(g) of the *Constitution* does not require that every accused person be represented by counsel. It gives an accused person the right to choose to be represented by legal counsel. Whether or not to be represented therefore depends on the choice by the accused. The duty of the court is to inform him that he indeed has the right to be represented by an Advocate of his own choice once he has opted to have a legal representation.

In this case the appellant never indicated that he wished to be represented by an Advocate. The fact that the trial court did not inform him of the right did not in any way amount to a violation of his rights.'

82. The Supreme Court in *Republic vs Karisa Chengo & 2 others [2017] eKLR* had this to say;

' It is thus clear from the above guideline that free legal assistance may be accorded to a person who 'does not have sufficient means to pay for it', and that representation should also be given 'where interests of justice so require'.

83. On the same notes, Section 43(6) of the *Legal Aid Act, 2016* states that:-

(6) 'Despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.'

84. The Court finds no plausible grounds to conclude that the Appellant's rights under Article 50(2) (g) and (h) of the CoK were violated. In the circumstances the Appellant's assertions fail.

Whether the Prosecution proved its case against the Appellant beyond reasonable doubt

85. In this appeal, the court's role is to re-evaluate the whole evidence on record to see if there was some evidence to support the Trial Court's finding and conclusion. The court is at liberty to make its own



conclusion upon considering the evidence on record or upheld the Trial Court's judgment. The Trial Magistrate convicted the Appellant on Count I and Count II.

86. Section 8(1) and (2) of the *Sexual Offences Act* provides as follows:

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

87. The ingredients of defilement are well highlighted in the case of *Charles Wamukoya Karani vs. Republic, Criminal Appeal No 72 of 2013* where the court stated that:

' The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.'

Whether PW2 age was proved

88. According to the charge sheet the Appellant intentionally caused his penis to penetrate a vagina of ENM a child aged 11 years.

89. In *Kaingu Elias Kasomo vs Republic Malindi Criminal appeal No 504 of 2010*, the Court of Appeal stated as follows:

' 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.'

90. In *Alfayo Gombe Okello vs Republic (2010) eKLR* the Court stated that:

' The age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt proof 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.'

91. The Appellant contends that there is conflicting evidence since PW2 stated that she was 10 years old while PW3 stated that PW2 was 13 years old. According to the Appellant the documentary evidence from the clinic relied upon by the Trial Court is prone to be doctored to suit the whims of the Prosecution. The Prosecution has placed reliance on the Child Health Care Form (PEXH 5) where it is indicated that PW2 was born on May 1, 2008. According to the Prosecution, the victim was 10 years old.

92. In *Fappyton Mutuku Ngui vs Republic [2012] eKLR*, where Joel Ngugi J held that:-

' Conclusive' proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.'



93. The Ugandan Court of Appeal in the case of *Francis Omuroni vs. Uganda, Criminal Appeal No 2 of 2000* held that:

' In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.'

94. The Court's views is that the Appellant's has made a mere assertion that the clinic form can be doctored. It has not been demonstrated by the Appellant how the form had been doctored. The Appellant has not tendered any documentary evidence to controvert the age of PW2. During the voire dire examination, PW2 stated that she was 10 years old. PW1 stated that PW2 was 10 years old. She placed reliance on PW2's Child Health Care Card with a date of birth as August 1, 2008. According to PW5 who was the investigating officer PW2 was born on May 7, 2008. She stated that PW2 was 11 years old. PW6 stated that Dr Ephantus Mwangi who prepared the complainant's and accused's P3 Forms, PW2 was aged 10 years old at the time of examining her.

95. It was held in *Njuki vs Rep 2002 1 KLR 77*, that:

' In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused'.

96. In *Twehangane Alfred vs Uganda, Crim App No 139 of 2001, [2003] UGCA, 6* the court stated that:

' With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.'

97. The Court finds there is sufficient evidence to conclude that PW2 was aged 10 years at the time of the commission of the alleged offence. The conflicting evidence does not go to the root of the Prosecution case.

Whether PW2 was penetrated.

98. Section 2 of the *Sexual Offences Act* provides that:

' Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person;'

99. PW2 evidence was corroborated by the testimony of PW1, PW3 and PW6 P3 Form (PEXH 4) shows leaking urine from vaginal soiled with blood. The Discharge Summary Form from Machakos Level 5 Hospital marked MFI-2 – Exh 2 indicates; 'Eunice Ndunge Mutisya 10 years old reported a HX of PV bleeding, pain, inability to walk, 2° to Assault by known person. Patient was taken to theater for repair of 3rd degree perineal tear. The patient is stable for discharge. Has done 5 days at antibiotics'



establish that PW2 was defiled. In his submissions, the Appellant has admitted that penetration was conclusively established through the evidence of PW6. The court finds that PW2 was penetrated.

Whether the Appellant was positively identified as the perpetrator by PW2

100. In the case of *Robert Gitau vs Republic Criminal Appeal No 63 of 1990 (Nakuru)* the Court of Appeal stated as follows:-

' It was held in *Abdullah Bin Wendo and Another vs. R* 1953 Volume KXX 166 and *Cleophas Otieno Wamunga vs R* (Criminal Appeal No 20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the Appellant's face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was the only one from the cell.'

101. The case of *R vs Turnbull & Others [1973] 3 ALLER 549* has set out the factors to consider when dealing with the issue of identification. It was held that:

' The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?'

102. The Appellant assert that he was not positively identified as the perpetrator. According to the Appellant, it was dark and the only source of lighting was a hurricane lamp hence PW2 could not see him clearly. The Appellant has asserted that he was a stranger to PW2. The Appellant has asserted that the evidence of PW4 was fabricated since PW4 openly intimates to have slapped the Appellant. It has been submitted that the medical evidence was not corroborative of the charges since the Appellant was found not to have any infection upon conducting the urinalysis test as per the evidence of PW6. According to the Appellant, the minor's evidence was obtained by coercion and fear of being beaten. The Appellant has asserted that the failure to call the 3 minors who were with PW2 to testify was fatal to the Prosecution case.

103. The Prosecution has asserted that PW2 properly identified the Appellant. According to the Prosecution, PW2 knew the Appellant very well having lived in the same plot as neighbors.

104. Based on the oral evidence and documentary evidence, the court finds that the Appellant was properly identified as the perpetrator. PW2 evidence was sufficiently corroborated by the evidence of PW1, PW4, PW5 and PW6. It is clear that the Appellant was well known by the said prosecution witnesses. Accordingly, there was no mistaken identity.

105. According to the Appellant he was not the perpetrator of the offence since on December 16, 2019 he was at home with C, M, M who are his children and wife. In nutshell he is pleading the defence of alibi.



The court notes none of the said family member was called to testify in support of the defence case. The explanation by the Appellant was his wife was embarrassed of his HIV status. He stated that he would not call her daughter Catherine.

106. The Court in *Patrick Muriuki Kinyua & Another vs Republic Nyeri Criminal Appeal No 11 of 2013 (UR)* held that:

' An alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.'

107. The burden of disproving the defence remains with the prosecution as was held by the Court of Appeal in *Victor Mwendwa Mulinge vs Republic [2014] eKLR*, thus:

' It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution.'

108. Despite the onus solely being on the prosecution, the defence of alibi must not be incredible. I am fortified by the words of Odunga J (as he then was) in *Onyancha Felix Omboga & another vs Republic [2019] eKLR* where the Learned Judge stated:

' While the burden of disproving an alibi falls on the prosecution, there must be some credibility to the defence. Any wild suggestion made by an accused, in my view, cannot be seriously treated as an alibi so as to exonerate an accused.'

109. In the same vein, the Court of Appeal in the case of *Ernest Abanga Alias Onyango vs Republic CA No 32 of 1990* stated that;

' In *Rafaeri Munya alias Rafaeri Kibuka vs Reginam* (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect'. This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it's a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available'.

110. The correct approach where the defence of alibi has been raised by the defence is well expressed by the South African Court in the case of *Ricky Ganda vs The State, {2012} ZAFSHC 59, Free State High Court, Bloemfontein* where it was held that:-

' The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities. The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are



indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and impro-babilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.'

111. The court's view is that PW2 positively identified the Appellant as the person who defiled her. PW2 was credible witness whose evidence remained unshaken. The court notes that despite the Appellant stating that he was with his family at home, he did not give details of time he was at his home. It is possible that the Appellant's wife or his daughter would give positive evidence on the Appellant's defence of alibi but the Appellant was in a hurry to discredit them as potential witnesses in his case. The court's view is that the Appellant's evidence raises doubts on availability of the defence of alibi to the Appellant.
112. The Court finds no basis to fault the Trial Magistrate for refusing to uphold the defence of alibi. The Trial Magistrate recorded his basis for not finding the defence to be plausible in the Appellant's case.
113. Based on the grounds of appeal and Appellant's written submission, the court notes that the Appellant has only challenged the conviction on the offence defilement. The conviction and sentence on the offence of deliberate transmission of HIV contrary to Section 26(1) (b) of the same Act has been raised. The facts of Count II of deliberate transmissions of HIV, the fact of defilement being proved by the evidence on record, implies imputes intention to transmit HIV by the Appellant even if at the time the victim tested negative.
114. Similarly the sentences meted by the Trial Court have not been challenged hence this court cannot render itself on the same. It is trite that the sole discretion to sentence is with the Trial Court as restated by the Court of Appeal in *Bernard Kimani Gacheru vs Republic [2002] eKLR*. The Appellant has not demonstrated whether the Trial Court while passing the sentence, took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive as held by the Court of Appeal in *Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No 253 of 2003*.
115. Consequently the Court finds that the prosecution proved its case against the Appellant beyond reasonable doubt. Taking into consideration the totality both the prosecution evidence and the defence, the Trial Court was correct to find the defence of alibi was not available to the Appellant.
116. The ground of appeal that Section 169 (1) of the Criminal Procedure Act was not complied with lacks any substance in that the judgment of the Trial Court is very well reasoned and indeed satisfies all the requirements set out in the section.

Disposition

117. The Appeal lacks merit and the same is dismissed.

Judgment accordingly.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF OCTOBER 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

JOSEPH MUTINDA MWATHA - APPELLANT

NO APPEARANCE - FOR APPELLANT



MWONGERA - FOR STATE

GEOFFREY/PATRICK - COURT ASSISTANT(S)

