



**Hassan v Republic (Criminal Appeal E083 of 2021)
[2022] KEHC 14677 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E083 OF 2021
A. ONG'INJO, J
OCTOBER 26, 2022**

BETWEEN

ISSA KUSOW HASSAN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision by Hon. E. A. Nyaloti, Chief Magistrate on 1st September 2021 in Mombasa Sexual Offences Case No. 26 of 2019, Republic v Issa Kusow Hassan)

JUDGMENT

Background

1. The accused Issa Kusow Hassan was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No 3 of 2006. The particulars are that during the month of February 2019 at [Particulars Withheld] area Mvita sub-county within Mombasa county, intentionally and unlawfully caused his penis to penetrate the genital organ (vagina) of HO a child aged 12 years.
2. In the alternative charge Issa Kusow Hassan was charged with the offence of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars are that during the month of February 2019 at [Particulars Withheld] area Mvita sub-county within Mombasa county, intentionally and unlawfully committed an indecent act with a child by touching her private parts namely vagina of HOM a child aged 12 years with his male genital organ namely penis.
3. The trial magistrate considered the evidence of six prosecution witnesses and found that a *prima facie* case had been established against the accused person who was put on defense and called three witnesses. The trial magistrate was satisfied that penetration occurred and that it was intentional and not accidental. The trial magistrate was further satisfied that the prosecution proved its case beyond reasonable doubt and that the accused committed the offence and found the accused person guilty of



the offence of defilement contrary to section 8 (1)(3) of the *Sexual Offences Act* No 3 of 2006. The accused was convicted and sentenced to twenty years imprisonment.

4. The appellant was aggrieved and dissatisfied by the entire decision by the trial court preferred the appeal herein on the following grounds: -
 - 1) That the honourable learned magistrate erred in law in convicting and sentencing the appellant without applying the trite principle of law of proof beyond reasonable doubt.
 - 2) That the honourable learned magistrate erred in law and in fact in convicting the appellant before proper identification was conducted and more specifically an identification parade for proper positive identification.
 - 3) That the honourable learned magistrate erred in law and in fact in convicting and sentencing the appellant on the strength of improbable circumstantial evidence and more so, without ascertaining the date when the offence whilst the same is crucial in proving the critical elements of the offence.
 - 4) That the honourable learned magistrate erred in law and in fact in convicting and sentencing the accused person partly on account of taking judicial notice that the complainant had no formal education to determine the date of the offence and without ascertaining whether the education at the madrasa was sufficient enough to aid the complainant in such identification.
 - 5) That the honourable learned magistrate erred in law in convicting and sentencing the appellant without considering his defense.
 - 6) That the honourable learned magistrate erred in law and in fact in convicting and sentencing the appellant on a charge that was defectively and broadly drafted so that it rendered it impossible for the appellant to prefer a specific and logical defense.
 - 7) That the honourable learned magistrate erred in law on the charges levelled against the appellant without considering the defense of alibi provided by the appellant.
5. This appeal was canvassed by way of written submissions.

Prosecution's Case

6. PW1, MRA stated that HOM, the complainant herein is her first child and in Madrassa in Mvita and that the accused was the previous teacher for H for three years. PW1 stated that she did not have a problem with the accused for three years until he defiled the complainant. That on March 5, 2019 at 2.00 pm, PW1 called her husband because she had seen the complainant having problems as she was not concentrating. PW1 explained to her husband what the complainant told her that the teacher had had sex with her. That the complainant explained to PW1 that the madrasa teacher touched her in her private parts and defiled her. PW1 stated that the complainant told her that around break time, the teacher took her to a separate room and removed her trouser, told the complainant to lie down and covered her face with a hijab. That the accused then inserted his penis in her private parts. That the complainant felt a lot of pain and cried, and the accused told her to wear her trousers. That the teacher also told the complainant to keep quiet and not to tell anyone, not even her parents. That the accused threatened to kill the complainant if she disclosed what had happened. PW1 stated that the incident happened in February but she learnt of it in March. That they went to Alasa Hospital on March 6, 2019 and thereafter reported the matter at Makupa Police Station where they were given a letter to take to Coast General Hospital. PW1 stated that she went to Coast General Hospital with the complainant who was examined. She stated that she was not around when the accused was arrested. That there were



two teachers at the madrasa, Issa and Abdir ahamen. PW1 stated that Issa was the one before court and that she had a cordial relationship with him.

7. PW2, H O underwent *voire dire* examination where the court established that she is intelligent enough and understands the meaning of oath. PW1 was affirmed and she gave her evidence in Somali which was interpreted in English by Moham Issack Shalle. She stated that she stays in Mvita with her parents, goes to [Particulars Withheld] primary school and is in class 2. She stated that on March 5, 2019, she informed her mother that her teacher did something bad to her and that the teacher is the accused by the name Issa Kussow. She stated that [Particulars Withheld] was the school where she was attending Madrassa. PW2 stated while crying that it was on Monday at break time when the other students went out that the accused told her to remain behind. PW2 stated that she asked the accused why she should stay behind and the accused told her to keep quiet. That PW2 asked the accused again why he was closing the door and the accused told her to keep quiet. That the accused told her to remove her trouser and PW2 asked why she should remove her trouser. PW2 stated that she told the accused that she will not remove her trouser. That the accused told her to lie down and that he also lay down with her. PW2 stated that she did not tell anyone after the act. She stated that she was hiding what the accused did to her because it was shameful. She stated that her mother asked why she was not feeling well and she told her mother about what had happened after a long time. That her mother then told her father. PW2 stated that she was taken to hospital but she could not tell which hospital she was taken to. She stated that she was not given medication and could not remember the length of time that she had been at the Madras. That there were two teachers at the Madras. There was Madhim Rahman Abdul Ralhma and Mallim Issa. That Madhim Rahman Abdul did not defile her. PW2 stated that the Accused defiled her only once. That the accused did something shameful to her of penetrating his penis in her vagina. That the accused had removed her trouser and underpants. That the accused also removed his trouser and underwear, and that there was no other person in the room. PW2 stated that she wanted to scream but the accused told her not to scream and that she felt so much pain. PW2 stated that she became sick after the act and when she went home, her mother saw that she was not feeling well. She stated that she had not differed with the accused and that she stopped going to the Madrassa.
8. PW3, OMH stated that on March 5, 2019 in the evening at around 7.00 pm, his wife MYA called him through phone number 07xxxx4 and asked him to go home. That she told him that their daughter HOM had been defiled by a Madras teacher Issa Kusow. PW3 stated that the child said the accused had done bad manners to her. That he probed and the complainant said that the accused removed her under pants and inserted his penis in her vagina. That the complainant said the accused locked her in a room, removed her underpants, told her to lie down and had sex with her. That the complainant was 12 years. PW3 stated that the child recounted to him what had happened and he took the child to hospital at Majengo at Aksa Hospital, Exp 3. PW3 stated that they examined the child and PW3 was told that the child had been defiled. That the hospital referred him to Coast General Hospital where he took the child. That the child was examined and he was referred to the police station. PW3 stated that he reported at Makupa police station where the child recorded a statement. PW3 produced the P3 Form that was issued at the police station Ex p5. He also produced the age assessment form. The child was assessed and it was confirmed that she was 12 years. PW3 stated that the child was attending Madras at Mvita for three years and PW3 knew the accused. PW3 stated that the accused was the one before court.
9. PW4, Dr. Bikuu Salman Mohamed appeared in court on behalf of the Coast General Hospital to present a P3 form filled by Doctor Aisha Alambu. PW4 stated that she had worked with the doctor and is familiar with her handwriting. She stated that the P3 was for a 12-year-old by the name HOM who was defiled by a person known to her and that the examination was after the alleged defilement. That the complainant was in clean clothes, she was in a fair general condition and had no physical



injuries on the head and upper abdomen. PW4 stated that the survivor had healing laceration and bruises at the vagina, the hymen was broken, the anal exam was normal, and there was no presence of discharge blood or sign of reverred infection. That the approximate age of the injury was around two months and the probable type of the weapon causing injury was a blunt object, probable a human penis. PW4 produced the P3 form as Exp 1. PW4 stated that she also had a PRC Form that belonged to the complainant aged 12 years and the assailant was someone known to her as the madrassa teacher. That the survivor stated that her madrassa teacher penetrated her in the vagina with his penis and she had been attended to at Alatha Maternity Hospital before proceeding to Coast General Hospital. That the complainant was examined on March 7, 2019 when the PRC form was filled while the incident happened on March 6, 2019. PW4 produced the PRC form as Exp 4.

10. PW5, Amina Mohamed stated that on March 5, 2019, she got a call from the mother of the complainant who told her that she suspected that her daughter had been defiled. That they took the complainant to hospital and that she was the one who interpreted to the doctor as the complainant did not know Kiswahili. PW5 stated that they reported the matter at Makupa police station where they were issued with a P3 form. That they took the child to the doctor who filled the P3 form. That the doctor told them that the complainant had been defiled.
11. PW6, No 105105 PC Nelson Ochieng' was the investigating officer attached at Makupa police station. He stated that on March 7, 2019, he had reported at the gender office Makupa police station. That two statements from the victim and mother had been recorded and he called the parents of the complainant. That the mother, the father and the complainant presented themselves to the police station and PW6 took the complainant's statement. PW6 stated that the complainant alleged that while at Majengo at the Madras, the Madrasa teacher namely Issa Kuso defiled her after asking other students to go home and that the victim was 12 years. That the Accused locked her in a classroom, remover her pants and penetrated her vagina. PW6 stated that he issued the victim with a P3 form which was filled by the doctor who examined the minor and confirmed that she had been defiled. PW6 stated that they proceeded to Majengo with PC Mwanzala at the accused's apartment in the company of Mama Mtaa and the complainant's father where the accused was arrested and taken to Makupa police station. That the complainant identified the accused at the gender office and the accused was charged with the offence. PW6 stated that he recorded the statement for the second time after taking the matter over from CPL Kazungu. That the matter was reported on March 6, 2019. PW6 stated that the complainant told him that the incident happened in February and he inquired why she took so long to report and she said that it was because she was scared. That the accused who was her madras teacher had threatened her. That the complainant had been circumcised when she was young.

Defense Case

12. The accused, Issa Kusow Hassan stated that he owns a madras school which is behind [Particulars Withheld] in Majengo. He stated that he knows the complainant and that she was his student from the year 2016 to 2019. He stated that there were two madras teachers and that he had employed Abdiralman, the son to his uncle as the second teacher. The accused stated that he was staying inside the Madras. That the house has three rooms and a sitting room. That he was using the two rooms and the sitting room as the madrassa while his family was staying in the master bedroom. The accused stated that his wife is Adegga Barkha Hussein, he has six children and he was staying with four of the said children including the other teacher who was with him all the time. The accused stated that there were two sets of classes, one set stayed in school up to 4.00 pm and the other set reported from 4.00 pm. That the complainant used to report at school from 6.00 am to 4.00 pm. That some children could go for a break while others remained behind. He stated that he was arrested and charged with the offence of defilement when he did not commit the offence. That he stays with his children and it



was not possible to defile the child. That the other teacher used to go for holiday when the madrasa schools close, and that there were students and parents all the time. The accused stated that he had 84 students at the madras and the father of the complainant was jealous of him because he was doing very well. That other people also got jealous as they wanted the house that the accused was staying in and that they also wanted to make him the head of the madras. That the other teacher told the accused to leave the madras for him to manage and that the other teacher went and opened a madras next to where the accused was running a madras.

13. DW2, Sofia Sheliba stated that she had been a village elder for more than seven years and that she knows the accused as the madras teacher who was staying in the estate. She stated that the accused went to the office and told her that he wanted to operate a madras school. That the house had three bedrooms and the accused used two bedrooms and sitting room as madras. DW2 stated that he used to go to the madras to monitor how the students were fairing on. That the students used to go for break and that the madras was busy with students. That there were three teachers, one was male and the other one was female. That the wife of the accused was always in the house. DW2 stated that he knows that the accused is charged with the offence of defilement.
14. DW3, Deka Baire Hussein stated that she is the wife of the accused and stays with him in the same house. That the house has three bedrooms and a sitting room. That she used to stay in the house throughout except when she left to go and buy vegetables and that the madras has about 100 students. DW3 stated that she knows the complainant and that she was a student at the madrasa. She stated that the accused had no differences or quarrels with the parents of the complainant and that the complainant's family spoilt the reputation of the accused.

Appellant's Submissions

15. According to submissions by the appellant, he was arrested on March 19, 2019 as stated in the charge sheet which date was neither attested to nor confirmed by any of the prosecution witnesses and the investigating officer who was also the arresting officer.
16. The appellant submits that the seven grounds of appeal were clustered into two broad grounds where grounds 1, 2, 3, 4, and 6 were argued under the umbrella to wit – the prosecution failed to prove their case against the appellant to the required standard of beyond reasonable doubt while ground 5 and 7 were argued to the effect that the defense tendered by the appellant and his witnesses was not considered as required by the law.
17. Submissions by the appellant state that the foundation and basis of the analysis of the evidence on record against the judgment of the court is that there was an unresolved dispute, pitting the appellant on one hand and co-tenants on the premise he was running his Quranic classes also known as madrasa school and his fellow teacher on the other hand. The desired results of the said dispute were to see the appellant out of the said premises and having the madrasa school taken over by his fellow teacher, hence dragging in the alleged victim and her parents. That the scheme came to fruition with the arrest, prosecution and conviction of the appellant herein.
18. The appellant submits that although it is the finding of the Hon Learned Trial Magistrate that a proper *voire dire* examination of the alleged victim was conducted, the same is faulted for failure to strictly comply with the laid down rules and procedures under section 19 of the [Oath and Statutory Declaration Act](#). That the conclusion that the victim was intelligent and understood the meaning of oath was contradicted when the said witness took the witness box without taking oath. That it is not a guarantee that one will tell the truth by the mere assumption that they appreciate the significance of telling the truth.



19. The appellant cited the case of *Dominic Kibet Mwareng v Republic* [2013] eKLR in bringing out the ingredients of the offence of defilement. He argued that the age of the complainant was not confirmed to be 12 years as the same was not supported by any documentary evidence. That reference was made to a non-existing age assessment report despite an order having been issued for age assessment on April 1, 2019 as reflected in the proceedings. That there was an extracted order for age assessment dated April 1, 2019 with specific instructions that the age assessment be conducted by a dentist and report filed in court on April 4, 2019. That from April 1, 2019 to the close of the prosecution's case on July 13, 2021, there was no dentist who was ever called as a witness, there was no evidence that the court order was ever served upon any dentist and there was no age assessment report that was ever filed in court let alone being produced as an exhibit.
20. The appellant submits that on matters of age, reference was inadvertently and erroneously made to the PRC and P3 forms which were executed on March 14, 2019 and March 28, 2019 respectively which was much earlier before the court issued an order for age assessment on April 1, 2019 and thereafter there was none that that was presented to court.
21. The appellant submitted that the complainant's age was fabricated and that was confirmed by PW1's admission that she did not know the date, month or year of birth of her daughter. The appellant submits that the age of the victim is fundamental in determining sentence when an accused is found guilty and in this case the age of PW2 was never conclusively confirmed and the sentence of the appellant stands to be illegal *ab initio*. That the trial court did not make any observation on the physical looks and appearances of PW2, if she looks like a minor and if her demeanor did portray the same.
22. The appellant submits that the claim that the complainant was defiled is extremely questionable and doubtful owing to the evidence of PW2 who was fronted as a minor and which evidence never corroborated independently as required by the law and case laws. That it is not convincing that the appellant could have defiled PW2 in an environment which was described to be public in nature and owing to its use as a madrassa or school during school hours, and residential with frequent visits from parents, mama wa mtaa amongst others. It is submitted that the said madrassa also happened to be the home/residence of the appellant together with his wife and four children out of six children plus another teacher by the name AbdulRahman. That from the investigations and more specifically the evidence of PW6, he insisted that there was only one madrassa teacher and that was the appellant and no other. Contrary to the evidence of PW1 and PW2 that there were two madrassa teachers.
23. The appellant submitted that there was no evidence of treatment notes from Al Aqsa Hospital where the complainant was initially treated on allegations of defilement. It was also argued that the evidence of PW5's evidence was suspect and it exposed the fabrication of evidence against the appellant for the reasons that she was not and could not have been Somali to Kiswahili interpreter when the father of the complainant was present and was fluent in Kiswahili.
24. The appellant questioned why it took over one month on February 2019 to March 2019 for the alleged defilement to be discovered. He also took issue with failure of Dr Aisha to attend court to produce the P3 form that she had filled whereas the PRC form does not show the name of the doctor who filled it. The appellant also questioned why the police officer Caroline Kazungu who was present during filling of the PRC form did not attend and instead PC Ochieng' is the one who testified in court.
25. The appellant contended that the P3 and PRC forms failed to corroborate the claims against the appellant in terms of failing to confirm the date of the alleged defilement and the suspected blunt object. He contended that it was not confirmed whether scars of the complainant's genitalia were fresh or old so as to put the claims of defilement in perspective as the month of February 2019 and it is



possible that perforation of the hymen was done during circumcision of the minor or was done by other unidentified means.

26. The appellant claimed that there was misunderstanding between him and the other teacher called Abdulrahman which led to PW1 withdrawing her daughter from the madrassa and the claims of defilement was as a result of the said misunderstanding. It was argued that parents of the complainant took sides with the other teacher who was suspect of defilement but was hidden from proceeding at the lower court.
27. The appellant argued that if the offence was committed at the madrassa, then other students should have witnessed and the appellant's trouser and the complainant's underpants ought to have been produced as exhibits. The appellant also argued that the complainant did not specify which Monday in the month of February 2019 she was defied and she did not also lead the police to the scene.
28. On the other hand, it was the evidence of PW1 that PW2 told her that the defiler covered her head with her hijab and went on to defile her. If it is true that the face of PW2 was covered by a hijab, then it is an exaggeration that she was defiled by the use of a penis since she was not in a position to see. That the mysterious hijab was also not identified to the police and the court and there was justification fronted for their absence.
29. It is submitted that despite the claims by PW1, PW2, PW3, DW1 and DW2 to a certain degree that there was no bad blood between them, it was however confirmed by PW1, PW6 and DW1 that there was a serious dispute and rivalry surrounding the ownership and management of the madrassa owned by the appellant not limited to the neighbours, the other madrassa teacher and the parents to PW2 as earlier stated.

Respondent's Submissions

30. The respondent in their submission summarized the prosecution's case and confirmed that PW1 said that the complainant was 12 years and PW3 also testified that the complainant was 12 years and referred to an age assessment report which was not produced in court.
31. On medical evidence, the respondent submits that PW4 testified on behalf of Dr Aish and said the complainant had reported to the hospital on March 7, 2019 in clean clothes, she was in fair general condition with healing laceration and bruises at the vagina, and that the hymen was broken. That she told the court that at the time of examination on March 7, 2019, the approximate age of the injury was two months. The respondent further submits that during cross examination, PW4 admitted that the complainant had a genital circumcision scar and argued that the same could not break the hymen. That in re-examination, the doctor said that the report was made on March 6, 2019 while the examination was conducted on March 7, 2019. She said that the incident occurred in February 2019.
32. The respondent submits on the age of the victim that PW1 told the court that at the time of the incident the complainant was 12 years old but she could not tell the date, month or year that the complainant was born. The respondent submits that PW3 referred to an age assessment form and that however the same was not produced in court.
33. Submissions by the respondent on allegation of bad faith are that in re-examination of PW1, she told the court that in February 2019, she had withdrawn PW2 from the madrasa as a result of some misunderstandings between the two teachers and that some days after the withdrawal from the said school, PW2 informed her that she had been defiled by the appellant. The respondent further submits that DW1 confirms that they were two teachers and that there were people who were jealous of his



madrassa business including PW3 and that they had promised to offer the other teacher a similar job and that currently the other teacher operates a madrassa at the same location.

34. On the effect of contradiction on dates of commission of the offence, the respondent cited the case of *Twehangane Alfred v Uganda* criminal application No 139 of 2001 [2003] UGCA where it was held that it is not every contradiction that warrants rejection of evidence. "... 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." The respondent submits that there were material contradictions as to the date of the offence which were material to the case. That lack of clarity on the same would occasion an injustice as the appellant needed to understand the particulars of the offence, in order to prepare sufficiently for the defense case.
35. The respondent submits on whether the case was proved beyond reasonable doubt that there was a business rivalry between the two teachers and the parents of the pupils at the madrassa may have been drawn into the same. That the allegation that the minor was circumcised created doubt as to the cause of the healing lacerations.

Analysis and Determination

36. 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 itself 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 rehash 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."

37. Although the respondent conceded to the appeal on allegations that there were material contradictions to the date of the offence and that there was business rivalry between the two and teachers and that the parents of the pupils at the madrassa may have been drawn into the same and further that the allegations that the minor was circumcised created doubt as to the cause of the healing lacerations, this court has considered the grounds of appeal, records of the trial court, submissions and circumstances of the case, and the issues for determination are as follows:-
- i. Whether the prosecution proved its case beyond all reasonable doubt
 - ii. Whether the trial magistrate convicted and sentenced the appellant on the strength of improbable circumstantial evidence, whether proof of date of offence is crucial in proving elements of the offence of defilement and whether the charge against the appellant was defective.
 - iii. Whether the learned trial magistrate considered the appellant's defense and/or defense of *alibi*

Whether the prosecution proved its case beyond all reasonable doubt**

38. For the prosecution to prove the offence of defilement it was held in the case of *George Opondo Olunga v Republic* [2016] eKLR that identification or recognition of the offender, penetration and the age of the victim must be established.



39. On the age of the victim, the testimonies of PW1 and PW3 the parents of the complainant said that she was 12 years old and PW3 identified an age assessment report which confirmed that she was 12 years. The trial magistrate in her judgment at paragraph 32 also made reference to an age assessment report which confirm that the complainant was 12 years. Perusal of the lower court records shows that among the exhibits in the list of exhibits there were two documents for age assessment identified by witnesses as exhibits P2 and P3. PW4 also produced P3 and PRC forms that indicated that the complainant was 12 years old.
40. In *Kaingu Elias Kasomo v Republic*, Malindi Court of Appeal criminal case No 504 of 2010, the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age. A similar position was held by Mwilu J (as she then was) in the case of *Hillary Nyongesa v Republic*, Eldoret criminal appeal No 123 of 2000 that: -
- “Age is such a critical aspect in sexual offences that it has to be conclusively proved ... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.”
41. In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR Ngugi J. stated as follows:
- “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean that there has to be a formal age assessment report or the production of a birth 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.”
42. In consideration of the above authorities and the evidence on record, it is clear that the age of the complainant was proved. In her cross-examination, the child said she was in class 2 at Mvita school at the time of her testimony on August 23, 2019. The appellant confirmed that the complainant had been his student for three years and there was no dispute to her age and cannot be an issue brought through submissions on appeal.
43. The complainant had been a student at the appellant's madrassa for three years and she alleged that this offence happened at break time one Monday in the month of February 2019. The complainant therefore knew the appellant as her religious instructor and the ground that there was need for an identification parade does not arise. The submission that the complainant could not have known whether it was the perpetrator's genital organ or fingers which penetrated her vagina because her face was covered by a hijab is outrageous because she said the appellant told her to remain behind as other students were leaving and that he locked the door and told her to remove her trousers.
44. On whether there was penetration and whether it is the appellant who used his genital organ to penetrate the complainant's genitals, the P3 form shows that there was healing laceration and abrasion at vagina and the hymen was broken. The P3 form also showed that the age of the injury was around two months. She said that the probable type of the weapon causing injury was a blunt object probably a human penis. She also testified that although the complainant was circumcised, circumcision causes a small cut and cannot break the hymen. The complainant's parents testified that she was circumcised when she was 7 years old by her grandmother back in Somalia. An injury inflicted five years before the date of the offence could not have been described as healing lacerations and abrasions at the vagina. PW4 has distinguished the scar and the healing lacerations and abrasions.



Whether the trial magistrate convicted and sentenced the appellant on the strength of improbable circumstantial evidence, whether proof of date of offence is crucial in proving elements of the offence of defilement and whether the charge against the appellant was defective.

45. The evidence against the appellant that he defiled the complainant was direct evidence. The complainant testified that she was defiled on one Monday in February 2019. The complainant's mother noticed that she was withdrawn and looked unwell and when she inquired, the complainant told her that the appellant had defiled her. Evidence that the complainant was defiled is corroborated by the medical evidence of PW4. It was the complainant's evidence that the appellant who was her madrassa teacher caused her to remain behind while the other students were going for break and defiled her behind closed door. There is an explanation why there are no eye witnesses and in any case the proviso to section 124 of the *Evidence Act* provides that: -

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

46. At page 34, the trial magistrate said that she was satisfied that the complainant was a truthful witness. She also observed that in the course of her testimony she also broke down and cried, and said that what the appellant did to her was shameful. The complainant said she was hiding what the complainant did to her because it was something shameful.

47. PW1 got information that her daughter had been defiled on March 5, 2019 on a Tuesday. She reported to her husband and took the complainant to hospital in the company of PW5. Although the complainant could not remember the date in February 2019 when she was defiled, she said that it happened only once on a Monday. The fact that the complainant could not remember the exact date when she was defiled cannot negate her quest for justice when it is clear from the medical evidence that indeed she was defiled. The trial magistrate took judicial notice that the complainant did not attend formal school apart from the madrassa and that she could not read and write. What comes out from evidence by the complainant is that she was withdrawn from the madrassa and she was in class two at Mvita School. Whether the appellant the madrassa students how to read and write or only to recite the Quran is not indicated in the evidence in the lower court. Being that the trial magistrate was in conduct of the matter and observed the witnesses while testifying, this court cannot doubt her conclusion that the complainant did not know how to read and write.

Whether the learned trial magistrate considered the appellant's defense and/or defense of alibi

48. The appellant said that the reason why he was charged was because the complainant's father and other people were jealous of his madrassa business which was doing well and that they wanted the house he was living in so that they could make the other teacher the manager. That the other teacher opened another madrassa next to where he was running his madrassa.

49. The appellant's defense does not raise any *alibi* and the trial magistrate could not have considered a non-existent defense. The appellant said that he had no dispute with the complainant's father and the



allegation that he was jealous of the madrassa business was not raised when PW3 the complainant's father testified. The teacher that the appellant alleged told him to leave the madrassa for him to manage was his uncle's son and they were living in the same house and there was no relationship between the said teacher and PW3 that could make PW3 have any inclination in his favour.

50. PW1 said that there were two teachers at the madrassa and that she had a cordial relationship with the appellant. She said that her and her husband did not insist that the appellant be evicted from the madrassa and for Abdulrahman to take over the madrassa. She confirmed that there was misunderstanding between the two teachers which made her withdraw the complainant from the madrassa. The allegation of jealousy was controverted by PW1 and PW3. Assuming that the appellants allegations as to jealousy were true, the medical evidence that the complainant was defiled could not have been positive.

51. In conclusion, this court finds that the appeal lacks merit and the same is dismissed. Appeal within 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 26TH DAY OF OCTOBER 2022**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Onduso and Mr. Chacha advocated for the Appellant present online

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Onduso Advocate

We apply for certified copies of judgment

Orders: Certified copies of the judgment to be supplied on payment of copying charges.

