Barasa v Republic (Criminal Appeal E012 of 2022)
[2022] KEHC 16686 (KLR) (21 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E012 OF 2022

DK KEMEI, J

DECEMBER 21, 2022

BETWEEN

HUMPHREY BARASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Humphrey Barasa, was charged before the Senior Principal Magistrate's Court at Bungoma in Sexual Offences Case No 514 of 2016 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that the appellant, on May 23, 2020 at [particulars withheld] area Kimilili sub-county within Bungoma county intentionally and unlawfully caused his penis to penetrate the vagina of SC, a mentally disabled child aged sixteen (16) years.

2. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that the appellant, on May 23, 2020 at [particulars withheld] area Kimilili sub-county within Bungoma county intentionally and unlawfully caused his penis to come into contact with the vagina of SC, a mentally disabled child aged sixteen (16) years.

3. In his judgement, the learned trial magistrate found that the appellant committed the offence with which he had been charged in the main charge and proceeded to convict him under section 215 of the *Criminal Procedure Code* and sentenced him to serve fifteen (15) years' imprisonment.

4. Being dissatisfied with the conviction and sentence, the appellant has lodged the instant appeal based on the following grounds:

    i. That the appellant pleaded not guilty to the said charges.

ii. That the learned trial magistrate erred in law and fact in conducting proceedings that violated the rights of the appellant.

iii. That the trial magistrate failed in rejecting the *alibi* defense adduced by the appellant.

iv. That the trial magistrate erred in law and fact in considering extraneous factors in the decision making.

v. That the appellant did not get a chance to air his mitigation as provided for in law and that the same was not considered in sentencing.

vi. That the appellant wishes the court to review the conviction and sentence when the same comes for hearing as it was too harsh.

5. The lower court record reveals that the prosecution called six (6) witnesses in support of its case.

6. According to JM (PW1), she told the court that the complainant herein was her daughter who was born on July 21, 2003. She told the court that the complainant fell ill while still a toddler and it reached a point where she became mentally challenged that she could not express herself. She testified that the complainant was physically challenged on the right side of her body and that when she was able to speak up no one could understand her. She stated that the complainant could show you where she was defiled but could not express herself. She recalled that on May 23, 2020 at around 1.00 pm while at home, she was called by her neighbor who lived a bit far from her place and whose name she didn't know and who alerted her of the arrest of a chicken thief and she quickly rushed to see who the thief was. The neighbor then informed her that a man had been found with the complainant down in the maize plantation. She found the man already apprehended and sitting on the ground. She stated that she recognized the arrested individual who was familiar to her as she had known him prior to the incident. She stated that she used to see him pass by the road and knew that he lived near the road but never knew his name. She added that the appellant was found defiling the complainant in the maize plantation. She also stated that MM had seen the appellant enter the maize plantation with the complainant and quickly alerted people. When the appellant noticed the crowd, he quickly stood up trying to make an escape leaving the complainant at the scene. The crowd pursued him and apprehended him and quickly called her. She was escorted to where the complainant was in the maize plantation where she found that she had already been defiled, her clothes had a whitish looking fluid and blood on it. On observation of her genitals, she noted it had things that looked like semen flowing from her genitals and that her underpants had some bloodstains. She handed over the underpants to the police. She escorted her daughter to Kimilili sub-county hospital where she was examined. She also stated that her daughter was later taken for age assessment as well as mental assessment. She identified the treatment notes, P3 form, age assessment and mental assessment reports. She also added that the appellant was examined at the same hospital before being taken back to the police station. The appellant opted not to cross-examine her.

7. PW2, MM, told the court that she is a resident of Kimilili water supply area and knew the complainant herein. She recalled that on May 23, 2020 at around 1.00 pm while from her farm she saw the complainant with a jerrican of water and it looked like she was from the stream. She also spotted a young man, the appellant herein, standing near a maize plantation beckoning at the complainant. The complainant did go towards the appellant and she watched to see what would happen next. The appellant took hold of the complainant's hand and led her deep into the maize plantation. She quickly sought help from some boys digging near the stream and directed them to move into the plantation from a different direction. By the time they arrived at the exact scene, the appellant had already defiled the complainant as she was lying down on the ground with her pant pulled down. The boys chased

after the appellant who was attempting to flee the scene. She further told the court that the complainant kept on saying "that man has done bad". Other people were summoned to help apprehend him. She left the scene as soon as the police arrived and she later proceeded to the police station to record her statement. She identified the appellant who appeared in court virtually as the man she had seen taking the minor into the maize plantation and who was subsequently apprehended at the scene by members of public.

On cross-examination, she stated that it was her first time to see the appellant that day and that she saw him beckoning the minor before holding her hand and leading her deep into the maize plantation. She confirmed that she did not take photographs of the appellant. She maintained that the appellant was the one who was picked from the maize plantation with the minor. She finally stated that she was alone at the time as it was quite hot and that the area was deserted at the time.

8. PW3, John Omondi, told the court he is the clinical officer based at Kimilili sub-county hospital and that he had examined the complainant and the appellant. He recalled during his shift at Kimilili sub county hospital in May 2020 the complainant was brought in on May 23, 2020 with her mother who complained that the complainant had been defiled. On examination of the complainant, he observed that she could not express herself so well but would simply smile. On her genital examination, he observed her inner pant had blood stains at the pubic area and that the pubic area itself was stained. He noticed that the hymen was broken and that the minor was experiencing active bleeding from her vagina. On laboratory examination; the VDRL test was negative, the high vaginal swab analysis revealed presence of epithelial cells, the pregnancy test was negative, and that the HIV test was negative. He concluded that there was a high likelihood that the complainant's bleeding was as a result of being defiled as the complainant's hymen was torn and that the same was a fresh wound. On the observation of the appellant, he observed that the appellant's penis had a sticky clear urethral discharge which is a pre-ejaculate discharged by a man upon sexual arousal. He produced the treatment notes for the complainant dated May 23, 2020 as P exhibit1. He produced the P3 form marked as P exhibit2. He further emphasized that the hymen was freshly broken. On cross-examination, he told the court that the complainant could barely walk with blood oozing from her vagina and that no DNA test was done on the samples collected.

9. PW4, Dennis Makayo, told the court that he is a dental technician at Kimilili sub-county hospital. He stated that he has the age assessment report for the age assessment conducted on the complainant on June 15, 2020. He observed that the complainant was 16 years old based on her dental formula. He produced the report dated June 15, 2020 as P exhibit 3.

10. PW5, Dr Edward Vilembwa, told the court that he works at Webuye county hospital and that on June 22, 2020 he conducted a mental assessment on the complainant herein. He observed that the complainant's behavior was uncertain as she was either in a laughing mode or she retracted herself. Her mood was good and her speech was not properly developed with no signs of illusions or flight ideas. Her memory and orientation was uncertain with poor concentration, judgement, abstract reports and insights. He found obvious extension of illusion which is a mental disorder that affects children but it extends to even lower and few higher teenage years. Her memory was uncertain with a possibility of her recalling what transpires but vaguely. He produced the complainant's mental assessment report dated June 22, 2020 as P exhibit 4.

11. PW6, No 260478 PC Woman Carolyne Chebet, told the court that she is based at Kimilili police station and was investigator in the matter. She recalled that on May 23, 2020 she was briefed on the matter by the OCS who had received a report of the same vide a phone call. The report was that the appellant was arrested by members of public at [particulars withheld] area on allegations that he had defiled the complainant. In the company of her colleagues, they proceeded to the scene where they

found a crowd gathered with the appellant seated on a field with bleeding head injuries. They quickly apprehended the appellant and proceeded to take him and the complainant to Kimilili sub-county hospital where they were treated and examined with a view to establish whether the complainant had been defiled. They later escorted the appellant and the complainant to Kimilili police station and issued the complainant with a P3 form. She recorded the statement of the mother of the complainant as the complainant was mentally challenged. She recovered the complainant's pant which was light green in colour with blood stains which she produced as P exhibit 5. She proceeded to the scene of the crime where she found crops and vegetation disturbed as they were lying flat indicating that someone had been lying there. She proceeded to charge the appellant. She got a letter dated May 25, 2020 from the CBSM special school where the complainant attended and produced it as P exhibit. 6. She was able to identify the person she apprehended and charged as the appellant who was in court virtually. On speaking to the mother of the complainant, she informed her that she had sent the complainant to the stream and after a period she heard screams and on moving towards the said noises it was then that she discovered what had happened. She also recorded the statement of PW2 who saw the appellant beckoning the complainant, getting hold of her hand and leading her into the maize plantation. She alerted some boys who quickly rushed towards them and that the appellant on noticing them, he attempted to flee but was apprehended by the crowd that was summoned to help.

12. On cross-examination, she told the court that she was the one who officially arrested the appellant and that she visited the scene where she observed the crops were down meaning that it was the place where the crime was committed. She added that the complainant's home was about 200 metres away from the scene.

13. At the close of the prosecution's case, the appellant was found to have a case to answer and was thus placed on his defence whereupon he opted to give unsworn evidence and did not call any witnesses. He told the court that he was a resident of jua kali sector and confirmed that he understood the charges leveled up against him. He recalled that on May 23, 2020 he left his home to search for a job in town but he was not able to secure the same so he decided to head back home. On his way home, he met a woman carrying firewood who informed him the he was blocking the road yet according to him other people were still using the same road. The woman hit him with a piece of firewood occasioning him to fall unconscious. On regaining consciousness, he found himself at Kimilili sub-county hospital where he was treated for the injuries sustained. He was later taken to Kimilili police station where he learnt of the strange charges. He denied committing the alleged offences.

14. The learned trial magistrate upon consideration of the whole evidence, found that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted him on the main count of defilement and then sentenced him to fifteen (15) years' imprisonment.

15. The appeal was canvassed by way of written submissions. Only the appellant filed his submissions.

16. I have carefully considered lower court record and the submissions filed. The only issue for determination is whether the prosecution proved its case beyond reasonable doubt.

17. This being a first appellate court and as is expected, is obliged to analyze and evaluate afresh all the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. (See *Okeno v Republic* [1972] EA 32) where the Court of Appeal set out the duties of a first appellate court 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 v 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 v 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, see Peters v Sunday Post [1958] EA 424."

18. Similarly, in *Kiilu & another v Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

1) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

2) 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 findings and 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."

19. Section 8 of the *Sexual Offences Act* provides as follows:

8 (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.

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

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

(5) It is a defence to a charge under this section if –

it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the *Children's Act*.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

20. This being a case of defilement, what was to be proved are the ingredients of the offence of defilement and in the case of *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

21. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is; whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the appellant. (See the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013), where it was stated that:

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

22. In regard to the age of the complainant herein, the same is not in dispute, as an age assessment report produced in court by PW4 indicates that at the time of commission of the alleged offence the complainant was 16 years old. A person of 16 years is a child within the meaning of a child both under the *Sexual Offences Act* and the *Children's Act*.

23. The trial court correctly directed itself that the age of a person can be proved by both medical and oral evidence. The court cited the case of *Joseph Kiet Seet v Republic* (2014) eKLR where it was held that:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No 2 of 2000. It was held thus: In defilement case, 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..."

24. A similar holding was reached by the Kenyan Court of Appeal in the case of *Mwolongo Chichoro Mwanyembe V Republic*, Mombasa Criminal Appeal No 24 of 2015) (UR) (cited in Edwin Nyambaso Onsongo V Republic (2016) eKLR) where the court stated that: -

> " ...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "...we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

25. It is trite that in any criminal offence, the positive identification of a person is what connects them to that offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. In the case of *Kariuki Njiru & 7 others v Republic*, Criminal Appeal No 6 of 2001 (unreported) the court held as follows:

> " Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

26. In reference to the identification of the appellant the trial court held that:

> " .....PW2 stated that she never knew the accused prior to the incident. There was need for her to identify the accused through a properly conducted identification parade. I am of the view

that failure to conduct one was not fatal as the accused according to PW2 never managed to disappear. He was arrested at the scene while escaping. In short, she identified a person she recognized as the accused a short while after she saw him entering into the maize plantation while holding the hand of the complainant. The evidence adduced by PW2 forms a chain so complete that there is no possibility that the accused did not defile the complainant."

27. I find that the circumstances were favourable for identification given that PW2 saw the appellant beckoning the complainant and holding her hand and then leading her into the maize plantation and being able to further identify him after he was apprehended by members of public and that she also pointed him out as the man before the trial court. Of course, it is not mandatory that there must be an identification parade in each and every case but if the conviction or acquittal of the accused was largely dependent on identification failure to conduct an identification parade had a negative impact on the prosecution's case. I do concur with the finding by the learned magistrate that failure to conduct the identification parade was not fatal to the prosecution's case as the appellant failed to disappear from the scene and was promptly apprehended by members of public and that PW2 was able to identify the appellant, a person she recognized as the she had just spotted him beckoning the complainant, holding her hand and leading her into the maize plantation. The evidence by PW2 forms a chain so absolute that there was possibility that the appellant did defile the complainant. The circumstantial evidence clearly placed the appellant at the scene of crime. It is instructive that PW2 saw the appellant beckoning the minor and then leading her into the maize plantation and that she made arrangements to get help from some boys who were working near the river and who managed to flush out the appellant from the crime scene and pursued him until he was apprehended. Both PW1 and PW2 found the minor on the ground already defiled and whose underpants were below her knees and was then bleeding from her vagina. Indeed, from the evidence adduced, the appellant was the last person to be with the minor as he led her into the maize plantation. Hence, the irresistible conclusion one makes is that the appellant must be held responsible for what befell the minor on that day. It is also instructive that none of the witnesses saw the appellant committing the act or rather found him in flagrant delicto. Again, none of the boys who managed to apprehend the appellant were called to testify. This then leaves the court to establish whether the circumstantial evidence was sufficient to prove the element of the appellant's identification as the perpetrator.

28. Circumstantial evidence relates to evidence of surrounding circumstances which by intensive examination is capable of proving a proposition with the accuracy of mathematics. (See the case of *Nzema Mwandone Ndzuya V R* [2008] eklr). Also in the case of *Sawe v R* [2003] eklr the court dealt with the issue of circumstantial evidence and the factors to be considered when relying upon it namely; that the circumstances from which an inference of guilt is sought be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused; that there are no other coexisting circumstances which would weaken or destroy the inference of guilt. It is noted that the incident took place during the day around 1.00pm and that the appellant was last seen by PW2 holding the victim's hand and leading her deep into the maize plantation and that a few minutes thereafter the appellant flees from the scene of crime but was promptly apprehended and that those who arrived at the scene found the girl already defiled and bleeding from her private parts and with her underpants still lowered at knee level and further that semen stains could be seen on the victim's thighs and underpants. The victim and the appellant were escorted to Kimilili sub county hospital where they were examined. PW3 who was the clinical officer established that there was defilement and that the appellant's penis had a sticky urethral discharge which is common when a man is sexually aroused. These circumstances leave no doubt that the

perpetrator was none other than the appellant. The said circumstances leave no doubt about the appellant's identity as the perpetrator of the crime. The appellant's defence claim that he had been assaulted for trespassing on someone's land is farfetched and did not shake or cast doubt about the respondent's case. The said defence was properly rejected by the learned trial magistrate. It is highly unlikely for the mother of the victim to use her mentally challenged daughter as a victim of defilement so as to punish the appellant for an alleged trespass on some land. Further, it is quite remote to suggest that the appellant was wrongly blamed for the crime yet he was an innocent passerby caught up in the alleged crime. That is not convincing at all in view of the overwhelming evidence against him. Hence, the ingredient on the identity of the appellant as the perpetrator was proved by the respondent beyond any reasonable doubt.

29. The next element is proof of penetration. "penetration" is a term of art and is defined under section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

30. In *John Mutua Munyoki v Republic* [2017] eKLR, the Court of Appeal in this regard held that:

> " Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt...The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:
>
> 'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'
>
> The court proceeded and stated that:
>
> 'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'
>
> As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was

doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."

31. The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was mentally challenged, the evidence of the clinical officer is key so as to corroborate such testimonies. I have critically analyzed the evidence of PW3 the clinical officer who testified herein who produced the relevant documents regarding the examination of the complainant. It was his testimony that he noticed a freshly broken hymen, the pregnancy and HIV tests were both negative. The urinalysis also indicated presence of epithelial cells. I have looked at the P3 Form produced as exhibit 2, and noted that PW3 confirmed that there was defilement with the vulva appearing wet with clear fluid and the hymen torn with new edges and bleeding from vagina. Under the part dealing with the perpetrator in the P3 form, he observed that the appellant's penis had a sticky clear urethral discharge which occurs whenever there is a sexual arousal. PW3 confirmed that the he believed the history of the complainant and went ahead to produce exhibit 1 and 2 that stated the findings were consistent with the history.

32. On the matter of penetration, this court observes that both PW1 and PW2 confirmed that they found the child at the scene of the crime lying on the ground. According to PW1, the complainant's clothes had whitish discharge and what looked like blood on them, her genitals had a whitish discharge flowing from it and that her inner pant had whitish discharge and something that looked like blood. PW2 on the other hand observed that the complainant remained on the ground lying down with her pant pulled down with a lot of discharge coming from her genitals. PW2 further testified that she had seen the appellant leading the complainant into the maize plantation and when she alerted the boys, the appellant was caught trying to flee from the scene. According to PW3, the examinations conducted on the appellant indicated that his penis had a sticky clear urethral discharge mostly observed upon sexual arousal which had him conclude from the complainant's examinations that the appellant did defile her. The court observes that neither PW1 nor PW2 confirmed finding the appellant defiling the complainant. It is one thing to find the complainant lying on the ground and it is another thing to find the complainant being defiled on the ground, although the former is of probative value as well. PW1's and PW2's oral testimony was however not the only evidence adduced. There was also medical evidence by the clinical officer, PW3 who testified that from the examination done, a conclusion was made that there was defilement by reason of the broken hymen with freshly torn edges and presence of puss cells from the urinalysis. These observations were highly indicative of sexual penetration.

33. Although not faulting the trial court, I am not certain why the learned magistrate termed the evidence of PW3 as circumstantial evidence yet it was conclusive medical evidence that depicted the complainant was indeed defiled and that the same corroborated the evidence tendered by PW1 and PW2, as further observed in his analysis. I believe in the absence of medical evidence to support the offence; the question courts must ask themselves is whether there was sufficient oral or circumstantial evidence to prove penetration on the complainant. In *AML v Republic* (2012) eKLR the Court of Appeal stated that: -

> "It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence."

34. The evidence by PW2 that the appellant tried to flee from the scene of crime but was successfully apprehended by people adds weight to the prosecution's case as the conduct of the appellant in fleeing from the scene is highly indicative of guilt.

35. In his submission, the appellant alleges that this is a witch hunt against him by PW1 and her daughter as they want him to finance their living and that several people have been made to pay money as compensation to the family. Furthermore, the defence raised by the appellant that he was attacked by a woman and was even rushed to the hospital did not cast any doubt on the evidence raised by the prosecution as he failed to present before the trial court the alleged alibi, in form of a witness, who would have been the doctor who nursed his injuries, or treatment notes. The appellant's submission raising a new line of defence is clearly misplaced since the appellant did not see it fit to raise it during the presentation of his defence. It is instructive that submissions in themselves is not evidence and hence such assertions by the appellant must be rejected.

36. The appellant's claim that his defence alibi was rejected by the trial court is not convincing at all as the trial court duly considered his defence and found that the same being weighed against the medical evidence and the evidence of PW1 and PW2 was not strong enough to raise doubt as to the appellant's guilt.

37. In criminal trials, the court is allowed to weigh the evidence in support of an accused person's defence against the evidence of the prosecution. I respectfully agree with the finding of Madan, Miller & Potter JJA in *Wang'ombe v The Republic* (1980) KLR 149, where they held as follows: -

> " The *alibi* was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing L, and particularly with L evidence.
>
> To weight one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers..."

38. Further, it is noted that the appellant did not raise the issue of alibi or that of being framed during cross-examination and raised the same during defence hearing for the first time. This court thus finds that the appellant's defence was an afterthought and hence the trial court was right in rejecting the same.

39. The appellant's ground that the trial magistrate considered the contradictory evidence is not merited. It is important to reiterate that his conviction was based on the medical evidence tendered by PW3 and the evidence of PW2 who identified the appellant holding the minor's hand and leading her deep into the maize plantation. Thus, I have no doubt as to whether the complainant was truly defiled. PW2 was clear that she saw the appellant beckon the complainant who according to PW5 had a poor sense of judgement and comprehension. She further saw the appellant leading the complainant by the hand into a maize plantation where he defiled her and attempted to escape on getting caught. She proceeded to even identify him as the man appearing virtually before the trial court. Her chronology of events in describing the acts of the appellant were in tandem and the evidence availed by PW3 did confirm that the appellant did defile the complainant. The evidence thus squarely placed the appellant at the scene of crime. Suffice to add that the appellant was apprehended at the scene of crime.

40. The way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred v Uganda CR Appeal No 139 of 2002 (2003) UGCA,6 where it was held 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".

41. On the overall examination of the evidence, it did not appear that the small contradiction, like the colour of the complainant's inner pant, did not affect the substance of the prosecution case.

42. On my own independent review of the evidence, I have no reason to depart from the finding by the learned trial magistrate on conviction on the main count of defilement which I find was sound and I see no reason to interfere with it.

43. Finally, regarding the sentence imposed, the appellant was sentenced to fifteen years' imprisonment. The guiding principles upon which a court may interfere with a sentence imposed by a lower court were stated in the case of *Ogalo S/O Owuor v Republic* 1954 24 EACA where it was held that:

> "an appellate court has the power to interfere with the sentence passed by the trial court if there is evidence that the learned magistrate or judge acted on wrong principles, overlooked some relevant material or factors or that the sentence passed is illegal or manifestly excessive or punitive or too low as to occasion a miscarriage of justice."

44. The complainant, a young and mentally challenged girl of 16 years was found by PW1 and PW2 inside the maize plantation lying on the ground at the exact scene of the crime with whitish discharge and blood oozing out of her vagina. The appellant attempted to flee the scene on realizing that he had been discovered but he was promptly apprehended and handed over to the police.

45. This court rejects the appellant's defence of the case being a frame up, for lack of evidence to support the same and further, for the reason that it was not raised during cross-examination earlier on. This court also rejects his defence of alibi for the reason that he did not raise it during cross-examination and in any case, the same was an afterthought. Going by the principle in *Wang'ombe v The Republic* (1980) KLR 149, i find that upon weighing the evidence adduced by the respondent and the appellant as a whole, the respondent had established all the elements of the offence of defilement beyond reasonable doubt and that the charge of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* against the appellant was indeed proven.

46. Indeed, the sentence possible in law under section 8(1) as read with section 8(4) upon conviction is fifteen years' imprisonment. The complainant was aged 16 years at the time of the offence and hence the same is within the age bracket of 16-18 years contemplated by the statute in which the appellant had been charged.

47. The lower court record indicates that the trial court duly considered the appellant's mitigation. I am satisfied that indeed the sentence imposed was neither excessive nor harsh. On a personal, familial, and social level, sexual abuse is a significant issue that can have long-lasting, even permanent effects. As a result, many forms of prevention constitute a public health concern. To effectively prevent sexual abuse of kids, prevention efforts should involve both adults and minors. The appellant had a role to play in protecting the complainant but he opted to conduct himself in such a deplorable manner as by

taking advantage of the complainant whom he understood had mental challenges. As a custodian of the relevant laws, the appellant has to face the repercussions of his actions. Hence, the appeal against sentence has no merit but that the same must commence from the date of cancellation of his bond namely September 10, 2020

48. In the result and save only that the sentence of fifteen years' imprisonment shall commence from date of cancellation of his bond namely September 10, 2020, the appeal herein lacks merit. The same is dismissed

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF DECEMBER, 2022.

D. KEMEI

JUDGE

In the presence of:

Humphrey Barasa Appellant

Miss Omondi for Respondent

Kizito Court Assistant