REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 4 OF 2018

(From Original Conviction and Sentence in Butere Principal Magistrate's Court Criminal Case No. 39 of 2015 (Hon. MI Shimenga, RM) of 22nd November 2017)

HO…….....……..…..…..……APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. MI Shimenga, Resident Magistrate, of defilement, contrary to section 8(1), as read with section 8(3), of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to twenty years' imprisonment. The particulars of the charge against the appellant were that on 30th January 2015 at [Particulars Withheld] Village, Ebuhala Sub-Location, Shirombo Location, within Khwisero District of Kakamega County, he intentionally caused his penis to penetrate the vagina of TI, a child aged fourteen years.

2. He had also faced an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally and unlawfully committed an indecent act with the same child.

3. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called six (6) witnesses.

4. The complainant, TI, testified on oath on 27th May 2015, as PW1. She stated that she was 14 years old then, having been born on 28th June 2000. She testified that she knew the appellant as a neighbour who lived three kilometres from her home. She stated that she had met him at the home of Judy, who she was her friend. She said they used to call the appellant Larete. On 30th January 2015, she and Judy were sent away from school, so, at about 11.00 AM, they went to Judy's home to prepare lunch and clean the house as her parents had travelled to Thika. The appellant came to the home as they were eating, and offered them sugar to make tea. Judy used to refer to him as her grandfather. He came back later and asked them to accompany him to his house, which was 100 metres away. They did so. When they got to his house, Judy walked away leaving her with the appellant, who carried her to a bedroom. He tore her skirt, placed her on her bed and removed her panties. He unzipped his trousers, removed his penis and inserted it into her vagina. As that was her first time to have sex, she felt pain, and therefore she screamed. Some people came to the door, and the appellant asked her to leave through a backdoor. She put on her underwear, which was covered in blood, behind the house, and thereafter walked away with difficulty. She went back to Judy's house, but Judy was not at home. When she heard her father looking for her, she ran away to a female neighbour of Judy's, who encouraged her not to fear. She joined up with her father, who took her to the Administration Police Camp, where they found the appellant. They were referred for treatment. The next day they reported at Khwisero Police Station, and thereafter to Hospital where she was treated. When cross-examined by the accused, she stated that she came into contact with him on the date of the defilement, but she knew his name as LHO. She told the court that the appellant defiled her three times.

5. PW2, Moses Ameyo Okello, a preacher at PAG Khumusalaba, previously at Eshirotsa, a church attended by PW1, testified that the father of PW1, NO, who testified as PW3, came to his house on 30th January 2015 at 2.00 PM, to report that PW1 had not come home from school, and requested him to help him look for her. They went to school, where they were told she had left with Judy. They went to Judy's home, who told them that she had left. A child within Judy's compound told them that she was at the appellant's house. They went there, and found the appellant with two boys. The appellant told them that PW1 was not there, whereupon they searched the house, but they did not fond her. They extended the search to a nearby bush. Eventually they traced her to a nearby homestead. She stared crying and informed that the appellant had defiled her. They escorted her to the Manyula AP Camp, where PW1 reported the matter. The next day they escorted PW1 to hospital. The appellant was subsequently arrested and taken to Khwisero health centre, where they recorded their statements with the police. During cross-examination, he said that he found the appellant at his house, and when they asked him about PW1, he said that she had been there but had left. He stated that they searched the appellant's house, but they did not find PW1. They saw in a bush just behind his house. He denied shouting so that people gathered at the scene, saying that those who were there were his relatives. He stated that they eventually found PW1 at the house of an old man who lived nearby. He said that it was the appellant who had ordered her to run away. He testified that they went with the appellant to the AP Camp, and were told to bring Theresia with them. He denied cutting the appellant.

6. PW3 was the father of PW1. He testified that when PW1 failed to go home on 29th January 2015, he went to school on 30th January 2015, to enquire, where he was informed that she had left with Judy. On the way to Judy's house, he asked PW2 to join him. It was PW2 and others who went into the compound of Judy. After some time, a woman who was in the team came back with PW1's books, saying that they were found in the house of the appellant. He went to the appellant's house, who said that PW1 had been there but had left. They searched around but did not find her. Eventually they went to report at the Chief's office at Manyula, where they were asked to bring PW1. She said that they found her with an old man, who was helping her find her way home. He described her as hysterical. They took her to the AP Camp where she reported the incident, the following day they took her to hospital and later to the Khwisero Police Station. He stated that PW1 was born on 28th August 2000.

7. Belinda Mulanya testified as PW4. She was the clinical officer who treated PW1. She stated that PW1 reported that she had been defiled by a person she knew on the day. She found that her genital area had a whitish vaginal discharge, which was not foul smelling, there were no lacerations or tears, the hymen was absent she was HIV negative, HVS had epithelial cells suggesting friction, pregnancy tests were negative and there were pus cells suggesting an infection. Her inner pants were stained with the discharge. She diagnosed defilement and a sexually transmitted disease, and prescribed drugs for the disease. She filled a P3 Form which was put in evidence. She also attended to the appellant the same day, who had been escorted by police officers, with a report of having defiled a minor. She found him to be HIV negative, but urinalysis revealed pus cells, confirming a sexually transmitted disease, for which she treated him.

8. No. [xxxxxxxxxxx], APC Robinson Omwamba, (PW5), received the report that PW1 had been missing since 29th January 2015. It was said that she had been seen with the appellant, and so they went to his house. They found him, arrested him and took him to the Khwisero Police Station. He stated that he did not know where PW1 was found, but they found her at the police station. No. xxxxxx, Police Constable Woman Immaculate Ogutu, (PW6), was the police officer who investigated the matter.

9. The appellant was put on his defence. He gave a sworn statement and called three witnesses. He said that on 29th and 30th January 2015, he was at home when a motorcycle operator who owed him money stormed into his compound and attacked him with a *panga*. The group arrested him and took him to the Manyulia APC Camp on 30th January 2015, and he was put in the cells. He was released the next morning at 5.30 AM. He was later rearrested the same day by officers from Manyulia AP Camp, who accused him of defiling a schoolgirl that he did not know. From Manyulia AP Camp he was taken to Khwisero Police Station, where he met PW1, who he said he had never seen before. He denied defiling PW1, and asserted that he was being set up by those who owed him money. He said that he was cut on 30th January 2015 and was taken to Khwisero Police Station on 31st January 2015 and he was still bleeding from the cut wound. He said it was PW3, the motorcycle operator, who cut him. He said that he did not know Judy. DW2, Hellen Amayi Onyimbo, was the wife of the appellant. She testified that on 30th January 2015, she was at home with him, when he was attacked, and taken to the AP camp. She stated that PW1 was not at their house. She stated that he called her later on 31st January 2015 to inform him that he had been arrested. During cross-examination, she said she saw PW2 and PW3 at her compound, but none of them had a *panga*, but one of them had a torch. She said she did not know of any Judy. DW3, Oginga Mukoli, was a neighbour of the appellant. He responded to screams from his house, he went there found him with two people who were not armed. They took him to the AP camp. He stated he knew Judy, as a daughter of a neighbour of the appellant, whose home was just 50 metres away from the appellant's home, whose father worked at Thika. DW4, John Eulcha Amboko, was another of the appellant's neigbours, who responded to the screams by DW2. He found the appellant with two men who were demanding for a girl. He stated that he knew about Judy, a daughter of one of the immediate neighbours of the appellant.

10. After reviewing the evidence, the trial court convicted the appellant of the main charge, and sentenced him as stated in paragraph 1 of this judgment.

11. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal. He largely averred that the charge sheet was defective, his rights under Article 50(2) (g) (h) of the Constitution were violated, the age of the complainant was not disclosed, the evidence did not satisfy the requirements of section 36 of the Sexual Offences Act, the medical evidence was doubtful and non-incriminating, and that the evidence in general was weak, fabricated, inconsistent and doubtful.

12. I am sitting as a first appellate court; I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant 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. 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

13. The appeal was canvassed on 17th October 2019. The appellant relied on written submissions that he had placed on record, while Ms. Omondi, Prosecution Counsel, made oral submissions.

14. The appellant's written submissions raised two matters. Firstly, he argued that key witnesses were not called. He meant Judy, the girl who allegedly went to his home with PW1. There were also the teachers and other individuals who informed PW3 about PW1 having left school with the said Judy, leading up to PW1 entering the appellant's house. Secondly, he argued that the evidence that he had a sexually transmitted disease was false for he never had any such disease. He submitted that such a disease could not be possibly be diagnosed two hours after sexual intercourse. In his short address to the court, he stated that PW1 was not found at his home. He invited the court to consider the probation report placed before the trial court, dated 14th December 2017.

15. On her part, Ms. Omondi submitted that all the ingredients of the offence of defilement were proved. She stated that there was evidence placed on record of the age of the minor. She stated that a birth certificate was produced. On penetration, she pointed at the medical evidence,

stating that the document put in evidence was comprehensive, and left no doubt that PW1 was defiled. On identification of the appellant as perpetrator, she submitted that he was known by PW1. They were neighbours. They even had a nickname for him. It was more a case of recognition than identification. She submitted that the case was proved beyond doubt. She submitted that PW1 was not moved even after lengthy cross-examination.

16. The appellant raised six grounds of appeal, but, in his written submissions, he argued two grounds. He did not submit that he had abandoned the rest, and I shall, therefore, consider all of them. I shall also consider his oral remarks at the hearing of the appeal. I shall first of all deal with the grounds of appeal in the petition of appeal and later address the grounds argued in his written submissions.

17. The first ground is that the charge was defective. Other than raising it as a ground in his petition of appeal, the appellant did not articulate the claim in his written submissions. Neither did he address it in his oral remarks at the hearing of the appeal. It is, therefore, not clear to my mind, in which respect he alleges that the charge that he faced was defective.

18. The offence of defilement is stated in section 8 of the Sexual Offences Act in the following terms. Limiting myself to section 8(1)(3):

> ""*8. Defilement*
>
> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) …*
>
> *(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 ..."*

19. I note that the charge alleges that PW1 was 14 years at the time of the alleged assault. According to section 8, where the victim of the offence is aged fourteen years, the applicable subsection would be (3), and the charge that the appellant faced was said to be brought under section 8(1), which defines the offence, as read with section 8(3), which prescribes the penalty. The particulars are also clear, that on a particular date and at a particular place, he intentionally caused his penis to penetrate the vagina of PW1, who was aged fourteen at the time. It is not alleged that the act was unlawful, but the omission of the word "unlawful" is of no moment, as the act of penetrating a minor is unlawful *ipso facto*. The courts have held as much, and the effect is that it need not be pleaded in the charge, that the penetration was unlawful. There is, therefore, no foundation to the allegation that the charge, that the appellant faced at the trial court, was defective.

20. The other ground is that his rights under Article 50(2) (g) (h) of the Constitution were violated. With respect to this ground the appellant did not submit. Article 50(2)(g)(h) states as follows:

> "*50. (1) …*
>
> *(2) Every accused person has the right to a fair trial, which includes the right—*
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> *(a) …*
>
> *(b) …*
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> *(c) …*
>
> *(d) …*
>
> *(e) …*
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> *(f) …*
>
> *(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;*
>
> *(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
>
> *(i) …"*

21. I would presume that the appellant is taking issue with the failure by the trial court to inform him of his right to legal representation. Article 50(2) (g) of the Constitution requires that an accused person has a right to choose an advocate of his own choice to represent him in the matter, and it imposes a duty on the trial court to inform the accused person of that right. In *Jared Onguti Nyantika vs. Republic* [2019] eKLR, it was stated that that is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing. The court linked Article 50(2) (g) with Article 25(c) of the Constitution, which states that the right to fair trial shall not be limited. Similarly, in *Daniel Mpayo Ngiyaya vs. Republic* [2018] eKLR, with regard to Article 50(2) (g), it was stated that where an accused person faced a serious charge or sentence, the court is

bound to inform him of the right to legal representation, and that it would amount to miscarriage of justice to fail to do so. The importance of legal representation, in general, cannot, therefore, be gainsaid.

22. Parliament passed the Legal Aid Act, No. 6 of 2016, to give effect to among other Articles of the Constitution, Article 50(2) (g) and (h), so as to facilitate access to justice and social justice. These objectives are stated in the preamble to the Act, as well as in section 3 of the Act. Section 3, in particular, states some of the objects of the Act as to provide affordable and accessible legal aid to indigent person in Kenya in accordance with the Constitution, and to provide legal awareness. The same theme is pursued in section 4, which sets out the guiding principles, and lists the principles of inclusiveness non-discrimination, and protection of marginalized groups. For the purpose of implementation, certain duties have been cast on the court. Section 43 states as follows in that regard:

> *"43(1). 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."*

23. The court had occasion, in *Joseph Kiema Philip vs. Republic* [2019] eKLR, to examine the Legal Aid Act, with respect to its application. In that case, the court highlighted the link between the Legal Aid Act, 2016, and the constitutional requirement that trial courts inform an accused person of their right to represented by advocates of their own choice. It was pointed out that the objective of the Legal Aid Act, 2016, is to give effect to Article 50(2) (g) of the Constitution, so as to facilitate access to justice and social justice. It was stated that section 48, it should in fact be section 43, of the Legal Aid Act, 2016, imposes duties on the courts, with respect to an unrepresented person, which include a duty to promptly inform him of their right to legal representation, if substantial injustice is likely to inform him of their right to an advocate to be assigned to him by the State and to inform the State to provide legal aid to the accused person. It was emphasized that trial courts, as a matter of constitutional duty, and the interest of justice, must give the information to the accused person, and make a preliminary enquiry, at the earliest possible time, to determine whether the accused person would require legal representation. The court stated that the trial record ought to indicate that the rights under Article 50(2) (g) (h) were communicated to the accused person.

24. The Legal Aid Act commenced on 10th May 2016. Its design is to breathe life to the constitutional provisions on the right legal representation, and, in particular, access to legal representation by the indigent. I would like to underline the fact that the statute talks about social justice, inclusiveness, non-discrimination and marginalized groups. It is no doubt intended to focus on the needs of the poor and their inability to access justice. The poor are, invariably, ill-educated and lack access to information on legal and constitutional rights, hence the need for them to be informed of these rights before the trial kicks off. It on the basis of that that the court, in *Joseph Kiema Philip vs. Republic* [2019] eKLR, stated that trial court must place it on record that the rights under Article 50(2) (g) (h) were communicated to the accused person. Both the Constitution and the Legal Aid Act state this duty on the part on the trial court in mandatory terms. That, to my mind, would mean that a trial, where these mandatory provisions are not observed, should be vitiated, for the poor will not get to enjoy the rights in the Constitution, unless the trial courts carry out their constitutional duty to inform them of those rights, as commanded of them by the Constitution and the Legal Aid Act.

25. In *David Njoroge Macharia vs. Republic* [2011] eKLR and *Karisa Chengo & 2 others vs. Republic* [2015] eKLR, the courts emphasized that one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years' imprisonment. The charge was a very serious one, for upon being found guilty, the appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trial court should have informed him of his right to legal representation and directed that he be provided with an Advocate at State expense. Ultimately, the cost of keeping a convict in jail for twenty years is, no doubt, higher than that of allocating to him an advocate to defend him at the trial.

26. The constitutional provisions on the right to legal representation, as stated in Article 50(2) (g) (h) and the provisions of the Legal Aid Act in general, clearly put a damper on the mantra that every citizen is expected to know the law, and that ignorance of the law is no defence. They clearly are alive to the general ignorance of the law and lack of awareness with regard to legal processes and rights amongst the general populace. It is against that reality that the law has placed a burden on the courts to enlighten accused persons of their rights in law, so that they can benefit from the law, and, specifically, the rights that accrue to them under Article 50(2) (h) of the Constitution and the Legal Aid Act. That reality was highlighted by the Court of Appeal in *Elijah Njihia Wakianda vs. Republic* [2016] eKLR, where it was stated that the trial court should play the role of an educator of the accused person so far as these matters are concerned.

27. From the record of the trial court, it is clear that the appellant was not represented by an advocate. The record is silent as to whether he was ever informed of his right to be represented by an advocate in the proceedings, so that he could make a decision as to whether or not to appoint one of his own choice. The duty to inform an accused person is a constitutional and statutory imperative, stated in Article 50(2) (g) of the Constitution and section 43 of the Legal Aid Act. Failure to inform the appellant of that right violated his fair trial rights and amounted to injustice. A trial where fair hearing rights have been violated in this manner cannot possibly stand.

28. Article 50(2)(h) of the Constitution states that every accused person is entitled to be assigned an Advocate by the State at State expense, if substantial injustice would otherwise result, and to be informed of that right promptly. The importance of this right was addressed in *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR, *Macharia vs. R* [2014] eKLR, among others. However, it has been held that the same is qualified and subject to the substantial injustice test. Not everyone, therefore, is entitled to an Advocate at State expense, with each case being considered on its merit. In *Charles Maina Gitonga vs, Republic* [2018] eKLR, it was stated that legal representation at State expense is not an inherent right available to an accused person under Article 50 of the Constitution, adding that, under section 36(3) of the Legal Aid Act, an accused person has to first demonstrate that he was unable to meet the expenses of trial. Even then, under section 43, the trial court is obliged to consider the circumstances of each accused person. Much as the accused person is required to make his case for such assistance,

the court does have a duty to assess the situation and advise the accused appropriately. The law is meant to assist the indigent, the marginalized, the excluded and the discriminated, largely the poor. It would be defeatist to again require them to make a justification. The trial court has to be proactive.

29. In the instant case, I do not find any material that suggests that the appellant sought to establish that he suffered substantial injustice, by not being provided with legal representation at State expense. It has not been demonstrated that that his case involved complex issues of fact or law which made him unable to effectively conduct his own defence, owing to some disability or language difficulties or the nature of the offence. However, the sentence imposed by the statute, which defines the offence charged, is very stiff, twenty years in jail. Secondly, he was never informed of his right to legal representation, and that he was entitled to an Advocate paid for by the State in case he faced a complex case. It should only after that that he should be expected to make a case or justification for provision of an Advocate at State expense. I believe the appellant's case was deserving.

30. Article 50(2) (g) (h) of the Constitution and section 43 are in mandatory terms. I believe failure to observe constitutional commands should vitiate any trial. These provisions were not observed. The appellant, therefore, received an unfair trial and the conviction should not stand.

31. The other ground relates to the age of the complainant. The appellant accuses the court of convicting without noting that the age of the complainant was not disclosed. I am not clear on what the appellant means by this. The charge that he faced clearly pleaded that PW1 was fourteen years old at the material time. PW1 herself, when she testified on 5th June 2015, stated that she was fourteen years old, having been born on 28th August 2000. She produced a certificate of birth to support her contention. Her father, PW3, did not state her age, but said that she was born on 28th August 2000, and pointed to the certificate of birth that PW1 had produced. Her exact age as at 30th January 2015 was fourteen years five months and two days. She was within the age bracket contemplated in section 8(3). I do find any merit in this ground. I am satisfied that the prosecution did provide adequate material that PW1 was fourteen years old as at the date of the commission of the offence.

32. The other argument by the appellant is that the trial court convicted on evidence that failed to satisfy the requirements of section 36 of the Sexual Offences Act. Like the other grounds discussed above, the appellant has not submitted or elaborated on this ground. Section 36 is about samples being taken from the appellant for the purpose of forensic or other scientific testing. Section 36 (1) of the Sexual Offence Act provide that -

> *"36. Evidence of medical, forensic and scientific nature*
>
> *(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.*
>
> *(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.*
>
> *(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.*
>
> *(4) The dangerous sexual offenders' databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.*
>
> *(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.*
>
> *(6) An appropriate sample or samples taken in terms of subsection (5)—*
>
> *a. shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and*
>
> *b. in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.*
>
> *(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—*
>
> *(a) the State;*
>
> *(b) any Minister; or*
>
> *(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith*

or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both."

33. A question on section 36 of the Sexual Offences Act would arise only where samples were taken from the appellant for forensics or other scientific tests. Were any such samples taken from the appellant herein? When he testified on 11th April 2017, the appellant did not speak about any samples being taken from him, instead he stated that he was taken to Khwisero health centre by officers from the Khwisero police station, a P3 Form was filled and produced as evidence. The P3 Form in question had been filled and produced by PW4, the clinical officer. Her evidence, given on 24th January 2017, was that she treated the appellant on 31st January 2015, having been brought to her by police officers. She noted that he had no injuries, and his condition was described as generally fair, with his genitals being intact. She stated that:

"On lab investigation HIV was negative, urinalysis revealed a pus cell which confirmed STD diagnosis and I treated him.

Treatment notes for accused P Exh 7 this P3 form P Exh 8 dated 31.10.2015. There was a pus cells on both accused and victim which confirmed that they had the same infection …"

34. From the testimony of PW4, it does appear that the witness did conduct laboratory tests, which led to conclusions that the appellant was HIV negative and had a STD. to conduct those tests PW4, no doubt, needed to have the samples for testing. For the STD, she did a urinalysis test, suggesting that she must have had obtained a sample of urine from the appellant. It is not clear what she used to test him for HIV, whether it was blood or saliva or urine, but there is no doubt that she had a sample of one kind or other from the appellant for the purpose of that test. It may be deduced that samples were taken from the appellant and subjected to testing. The results of the tests were then placed before the court as evidence, and the trial court relied on the same to convict the appellant.

35. Was there anything wrong with that? The Court of Appeal in *COI vs. Chief Magistrate Ukunda Law Courts & 4 others* (2018) eKLR, linked the constitutional right to privacy with the constitutional right to dignity, and said that it extended to the right to not being compelled to undergo a medical examination, noting, however, that such rights can be limited and section 36 of the Sexual Offences Act is one of the provisions limiting such rights. According to section 36(6) (a) of the Sexual Offences Act, a sample for forensics for the purpose of a sexual offence includes that of blood and urine. According to *COL & another vs. Resident Magistrate – Kwale Court & 4 others* (2016) eKLR, samples may be take voluntarily or by consent from the accused person, but where the consent is not forthcoming or the accused person declines to voluntary medical examination, the prosecution has the option to seek a court order under section 36(1) of the Sexual Offences Act.

36. Did the appellant consent to samples being taken from him, or, put differently, did the appellant voluntarily consent or submit to the taking of the samples? The appellant testified that he had been cut with a *panga*, and was escorted to the health centre for treatment. According to him, the purpose of his being at the health centre was for treatment. It is unclear, from his evidence, whether or not he was aware that samples were taken from him, and subjected to testing. It is not clear whether he consented to that testing, and if he indeed consented, whether he was aware that the taking of the samples and their testing were part of the police investigations, and he voluntarily submitted to the same with that in mind. PW4 talked of doing tests and obtaining certain results, he did not mention whether or not the consent of the appellant was obtained before the samples were taken and tested. PW4 did not state whether she took the samples and tested them as part of the treatment regimen, or whether she did not so with the concurrence of the police as part of their investigations. Either way, the taking of the samples and their testing amounted to evidence gathering, and the evidence gathered was presented at the trial of the appellant.

37. Was that evidence admissible? Its admissibility depended on whether the same was legally obtained, and it would have been legally obtained if the appellant had consented to its taking, or otherwise the court had ordered its taking. There nothing on record to suggest that the trial court, or any other court for that matter, had made orders, under section 36(1) of the Sexual Offences Act, for the taking of samples from the appellant. I would, therefore, hold that the same was done without a court order. That then leaves us with the question as to whether the appellant consented to its taking. The appellant has not submitted on the matter. He has not argued that the samples were taken against his will. It would appear that the sample were taken in the usual course of treatment, and there could be some element of voluntariness. That should be discounted by evidence that the appellant did not know that samples were taken; or, if he was aware, he did not know that the same could be used against him at a trial.

38. Case law appears to suggest that where evidence obtained in such a manner is used in a trial, it cannot be said to be self-incriminating. It was said in *Republic vs. John Kithyululu* (2013) eKLR, that an accused person's right against self-incrimination constitutes giving of oral or documentary testimony against himself, and it does not extend to the taking of blood samples to prove a particular fact. In *Republic vs. Godfrey Kipkemboi Kangogo* (2018) eKLR, it was stated that the privilege in the rule against self-incrimination is not violated by non-testimonial compulsions such as requiring a person to provide a blood sample or a handwriting sample or fingerprints or to participate in an identification parade or even to speak certain words or model particular clothing. It was stated that the right of an accused person not to incriminate himself, protects against compulsory oral examination or confession or declaration. In the opinion of the court, samples for forensic testing amount to real physical evidence which an accused person could be compelled to provide, if there are reasonable grounds to believe that the sample might produce evidence leading to confirm that he committed the offence, in which case the court may order it under section 36 of the Sexual Offences Act.

39. Similar sentiments were expressed by the Court of Appeal in *Boniface Kyalo Mwololo vs. Republic* [2016] eKLR, where it said:

"… even in ordinary criminal matters, investigations are normally carried out and the outcome is used in evidence. Such investigations include, mentioning just a few; finger printing, sometimes items belonging to a suspect are taken away for further scrutiny which may include forensic examination, this is not always done with the approval of an accused person, but it is gathering

of evidence to be used in a criminal trial. In this scenario it has never been alleged that, by a suspect availing their fingerprints, they incriminate themselves in the trial."

40. Taking everything into account, it cannot be said that the samples that were taken from the appellant were illegally obtained, neither can it be said that the use of the results of the tests amounted to self-incrimination on the part of the appellant. I, therefore, do not find any merit with regard to the ground that he has raised on section 36, for the trial court never made any findings under that provision.

41. Let me conclude this by stating that section 36 is in permissible terms. It grants discretion to the court to order one way or the other. In any event, it is trite law that a defilement case is not dependent exclusively on medical evidence. A court may still convict in the absence of medical evidence so long as it is persuaded by the testimony of the victim. See *Fappyton Mutuku Ngui vs. Republic* [2014] eKLR, *AML vs. Republic* [2012] eKLR, *Kassim Ali vs. Republic* [2006] eKLR, and *George Muchika Lumbasi vs. Republic* [2016] eKLR, *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, among others.

42. The next ground is that the trial court convicted him on doubtful medical evidence. He elaborated on this ground in his written submissions, where he essentially denied that he had an STD as stated in the medical records. The conclusion that the appellant had a STD was founded on tests that PW4 stated that she conducted. The appellant has not countered by saying that the samples that formed the basis of the tests were not obtained or if they were obtained they were not tested. The only way to counter medical evidence is usually by procuring another medical opinion. None was placed before the trial court, and the only available evidence was that presented by PW4. Without alternative or counter evidence, the trial court would have had no basis for disbelieving the evidence before it. On whether tests conducted two hours after the alleged sexual assault could have yielded the results they did, again the appellant needed to place before the trial court medical opinion to the contrary. Without alternative medical evidence, the trial would not have a basis to conclude that the evidence on the sexually transmitted disease was false.

43. The final ground in the petition is that the evidence was generally fabricated. I trust that this ground is related to the previous one, where he had pleaded that the evidence on the sexually transmitted disease was flimsy doubtful and contradictory. He dwelt on that at length in his written submissions, and I believe what I have said with regard to it in the foregoing paragraph suffices. See *George Muchika Lumbasi vs. Republic* [2016] eKLR, *Evans Wamalwa Simiyu vs. Republic* [2016] eKLR and *Edwin Maiyo Kandie vs. Republic* [2019] eKLR.

44. As stated above, the appellant, in his written submissions, addressed two issues. I have already dealt with one above, and I am left with the other, that certain key witnesses were not called to testify. He has in mind in particular the witness identified as Judy, the friend of PW1, who was literally the link or connection between the appellant and PW1. She was said to have left school with PW1 and they ended up at her father's home, the appellant showed up, the three ended up at his house, where Judy conveniently made herself unavailable, setting the stage for PW1's defilement. Then there are the teachers and other persons who informed PW2 and PW3 that PW1 had left school with Judy, which then led them to Judy's home, from where they got information that PW1 had gone to the appellant's home. These were, no doubt, critical witnesses to complete the picture. The question then is, without their testimonies, was the prosecution's case the weaker?

45. It is trite law that the prosecution is not obliged to call any particular number of witnesses to establish their case. It would suffice that the prosecution calls such a number of witnesses as would prove its case. In addition, it is the principle, in defilement cases, that the court may proceed to convict even without corroboration, so long as the testimony by the complainant was believable and credible. From the material before the court, it is clear that PW1 knew the appellant. She stated that they even had a nickname for him. The events happened in broad daylight, and, therefore, identification was not an issue. The appellant was arrested the same day. Both were medically examined and were found to be suffering from the same sexually transmitted disease. PW1 was consistent throughout, that it was the appellant who assaulted her. The case marshaled by the prosecution against the appellant was formidable, even without the testimonies of Judy and the other witnesses.

46. The last ground was raised through oral remarks. The appellant submitted that PW1 was not found at his home. It is correct from all the testimonies that she was not found there. Indeed, she, herself, said she that the appellant drove her out to avoid being found there by persons who were apparently coming to respond to her screams. She ran into a bush and eventually ended up in the compound of a friend of the appellant. The fact that she was not found in his house did not exonerate the appellant, for the reasons that should emerge from the foregoing paragraph.

47. The offence of defilement is established to the extent that the state proves the age of the complainant, the fact of penetration and identification of the appellant as the perpetrator of the crime. It was stated in *Dominic Kibet Mwareng vs. Republic* [2013] eKLR, that:

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

48. There is sufficient material in the case before the trial court to demonstrate that PW1 was a minor aged fourteen at the time of the assault, her sexual organ was penetrated and the person whose sexual organ penetrated hers was the appellant. That was all the prosecution needed to prove, and I am persuaded that that was established beyond any reasonable doubt.

49. Since the appellant faced an unfair trial, I hereby declare a mistrial for the failure to observe the mandatory provisions in Article 50(2) (g) (h) of the Constitution and section 43 of the Legal Aid Act. Consequently, I shall order as follows:

a. That I hereby quash the conviction of the appellant, in Butere PMCCRC No. 39 of 2015, and set aside the sentence imposed upon him;

b. That there shall be a retrial of the appellant, in proceedings to be conducted by a magistrate other than Hon MI Shimenga, Resident Magistrate;

c. That the Deputy Registrar shall, with due dispatch, return the trial court's original record to the Butere Principal Magistrate's Court; and

d. That there is a right of appeal, to the Court of Appeal, within fourteen (14) days.

50. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF FEBRUARY 2020

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant

Ms. Omondi, instructed by the Director of Public Prosecutions

HO, appellant, in person