REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 79 OF 2018

BKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Honourable C. A. Ocharo- PM dated 29th December, 2017 in Machakos CM's Court Criminal Case No. 1885 of 2014)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

BKM.....ACCUSED

JUDGEMENT

1. The appellant, **BKM**, was charged in the Machakos CM's Court Criminal Case No. 1885 of 2014 with the offence of defilement contrary to 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006*** the particulars being that on the 22nd day of November, 2014 at around 1900 hours in Kathiani Subcounty within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of WN, a child aged 10 years.

2. He faced the alternative charge of indecent act with a child contrary to section 11(1) of the same Act the particulars being that on the same day at the same place the appellant intentionally and unlawfully caused his penis to touch the vagina of WN, a child aged 10 years. He pleaded not guilty to the offence.

3. In support of its case the prosecution called 4 witnesses. It would seem that after the evidence of three witnesses were taken the court file went missing and though the court record does not seem to state so, the trial started de novo. At the de novo hearing, PW1, **CNM**, testified that the complainant was her daughter and at the time of her testimony on 26th July, 2017, the complainant was 12 years old. According to PW1, on 27th November, 2014 she arrived home from work at 7pm and after taking her meal went to bed. At 9pm her mother in law arrived in the latter's house and inquired from the children who had dirtied the sofa set and they informed the mother in law that it was the Complainant and the Appellant, PW1's nephew since her husband and the appellant's father were brothers. According to PW1, she could hear what was going one because her house and that of her mother in law are nearby. She however slept wondering what the complainant and the appellant were doing. In the morning PW1 sked the complainant what she and the appellant were doing and the complainant informed her that at around 7pm, the Appellant removed her pant, placed her on the sofa and inserted his penis into her vagina.

4. PW1 then went to inform her mother in law who told them to wait for the Appellant. When the Appellant arrived, he was asked about the incident but he started abusing them. PW1 then reported the matter to the Assistant Chief, **Jeremiah Makau**, who referred her to the police at Nzaikoni from where she was sent to Kathiani Hospital. However, the Hospital referred her to Kathiani Police Station where she was given a letter and a police officer to proceed to the Hospital where the complainant was treated before they returned to the Station to record their statement. According to PW1, the complainant was not in pain since according to the complainant and the doctor it was not the first time. PW1 stated that the appellant with who she was staying in the same home but in different houses, would take the complainant to his house when people had gone to church and defile her. PW1 stated that she did not examine the complainant because she was angry. She identified the treatment card and p3 form.

5. In cross-examination, PW1 stated that the previous incidences were discussed as a family but were left to rest. She could however not recall the first time the Complainant informed her about the defilement. She however denied having told the appellant's younger brother that she would put him where she had put the appellant. She explained that by the time she took the complainant to the Hospital she had not bathed though she changed her clothes which were dirty.

6. After *voir dire* examination, the trial court found that though the complainant appreciated the essence of telling the truth, she did not understand the meaning of the oath. The court therefore decided that she would give unsworn statement.

7. In her statement, the complainant stated that she was 12 years old. According to her, the Appellant told her fellow children to fetch firewood and leave the complainant behind. After that the appellant placed her on the seat, removed her pants and lay on her. She stated that she felt pain in her vagina. After that the Appellant told her to get out and she went to the house of **Mama Mutheu**, a neighbour. It was her statement that the incident took place in her grandmother's house at 7pm when it was a bit dark. Due to the threats from the Appellant, the complainant did not disclose the incident to her mother but did so in the morning after which she was taken to see a doctor for examination and treatment. She stated that this was the third time that the Appellant was defiling her and on previous occasions she had disclosed the same to her mother. She stated that the Appellant was her cousin who was staying nearby.

8. In cross-examination she stated that the Appellant went to the grandmother's house alone and told the other children to take the firewood to the kitchen. One **Dennis** however found the Appellant defiling her on a big sofa set but did not tell her mother. According to the complainant the appellant threatened to kill her if she informed any one. She confirmed that she did not bathe before going to the Hospital though she was not in the same clothes she had when she was defiled. According to her she was not injured anywhere.

9. In re-examination, she explained that **Dennis** found after the Appellant had finished defiling her.

10. PW3, **Dr Kathleen Kilonzo**, testified on behalf of **Dr Jackline** who examined the complainant but was no longer in service having resigned. She however was able to recognise her signature on the P3 form dated 23rd November, 2014. According to the report, the child was clean and well kept and the degree of injury was harm and the estimated age of the child was 10 years. Upon examination, the external genitalia was normal but the hymen was absent. The vaginal canal was widened and the child stated she had been defiled severally before and the doctor confirmed the defilement. The lab test however did not reveal the presence of spermatozoa or pus cells. She produced the P3 form, the treatment documents and the lab test results as exhibits. In her opinion, there was a possibility that the child may have taken a bath which could result into lack of spermatozoa or that the perpetrator did not ejaculate.

11. PW4, PC **Mauline Sagire**, the Investigations officer testified that on 23rd November, 2014 at 12 noon, the complainant and her mother reported at Kathiani Police Station a case of defilement by a person known to the complainant on 22nd November, 2014 at about 7pm. According to her, by that time the child was already bathed and had even changed and was well dressed. She however appeared normal but a bit fearful. After carrying out the investigations she decided to charge the appellant with the offence.

12. In cross-examination she stated that she did not establish any grudge between the appellant and the complainant's family in the course of her investigations but later learnt that the complainant's father was chased out of the home after the incident.

13. Upon being placed on his defence, the Appellant testified that on 24th he woke up as usual at 6pm and left for work where he stayed till 9pm. He then closed his business and went home arriving there at 11pm and found everyone asleep. The next day he again left for work and at about 5pm, he saw police officer who arrested him and took him to Kathiani Police Station after which he was charged with the present offence.

14. In cross-examination, he stated that on 24th November, 2014 at 7pm he was still at work having left his home at 8am. he however confirmed that his house is in the same homestead as the complainant and he was staying alone in his house. Though he returned home at 11pm no one saw him return at that time. According to him, his parents were not in good terms with the complainant's mother though he did not know what the disagreement was all about.

15. In her judgement, the learned trial magistrate found that from the evidence the age of the complainant was not certain but was between 9 and 12 at the time of the commission of the offence. She further found, based on the medical evidence that there was penetration. From the demeanour of the complainant the learned trial magistrate found that the complainant was truthful in her evidence as to the defilement by the appellant. She therefore found the appellant guilty of the main charge and convicted him accordingly. She proceeded to sentence the appellant to 20 years imprisonment.

Determination

16. I have considered the evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

17. In this case the prosecution's case was that on 22nd November, 2014, the appellant went to the complainant's grandmother's house, found the complainant with other children, sent the other children on an errand leaving himself and the complainant alone after which he placed the complainant on the sofa set removed her pants and inserted his penis into her vagina. This was not the first time such an incident was happening as the appellant had previously defiled the complainant when people were away and on those occasions the complainant reported to her mother but the incidences seemed to have been hushed up. After defiling her he threatened to kill her should she disclose the incident to anyone. When the complainant's mother, PW1, returned home in the evening, she heard her mother in law asking the children who had soiled the sofa set and the children stated that it was the complainant and the appellant. The following day, the complainant confirmed to her mother, PW1, that she had been defiled by the appellant after which the incident was reported to the police and the complainant taken for examination and treatment. The doctor found that the complainant's external genitalia was normal but the hymen was absent. The vaginal canal was widened and this was explained by the fact that the complainant had been defiled severally before. In the doctor's opinion lack of

spermatozoa could be explained on the ground that the child may have taken a bath or that the perpetrator did not ejaculate.

18. The appellant's evidence was that he was at work on 24th November, 2014 from 8am and returned home at 11pm.

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 -***
>
> ***(a) 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***
>
> ***(b) 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. 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 vs. 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."**

21. It was contended that there was no evidence tendered to prove the age of the complainant. In this case the evidence on record both oral and evidentiary placed the age of the complainant between 9 and 12 years at the time of the commission of the offence. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence."**

22. Closer home in the case of **Kaingu Elias Kasomo vs. Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010** stated as follows:

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

23. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said: -

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."**

24. However, in **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

25. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact, according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich vs. Republic** - Criminal Appeal No. 89 of 2016.

26. In this case since the evidence was that the complainant's age at the time of the commission of the offence was between 9 and 12 on the authority in the case of **Alfayo Gombe Okello vs. Republic** (supra), the learned trial magistrate was right in taking the age that was most favourable to the accused which was 12 years. Accordingly, I see no error in that finding.

27. Regarding penetration, it is clear that the evidence of penetration on the material day only emanated from the complainant. That evidence was not corroborated. It is not in doubt that the evidence of a minor requires corroboration and in this regard the Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR** stated that:

> **"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."**

28. Similarly, in **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal was of the opinion that:

> **"The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:**
>
> **'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'**
>
> **The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124."**

29. It follows that as a matter of practice, corroboration is necessary in sexual offences. What then is corroboration? The meaning of corroboration as defined or stated in the Nigerian case of **Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108** is thus: -

> **"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".**

30. In **Mukungu vs. Republic [2002] 2 EA 482**, the Court of Appeal citing **Mutonyi vs. Republic [1982] KLR 2003**, held that:

> **"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."**

31. In **R vs. Kilbourne [1973] 2 WLR 254, 267**, **Lord Hailsham** of St Marylebone LC stated:

> **"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed."**

32. In **Khalif Haret vs. The Republic [1979] KLR 308, Trevelyan** and **Hancox, JJ** pronounced themselves as hereunder:

"What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."

33. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

34. In this case there was clearly no material corroborating the Complainant's evidence that it was the Appellant who defiled her. That however, is not the end of the matter. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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." [Emphasis added]

35. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** the Court held that:

"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."

36. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

37. Therefore, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. What is required of the trial court is to be satisfied that the victim is telling the truth. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. The fact of the warning must appear in the judgement of the trial court and the record itself must show that the trial court was so satisfied. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."

38. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to

this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."

39. In this case however, the truthfulness of the complainant's evidence seemed to have been directed at the identity of the perpetrator rather than at the penetration where it should have been directed. Though both the complainant and PW1 stated that the complainant had not taken birth by the time of her examination, there was no evidence that spermatozoa was found in her genitalia. In **John Mutua Munyoki vs. Republic [2017] eKLR**, the Court of Appeal 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. Did the prosecution discharge this task? According to the appellant the prosecution failed in this undertaking, whereas the respondent is of a different view. Apart from the testimony of the complainant, there was no other evidence linking the appellant to the crime. The only reason why the appellant was the prime suspect was because he was the last person to be seen with the complainant. Much reliance was placed on the evidence of the complainant despite having been discredited by the evidence of the clinical officer. 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. 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."

40. It is however clear that lack of spermatozoa alone does not mean that there was no penetration if there is some independent credible evidence that there was in fact penetration. This must be so in light of Section 2 of the ***Sexual Offences Act*** which provides that:

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

41. In **Mwangi vs. Republic [1984] KLR 595** at 603, the Court rendered itself thus:

"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."

42. In this case however, considering the evidence of the complainant and PW1 that the complainant did not bathe and PW3's evidence that lack of spermatozoa could be explained on either the complainant having bathed or the appellant having not ejaculated, it is my finding that considering the fact that the complainant's alleged that she had been defiled previously by the appellant, the evidence adduced did not prove beyond reasonable doubt that on the material day the appellant penetrated the complainant. In **Dominic Kibet Mwareng vs. Republic [2013] eKLR** it was held that:

"The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time. According to the Medical Examination Report produced as MF1, there were no obvious tears on the Complainant's genitalia. There was however evidence of old penetration. In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence. The Complainant in the instant case testified that the Appellant was previously known to her. She even claimed that he had defiled her on two previous occasions, although she had not reported the previous defilements. According to the charge sheet, the Complainant was defiled on 20th June 2011 and from the

Medical Examination Report, she was examined on 24th June 2011 at which point she showed evidence of old penetration with no obvious tears. The Court was therefore unable to reconcile the alleged defilement by the Appellant on 20th June 2011 with the Medical Examination Report. The Court treated the Complainant's evidence that the Appellant had defiled her on two previous occasions with extreme caution as it could well have been intended to fill in gaps in the Prosecution case."

43. Similarly, in the case of **Gerishon Gichera Muremi vs. Republic [2017] eKLR** the court opined as follows:

"I find that medical evidence has failed to prove that penetration occurred on the date indicated on the particulars of the charge. The complainant admitted that she had a boyfriend by name Amos Chomba. There is a possibility based on her testimony that she had multiple boyfriends."

44. Again, in **Daniel Kiplimo Cherono vs. Republic [2014] eKLR,** the court while faced with the issue of complete penetration stated as follows:

"…where a complainant was emphatic that the penetration took the form of complete sexual intercourse like in the present case, the prosecution bears the burden of proving beyond doubt that indeed the victim had engaged in sexual intercourse on the date alleged."

45. In this case where the complainant alleged that she had been defiled by the appellant on previous occasions, it was necessary to prove to the required standards that on the day in question, all the three ingredients of the offence, particularly, in this case penetration, took place. Regrettably the evidence adduced falls below the prescribed threshold.

46. The appellant raised the issue of the existence of a grudge between the two families. He did not however elaborate on its nature. In fact, he stated that he did not know the source of the disagreement.

47. Regarding the identity of the appellant, the appellant was the complainant's cousin ad they were staying in the same homestead. The question of mistaken identity does not therefore arise.

48. In his defence, the Appellant explained the events of 24th November, 2014. He said nothing about 22nd November, 2014, the day of the incident. As was held by the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR**:

'With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: "I find that the defence of the 5th accused is not true." We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: "The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances." We agree with this confirmation.'

49. It is therefore my finding that on 22nd November, 2014, the appellant sent away the children who were with the complainant and proceeded to remove her pants. He also removed his pants and at some point the complainant felt pain in her vagina. However, there is no proof to the requisite standards whether on that particular day the appellant penetrated the complainant. In this case however, the appellant faced the alternative charge of indecent act. Section 2 of the ***Sexual Offences Act*** provides *inter alia* as follows:

"indecent act" means an unlawful intentional act which causes-

a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

b. exposure or display of any pornographic material to any person against his or her will;

50. Section 11(1) of the ***Sexual Offences Act*** provides that:

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

51. Therefore, for the purposes of that alternative charge, it does not matter whether in doing so, the appellant used his male genital organ or any part of his body.

52. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. From the evidence adduced it is my view that the evidence disclosed the commission of the offence of indecent act. Though that was not the main offence with which the appellant was charged, indecent act is a cognate offence to the offence of defilement. Section 179 of the ***Criminal Procedure Code*** provides that:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

53. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

> **"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged…As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171* and *WACHIRA S/O NJENGA V. REGINA (1954) EA 398*). *Spry, J*. explained the essence of the first consideration as follows in *ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294,* while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:**
>
> **"*Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."***
>
> **That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial."** [Underlining mine].

54. The Court proceeded:

> **"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500).* In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."**

55. Accordingly, I hereby set aside the appellant's conviction of the offence of defilement and substitute therefor the conviction of the offence of indecent act.

56. As regards the sentence, the appellant's action was heinous. In this case, the appellant took advantage of the tender age of the complainant for his own selfish gratification. In **D W M vs. Republic [2016] eKLR** where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

57. However, as was appreciated in **Tito Kariuki Ngugi vs. Republic [2008] eKLR**:

> **"The Appellant…caused her trauma which she will have to live with for the rest of her life."**

58. This Court does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

> **"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of**

all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

See also **Omari vs. Ali [1987] KLR 616.**

59. Before I conclude this matter, I must deprecate the conduct of PW1 in this matter. According to the complainant and a fact which was admitted by PW1, the complainant informed her on each previous occasion she was defiled of the same and apart from dealing with the matter as a family no step was taken. By not taking the matter seriously PW1 abetted the injuries that the complainant was undergoing. While this court cannot make a finding as to the authenticity of the said allegations, the fact that PW1, despite complaints from her own daughter chose to do nothing, is a serious indictment on the part of PW1 as a mother. That no action was taken against PW1 as well is similarly an indictment on the part of the investigation officer in this matter

60. In the premises I allow the appeal in so far as the conviction and sentence imposed on the appellant in respect of the offence of defilement is concerned, substitute therefor a conviction of the offence of indecent act and sentence the appellant to serve 10 years' imprisonment to run from 13th May, 2016 when his bail was cancelled.

61. Judgement accordingly.

62. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic, the Appellant have consented to that mode of delivery.

Read, signed and delivered in open Court at Machakos this 30th day of April, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Njeru for the Respondent

Appellant in attendance through skype

CA Geoffrey