REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 153 OF 2016

ROBERT SIALO SIMIYU.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment of Honourable J. Nthuku SRM delivered on the 19th September 2016 in Nakuru Adult Criminal Case Number 20 of 2011)

J U D G M E N T

1. Robert Sialo Simiyu was charged with the offence of **defilement Contrary to Section 8(1) as read with 8(1) (2) of the Sexual Offences Act.** In the alternative he was charged with **Indecent Act with a child Contrary to Section 11(1) of the same Act**. It was alleged that he committed the offences on 5th February 2011 at [particulars withheld] in Nakuru District within Rift Valley Province by inserting his penis into the vagina of MN aged eleven (11) years old an act which caused penetration, and in the alternative that he "touched" the vagina.

2. Plea was taken on 7th February 2011. Trial commenced on 23rd May 2011. Twice the trial magistrate appears to have been transferred after taking the evidence of the complainant and twice the matter had to start afresh. The complainant testified three (3) times; on 23rd May, 2011, 8th September 2011 and 9th July 2012.

3. After hearing nine (9) witnesses and the accused's defence the trial court found that the child was eleven (11) years and two (2) months at the time of the alleged offence, found that defilement was proved, and that the accused was guilty. The trial court convicted him and sentenced him to twenty-five (25) years imprisonment.

4. The appellant was aggrieved by the finding of guilt, the conviction and sentence and filed this appeal on the following grounds;

> *1. THAT the learned Magistrate erred in law and in fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the Appellant and in convicting the Appellant herein against the weight of the evidence adduced.*
>
> *2. THAT the Learned Magistrate erred in law and in fact in failing to find and rule that there was no cogent, substantial, credible and direct evidence connecting the appellant to the offence of Defilement.*

3. THAT the Learned Magistrate erred in law and in fact in convicting the Appellant on highly contradictory, misleading, inconsistent and unreliable evidence presented by the prosecution.

4. THAT the Learned Magistrate erred in law and in fact in convicting the Appellant on the uncorroborated and or insufficiently corroborated evidence of a minor.

5. THAT the Learned Magistrate erred in law and in fact in failing to find and rule that evidence of a parent is not and cannot be sufficient corroboration of a testimony of a minor.

6. THAT the Learned Magistrate erred in law and in fact in convicting the Appellant on purely circumstantial evidence which was incompatible with the innocence of the Appellant herein.

7. THAT the Learned Magistrate erred in law and in fact in shifting the burden of proof of the charge from the Prosecution to the Appellant.

8. THAT the Learned Magistrate erred in law in placing reliance on the incredible evidence of the Prosecution and in failing to accord due weight to the evidence of the Appellant.

9. THAT in any event, the Learned Magistrate erred in fact in meting out sentence that was grave and excessive in the circumstances.

10. THAT the Learned Magistrate erred in law and in fact in failing to consider the issues raised in mitigation amongst other factors in sentencing the Appellant.

11. THAT the Learned Magistrate erred in law and in fact in failing to acquit the Appellant for failure to the Prosecution to prove the charge beyond any reasonable doubt.

through the firm of Geoffrey Otieno & Company Advocates, accompanied by the submissions and authorities relied upon in the trial court as part of the Record of Appeal.

5. In support of his appeal counsel filed written submissions and framed four (4) issues for determination;

i. Whether the trial court complied with the provisions of the Evidence Act.

ii. Whether the elements of defilement were proven.

iii. Whether the prosecution proved the case beyond reasonable doubt.

iv. ***Whether the Appellant has shown remorse.***

The appeal was argued by Ms. Amulabu and opposed by Ms. Kibirui for the state.

5.1 The case for the prosecution on 9th July 2012 was that complainant was that complainant was born on 22nd April 2000. She was in class two (2). Her family lived in the same estate, same plot with the appellant, his wife and his cousin one Josephine Nanjala, PW7. There was some form of arrangement for the complainant to get extra tuition after school. According to her testimony *"....Josephine used to tutor me and at times Baba M (the appellant) used to tutor me."* On this date she found Josephine busy sorting peas (she had earlier said Omena). So she read a book, then Josephine gave her questions which she marked. By this time Baba M was away, and when he arrived he gave Josephine money to go buy milk. As soon as she left, he took her to the bedroom where he *"unbuttoned my dress and put me on the bed. He did bad manners to me. He removed my clothes all of them and he remained with a short and a shirt. He removed his short and I saw his thing in between. The thing for helping himself in the toilet. He inserted it between my legs... I felt pain here (touches his genitals). He covered my mouth with his hand so that I didn't scream. He heard a knock and he let me go. I went and saw my mother. She asked me what I had (sic). She saw me coming from the other room. She asked me what I was doing and she screams (sic). He took my*

panty and threw it through the window to some bushes. He told me to put on the dress fast. When mom asked me who I was with I said Baba M. We went home and I told her what Baba M had done and she screamed and called police officers and we were told to go to Provincial General Hospital. The landlord came and talked to Baba M and also to my mother. Police officers came and took the clothes and put in a paper bag. We came with officers… we found my panty and short behind the house... he did that to me another day I was going to church AIPCEA in Pangani. I met him on the way back. I saw Baba M and I went back to church. He then came back and took my hand and did bad manners to me. Another day I went to bathe and Baba M came to the bathroom and did bad manners to me again. I didn't tell anybody."

5.2 Her mother **PW2 EKN** confirmed that her child used to go to Appellant's house for tuition and on this day she left at 7.30 p.m. after some time, she called out to her to come add charcoal to the *jiko,* only to find that the complainant was not at home. She testified; *"I went and knocked and saw N coming from the bedroom and I slapped her asking her what she was doing in the person's bedroom. I took her to the house and demanded to know the truth. I told her I will kill her. She said Baba M had been doing tabia mbaya to her. I lifted her dress and saw that she had no panty and biker. I screamed and went to Baba M's house and saw him in a short inside the house. The landlord **Mary Wanjiru – PW4**) came. My brother (**PW3 – J W W**) followed me to Baba M's door. People came in large numbers. Baba M followed me to my place we talk. I was called a short while by officers in Bondeni. I went to the station. We went to Baba M's house and the child said the panty was put under the heard of mattress (sic). The officer peeped outside the window and saw the panty outside.... we went to Provincial General Hospital with accused, PW3 and officers... the child said he defiled her another day after church in an incomplete house..."*

5.3 According to **PW3,** he was at PW2's place. While there he heard her call out to N who did not respond. It was then that *"N came and her mother insisted on knowing what had happened. She lifted her dress and saw she had no panty. Mama N screamed and on going to the accused house I found him in a short. I went and brought Baba M over but neighbours had come. We took the child to police station with.... Simiyu. At police station we said the child had been raped by Simiyu... and we went to Simiyu's house and we looked for the panty and N said it was thrown through the window. She passed through a tiny space and retrieved it outside... the panty was collected outside Simiyu's bedroom window."*

In cross examination the witness said that he heard PW2 call N and she followed her and found her coming out.

5.4 PW4's testimony was that when she arrived at the scene she spoke to N who told her that the appellant used to waylay her from church and take her to Flamingo for like ten (10) times. She too lifted N's dress and saw that she had no panty. That they went to the police station and *".....at midnight Simiyu and officers came to his house to search for the panty but Simiyu was saying it was not there. One lady saw an open bedroom window she went towards the toilet and told my son to open behind. She retrieved the panty and short behind the bedroom window... I saw them as the officer held them...."*

On cross examination she said it is only God who knew the truth about the allegations.

5.5 **PW6** was **Number 70960 PC Stephen Mathenge**, who accompanied **PW9,** the Investigating Officer **Cpl Charity** in the search at the appellant's house. He said; "*We conducted a search inside the house of the accused and there was nothing. The bedroom window was open. Charity saw a pant. She also recovered the complainant's book."* On cross examination he said they recovered a book and a panty.

5.6 **PW7 Josephine Nanjala** was the appellant's cousin and was living with his family at the material time. She testified that the complainant came to their house at 8.00 p.m. and by then the appellant had gone to visit a patient. She said *"he called me saying, prepare tea. He arrived and found me with Margaret at 8.00 p.m. he sent me to buy milk but before I left Margaret was called*

by her mother. She left before I could go. I came back and found many people at the compound. I took about 5 minutes... the child was outside the house when I came back. The house is about 20m from MN's house... I had not finished tutoring [her]. So she left her books in our house and the accused was also in the house.... by the time I left MN was not in the house..."

On cross examination she said she was the one who was tutoring the complainant for free. The shop is about fifty (50) metres away. She said accused never tutored the child. She denied that he raped the child.

5.7 **PW8 Doctor Emmanuel Wekesa** testified on behalf of Doctor Nondi. He testified that the P3 before court was completed by Doctor Nondi but he was away on further studies. That the child was defiled on 5th February 2011 but was examined on 21st November 2013. She had no physical injuries. Other information was obtained from the Post Rape Care (PRC) Forms and lab tests which were all negative. He produced the P3 form signed on 21st November 2013. PRC form and lab requests. On cross examination he said that as at 5th February 2011 he was an intern at the Provincial General Hospital. That Doctor Nondi examined the complainant on 21st November 2013, two (2) years nine (9) months after the alleged defilement. That the doctor told him that the first P3 form was lost.

5.8 **PW9** was **Number 60216 Cpl Charity Kaguiria** the investigating officer. On 5th February 2011 she saw in the OB that she has been assigned this case to investigate. The appellant was already in the cells and the complainant at the police station.

On interrogation the complainant told her that on that date, she had come from school at 4.00 p.m. then went to accused's house for tuition. Accused was absent and PW7 told her accused would come. When accused arrived, he sent PW7 to buy milk and left them together. *"when Josephine left accused put the complainant on the bed, removed her pants, biker and defiled her. The mother suspected when the complainant took longer than usual and went to check accused's house. She knocked and nobody opened. She pushed the door and saw nobody. She went out and screamed because she suspected her child was inside. Members of the public came and found both accused and complainant in the bedroom. They arrested him and took him to Bondeni Police Station... she told me she left her books at the accused's house... this is the panty... this is the biker. She had no panty when she came to report. I visited the scene with accused, complainant, her mother and my colleagues... we looked for the panty and the biker but we didn't get them. I opened the bedroom window and by use of torch light I saw the panty and the biker behind the accused's house... it appeared they were thrown through the window... I carried on with investigations and charged the accused person."*

On cross examination she said that the complainant went for tuition at 4.00 p.m. the offence was reported at 8.30 p.m. the complainant did not know the time she was defiled. That the two (2) families had cordial relationships until this day.

6. At the close of the case for the prosecution the accused was put on his defence. He gave a sworn statement. He testified that at the material time he was an adult's teacher and on that night he arrived home about 7.30 p.m. He saw the complainant's mother lighting a *jiko*. He went into his house and found MN with PW7. His wife was at Bondeni Maternity so he wanted to go see her. He sent PW7 for milk and they left with MN. A while later he heard someone crying painfully, and on going out was confronted by complainant's mother accusing him of defiling her daughter. He denied it. Neighbours came. MN was asked what happened but PW2 would not let her speak so they left leaving him, the PW2, PW4, the child, members of complainant's family. He demanded that they go to the police station but PW2 chose to go to St. Elizabeth's Hospital where they all went and were referred to Provincial General Hospital. They went to Bondeni Police Station. He was placed in the cells later they went to the plot, his house, recovered MN's books here, but nothing else. The PW2 suggested they look outside, and panty was found outside the bathroom. He said when the shouting was going on PW7 had come back. That the tutoring arrangement was between the complainant's mother and Josephine, not him. That his family and

complainant had cordial relationship, except that PW2 and his wife had differences.

7. It is on the basis of his evidence that the appellant was convicted and sentenced him to twenty-five (25) years imprisonment.

8. As a first appellate court my mandate is to set out in O**keno v Republic** to re-assess, re-evaluate the evidence without losing sight of the fact that I did not see or hear the witnesses, and arrive to my own conclusions. To do this I adopted the issues set out by the appellant as they appeared to capture the whole essence of the appeal.

8.1 Did the trial court comply with the provisions of the **Evidence Act?** This issue arose in relation to the production of the P3. The P3 was allegedly completed by a Doctor Onchere Samuel, on whose behalf, Doctor Justus Nondi had come to testify. Doctor Nondi's appearance was challenged by the defence, that he provided no evidence that the doctor who examined the child was his colleague, and was unable to attend the court. This objection was overruled. By then Doctor Nondi was not available and a Doctor Wekesa testified. The defence raised the issue of whether another doctor can actually state that the document he is producing was made and signed by his colleague and whether this is not an issue for a document examiner. The defence literally pitted **Section 48** and **50** of the **Evidence Act** against **Section 33** and **77** of the **Evidence Act.**

"S. 33. Statement by deceased person, etc., when

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) relating to cause of death

when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

(b) made in the course of business

when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

(c) against the interest of maker

when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

(d) an opinion as to public right or custom

when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it

existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;

(e) relating to existence of relationship

when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;

(f) relating to family affairs

when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;

(g) relating to a transaction creating or asserting, etc., a custom when the statement is contained in any deed or other document which relates to any such transaction as is mentioned in section 13(a);

(h) made by several persons and expressing feelings when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

S. 77. <u>Reports by Government analysts and geologists</u>

(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

S. 48. <u>Opinions of experts</u>

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(*2) Such persons are called experts.*

S. 50. <u>Opinion as to handwriting</u>

(1) When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by

that person, is admissible.

(2) For the purposes of subsection (1) of this section, and without prejudice to any other means of determining the question, a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him.

8.2 It was the view of the defence that, because Dr. Wekesa was producing the P3s on the mere fact that he was familiar with these doctors' hand writing, the only way the court could have admitted the medical evidence was only if a handwriting expert confirmed that the signatures and writing in the documents belonged to the said Doctor Nondi or Doctor Onchere. They cited several authorities.

8.3 The position of the prosecution was that the Provisions of **Section 33** and **77** of the **Evidence Act** allow for the production of the medical report by any other officer except the one who made it.

8.4 The defence relied on authorities on the role of handwriting experts where writings are in dispute. However, in this case, the signatures of the doctors who filled in the P3 were not in dispute. The dispute was the basis upon which the court proceeded to allow another Doctor to produce the report without establishing that the one who actually filled the P3 was unavailable as required by s. 33 of the Evidence Act.

8.5 First it is correct that the P3 report is an opinion of an expert, on a point of science, as per **Section 48** of the **Evidence Act**. It is also a report within provisions of s. 77 (1) of the same Act. The prosecution however had an obligation to establish under **Section 33** that the Doctor who examined the complainant was not available or his attendance could not be procured without unreasonable delay or expense. In this case the court simply went with the fact that Doctor Wekesa testified on oath that Doctor Nondi was not available due to the fact that it was alleged the original P3 was lost, and a fresh one had to be filled in two (2) years later. The trial court ought to have deemed it appropriate the summon the maker of the document to testify on its contents as per **Section 77(3)** of the **Evidence Act,** because now there was a dispute, but failing to do so, both complainant and the appellant were prejudiced.

Look at the circumstances, the doctor who examined the complainant *did not* testify. The P3 he allegedly completed *allegedly* got lost, another P3 was completed by *another doctor*, who again was *not availed* to testify as to the alleged loss. To make the matter worse, even the investigating officer was not aware of the alleged loss of the original P3.

No relationship was established with the offence of 5th February 2011, and any subsequent examination with the examination of the complainant two (2) years nine (9) months later and the P3 produced as exhibit in this case. It indicated that as at 21st November 2013 the complainant was eleven (11) years old, and had tear on vaginal wall, broken hymen, so when did this happen and how is it related to the incident of 5th February 2011? He did not indicate the age of the injuries and only crossed that section, did not indicate whether there was prior treatment to filling of the P3, or even that there had been another P3 that got lost. The document before court did not speak for itself and the evidence of Doctor Wekesa that he was told that the original P3 was lost, was pure hearsay not backed by anything. There was no reference to Doctor Onchere's notes, the doctor who allegedly examined the complainant neither was any made to the PRC form before the court. The prosecution failed to comply with the Evidence Act, rendering Dr. Wekesa's testimony hearsay.

8.6 ***Were the elements of defilement proved?*** Proof of defilement is not a mathematical equation that can be answered with mathematical precision. This is recognised by s. 33 of the Sexual Offence Act which calls for the consideration of the circumstances of the offence.

8.7 The **age** of the complainant is said to be eleven (11) years at the time of defilement. A certificate of birth was produced stating she was born on 22nd April 2000. However, the P3 that was produced created an inconsistency in that it stated that at the of examination on 21st April 2013, the complainant was eleven (11) years old, creating the impression that perhaps a different person was examined? The complainant could not have been eleven (11) on 5th February 2011 and also on 21st November 2013. The prosecution's duty was to ensure that the evidence was consistent by extracting the appropriate explanation from their witnesses and placing it before the court.

8.8 ***Was penetration proved?*** The evidence of the complainant is on record. That evidence must be consistent with the circumstances surrounding the alleged defilement. There was the evidence about her being in the bedroom of the appellant, her not wearing a panty that night when her mother confronted her, and the recovery of the panty. The circumstances surrounding this allegation of defilement, are what I describe in Kiswahili, ***za kutatanisha***. Was the complainant found coming out of the appellant's bedroom by her mother or did her mother meet her coming from the house of appellant? Was the appellant and the complainant found in the bedroom together by neighbours as alleged? Was the complainant confronted by her mother at home about where she had been under threat of death? Was the complainant defiled once, thrice or ten times by the appellant? These questions arise from the evidence of the prosecution witnesses. These scenarios raise the issue of the credibility of the case for the prosecution.

8.9 The appellant was arrested the same evening. He and the complainant were taken for medical examination that night. He was not examined. The medical evidence does not support the allegation that the complainant had sexual intercourse that night. The appellant's house was visited by the I.O the same night. There is nothing said whether the appellants bed or beddings were looked for examination. The possibility of the appellant's DNA or the minor's DNA being found on each of them, or the appellant's house was more than likely if the offence was committed as alleged. A proper investigation ought to have taken that into consideration.

8.10 The evidence of the recovery of the complainant's pants and biker only created further doubt in the case for the prosecution. Several versions exist. ***First,*** it is alleged that it is the complainant said they were placed under the mattress, ***then*** that she saw they were thrown out by the appellant, ***thirdly*** that the investigating officer by chance happened to see an open bedroom window through which she shone her torch and voila! the missing pants were there, ***further that*** it was another un named lady who recovered them. ***Yet another version*** that the same were seen outside the bedroom window and the complainant was squeezed through the window grills to recover them. These are not idle inconsistencies. This recovery is supposed to prove that the minor was inside that room, and her pants were thrown outside the window to hide that fact. Which version should the court believe? No inventory was filled by the investigating officer to be signed by the appellant that indeed the pants were found outside his window.

9. The complainant changed her story every time the case started *de novo*, as to how the defilement happened, creating the impression of three (3) different scenarios. Hence despite the provisions of **Section 124,** the complainant's testimony and that of the doctors fall short of proving penetration by the appellant on the alleged night. The evidence of the PW1, PW2 and PW3, in not believable. On this I find guidance from the Court of Appeal in **Joseph Ndung'u Kimanyi v Republic [1979] eKLR** where it was held;

> *We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.*

10. The manner in which the complaint was obtained beating and threats, she was slapped and threatened with death is problematic. The court would not know what her mother was telling her as she slapped and threatened her with death. It is also the people who took her to the police station who told the police that

she had been “raped” by the appellant. There was no evidence of the alleged previous defilements giving the impression that this was an exaggeration created along the way. The court of appeal dealing with a similar situation had this to say in **Paul Kanja Gitari v Republic (2016) eKLR;**

> *What we find troubling about this case is that J.M.K did not on her own volition make a complaint that the appellant had defiled her. Her testimony was that after the "bad things", she went home whereat she met her aunt (PW2) who beat her up to reveal what had transpired. It was the appellant's contention that J.M. Ks' testimony was procured by threats and that it was only given as instructed by PW2. We cannot dismiss this as an idle or insubstantial contention.…*

Regarding the other contradictions in the testimonies of the witnesses the same court noted:

> *We also note the contradiction between PW2's claim that the appellant habitually had sex with J.M.K and J.M. K’s own evidence on oath that it was the first incident and that the appellant "had never joked with her before". There is also the contradiction that contrary to what PW2 herself said, the investigating officer PC Nixon Tallam (PW4) provided a different picture that the report he received was that PW2 went to the appellant's home during the incident and "found the complainant on accused's bed without pants." That variance is not a minor one.*

11. The investigating officer did not investigate those allegations. For instance, this was said to be a common bathroom for more than ten (10) households, what is the likelihood that the complainant would be defiled five (5) times and no one would notice anything suspicious? The allegations that appellant would waylay her from church and take her to Flamingo. Where in Flamingo? Was there a possibility anyone saw them together even once? Surely these allegations needed to be established as they formed for the basis for the allegation that this was not the complainant’s first sexual encounter.

12. PW7 was not declared a hostile witness by the prosecution, hence her testimony remains on record that the complainant was not left alone with the appellant in the house when she left for the shop. Neither is her testimony challenged that she is the one who was tutoring the complainant and not the appellant.

13. Regarding the appellant’s statement of defence the first thing to note is that an accused person is presumed innocent until proven guilty. The moment he pleads not guilty the prosecution is placed at that place where everything about the charge is in issue and the accused person does not have to say anything.

14. No investigations were conducted in this case. Merely visiting the scene is not enough. Sexual offences are serious offences, and because of their nature and the manner in which they are committed they deserve proper investigations where each available piece of evidence is collected and examined. These offences where the perpetrator is exercising his/her power, physical, psychological, authoritative, relational, over the other person, and destroying not just the physical, but the dignity/ ***“utu-ness”*** of the victim. To my mind it also demonstrates the absence of ***“utu-ness”*** in the perpetrator, whose sentence must not only punish the deed but seek to restore this quality . S. 33, and 36 of the Sexual Offences Act gives the investigator and the prosecution the opportunity to dig deeper so as to ascertain not just the ingredients of the offence but the circumstances; which in the long run, determine the perpetrator and the sentence.

15. In this case, it is my considered view that the prosecution failed to prove its case beyond a reasonable doubt

16. In the upshot, I adopt the words of the Court of Appeal in **Paul Kanja Gitari v Republic**

> *Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere*.

17. The appeal is allowed. The conviction is quashed. The sentence is set aside. The appellant is to be set at liberty unless otherwise legally held.

Delivered, Dated and Signed at Nakuru this 12th day of June, 2020.

Mumbua T. Matheka

Judge

In the presence of: - VIA ZOOM

Edna Court Assistant

For state Ms. Wamboi

N/A for appellant

Appellant present