REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 16 OF 2019

NICHOLAS KIPNGETICH MUTAI.........................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no.198 of 2015 delivered on the 6th March 2019 Hon. J. Nthuku, SRM]

JUDGMENT

Introduction

[1] The appellant was on 6th March 2019 convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act. The particulars of the charge were as follows:

> ***"CHARGE: DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006***
>
> ***PARTICULARS OF OFFENCE: NICHOLAS KIPNGETICH MUTAI:*** *On the 8th day of March 2015 in Koibatek Sub County within Baringo County committed an act which caused the penetration of his penis into the vagina of [NJR] a child aged 10 years."*

[2] The appellant faced an alternative as follows:

> ***ALTERNATIVE CHARGE***
>
> *INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006*
>
> *PARTICULARS: NICHOLAS KIPNGETICH MUTAI: On the 8th day of March 2015 in Koibatek Sub County within Baringo County committed and act which caused his penis to come into contact with the vagina of [NJR] a child aged 10 years.*

[3] The Prosecution called four witnesses and the appellant when placed on his defence gave sworn testimony.

Judgment of the trial court

[4] The trial court upon consideration of the issues before it and the evidence presented by the parties found the appellant guilty and convicted him as follows:

> *8. "The issues for this determination are:*
>
> *1) Has the age of the complainant been proved*
>
> *2) Has penetration been proved*
>
> *3) If yes, has the identity of the defiler been established.*
>
> *9. On the issue of age, the child said she doesn't know her date of birth. Her mother said she is 11 years old. To prove her age, the Investigating Officer produced his birth immunization card showing date of birth as 10/3/2005 as at the date of the alleged offence*

he was aged 10 years and her age has therefore been proved.

10. On the issue of penetration, Pw 4 said that upon examination, the child was found to have hyperemic anal region and sperms were seen in lab tests, she had pain around the anus and her hymen was torn with labias bruised. The child said a penis was inserted in her anus as well as the vagina. What would make a 10 year old girl child have hyperemic anal orifice and spermatozoa on examination? This coupled with the child's evidence lead to only one logical conclusion, a penis was inserted in her anus and also her vagina hence penetration has been proved.

11. On the issue, i.e. identity of the defilers, the child said it's the accused person herein who defiled her. She said that she had seen the accused person in their kitchen moments before the incident. Her mother said she served the accused person ugali and Sukuma wiki and left him in the kitchen together with the child only to come and find both missing a few minutes later. The accused person raises issues of being framed by one Kipchumba. If Kipchumba wanted to frame the accused person why would he use the complainant and her mother to do so? The child's mother says she is the one who alerted K that her child had been defiled so it's not true Kipchumba authored the defilement story to frame the accused. Let's look at the demeanor of the child's mother, she welcomed the accused person and served him with food as happens a lot in a village set up. This is not the behaviour of one who has grudges against another person. The accused never challenged her on this issue during cross examination so the issue of being framed has no merit at all. These two prosecution witnesses said they saw the accused well and I have no doubt they were able to identify him although they never knew him before that day, they had seen him in the well-lit kitchen hence there is no possibility of mistaken identity. The child stood firm even upon the lengthy cross examination by Mr. Tengekyon counsel for the accused person and she struck me as a person telling the truth. I am satisfied that the child was defiled by no other person but the accused person herein, I find that the charges of defilement have been proved against the accused person beyond reasonable doubt and I convict him of defilement contrary to section 2(1) as read with 8(2) of the Sexual Offences Act. The conviction is under the provisions of section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.

Right of appeal 14 days.

***DATED** at **Eldama Ravine** this 5th day of March, 2019*

NTHUKU J.N

***SRM**"*

[5] The Prosecutor told the trial court that he had no previous records and the appellant is recorded to have said that he had nothing to say upon mitigation, and the trial court then sentenced the appellant to imprisonment for life and it is from this conviction and sentence that the appellant now appeals.

Appeal

[6] The appellant appealed the decision of the trial court upon amended grounds set out in the Amended Petition dated 24th August 2020 as follows:

"***AMENDED PETITION***

***NICHOLAS KIPNGETICH MUTAI** being aggrieved by the conviction and sentence of the Hon. Judicaster Nthuku – Senior Resident Magistrate hereby appeals on the grounds:*

1. THAT the Learned Magistrate erred in law and fact in failing to comply with section 200 of the Criminal Procedure Code, Cap. 75.

*2. THAT the Learned Magistrate erred in law and fact in conducting a second **voire-dire** examination of the complainant while the first examination had already concluded that the minor did not understand them meaning of taking an oath.*

3. THAT the Learned Magistrate erred in law and fact in failing to find that the offence of defilement as charged was not proved beyond reasonable doubt.

*4. THAT the Learned Magistrate erred in law and fact in failing to find that the failure to call vital witnesses by the prosecution entitled the court to draw an adverse presumption against it based on the rule in **Bukenya v Uganda**, (1972) EA, 544.*

*5. THAT the Learned Magistrate erred in law and fact in proceeding to review the order for the attendance of witnesses earlier ordered to be recalled thus prejudicing the rights of the appellant to cross examine witnesses and also in failing to consider that section 146 of the **Evidence Act,** Cap. 80 did not confer jurisdiction to review an order recalling witnesses once it was made.*

*6. THAT the Learned Magistrate erred in law and fact in failing to comply with the proviso to section 124 of the **Evidence Act**, Cap. 80 by failing to record reasons for believing the complainant was a truthful witness.*

***REASONS WHEREOF** the appellant prays that the appeal be allowed, the conviction and sentence be set aside and be set at liberty unless so lawfully held.*

DATED and AMENDED at ELDORET this 24th day of August, 2020."

Submissions

[7] For the hearing of the appeal, the appellant's counsel Mr. Mogambi and Ass. DPP, Mr. Mongare relied on respective written submissions filed in court. For the appellant submissions drawn by Mr. Tobias N. Mogambi and dated the 27th August 2020, were filed:

APPELLANT'S SUBMISSIONS ON THE APPEAL

Your Lordship

*1. **Introduction***

The appellant NICHOLAS KIPNGETICH MUTAI lodged an amended petition of appeal challenging his conviction and sentence for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act, no. 3 of 2006. The appellant had been charged vide Eldama Ravine Principal Magistrate Court in Criminal Case no. 198 of 2015 the particulars being that on the 8th March, 2015 in Koibatek Sub County in Baringo County he caused the penetration of his penis into the vagina of NJ a child aged 10 years. He also faced an alternative count of committing an indecent act with a child by touching her vagina with his penis. The appellant was convicted on the principal count and was sentenced to serve a term imprisonment for life. The appellant has challenged the conviction and sentence based on the amended petition with 6 grounds. He wishes to submit on the same as hereunder.

*2. **Compliance with section 200 of the Criminal Procedure Code, Cap. 75 – ground 1.***

The trial of the appellant commenced on the 17th May, 2016 before the Hon. R. Yator – Senior Resident Magistrate. Before the Learned magistrate witnesses testified being the victim Nelly Jepkemboi, the mother GE, ST the head Teacher of [Particulars Withheld] Primary School and Police Sergeant Sarah Situma the Investigating Officer. The trial Magistrate ceased to exercise jurisdiction over the matter and on the 8th November, 2017 Hon. J. Nthuku Senior Resident Magistrate took over the matter. The record of the proceedings indicates at pages 41 – 42 as follows:

> ***"Directions under section 200 (3) CPC taken and accused person responds;***
>
> ***Accused: I want case to proceed from where it had reached.***
>
> ***Court: Hearing to proceed from where it had reached.***
>
> ***Prosecutor: I pray that the order for recall be set aside so that we call our remaining witnesses i.e the doctor Gladys Koech and the Investigating Officer is not in court and she never communicated."***

The provisions of section 200 (3) of the Criminal Procedure Code, Cap. 75 provide;

> ***"Where a succeeding magistrate commences the hearing of proceeding and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

No record exists that the succeeding Magistrate informed the accused of the right. The court also failed in its duty to sparingly consider the invocation of considering the length of the testimonies of the witnesses having been brief and their availability ought to have ordered the matter to commence de – novo. Also the offence before the court required a keen examination of the demeanor of the victim and the other witnesses the court failed to consider the said matters thus erred in law and fact. We do pray the court to be guided by the authority in Ndegwa v Republic, (1985) KLR 534 in which Justices Madan, Kneller and Nyarangi; JJ.A as they then were held;

> ***"Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not , or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.***
>
> ***Section 200 is not to be invoked where, as seemingly in the instant case, such a half-heard trial is a short one, it could be conveniently started de novo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.***
>
> ***No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.***

> ***It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanor of all the witnesses in the case. A fatal vacuum in this case, in our opinion.***
>
> ***The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation.***

For the reasons we have stated, in our view the trial was unsatisfactory."

3. __The conducting of a second voire – dire examination__

On the 17th May, 2016 before the victim commenced to testify the initial trial Magistrate conducted in ***voire – dire*** *examination as contained at page 14 of the typed proceedings. After concluding the same she made a ruling.*

"I do note the age of the minor and that she does not understand meaning of oath taking hence shall give unsworn evidence."

On the 10th July, 2018 upon the victim being recalled to testify the succeeding Magistrate conducted a ***voire – dire*** *examination once again and page 77 of the proceedings concluded;*

"COURT:

Child is intelligent and she understands importance of telling the truth and meaning of oath."

We do submit that the trial court in conducting the subsequent ***voire – dire*** *examination did error as the initial conclusion reached was that the victim was not competent to testify on oath.*

4. __Proof of the offence beyond reasonable doubt, review of the order on recall of witnesses and compliance with section 124 of the Evidence Act, Cap. 80 – grounds 3, 5 and 6 of the appeal.__

We do submit that the court erred in failing to find that the offence of defilement was not proved beyond reasonable doubt. The identification of the perpetrator was a crucial element to be proved. The alleged offence is indicated as having taken place at 8 pm at night. The evidence shows it was dark. PW1 and PW2 indicated that they never knew the appellant prior to the incident. The two witnesses indicated that they relied on the light from the firewood in the kitchen to identify him. The relevant extracts of the evidence are at page 15 of the proceedings where PW1 stated;

> ***"I could not see him well at the shamba, but in the kitchen well as the fire was well lit (firewood)…."***

PW2 stated at page 18 as follow;

> ***"The kitchen I left accused with the child was lit with firewood which was enough reflection to see someone."***

PW3 at page 30 of the proceeding stated;

> ***"The accused first got hold of her behind the kitchen and there had been light from the lamp in the kitchen hence could see him/identify."***

We do submit that the exact source of lighting, its intensity size of the room available of lighting at the locus in quo being the shamba were not established. The evidence of PW3 indicating there was a lamp runs contrary to PW1 and PW2 on stating that they relief on light from the firewood. The size of the kitchen was not given to enable one to decipher the required intensity. In the shamba where the crime took place it is confirmed as dark. The duration of time that assailant remained with PW1 and PW2 was not addressed in the evidence and the judgment of the trial court. We do invite the court to be guided by the authority in ***__Wamunge v Republic__****, (1980) KLR 424 in which it was held;*

> ***"It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction"***

We do also rely in the authority in Maitanyi v Republic, (1986) KLR 198, in which the Court of Appeal in, holding that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification held;

> ***"The strange fact is that many witnesses do not properly identify another person even in daylight…It is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all***

> ***important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into…"***

*The court also erred in law and fact in reviewing the order on attendance of witnesses for further cross-examination by the appellant which it had made after a ruling by the erstwhile trial magistrate at page 39 of the proceedings. The court based on the law had no jurisdiction to set aside an order recalling witnesses. The best it could do was to make a finding that the prosecution had failed to avail the witness for cross-examination. We do invite the court to consider the scope of section 146 (4) of the **Evidence Act**, Cap. 80 which provides;*

> ***"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."***

The court also erred in failing to record the reasons for believing the minor complainant as a truthful witness. Indeed, in this matter the complainant fell way below the test and considerations of being truthful. Her reports to the police is at great variance with that given in her testimony. She informed the Investigating Officer the accused left the house after eating and they did not know where he went to. He however emerged while she had gone for a short call behind the kitchen. However, in her testimony in chief she informed the court that the appellant came to the kitchen and pulled her away. It is clear that the victim gave two different versions of the events. The relevant extracts of the evidence appear at page 14 as follows;

> *"On unknown date we were from milk to boil at my grandmother's place with kids of K who was a neighbour. Kipngetich came to the kitchen (accused pointed out) and K called the kids to go home as tomorrow was school and I remained with Kipngetich who then closed my mouth and pulled me away."*

The evidence of PW3 on what the victim told her at page 28 is as follows;

> ***"I am attached to Kangundo Police Station formerly Eldama Ravine Station. On 9th March, 2015 at 1.30 am while asleep I received a phone call from OCS C.I Victoria Mutuku telling me there was a suspect at AP Camp Esageri and together with P.C Mwangangi in station Landcruiser driven by P.C Mwita left for the AP post and on arrival found the suspect in the office and there was a girl who is complainant herein together with the mother called Grace and he had been beaten by a mob and on inquiry I was informed he had defiled the 10 year old girl and I took him to the station and I took complainant aside and interrogated and she informed me that on 8th March, 2015 while with the mother in the kitchen preparing supper and accused got to the kitchen and after being served with food and ate the accused then first left and they did not know where he went to and the <u>rest family members left the kitchen for main house. The complainant wanted to go for short call and went behind the kitchen when she was attacked by the accused herein</u> and closed her mouth and carried her to their shamba a few steps from the kitchen…"***

*We do invite the court to the guided by the authority in **<u>Tekerali s/o Korongozi & 4 Others v Republic</u>**, (1952) 19 EACA 259 in which it was observed;*

> *"**Their importance [of the first report] can scarely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [come] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others**."*

Indeed the witness proved unbelievable and no basis for conviction could arise from her evidence. We do invite the court to be guided by the authority in Ndungu Kimani v Republic, [1979] KLR 282, where the court of Appeal aptly observed:

> ***"The witness in a criminal case upon whose evidence 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 unreliable inordinate witness which makes it unsafe to accept the evidence."***

*The conduct of the victim and the mother also went below being truthful when they alleged that the victim was denied admission to [Particulars Withheld] Primary over the sexual offence case before the court as she would have been a bad example to the other children. The Headteacher of the school in his evidence stated that she disappeared from the school. Reference can be made to page 20 of the proceedings. It was thus a clear breach of section 124 of the **Evidence Act**, Cap. 80 and the proviso thereto being of utmost relevance. We do invite the court to be guided by the authority in **<u>Paul Ndogo Mwangi v Republic</u>**, [2016] eKLR in which Justice Mativo held;*

> *"Regarding the issue of corroboration, counsel for the appellant argued that the provisions of Section 124 of the Evidence Act, particularly the proviso thereto was not complied with by the trial magistrate. The said section provides as follow:*
>
> > ***"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."

The above proviso is clear. The evidence of victim if she is the only witness is admissible, but the court is required to record reasons in the judgment that it is satisfied that the witness is telling the truth. This was a grave omission in the present case because the medical evidence, which is the only collaborating evidence clearly indicated that the complainant was not a virgin.

5. ***The failure to call all witnesses – ground 4.***

We do submit that the evidence of the prosecution fell short of the standard required to establish the allegations of defilement. The court ought to have drawn an adverse presumption against the prosecution for failure to call K whom was alleged to have assaulted the appellant. He was also the best person who may have confirmed if the appellant was at the house of the best person who may have confirmed if the appellant was at the house of the victim. We do invite the court to be guided by the authority in Bukenya v Uganda, (1972) E.A. 549 in which it was held;

> ***"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were others witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

6. ***Conclusion.***

We do pray that the appeal be allowed the conviction and sentence for the offence of defilement be set aside and substituted thereof an acquittal of the appellant.

Most obliged.

Dated at Eldoret this 27th day of August, 2020."

[8] For the DPP, the following submissions drawn by Ms. Esther Macharia, and dated 9th July 2020 but filed on 26th August 2020 were relied by Mr. Mong'are who did not wish to add anything in reply to the appellant's submissions which were filed after the written submissions for the Republic:

"REPUBLIC'S WRITTEN SUMBISSIONS

This appeal is opposed on conviction but Not opposed on sentence.

The appellant herein was convicted of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. He was sentenced to life imprisonment on 6th of March 2019.

PW1 testified that on the material day the accused person went to her house where she used to stay with her mother and grandmother. He then pulled her to her grandmothers shamba where he defiled her after putting a piece of cloth in her mouth. He inserted his penis into her anus and then in her vagina. She was able to identify the appellant as there was light from the fire in the kitchen. She informed her mother, PW2 what had happened. Her mother informed one K who was their neighbour and he assisted in the arrest of the appellant. The complainant was taken to Esageri dispensary and later to Eldama Ravine District Hospital the following day.

PW2 testified that she is the mother of the complainant. She did not know the appellant but saw him in the kitchen on the material day and served him with food together with her daughter and other children. The complainant informed her that it was the man who was in the kitchen who had defiled her. She informed her neighbour K who went looking for the appellant.

PW2 produced a clinic card which showed that the complainant was born on 10th March 2005. She was therefore 10 years at the time of the offence.

PW5, the Clinical Officer stated that upon examining the complainant, she had bruises in the vagina and also at the anal orifice. She had pain while urinating and passing urine. This evidence corroborates the evidence of the complainant that she was defiled on the anus and the vagina.

The appellant herein was positively identified by PW1 and PW2 as he was in their kitchen moments before the incident took place. Although they had not known him before, they were able to identify him from the fire in the kitchen. The complainant was able to positively identify the appellant when she told her mother that it was the person in the kitchen who defiled her. PW2 also served the appellant with food on the material day and was able to positively identify him.

The evidence against the appellant is overwhelming and I urge this court to dismiss the appeal on conviction. However, the court may review the life imprisonment in the line with the Muruatetu case."

Issues for determination

[9] The Issues for Determination are as follows:

(a) Whether there was valid compliance with section 200 of the Criminal Procedure Code, Cap. 75.

(b) Whether there was valid review of the order on recall of witnesses and compliance with section 124 of the Evidence Act, Cap. 80.

(c) Whether the conduct of a second voire – dire examination was valid.

(d) Whether there was proof of the offence beyond reasonable doubt,

(e) The failure to call all witnesses was fatal to the prosecution case.

DETERMINATION

Preliminary

Breach of section 200 of the Criminal Procedure Code

[10] Section 200 of the CPC is in terms as follows:

"200. Conviction on evidence partly recorded by one magistrate and partly by another

(1) *Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—*

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

[Act No. 13 of 1982, First Sch., Act No. 11 of 1983, Sch.]"

[11] The relevant proceedings of the days indicate as follows:

"08.11.2017

Coram: Before: Hon. J.Nthuku - SRM

PC: Miss Mburu

CC: Malakwen

Accused: Present

Court Prosecutor

Matter is for hearing, the defence had made an application for recall of PW1, PW2 and PW3. The investigating officer tells me he has tried looking for the two PW1 and PW2 but ***he established that they relocated to an unknown place and there's no forwarding address****. That is the complainant and the mother.*

Directions under Section 200(3) CPC taken and accused person responds;

Accused: ***I want the case to proceed from where it had reached.***

COURT*:* *Hearing to proceed from where it had reached."*

[12] In terms of subsection 4 of the section 200 of the Criminal Procedure Code, this court must consider whether in convicting the appellant on the evidence taken by the previous trial court, the appellant "*was materially prejudiced thereby, set aside the conviction and may order a new trial.*".

Recall of witnesses

[13] The order for recall of witnesses PW1, PW2 and PW3 was made by the first trial court (Hon. R. Yator, SRM) on 3/8/2017 upon application by Counsel who had just come on record for the accused on 19/07/2017 and sought *"recall of all the prosecution witnesses who have testified for purposes of cross examination and application is made under Section 146(4) Evidence Act as when matter came for hearing the accused was unrepresented and he conducted the case without the benefit of legal counsel"*, as follows:

"***Ruling:***

Having considered submissions of the defence counsel and the nature of offence herein where if accused is found guilty might be sentenced to life imprisonment. I do hereby grant the recall of the witnesses for factor cross examination and the prosecution shall have right to re-examine.

Hon. R. Yator – SRM

03.08.2017"

[14] The subsequent trial court (Hon. J. Nthuku, SRM) on 16.07.2018 set aside its earlier orders for the recall of PW2 when it became clear that she could be traced as follows:

"*Ruling:*

From the information given by the investigating officer on oath and also the Chief Kiplombe I am convinced that its impossible to avail Grace Akeno for purposes of further cross examination by the defence. That being the case, I hereby review/set aside the earlier orders directing that the said Grace Akeno be availed for further cross examination by the defence."

[15] Section 146 of the Evidence Act, which is as shown on the marginal note on the ***"Order and direction of examinations"*** permits recall of witnesses for further cross-examination, and it must be considered subject to the availability of the particular witnesses. The applicable subsection (4) provides as follows:

"(4) The court may in all cases ***permit a witness to be recalled either for further examination-in-chief or for further cross-examination,*** and if it does so, ***the parties have the right of further cross-examination and re-examination respectively.***"

[16] The provision is one for procedure to be followed in the examination on recall of witness rather than substantive law of evidence as to the weight or presumptions to be accorded such evidence. If it is shown on oath, as here, or otherwise to the satisfaction of the court that the witness is not available the order for recall may be set aside. All that happens is that the court in considering the evidence will caution itself that further cross-examination of the witness was not possible because the witness was not traced for purposes of recall.

Voire dire examinations

[17] The first time the child victim testified on 17.05.2016, the court found her qualified to give an unsworn statement in ***voire dire*** examination as follows:

"*17.05.2016*

Coram: *Before: Hon. R. Yator - SRM*

PC: *Macharia*

CC: *Lilian*

Accused: *Absent*

Court Prosecutor

The same was for mention we pray that the matter be heard today as the minor and mother is in court.

Hon. R. Yator – SRM

Accused: *I am ready to proceed.*

Hon. R. Yator – SRM

Examination of Female minor in Voire Dire

Hon. R. Yator – SRM

What is your name?

NC.

How old are you?

I am 11 years old.

Do you go to school?

No. my mother took me to [Particulars Withheld] School but the headmaster refused to admit me saying I follow up with my case.

What class were you in?

I was in class two going to three.

Where do you come from?

Esageri.

Whom do you live with at home?

I stay with my mother.

Do you go to church?

Yes. I go to Gospel Assembly in [Particulars Withheld].

What are you taught in church?

We are taught not to steal and to report our parents.

Do you know meaning of oath taking?

No.

Hon. R. Yator – SRM

COURT:

I do note the age of the minor and that she does not understand meaning of oath taking hence shall give unsworn evidence.

Hon. R. Yator – SRM"

[18] On the second ***voire dire*** examination taken on 16/07.2018, the trial court, differently constituted, found that the child understood the nature of oath and directed that she gives sworn evidence as follows:

PW1: Female Child – Voire Dire

Question: Hallo

Answer: ***Hallo***

Question: What is your name?

Answer: ***NJ***

Question: How old are you?

Answer: ***13 years old.***

Question: Do you go to church?

Answer: ***Yes, Gospel Assembly***.

Question: Are lies good?

Answer: ***No. liars will go to burn in hell***.

Question: what is to swear?

Answer: ***I know.***

COURT:

Child is intelligent and she understands importance of telling the truth and meaning of oath."

[19] There was a time difference of over two (2) years between the first and second ***voire dire*** examinations, and it cannot be surprising that the second court found the child then with increased age of 13 years to be aware of the nature of oath. Indeed, the case-law has set tender years for which sections 19 of the Oaths and Statutory Act and 124 of the Evidence Act apply at 14 years, and child herein was at the second appearance before court only a year thereof. See ***(Kibageny A rap Kolil v R*** (1959) EA 92 and ***The Kenya Judiciary Criminal Procedure Benchbook 2018*** at paragraphs 90-91 as follows:

> "*90. Section 19 of the Oaths and Statutory Declaration Act sets out the procedure for taking evidence from a 'child of tender years'. Although the Act does not define the term* ***'child of tender years'****, the Children Act section 2 defines this as a child under the age of ten. The definition in the Children's Act, however, has been held not to apply to section 19 of the Oaths and Statutory Declaration Act* ***(Maripett Loonkomok v R*** *Court of Appeal at Mombasa Criminal Appeal No. 68 of2015;* ***Patrick Kathurima v R*** *Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014;* ***Samuel Warue Karimi v R*** *Court of Appeal at Nyeri Criminal Appeal No. 16 of2014).* ***<u>The courts have held that a child of tender years for purposes of this Act is one under the age of fourteen</u> (Kibageny A rap Kolil v R*** *(1959) EA 92;* ***Patrick Kathurima v R*** *Court of Appeal at Nyeri Criminal Appeal No. 131 of2014). 91.* ***<u>Where a child under the age of fourteen is called as a witness, the court must first conduct a voir dire examination</u>*** *before allowing the child to testify in order to:*
>
> > ***(i) <u>Determine whether the child understands the nature of an oath, in which case evidence may be received on oath.</u>***
> >
> > *(ii) Ascertain whether, if the child does not understand the nature of an oath, the child possesses sufficient intelligence and understands the duty to tell the truth. If in the affirmative, the evidence may be received though not given on oath (s. 19(1), Oaths & Statutory Declarations Act;* ***Maripett Loonkomok v R*** *Court of Appeal at Mombasa Criminal Appeal No. 68 of 20 15)."*

[20] The impact in law of ***sworn*** and ***unsworn*** statements by a child under section 124 of the Evidence Act and section 19 of the Oaths and Statutory Declarations Act is discussed in the Kenya Judiciary ***<u>Criminal Procedure Benchbook 2018</u>*** at paragraphs 94-96 as follows:

> "*94.* ***<u>No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).</u>***
>
> *95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, Evidence Act). The reasons for the court's satisfaction must be recorded in the proceedings (lsaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of2011).*
>
> ***<u>96. The evidence of a child, sworn or unsworn, received under section 19 of the Oaths and Statutory Declarations Act is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK"</u>***

[21] From the proceedings, it is clear that the evidence of the child was subjected to cross-examination on both occasions when she gave unsworn and sworn evidence, respectively. However, there was prejudice of not looking for corroboration of the evidence of the child who gave ***sworn*** evidence in this case. The trial court's invocation of section 124 of the Evidence Act and finding that the child was ***truthful*** would cause prejudice to the appellant who is entitled to corroboration of evidence led against him by a child of tender age who gives an ***un*****sworn** testimony.

[22] The trial court should have carefully considered the **sworn** or **unsworn** evidence of the child witness, looking for necessary corroboration and acquitted if it did not find such corroboration of the evidence of the child of tender age.

Section 124 of the Evidence Act

[23] The trial court's key determination was that the child was telling the truth, without reference to section 124 of the Evidence Act. Section 124 of the Evidence Act is on the following terms:

> ***"124. Corroboration required in criminal cases***
>
> *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*
>
> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*
>
> *[Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]"*

[24] As noted in The Kenya Judiciary Criminal Procedure Bench book, ibid at paragraph 95 the exception to requirement for corroboration is circumscribed as follows:

> "*95. However,* ***in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, Evidence Act). The reasons for the court's satisfaction must be recorded in the proceedings (****lsaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).*"

[25] The purpose for the record of reasons is to enable an appellate or a court exercising supervisory jurisdiction to satisfy itself that the power to convict not withstanding lack of corroboration was in the particular case properly exercised and in accordance with the provision of the law and that the resultant conviction was safe.

The evidence before the trial court

[26] The Prosecution witnesses testified as follows. **PW1,** the child complainant testified in her initial appearance as follows:

> ***"PW1 – Nelly Kipkemoi Female Minor Unsworn in Kiswahili***
>
> *I come from Esageri where I live with mother Grace Ekeno and my grandmother. I used to school at Mandina and I was going to class three I am eleven years old. I do not know date of birth.*
>
> ***On unknown date we were for milk to boil at my grandmother's place with kids of K who was a neighbour. Kipngetich came to the kitchen (accused pointed out) and K called the kids to go home as tomorrow was school and I remained with Kipngetich who then closed my mouth and pulled me away. My mother had taken food to my grandmother and she had also seen Kipngetich around.***
>
> ***He pulled me away to grandmother's shamba and it was around 8:00pm and he removed my pant and was still covering my mouth with a piece of cloth which he had in his pockets he then defiled me after laying me down on the ground*** *and he removed his penis and he inserted first into my anus then the vagina. He removed my pant only and he removed his trouser.* ***I could not see him well at the shamba, but in the kitchen well as the fire was well lit (firewood) he left me behind and I remained with my pant and untied cloth on mouth and left pant in the shamba.***
>
> *At grandmothers place were two houses and a separate kitchen and when I returned home and I went to the separate house as my mother and grandmother were in another house. My mother then came and found me crying and* ***I told her it was the person who was in the kitchen who had defiled me. My mother never used to know him nor myself or I did not know what he wanted and he did come alone. It was that day that he had gone to grandmothers place and he never used to live there.***
>
> *My mother then went to inform K who went to get accused from his home and brought …….grandmothers place and he tried to escape while going to Chief's place but he was arrested again and I was taken to hospital that same night at Esageri Health Centre and following morning I was taken to Eldama Ravine District Hospital by my mother and K and I was treated. The accused is the one in chambers (pointed out) and I saw him well that day. I had never met him before but I saw him in court after the offence.*

Hon. R. Yator – SRM

<u>Cross examination by accused</u>

I was at my grandmother's place at [Particulars Withheld] as she called us to go stay there and you came to pull me and I saw you as it was at night and was heading to 8:00pm and you came to grandmother and it's not your home as your home is near the school. My mother was selling alcohol to K and she does not brew nor drink alcohol. I informed my mother you had defiled me as she was with grandmother.

Hon. R. Yator – SRM

<u>Re-examination</u>

Kipngetich lies at his home with the mother and not at our grandmother's place. After he defiled me I told my mother. When he defiled me K was at his house which is neighbouring. I am telling the truth to court.

Hon. R. Yator – SRM"

[27] Upon recall for further cross-examination at the request of counsel for the accused, the complainant PW1 said:

<u>PW1: Female Child Duly Sworn States in Kiswahili</u>

I am NJ. I had testified before in this case.

<u>Cross examination by Tengekyon:</u>

I stay in [Particulars Withheld]. I know Nicholas Kipngetich.

On 08.03.2015 I was in the kitchen with mum and other four children. They are younger than me.

<u>My mum was in the main house when the incident occurred. She wasn't chased by anyone. She left the accused person in the kitchen.</u>

<u>He defiled me in the shamba. I was going to urinate behind the kitchen when I found the accused hiding there and he grabbed me, covered my mouth and took me to the shamba. I informed my mother about it at night. I went to a house next after the incident but I didn't find anyone. My mother came but I can't recall the time she came so I told her</u> *and she took me to the Chief's office then I was taken to the hospital. The Chief stays at the camp. So we reported to the Police who called the Chief. We didn't find the accused at the Chief camp. Mom went to look for him. We came with neighbours and the accused because he had already been arrested my mum and neighbours when we reported.*

<u>Mum made noise so neighbours came to our house. He was arrested and I said he is the one. Its mum and neighbours who brought him.</u>

I was taken to dispensary at Esageri and examined but I wasn't told the results. I can't recall the number of AP officers who were at the camp. Many neighbours came to our home they were adults.

I was taken to another hospital the following day in Eldama Ravine.

I found Kipngetich at the camp. I went there with my mom and neighbours.

I can't recall if a lady officer spoke to me at the Police Station. I can't recall because it's been a long time now. I can't recall Kipchumba. I didn't see the doctor at Esageri record anything. She was a lady/female.

The second house had no one. Mom had gone looking for me so she found me in that house which had no one. I only informed my mom.

<u>Re-examination by Prosecution</u>

Kipngetich came to the kitchen and fell down. Mom saw him but she was busy cooking so she left to the main house leaving him in the kitchen.

At the AP camp, we found AP officers. We are the ones who together with neighbours took Kipngetoich to the AP camp. When mum screamed neighbours came."

[28] PW2, the complainant's mother testified on **17.05.2016** as follows:

*“**PW2 Grace Ekeno Female Adult Christian Sworn and States in Kiswahili***

I come from Esageri and I am a saloonist the complainant is my daughter turning 11 years this year and was schooling at [Particulars Withheld] Primary School till last year till April 2015 but when I returned her to the school the head teacher one K refused to readmit her saying she will teach other children bad manners and she has not been in school since last year April 2015. I was back on Monday last week 9th May, 2016 but he refused to readmit her again and she has not been school close to a year and says it’s because child was defiled.

On 8th March, 2015 I was in grandmother’s one TC together with the children and Kipngetich in the kitchen. The children were K and other children of IK and it was around 8:00pm and accused then came and knocked the door and I had prepared food which I served the children and accused and he sat in the kitchen and milk was boiling. I left them eating and asked PW1 to look after the milk and I went to serve grandmother in the main house and on returning to the kitchen I did not find the child in the kitchen nor the accused and I called out for “Memo” who is accused and children of K told me she had gone behind the kitchen with accused and that he was carrying her and I called I to look for her and he returned with the child whom he said was under the tree.

The child said accused took her away while covering her mouth and defiled her. *The child’s clothes were dirty and looked sort of blood stained and skirt and the pant and* ***she said she could identify the person.***

Idris then went to arrest him at their home and I took child up to AP Camp when accused had also been brought and he said he had confirmed he defiled the child. Police came and re-arrested him and I took child to hospital in Esageri that night and doctor referred us to Eldama Ravine District Hospital where I brought the child and was treated.

The kitchen I left accused with the child was lit with firewood which was enough reflection to see someone. I never used to know accused before that day and I just served him food without suspicion and grandmother said she knew him as a neighbour and Idris also said he knew but I looked at him well as I served food. *At Eldama Ravine District Hospital I was given medicine and she was taken to the lab and I have the lab request form*

-MFI 1, treatment chit from Eldama Ravine District Hospital

-MFI 2

-PRC form MFI -3

- have the child clinic card showing date of birth as 10th March, 2005 MFI-4.

I never used to know accused before offence herein.

Hon. R. Yator – SRM

Cross examination by accused

You were in the kitchen together with my child and you found me serving my children and there was no alcohol brewed and it was 8:00pm and I also served you.

I did not come to your house to arrest you and no one accused you of stealing money from sale of alcohol and it was Idris who came to arrest you. *I did not come to arrest you and I did not know your home. I had prepared ugali and sukuma which I served you with my children and I had gone to serve grandmother when you took her away. You were beaten by I so to confess defiling the child and we escorted you to the Police.*

Hon. R. Yator – SRM

Re-examination

When he came to the kitchen I was serving food and not selling alcohol and it’s Idris whom came to arrest him at his home as I never used to know. *I did beat him out of anger and* ***I did not tell my crowd to beat him at his home as I do not know the place he was arrested due to defiling the child and not due to stealing money of alcohol.***

Hon. R. Yator – SRM”

[29] It is note-worthy that PW2, the child’s mother and other adult witnesses in the trial had failed to attend court despite being bonded and the court had to issue warrant of arrest and indeed as the record shows PW2 was brought to testify under a warrant of arrest as follows:

“16.05.2016

Coram: Before: Hon. R. Yator - SRM

PC: Macharia

CC: R

Accused: Absent

<u>Court Prosecutor</u>

The mother of the child has been brought under warrant of arrest.

Hon. R. Yator – SRM

<u>Grace Ekeno</u>

I did not attend nor bring the child as after the last hearing date I lost the bond with hearing date and my other child was unwell.

<u>COURT:</u>

Warrant of arrest lifted and mother to avail victim in court tomorrow 17th May, 2016.

Hon. R. Yator – SRM

16.05.2016"

[30] When an order for recall of the witnesses was made PW2 the child's mother could not be traced and the court had to review the order for recall so as to proceed with the trial to conclusion. As discussed above, caution was necessary when dealing with the evidence of the witness who was not availed on recall for further cross-examination.

[31] PW3, the Investigation Officer testified that –

"***<u>PW3 – No.60131 Sargent Sarah Situma Female Adult Christian Sworn and States in Kiswahili</u>***

I am attached Kangundo Police Station formerly Eldama Ravine Police Station. *On 9th March, 2015 at 1:30am while asleep I received phone call from OCS C.I Victoria Mutuku telling me there was a suspect at AP Camp Esageri and together with P.C Mwangangi in Station Landcruiser driven by P.C Mwita left for the AP post and on arrival found the suspect in the office and there was a girl who is complainant herein together with the mother called Grace and he had been beaten by a mob and* ***<u>on inquiry I was informed he had defiled the 10 year old girl</u>*** *and I took him to the station and* ***<u>I took complainant aside and interrogated and she informed me that on 8th March,2015 while with the mother in the kitchen preparing super and accused got to the kitchen and after being served with food and ate the accused then first left and they did not know where he went to and the rest family members left kitchen for main house. The complainant wanted to go for short call and went behind the kitchen when she was attacked by the accused herein and closed her mouth and carried her to the their shamba a few steps from the kitchen and as she was covered the mouth she could not scream and on arriving at the shamba, the accused removed a piece of cloth from his pockets to cover her mouth so as not to scream, fell her down and removed her inner clothes, then he removed his trouser and put complainant down facing up and lied on her and that he lifted her waist then defiled her after which he left her and she removed the piece of cloth from mouth and as it was dark she looked for her pant and did not get it and she went home without it and she found everyone was asleep she knocked the door and no one opened and as it was dark she decided to go sleep at adjacent room which was not locked and at around 1:00am she started coughing and the mother learnt she was in that room hence woke up to take her and on inquiry where she had been, she stated what had happened and that accused had promised to give her money but refused.</u>***

I then recorded the same and booked accused and advised the mother that in the morning she brings child for medication and the child health card and following morning she gave me the card of complainant and I confirmed she was ten years old having been born on the 10th March, 2005 as per the child's health card and mother is one GR and father is one KK – pexb.4.

I took child to hospital and on examination form to have injuries on private parts confirming to be injured and PRC form was filled and I was given after child also being examined in the lab and I then preferred charges against accused herein. I am the investigating officer herein. The child said she knew accused physically as he used to pass by and had sat in their kitchen for a while though she did not know him by names.

The accused first got hold of her behind the kitchen and there had been light from the lamp in the kitchen hence could see him/identify.

Accused had been served food at the kitchen of PW1 alongside other family members and I did not establish if they used to know each other before but the mother told me it was her first time he got to their kitchen and sat hence served him food. The suspect who had already been arrested is the accused herein pointed out and I never used to know him before.

Hon. R. Yator – SRM

<u>Cross examination by accused</u>

I am the investigating officer offence was on 8th March, 2015 and I came to arrest you on 9th March, 2016. You were eating at home of complainant with other family members. I found you at [Particulars Withheld] and had been beaten by members of Public and you had been taken by AP officers for treatment and child was also examined at Esageri Health Centre but referred to Eldama Ravine District Hospital.

Hon. R. Yator – SRM

<u>Re-examination</u>

Nil.

Hon. R. Yator – SRM"

[32] On recall for further cross-examination, PW3 [although recorded in proceedings as PW4] said:

"***<u>PW4 – Female Adult Duly Sworn (recalled) States in Kiswahili</u>***

<u>No.60131 Senior Sergent Sara Situma. I had testified in the case. From Kangundo Police Station. The investigating officer in this case.</u>

<u>Cross examination by Accused Person</u>

You were arrested by AP officers of [Particulars Withheld] and relatives of the child. I collected you from the AP camp at 2am. I found two AP officers. ***<u>You raped the child as she went to answer a urine call.</u>*** *I can't tell where you were at 8pm of that date. I personally examined physically at the child's genitals and it was reddened. She had no panty.*

<u>Court Prosecutor</u>*: No re-examination."*

[33] PW4 [although recorded as PW5] the examining clinical officer testified that –

"***<u>PW5 Female Adult Duly Sworn States in Kiswahili</u>***

I am Gladys Koech of Eldama Ravine District Hospital. I work as clinical officer my Reg.No.1997550046. I have a PRC form for one NJR born in 2004. I am the one who filled the PRC forms. On examination she gave history of having been sexually assaulted on 8th March, 2015 at 9:30pm. ***<u>She had bruises in vagina and anal orifice she had been taken to Esageri Medical Centre.</u>***

<u>She had painful defecation and dysuria (pain while urinating).</u>

<u>I examined her and found her hymen was bruised and bleeding and anus was bruised. The labia minora was hyperemic.</u> *I produce the PRC form as an exhibit. Exh3.*

I sent her to the laboratory and these are the results;

§ *She had proteins in urine meaning she had a renal problem,*

§ *High vaginal swab, no yeast cells but sperms were seen and few pus cells,*

§ *HIV test was –ve*

I produce the laboratory results as exhibit 1.

Treatment chit exhibit 2.

<u>I formed an opinion that the child had been defiled.</u>

<u>Cross examination by accused person</u>

I examined her on 9th March, 2015 and confirmed she had been defiled. <u>Its true she had been seen at Esageri hospital.</u>

<u>Court Prosecutor</u>*: No re-examination."*

[34] When put on his defence the appellant (DW1) testified as follows:

DW1: Male Adult Duly Sworn States in Kiswahili;

I am Nicholas Kipngetich Mutai. I stay in Kimomoi in Perkerra. I was a herd's boy. I recall the charges leveled against me and I deny the same. I recall on 08.03.2015 I got home at 4pm and KM had alcohol in his house. I then left and came back at 5:30pm. I went to my house and K came and called me. I went out to meet him. He slapped me and started beating me. He asked why I took his money. He said the person who was selling liquor for him said I am the one who took the money. That person was the complainant mother. I asked him to take me to her but he refused. I then slept. At 9pm people came and kicked my door open. I went out and found its K and five other men. He started beating me. I called his mother to intervene but he couldn't listen. I decided to go to the Chief. At the Chief's office I found two officers Vero and Koech. I told them what K had done to me. That's when Kipchumba and his team arrived. The officers asked him why he beat me and he said I had raped his child. He said he will go avail the child and said he did. The child was asked if its true but she went quiet. K told the child to say it's true so when she was asked the 2nd time she said it's true. We went to Esageri Health Centre and the doctor (Peninah) examined her and said she hadn't been defiled. K refused and said the doctor is lying so the doctor referred us to Eldama Ravine Hospital. We went to the Chief's office and a Police vehicle came but on seeing it they all ran away leaving me alone. I explained what had transpired and the officer told me to accompany them and I did on 9th at 6am I was booked in and at 1pm the child's mum and K came and said they had P3 form and I was pretending to go to the Chief. He said he is stage 4. I didn't commit the offence. All along K has been at home during the pendency of this case but he didn't come to testify.

Cross examination by Prosecution

I didn't abscond. I didn't know the date. My father didn't know where I was during that period. An innocent person doesn't abscond. I never reported assault to any Police Station. I don't know the child called N and she doesn't know me. I don't know about the defilement allegations. The doctor at Esageri said the child wasn't defiled. I didn't defile her.

Re-examination by Mr. Tengekyon

I reported at Chief's camp that K had beaten me. I didn't run away because I was guilty of defilement. If she was defiled; it wasn't by me. The child and the mother said they didn't know me before. I didn't defile her."

Evidence of Defilement

[35] In her evidence, the victim complainant PW1 said she had been attacked by her assailant who –

"***removed his penis and he inserted first into my anus then the vagina.*** *He removed my pant only and he removed his trouser. I could not see him well at the shamba, but in the kitchen well as the fire was well lit (firewood) he left me behind and I remained with my pant and untied cloth on mouth and left pant in the shamba.*"

[36] The clinical officer PW5 who examined the child PW1 formed an opinion of defilement from evidence that –

"***She had bruises in vagina and anal orifice she had been taken to Esageri Medical Centre. She had painful defecation and dysuria (pain while urinating). I examined her and found her hymen was bruised and bleeding and anus was bruised. The labia minora was hyperemic.***"

[37] This evidence may appear corroborative of the allegation of penetration into the complainant's anus and vagina by her assailant. The question that would remain whether the complainant's assailant was the accused who was charged with the offence and who is the appellant herein.

[38] However, the witness PW5 confirmed that the child had been seen at Esageri Health Centre as alleged by the accused in his defence, where according to the accused she had been found not to have been defiled. Curiously, there were no treatment notes indicating the prior examination at Esageri. The usual formal report Medical Examination Report P3 was never produced if any existed. The record testifys to this default as follows:

"*17.05.2017*

Coram: Before: Hon. R. Yator - SRM

PC: Miss Mburu

CC: Lilian

Accused: Present

Court Prosecutor

I am not ready as ***I note from file there is no P3 form*** *and investigating officer is off duty and I do pray for adjournment and* ***summons to the doctor who filled the PRC form i.e Gladys Koech and not Dr.Yator.***

Hon. R. Yator – SRM

Court: *Summons to issue.*

Further hearing 14.06.2017

Hon. R. Yator – SRM

17.05.2016"

[39] All that the clinical officer produced was a PRC (Post Rape Care) form. The court is entitled to take into account this gap on the principle of ***Bukenya & Others v. Uganda,*** supra, that an adverse presumption arises where the prosecution fails to produced evidence where the one adduced barely suffices.

Glaring contradictions in the evidence of the prosecution

[40] There were different versions of the sexual assault on the complainant and surrounding circumstances -

i. PW1 at cross-examination upon recall said, ***"He defiled me in the shamba. I was going to urinate behind the kitchen when I found the accused hiding there and he grabbed me, covered my mouth and took me to the shamba. I informed my mother about it at night."***

ii. PW1 in her initial examination in chief suggested the appellant picked her from the kitchen as follows:

> "*Kipngetich came to the kitchen (accused pointed out) and K called the kids to go home as tomorrow was school and* ***I remained with Kipngetich who then closed my mouth and pulled me away.***"

PW2 said that the "***children of K told me she had gone behind the kitchen with accused and that he was carrying her and I called Idris to look for her and he returned with the child whom he said was under the tree. The child said accused took her away while covering her mouth and defiled her.***".

iii. The Investigation Officer PW3 said that the complainant had described the ordeal as follows:

> "*I took complainant aside and interrogated and she informed me that on 8th March,2015 while with the mother in the kitchen preparing super and* ***accused got to the kitchen and after being served with food and ate the accused then first left and they did not know where he went to and the rest family members left kitchen for main house. The complainant wanted to go for short call and went behind the kitchen when she was attacked by the accused herein and closed her mouth and carried her to the their shamba a few steps from the kitchen*** *and as she was covered the mouth she could not scream and on arriving at the shamba, the accused removed a piece of cloth from his pockets to cover her mouth so as not to scream, fell her down and removed her inner clothes, then he removed his trouser and put complainant down facing up and lied on her and that he lifted her waist then defiled her after which he left her and she removed the piece of cloth from mouth…."*

iv. PW3 said that the assailant had promised the complainant to pay her money as follows:

"*on inquiry [by mother] where she had been, [complainant] stated what had happened and* ***that accused had promised to give her money but refused."***

[41] The consistent version supported by evidence of PW1 and PW3 is that the complainant had gone out of the kitchen to urinate and the accused who had earlier been in their kitchen but left and was then hiding behind the kitchen pounced on her and covering her mouth with a piece of cloth so that she could not scream as he defiled her. The assault happened according to the witnesses at 8.00pm when it was dark outside such that (according to Investigation Officer PW3) when the complainant sought to recover her pant which the accused had removed to enable him engage in the defilement "*as it was dark she looked for her pant and did not get it and she went home without it and she found everyone was asleep*".

[42] There were also discrepancies as to what happened after the complainant was allegedly defiled. The Investigation Officer PW3 said the complainant had gone back to the house as follows:

"*[A]s it was dark she looked for her pant and did not get it and* ***she went home without it and she found everyone was asleep she knocked the door and no one opened and as it was dark she decided to go sleep at adjacent room which was not locked and at around 1:00am she started coughing and the mother learnt she was in that room*** *hence woke up to take her and on inquiry where she had been, she stated what had happened*"

[43] The mother PW2 said the girl was recovered by I as follows:

> "*on returning to the kitchen I did not find the child in the kitchen nor the accused and I called out for "Memo" who is accused and children of K told me she had gone behind the kitchen with accused and that he was carrying her and* ***I called I to look for her and he returned with the child whom he said was under the tree.***"

[44] The complainant PW1 herself said she went home by herself as follows:

> "*he left me behind and I remained with my pant and untied cloth on mouth and left pant in the shamba. At grandmothers place were two houses and a separate kitchen and* ***when I returned home and I went to the separate house as my mother and grandmother were in another house. My mother then came and found me crying and I told her it was the person who was in the kitchen who had defiled me.*** *My mother never used to know him nor myself or I did not know what he wanted and he did come alone. It was that day that he had gone to grandmothers place and he never used to live there."*

[45] In addition, as regards the circumstance of assault, the complainant PW1 said that –

> "*On unknown date we were for milk to boil at my grandmother's place with kids of K who was a neighbour.* ***Kipngetich came to the kitchen (accused pointed out) and K called the kids to go home as tomorrow was school and I remained with Kipngetich who then closed my mouth and pulled me away.*** *My mother had taken food to my grandmother and she had also seen Kipngetich around.*"

[46] The mother PW2 on the other hand claimed to have been told by the same K's children as to what had transpired in her absence as follows:

> "*I went to serve grandmother in the main house and on returning to the kitchen I did not find the child in the kitchen nor the accused and I called out for "Memo" who is accused* ***and children of K told me she had gone behind the kitchen with accused and that he was carrying her***"

[47] The children could have been present to tell the mother what had happened if they had previously been taken by their father before the appellant assaulted the complainant. It is not possible to tell who between the complainant PW1 and her mother PW2 whose evidence contradicted was a witness of truth.

[48] These glaring and extensive discrepancies in the material evidence of the prosecution witnesses raise a doubt in the mind of the court whether the incident of defilement ever happened. Even if it did, there is a danger of embellishment apparent in the stories of the two key witnesses that make it unsafe to convict. While PW1 and PW3 were clear that the complainant did not find her pant after the incident, the mother PW2 said "*The child's clothes were dirty and looked sort of blood stained and skirt and* ***the pant*** *and she said she could identify the person.*". These garments were, however, not put in evidence.

[49] As regards the arrest of the appellant here minor discrepancies which taken together with others makes it unsafe to convict on the prosecution evidence. PW1 on recall said the appellant had been arrested when her mother called for help and she identified him as her attacker as follows:

> "*Mum made noise so neighbours came to our house.* ***He was arrested and I said he is the one. Its mum and neighbours who brought him.***"

[50] At her first appearance in court on examination in chief PW1 said the appellant was arrested by K as follows:

> "*I told her it was the person who was in the kitchen who had defiled me. My mother never used to know him nor myself or I did not know what he wanted and he did come alone. It was that day that he had gone to grandmother's place and he never used to live there.* ***My mother then went to inform K who went to get accused from his home and brought …….grandmothers place and he tried to escape while going to Chief's place but he was arrested again***."

Identification of the appellant

[51] The complainant PW1 testified as to the source of lighting in the kitchen which enabled her to identify the appellant as follows:

> "***I could not see him well at the shamba, but in the kitchen well as the fire was well lit (firewood)*** *he left me behind and I remained with my pant and untied cloth on mouth and left pant in the shamba.*
>
> *At grandmothers place were two houses and a separate kitchen and when I returned home and I went to the separate house as my mother and grandmother were in another house. My mother then came and found me crying and I told her it was the person who was in the kitchen who had defiled me.* ***My mother never used to know him nor myself or I did not know what he wanted and he did come alone. It was that day that he had gone to grandmothers place and he never used to live there.****"*

[52] PW2 the mother said the child had said she could identify the attacker who they had not seen before that day as follows:

"*The child said accused took her away while covering her mouth and defiled her. The child's clothes were dirty and looked sort of blood stained and skirt and the pant and* ***<u>she said she could identify the person.</u>***"

[53] The Investigation officer (PW3) contradicted both the complainant and the mother when she asserted in her testimony that the complainant had been seeing the appellant before as follows:

"*I am the investigating officer herein.* ***<u>The child said she knew accused physically as he used to pass by</u>*** *and* ***<u>had sat in their kitchen for a while</u>*** *though she did not know him by names.*"

[54] However, the alleged defilement is not alleged to have taken place in the kitchen where there was lighting no matter how strong or otherwise. The defilement if alleged to have taken place at a dark place outside the kitchen where it was so dark that the girl according to the Investigation Officer could not see her panty as she rose to go after the attacker had defiled her. If the child had told the mother that it was the person who was in the kitchen who had defiled her there must be evidence as how she identified him visually at the scene of crime in the dark night outside the kitchen, with no evidence as to the distance of the source of lighting from the kitchen fire to the place under the tree outside the kitchen where the defilement allegedly occurred.

[55] In these circumstances, there is need for a cogent string of evidence with an unbroken chain of events from the point of the appellant's identification in the firewood light of the kitchen fire through to the alleged defilement outside the kitchen where it was dark with no other source of lighting.

[56] There no such unbroken chain of evidence from the lighted kitchen to the scene of crime outside the kitchen, and the complainant does not claim to have identified the appellant in any other way other than visual identification using the firewood light in the kitchen. Although the Investigation Officer PW3 claimed that she told her that the appellant had said he would give her money but refused, details of this this conversation are not given as to allow the court assess whether voice recognition occurred, bearing in mind that the witnesses said the appellant was not known to them previously.

[57] Moreover, PW1 did not say by what means of identification that she realised that the person who attacked her in the shamba in the darkness of the night as she went to urinate was as she allegedly told the mother PW2 –

"***<u>I told her it was the person who was in the kitchen who had defiled me.</u>*** *My mother never used to know him nor myself or I did not know what he wanted and he did come alone. It was that day that he had gone to grandmothers place and he never used to live there.*"

[58] The court was on the principle of caution in identification evidence as held by the Court of Appeal for Eastern Africa in ***Abdalla Bin Wendo v. R*** [1953] 20 EACA 166 required to seek corroboration of the identification evidence of a single witness, as follows:

"*Subject to certain well-known exception it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen* ***<u>the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility."</u>***

See also R v. Turnbull (1976) 3 ALL ER 549.

[59] The court was thus bound to caution in the identification evidence of the complainant and to seek the corroboration thereof. In the decision cited by the appellant "***<u>Wamunga v Republic</u>***, (1989) KLR 424, the Court of Appeal emphasized the same as follows:

"It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and <u>to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction."</u>

[60] The identification evidence of the complainant PW1 was not corroborated, and the circumstances of identification in this case were not favourable and free from possibility of error.

Invocation of section 124 of the Evidence Act

[61] Could it be said that the trial court in this case properly invoked section 124 of the Evidence Act? Without referring to the provision of law in her judgment, the trial court said:

"*Let's look at the demeanor of the child's mother, she welcomed the accused person and served him with food as happens a lot in a village set up. This is not the behaviour of one who has grudges against another person. The accused never challenged her on this issue during cross examination so the issue of being framed has no merit at all.* ***<u>These two prosecution witnesses said they saw the accused well and I have no doubt they were able to identify him although they never knew him before that day, they had seen him in the well-lit kitchen hence there is no possibility of mistaken identity. The child stood firm even upon the lengthy cross examination by Mr. Tengekyon counsel for the accused person and she struck me as a person telling the truth. I am satisfied that the child was defiled by no other person but the accused person herein, I find that the charges of defilement have been proved</u>***

against the accused person beyond reasonable doubt *and I convict him of defilement contrary to section 2(1) as read with 8(2) of the Sexual Offences Act. The conviction is under the provisions of section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.*"

[62] There are no reasons within the meaning of section 124 Proviso of the Evidence Act for the court to believe that the complainant was telling the truth in view of very divergent evidence of the other witnesses and of the complainant herself at different times. The section is an exception to the rule for corroboration to evidence of children which, is based undoubtedly on the good sense and principle of best interests of the child and the usual occurrence of sexual offences in circumstances where there may be no witness other than the victim, but which must in the interest of fair trial of accused persons be used sparingly and only where the circumstances fit the situation contemplated in the law that there is no other evidence available but a sexual offence crime should not go unpunished for lack of corroboration of the victim sole evidence. In my view, the procedure is not properly invoked where there is available other evidence presented before the court and which the court is enjoined in its ordinary course of judicial decision-making to consider and weigh as a whole against the evidence of the child victim of sexual offence.

[63] The trial court's determination was not an application of the exception in section 124 of the Evidence Act as that provision requires that there be no other evidence but here the trial court was improperly finding cross-corroboration in the evidence of the complainant PW1 and her mother PW2 on identification of the appellant as the attacker. It is a cardinal principle of the law on corroboration that evidence which itself requires corroboration cannot corroborate other evidence. I find that the exceptional provision of section 124 of the Evidence Act was not properly invoked in this case.

[64] Moreover, in cases relying on the identification of the attacker the principle of caution now entrenched in our courts since in ***Abdalla Bin Wendo v. R*** [1953] 20 EACA 166 requires the court to seek corroboration of the identification of a single witness, as follows:

> "*Subject to certain well-known exception it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen* ***the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility."***

Consideration of the Defence and implausibility of the prosecution's stranger storyline

[65] The appellant's defence was primarily stated as follows:

> "*I recall on 08.03.2015 I got home at 4pm and* ***K****M had alcohol in his house. I then left and came back at 5:30pm. I went to my house and K came and called me. I went out to meet him.* ***He slapped me and started beating me. He asked why I took his money. He said the person who was selling liquor for him said I am the one who took the money. That person was the complainant mother."***

[66] The key prosecution witnesses, the complainant PW1 and her mother PW2 both testified that they both did not know the appellant before and that he had only come to their home and the mother had given him food and when the appellant was left with the child in the kitchen he had pulled her to the shamba and defiled her.

[67] It is not usual for a person to treat a total stranger as narrated by the two prosecution witnesses, PW1 and PW2, giving him food and drink without caring to know from whence he came or his business at their home. Even if as considered by the trial court it happened in the village setting, the host would be expected to find out who was their guest and the business of his visit. The two prosecution witnesses, PW1 and her mother PW2, were not telling the truth as to his stranger status, or they were hiding the true nature of the appellant's visit at their home, giving credence to the appellant's story that he had at the home drinking alcohol owned by one K and sold by the child's mother PW2, when was accused of having stolen the alcohol money. It creates a doubt as to the defilement-by-the-appellant story; it is a redacted version of what actually transpired at the home and the benefit of the doubt must be given to the appellant.

Bukenya & Others v. Uganda (1972) EA 549, 550-1.

[68] K was the custodian of corroborative information that –

> i. That the appellant was at the complainant's mother's house on the material date and time as testified by PW1 and PW2.
>
> ii. The PW2 had on finding the complainant missing from the house where she had left her called him and asked him "*Idris to look for her and* ***he returned with the child whom he said was under the tree."***
>
> iii. The child PW1 had reported to the mother that she had been defiled by the person who was in the kitchen, whereupon the mother called him K who went to arrest the appellant as follows:
>
> "*I told her it was the person who was in the kitchen who had defiled me. My mother never used to know him nor myself or I did not know what he wanted and he did come alone. It was that day that he had gone to grandmothers place and he never used to live there.* ***My mother then went to inform K who went to get accused from his home*** *and brought …….grandmothers place and he tried to escape while going to Chief's place but he was arrested again*"

[69] Failure to call IK or IE who appears to be the same person that the accused (DW1) referred to as *KM* for whom warrant of arrest had to be issued when he could be traced upon summons to the witness in the circumstances of this case must, in accordance with the rule in ***Bukenya v. Uganda,*** *supra*, attract the adverse inference that his evidence or his cross-examination of him by the defence would have prejudiced the case for the Prosecution. That PW2 and other witnesses had to be compelled by warrant of arrest to attend court to testify may be a pointer to the genuineness of the charges against the appellant herein.

Retrial?

[70] Although entitled to set aside the order for recall of the witness could be traced, in accepting the evidence of the complainant's mother PW2 without cautioning itself that the witness had not been availed for further cross-examination and therefore examining the evidence with greatest care, the subsequent trial court which did not take the evidence of the said witness was in error. The court has considered the provisions of section 200 (4) of the Criminal Procedure Code, for retrial where the trial court takes over a trial from a previous court and the High Court is of the opinion that the accused had been prejudiced.

[71] However, this court, on the principle that a retrial should be ordered only where the interest of justice so requires and not to facilitate the prosecution to fill gaps or correct contradictions and inconsistencies in its case, as identified herein, takes the view that in the circumstances of this case where some witnesses could not be traced for recall and in the case of the complainant's mother had to be brought in her initial appearance by a warrant of arrest, and for the need to facilitate, in the best interest of the child, her healing and closure for the child who twice had to be subjected to court appearance, it is not in the interest of justice to order a retrial. See ***Fatehali Manji v. R*** (1966) EA 343. The court also notes that the accused has also been in custody since 28.5.2018 when his bail pending trial was cancelled.

Conclusion

[72] **The court must conclude that even though the child complainant in this case may have been defiled, it has not been shown to the required standard of beyond reasonable doubt that the defilement, or the indecent act charged in the alternative, was perpetrated by the appellant.**

[73] **For that reason, it was not safe to convict the appellant in those circumstances and the doubts lingering in the mind of the court, and set out above, must be resolved to the benefit of the accused appellant.**

Orders

[74] Accordingly, for the reasons set out above, the court makes the following orders:

1. The conviction and sentence of the appellant for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act are, respectively, quashed and set aside.

2. Consequently, there shall be an order for the release of the appellant from custody forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF OCTOBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mogambi, instructed by M/S Wambua Kigamwa & Co. Advocates, for the Appellant.

Mr. Mong'are Ass. DPP for the Respondent.