REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 132 OF 2019

EMMANUEL MULEI KILOVA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. C.A Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Case No. 49 of 2019 delivered on 23rd July 2019).

JUDGMENT

1. **Emmanuel Mulei Kilova** the Appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 10th day of June 2019 at around 1500hrs within Makueni county intentionally caused his penis to penetrate vagina of **VNM** a child aged 16 years old.

2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 whose particulars were that the Appellant on the 10th day of June 2019 at around 15hrs within Makueni county intentionally touched the breast and vagina of **VNM** a child aged 16 years old.

3. The case proceeded to full hearing with the prosecution calling four witnesses. The Appellant gave a sworn defence without calling any witnesses. He was finally found guilty, convicted of the principle count and sentenced to serve 20 years imprisonment.

4. Being dissatisfied with the judgment he filed this appeal citing the following grounds after being amended by Mr. P. Wasolo for the Appellant:

a) **That** the court did not consider the mitigation factors of the Appellant being that he was a first offender and the conduct of the complaint.

b) **That** the learned trial court erred in both law and facts by relying on contradictory and inconsistent evidence to convict the Appellant and failed to consider the evidence of Pw4 adduced in favour of the Appellant after his medical examination.

c) **That** the trial court erred by relying on the doctor's evidence which lacked merit and that penetration was not proved.

d) **That** the learned trial Magistrate erred both in law and facts by dismissing his explosive and firm defence contrary to section 169(1) of the CPC

e) **That** the entire proceedings herein infringed on the Accused's right to a fair trial at Articles 50(2)(c), right to prepare adequate and effective defense owing to the nature of the charges having been commenced and concluded within 45 days.

5. The complainant (VNM) aged 16 years testified as Pw1. She stated that on 10th June 2019 she was from the posho mill when she saw the Appellant whom she knew coming from behind. He stopped his motorbike ahead of her and asked her to board it for him to take her home. At first she refused then agreed. When she arrived where she was to alight he stopped. As she alighted he also alighted and got hold of the paper bag she was carrying. He grabbed her hand and forced her into an uncultivated farm. He dropped her down and tried to remove her lesso forcefully but she stuck on it.

6. He got off her lesso from below and removed her under pant. He then removed his clothes and inserted his penis into her vagina. He told her not to talk. Her mother (Pw2) found them in the act. On being asked who he was he said he was Mulei. Pw2 ordered them out of the farm and escorted her to Salama police station. She recorded a statement after which she was referred to the hospital. She identified the treatment documents (EXB1), P3 form (EXB2), Appellant's P3 form and treatment notes (EXB3 and 4). She identified the Appellant as the person who defiled her.

7. In cross examination VNM said the Appellant is usually given casual work at their home.

8. **Pw2 FMW** testified that on 10th June 2019 her children had been sent home from school to shave their hair which she did. She then sent VNM to the posho mill. She continued herding cattle nearby. She saw a motorbike and she also saw VNM. She continued with her work. However, after waiting for some time without seeing V.N.M and yet the motorbike was still there, she decided to check. She found the motorbike parked by the road side. She went into the farm nearby and saw someone kneeling down. She moved to the scene.

9. The person she found kneeling down was the Appellant while VNM was lying sideways. She asked him who he was and he said "Mulei". She asked them to leave as the Appellant continued asking to be forgiven. She asked him to go with her to the hospital. He carried her and VNM to Dr. Susan who could not handle the case after observing VNM. She went to Sultan Hamud police station then to hospital where she was treated. In cross examination she denied having called him that night to spend time with her.

10. **Pw3 No. 100041 Pc Veronicah Kyayalya** stated that VNM and Pw2 came to Salama police station on 11th June 2019. They had earlier reported a case of defilement against the Appellant a boda boda rider. A P3 form confirming defilement had been filled. She produced VNM's birth certificate (EXB6) showing she was born on 15th March 2003. She arrested the Appellant.

11. **Pw4 Dr. Charles Mwendwa Mutisya** produced the P3 form (EXB1) on behalf of Frank Musembi with no objection raised by the Appellant. He stated that there were no physical injuries noted on VNM, nor on her genitals. HVS revealed epithelial cells of about 10-18 and pus cells of 1-3. No spermatozoa were noted. Her hymen was broken. He produced the P3 form (EXB2), treatment card (EXB1), PRC form (EXB4), Appellant's P3 form as EXB5, V.N.M's birth certificate as EXB6.

12. In his sworn defence the Appellant said he was a bodaboda operator. On 10th June 2019 he went to visit his brother's child. On his way back he met VNM who stopped him for a ride and he dropped her at their gate. Pw2 was grazing nearby. As he untied the maize flour she asked to pick money from her mother to pay him. Pw2 came in haste, asking why he had stopped by the roadside. She insisted that he had defiled the daughter whom she took to hospital.

13. The next day he reported to the chief. He was arrested while with the chief. He was taken to hospital the next day and then charged. He believes this issue is work related. That Pw2 used to summon him for work but he would sometimes decline.

14. The appeal was canvassed by way of written submissions.

15. Mr. Wasolo for the Appellant has reminded the court of its duty as a first appellate court by citing the cases of **Joseph Ndungu Kagiri – vs- Republic (2016) eKLR and K. Anbazhagan – vs State of Karnataka & Others** (*No citation*).

16. He further submits that the trial was handled in a very speedy manner which raises serious fundamental constitutional issues among them the fairness of the trial. He contends that the manner in which this case was handled was rushed and goes against the tenets of criminal justice. He referred to the **Supreme Court of India case of Rattiram –vs- state of M.P** where a three judge bench ruled thus:

> "*Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."*
>
> ***And again:-***
>
> "*Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused …."*

17. Counsel raises issue with the failure to supply the Appellant with witness statements. It's his submission that there was no pre-trial conference held to ensure that the defence was supplied with all the necessary documents. He refers to Article 50(2)(j) of the Constitution which he says was not complied with. He has referred to a number of foreign and local authorities to support this submission. See. **Republic –vs- Ward (1993) 2 ALLER 557. Thomas Patrick Gilbert Cholmondeley –vs- Republic (2009) eKLR**.

18. Counsel has further submitted that the charge was defective since the wrong penalty section was quoted. That since VNM was 16 years plus three months at the time of incident the proper penalty section to apply was section 8(4) and not section 8(3) of the Sexual Offences Act. Relying on the case of **David Mwangi Njoroge –vs- Republic (2015) eKLR** counsel submits that this was a defect that is not curable under section 382 of the Criminal Procedure Code. Further that substitution of any offence must be in accordance with section 179 of the Criminal Procedure Code. The offence being substituted must be cognate and minor to the offence that an accused was initially charged with. See the Court of Appeal case of **Kalu –vs- Republic (2010) I KLR**. His submission on this issue is that the charge herein was defective leading to improper sentencing thus occasioning an illegality.

19. On the ingredient of penetration he has submitted that the evidence was inconclusive and the medical evidence did not support the allegation of penetration. On this he refers to the evidence of VNM, Pw2 and the medical evidence and submits that there was no penetration. The medical forms were filled the same day but they don't confirm penetration he argues. Referring to sections 107 and 109 of the Evidence Act and court decisions counsel submits that the prosecution did not prove its case to the standard required. He contends that many questions remain unanswered.

20. On sentencing he has submitted that the circumstances of each case must be considered as was stated by the Court of Appeal in the case of **Thomas Mwambu Wenyi –vs- Republic (2017) eKLR.** Sentencing he argues is a matter of discretion. See **Kariuki –vs- Republic**

(1970) E.A 230; Macharia –vs- Republic (2003) KLR 115; Ogalo s/o Owuor –vs- Republic (1945) EACA 270. He urged the court to allow the appeal.

21. The Respondent opposed the appeal through learned counsel Mrs. Ann Penny Gakumu. She submits that the trial court considered the Appellant's brief mitigation before sentencing him. She further submits that the evidence of VNM, Pw2 and the medical evidence was very consistent and proved penetration citing the case of **Richard Munene –vs- Republic (2018) eKLR.** She submits that minor inconsistencies cannot go to the root of a case. Counsel submits that even if the medical evidence were to be excluded the evidence of VNM is sufficient by virtue of the proviso to section 124 of the Evidence Act. She has referred to the case of **Geoffrey Kioji –vs- Republic Criminal appeal No. 270 of 2010 (Nyeri)** where it was stated that:

> *"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the evidence Act, cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reason for such belief."*

22. Counsel submits that the Appellant's defence was a mere denial. The issue of a grudge has only surfaced in the appeal which is unacceptable. At page 16 lines 8-9 of Record of Appeal the Appellant said there was no grudge between him and complainant's family.

23. It's her further submission that there was no violation of Article 50(2)(c) of the constitution. That before the case started both the prosecution and defence would confirm their readiness to proceed with the trial. She has cited the various dates. Citing Article 20(2)(e) of the Constitution, she said the Article guarantees an accused person the right to have a trial begin an be conducted without unreasonable delay. Further there is no prejudice that was caused to the Appellant.

24. On sentence she concedes to its reduction as per the provisions of section 8(4) of the Sexual Offences Act No. 3 of 2006, since VNM was aged 16 years at the time of the commission of the offence.

25. This is the first appellate court and as such it is guided by the principles set out in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated

> ***"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

26. I have carefully considered the evidence on record, grounds of appeal, both submissions and the law. The issues I find falling for determination are as follows:

i. Whether the speedy manner in which the case was heard and finalized violated the Appellant's right to a fair trial.

ii. Whether there was a violation of the Article 50(2)(j) of the Constitution

iii. Whether the charge was defective.

iv. Whether the prosecution proved a case of defilement against the Appellant.

v. Was the sentence harsh and excessive in the circumstances of this case?

Issue (i) Whether the speedy manner in which the case was heard and finalized violated the Appellant's right to a fair trial.

27. Plea in this case was taken on 17th June 2019 when the Appellant was first arraigned in court. The case was fixed for hearing on 27th June 2019. On the said date the prosecution was ready with two (2) witnesses and the Appellant also indicated he was ready. However after the first witness who was VNM testified the Appellant requested for more time to prepare for the rest of the witnesses. Its noted that he cross-examined VNM and the matter was adjourned to 8th July 2019.

28. On that day both parties were ready to proceed and the prosecution presented two witnesses whom the Appellant cross examined. The prosecution applied for an adjournment to call the doctor and the Appellant had no objection to it. The case was adjourned to 11th July 2019.

29. On the said date both parties assured the court they were ready to proceed. The doctor testified on behalf of a colleague with the Appellant's permission. He too was cross examined by the Appellant and the prosecution closed its case and the Appellant was placed on his defence.

30. His defence was fixed for hearing on 15th July 2019. Come that day both parties confirmed their readiness for the defence hearing. The case proceeded and the judgment was delivered on 23rd July 2019.

31. I have considered the submissions by both counsel on this issue. Article 50(2)(e) of the Constitution provides this:

> (2) **Every accused person has the right to a fair trial, which includes the right –**
>
> *(e) To have the trial begin and conclude without unreasonable delay;*

Mr. Wasolo has submitted that the hearing herein was too rushed. It was his duty not only to show that the hearing was rushed but most importantly to show that the Appellant was prejudiced by the alleged rushed hearing.

32. It has nowhere been shown that the learned trial Magistrate had a parked diary and specifically created room in order to rush this case. Fixing of hearing dates solely depends on the availability of the dates between the trial court, the accused and the prosecution. There is nothing on record to show that any of these parties was not available for one reason or another but was forced to attend court.

33. The record speaks for itself. It shows that the parties were always ready to proceed with the hearing and the available witnesses. On the first hearing date though the prosecution had two witnesses the Appellant requested for more time to prepare after VNM had testified. The learned trial Magistrate granted an adjournment to allow him prepare for the remaining witnesses. I am sure if he would have made a similar request any other time the same would have been allowed.

34. As stated in the case of **Rattiram –vs- State of M.P (supra)** what the court should avoid is prejudice to the accused person. In the instant case the learned trial Magistrate accorded the Appellant time to have his case heard. Submitting upon closure of a case is not mandatory. The Appellant did not request to be allowed to submit and was denied the opportunity. I find no prejudice shown to have been caused to the Appellant. Infact Hon. C. Mayamba should be congratulated for the record time within which he handled the case.

Issue (ii) Whether there was a violation of the Article 50(2)(j) of the Constitution

35. Article 50(2)(j) of the Constitution provides:

> **Every accused person has the right to a fair trial, which includes the right –**
>
> *(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*

36. Its correct to state that Article 50(2)(j) of the Constitution means that the accused must be supplied with witness statements and any other documents the prosecution wishes to rely on in stating its case. The record indicates that on 17th June 2019 the court directed the accused to be supplied with witness statements at his own cost. It is nowhere indicated that the Appellant had any difficulty with witness statements. The record shows that the hearing of the case began and continued without the Appellant raising any issue on witness statements.

37. Infact, if he had had any issue with them he would have raised the issue on 27th June 2019 when he requested for time to prepare his evidence against the rest of the witnesses. How was he to prepare for them without witness statements?

38. It is thus my finding that owing to the evidence on record an inference can be drawn that the Appellant was supplied with the witness statements and documents the Respondent intended to rely on during the trial. The Appellant's right under Article 50(2)(j) of the Constitution of Kenya were not violated in any way and I find that ground of appeal lacking in merit.

Issue (iii) Whether the charge was defective.

39. It is the Appellant counsel's submission that the charge was defective because the wrong penal section was quoted. It is true the particulars of the charge put the age of VNM at 16 years. The birth certificate (EXB6) indicated her date of birth as 15th March 2003. The incident complained of occurred on 10th June 2019. This puts her age at 16 years, two months and 26 days. This is therefore closer to 16 years as correctly stated in the charge sheet.

40. The Appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. Section 8(3) which is the penal section provides:

> **8(3) Sexual Offences Act**
>
> A person who commits an offence of defilement with a child between the age of twelve an fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> Whereas **section 8(4)** provides:
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

41. Both parties are in agreement that the penal section that the Appellant ought to have been charged with alongside section 8(1) is section 8(4) and not section 8(3) of the Sexual Offences Act. Mr. Wasolo argues that the charge sheet was defective and caused an injustice to the Appellant because he was sentenced under section 8(3) of the Sexual Offences Act which carries a heavier sentence. Counsel for the Respondent in her submissions concedes that the sentence should be reduced to conform with section 8(4) of the Sexual Offences Act.

42. The issue to be determined is whether failure to indicate the correct penal section made the charge defective and whether the error could be corrected under section 382 of the Criminal Procedure Code which provides:

> **"***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.*
>
> ***Provided** that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

From his judgment the learned trial Magistrate in the instant case does not seem to have noted that the correct penal section applicable was section 8(4) and not section 8(3) of the Penal Code as stated in the charge sheet.

43. The issue here is not about substituting a charge facing an accused person as provided for under section 179 and section 186 Criminal Procedure Code. Did the charge as drafted conform to section 137 Criminal Procedure Code? My answer is yes. The charge refers to the offence of defilement as created under section 8(1)(3) of the Sexual Offences Act. Section 8(1) creates the offence of defilement, while section 8(3) provides for the penalty of the offence where the victim is a child aged 12-15 years.

44. While it is clear that the drafter of the charge erred in the framing of the charge, I don't consider that to be sufficient reason to make this court interfere with the conviction. It is not even an issue in this appeal. The Appellant was well aware of the charge facing him.

45. The particulars in the charge herein indicate the age of the victim as 16 years. If one is convicted in a case where the victim is of the age of 16 years the sentence is provided for under section 8(4) of the Sexual Offences Act. This sentence or any other under section (8) though a minimum one may be enhanced or even reduced depending on the circumstances.

46. Citing a wrong penalty section in my view does not go to the root of the charge in the circumstances. The most crucial thing is to have the charge proved to the required standard. Section 382 Criminal Procedure Code focuses not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice.

47. I am of the view that the error in the charge did not occasion a failure of justice and I find that such an error is curable under section 382 of the Criminal Procedure Code. The said section insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge unless it has occasioned a miscarriage of justice. See **Samuel Kilonzo Musau –vs- Republic 2014 eKLR Criminal appeal No. 153 of 2013** and **Thomas Aluga –vs- Republic (2018) eKLR**.

Issue (iv) Whether the prosecution proved a case of defilement against the Appellant.

48. The ingredients for proof of the offence of defilement are:

a. Age of the complainant.

b. Whether there was improper intentional and unlawful penetration of VNM's genital

c. Whether the Appellant was positively and properly identified.

See the case of **Charles Wamukoya Karani –vs- Republic, Criminal appeal No. 72 of 2013**.

(a) Age of the complainant.

49. One of the ingredients necessary to satisfy the charge of defilement is determination of the victim's age. Age is key in cases of defilement as the penalty is pegged on the same. See section 8(2) – (4) of the Sexual Offences Act. **Alfayo Gombe okello –vs- Republic Criminal Appeal No. 203 of 2009** (Court of Appeal Kisumu) **Francis Omuroni –vs- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000; Handson Ali Machongo vs- Republic (2016) eKLR**.

50. **PC Veronicah Khayalya** testified as Pw3 and produced VNM's birth certificate as EXB6, which indicated that VNM was born on 15th March 2003. I find that EXB6 provided the best evidence as far as VNM's age which was about 16 years at the material time was concerned. Thus any sexual activity with her fell within the ambit of ***"Defilement"*** under section 8(1) and the penalty within section 8(4) of the Sexual Offences Act 2006. This was therefore sufficiently proved by the Respondent.

(b) Whether there was improper intentional and unlawful penetration of V.NM's genital

51. Mr. Wasolo has submitted that the evidence on this was inconclusive. That the medical evidence did not support the allegation of penetration. He recounts the evidence of VNM, Pw2 and the medical evidence. In particular the PRC (EXB4) which was filled the same day. On the other hand the Respondent argues that the evidence of VNM supported by that of Pw2 and corroborated by that of Pw4 proved there had been penetration.

52. The Sexual offences Act 2006 defines ***"penetration"*** as the partial or complete insertion of the genital organs of a person into the genital organs of another person;

53. The Court of Appeal in the case of **Sahali Omar –vs- Republic (2017) eKLR** held that:

> *" … penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act."*

54. VNM said she had been given a ride by the Appellant on his motorbike on the material day. After he stopped at her point of disembarking he too alighted and got hold of the paper bag she carried. He forced her into an untendered farm, and asked her not to shout. He removed her clothes and his and inserted her penis into her vagina. That her mother (Pw2) found them in the act.

55. Pw2 had tried to trace VNM after seeing her alight from a motorbike in vain. On further checking this is what she states at page 8 lines 11-16

> *"I thought to myself why the motorcycle had not left after my daughter alighting. I proceeded to check and went to the road side. I found the motorcycle parked by the road. I was unable to see my daughter or the rider. I went into a firm nearby and saw someone kneeling down. I proceeded to the scene. I found accused kneeling down but the complainant was lying sideways."*

56. Pw2 is VNM's mother and an adult. She did not at any time state in her evidence that she found the Appellant and VNM in the act of having sex or anything close to that. She did not mention anything about the clothing of VNM and the man. This is in view of the evidence of VNM where she said the man who defiled her removed his and her clothes. All that she says she saw was the man kneeling down while VNM was lying on her side.

57. The VNM was seen by the doctor on 10th June 2019. The medical evidence by Pw4 was to the effect that there was evidence of defilement. The witness did not explain what led to that conclusion. I say this because there was no evidence of any physical injuries or bruises on her genitalia. There were no spermatozoa found in the HVS. What was present were epithelial cells and pus cells. Would that be a confirmation of defilement considering that she was treated the same day?

58. The witness also mentioned that VNM's hymen was broken. A broken hymen *"per se"* is not conclusive evidence of a sexual activity. There ought to be some other supportive evidence to the broken hymen. He did not even state that it had been freshly broken.

59. In the case of **P.K.W –vs- Republic (2012) eKLR** the Court of Appeal (Maraga and Rawal JJA, as they were) stated this on the said issue:

> ***"15.*** *In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium of the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?*
>
> ***16.*** *Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of the* ***Queen –vs- Manuel Vincent Quintanila (1999) AB QB769."***

This decision was later followed by the Court of Appeal in the case of **David Mwingirwa –vs- Republic (2017) eKLR.**

60. VNM testified that she was forced into the act by the perpetrator who had grabbed her and pushed her onto the ground. For sure there is no evidence on record to support this especially that of the medical factor.

61. The prosecution always has the burden to prove its case beyond reasonable doubt. See section 107 and section 109 of the Evidence Act; **Pius Arap Maina –vs- Republic (2013) eKLR**. The ingredient of penetration from the evidence above was not proved to the required standard.

Whether the Appellant was positively and properly identified.

62. The evidence of VNM, Pw2 and the Appellant places the Appellant at the scene. The only issue is what VNM and the Appellant were doing at the scene at that time. VNM. did not make any noise, shout for help or struggle in anyway. Can it be said that the Appellant committed an indecent act by touching the breast and or vagina of VNM? It is the two of them who know what took them to the farm. VNM never mentioned that the Appellant touched her breast or vagina. The particulars in the alternative count do not also state with what he allegedly touched those two parts of the body with. The court will not convict on the alternative count just because the main count has failed. There must be evidence to support it.

63. All in all my analysis reveals that VNM and the Appellant who know each other were together on the date in issue and with an agenda. Pw2 interrupted them before they did what had taken them to the bush. A story had to be created to save V.N.M's face. That is the evidence that was presented before the court with no medical corroboration.

64. I find merit in the appeal which I hereby allow. The conviction is quashed and sentence set aside. The Appellant to be released unless

lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 11th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge