REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NUMBER 166 OF 2019

VINCENT KIPTOO CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Iten Senior Principal Magistrate's Court Sexual Offences

Case No. 1 of 2016 delivered on 17th October 2019 by Hon. C. Ateya (SRM)

J U D G M E N T

1. The appellant Vincent Kiptoo Cheruiyot was charged with the offence of **Defilement Contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that on the 13th day of June 2016 at about 5.00 p.m. in Koisungur Location within Elgeyo Marakwet County he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of SJ, a girl 14 years old.

2. He also faced the alternative charge of **Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the charge were that on the 13th day of June 2016 at about 5.00 p.m. in Koisungur Location within Elgeyo Marakwet he intentionally and unlawfully caused his penis to come into contact with the vagina of SJ aged 14 years old.

3. The appellant denied the charges and prosecution called five witnesses to prove their case.

4. **PW1 SJ** testified that at the material time she was in Top Class at K Primary School. On 13th June, 2016 at about 5.00 p.m. she was at home alone when, in her own words:

> "There *is a person who stays at our home who did tabia mbaya to me. I don't know his name…I was lighting the fire. He removed my under pant. I had slept on the sofa when he removed my underpant. He is the one that told me to sleep on the sofa. He then removed his thing and did tabia mbaya to me two times. I don't know what the thing is called. He removed his thing outside. He put it here (pointing to her private parts) he did it twice. He then left. My mother came and found me crying. She saw she and me examined my private parts. She took me to Mama C. Mama C examined me. I was then taken to Kapsowar where the doctor examined me. From the hospital, he went to the police station. The person who did tabia mbaya to me is this one (pointing at accused).*

5. On cross-examination by the accused, she told the court;

> ***"You came with my father. I was in the home. My father had asked where my mother was and I told him she had gone to fetch water. He then said that he wanted to go and check on posts in the forest and you left together***. *I did not scream. I told my mother what you had done. I don't know why she did not chase you. The next morning you had gone with my father to load posts. You told me to remove my pants. I did not see my father. My father was drunk when he came back home."*

6. **PW2 GK** stated that S, the father to the complainant was her neighbour, and she knew the accused was a friend to Sl. She testified that there was a woman by the name J who took care of SJ. On 13th June 2016 at around 5.00 p.m., while on her way home from the farm, she met the said Josephina who told her that the accused had defiled SJ. She testified that on learning this she went and,

> *"…interrogated SJ who told me the accused had come home and asked her where her mother was. She told him that she had gone to fetch water. That is when the accused inserted his fingers in her private parts and defiled her. We examined her and only saw*

some white discharge".

7. She testified further that SJ had no pants. That SJ spent the night at her house. That S was drunk. That she told Jnot to report the incident to S until the next day. That she did not know what time SJ's father came back home. She testified that she did not take any action, but later learnt that the said SJ was taken to hospital. That the person who is said to have defiled the child spent that night in S's house. On cross - examination she said she never met the accused person.

8. **PW3 SKK** testified that his daughter SJ was 15 years old at the material time, and the appellant was his nephew. He testified that he and the appellant spent the 13 th June 2016 on a drinking spree from 8:00am to 5:00pm. At 5:00pm, they left for his home but as they neared the home, he and the appellant parted ways. The appellant went home, while he went to P's where he remained until 8:00pm. That when he got home the appellant was seated on the sofa, they had dinner together and each retired for the night in their separate bedrooms. That about 2:00a.m. or 3:00am or there about, his wife woke him up. That she asked him to explain the relationship between him and Vincent. That he told her that his uncle was married to Vincent's Aunt and therefore Vincent was his nephew. That her response was that could not be because Vincent had defiled SJ. He asked how that could be because he had been with Vincent all along. She told him that it happened during the time he had gone to P's place, and she had gone to fetch water. That upon her return, she found SJ crying and SJ told her that the person who always accompanied her dad had held her, pushed her to the sofa and defiled her. That she had sent her to Mama C, who examined her and found spermatozoa in her private parts.

9. On hearing all this, between 5:00am and 6 00am, he said he went and woke up Vincent on the pretext of going to gather murram. They left together for the shopping center where he told Vincent to wait for him while he went to collect the money to buy the murram. It is then that he went and reported to the Assistant Chief Reuben Biwot, who called the KPR who arrested Vincent and escorted him to Kimnai AP post. He then took the child to Kimnai Dispensary but was referred to Kapsowar Mission Hospital. From there he reported at Kapsowar Police station and was issued with a P3. It was completed on 14th June 2016. He later recorded his statement.

10. On cross-examination, PW3 testified that:

> *"My daughter is mentally unstable and could not cry. She could not come up with things that do not exist. She has been mentally unstable since the day she was born. She had difficulty talking, her head is disfigured, and her eyes are not normal. She does things which normal people do not do like making herself dirty. If she is told to do a thing, she will do only that thing and sit. When her mind is set to do something, she just does it. I do not know her state of mind at the time she decides to do abnormal things. Sometimes she does so without knowing."*

11. He further confirmed that he had been on a drinking spree with the appellant, that in his statement to the police he said he went to Paulo's at 6:30pm, and that before going to Paulo's he had been at home. On re- examination he testified that his child was mentally unstable but could not lie because she said that the person who did those things to her was the one *'who accompanies her father'*. At the same time, he said that Vincent had come to visit him for two days as his nephew. Asked about Vincent's allegation that he had taken Vincent's mobile phone, he denied it. He also denied that that he and Vincent had an issue over mobile phone.

12. **PW5 Dr. Wilfred Kimosop** was by then working at Kapsowar Hospital. He testified that the complainant was defiled on 14th June, 2016 by a person known to her parents. On examination he found that;

> *"… She was mentally retarded and was unable to communicate properly. Her father brought her and he was the one who gave the information…on examination, the labia majora was normal, the labia minora was lacerated on left side and was still fresh, hymen was lacerated and there was a whitish discharge… approximate age of injury was one day, probable weapon, blunt. He formed the opinion that there was penetration. He assessed the degree of injury to be grievous harm".*

On cross-examination, he confirmed that he had not examined the appellant.

13. **PW5** was **Dr. Edward Simiyu,** a dentist at Iten County Referral hospital. He carried out an age assessment of the complainant on 6th June 2019. He formed the view that she was approximately seventeen (17) years old. He produced the age assessment report.

14. On the 17th July 2019, the learned trial magistrate found that the appellant had a case to answer. The record states:

15. In his unsworn statement of defence rendered on the 6th August 2019, the appellant told the court that indeed it was true he was with his uncle Samuel (PW3) on the 13th June 2016. He however denied committing any offence. He testified that his uncle took his mobile phone and he reported the incident to Kimnai AP post and his uncle was summoned there. That his uncle made a commitment at the AP Post to sell his trees and pay for the mobile phone. That they went home between 5:00pm and 6:00pm. His uncle told him to spend the night, which he did. The next morning his uncle woke him up at 5:00am. He told him it was too early. He went back to sleep until 6:00am when they both left for the shopping center, His uncle told him they were there to get a tractor. They waited there until 8:00am when his uncle sent him to some building. Therein he found the Assistant Chief who asked him to assist in carrying a pool table. He did so, and was surprised when the Assistant Chief ordered him to sit down. He enquired from his uncle what was going on. The uncle told him he did not know. The assistant chief demanded to know from him whether he was aware of the offence he had committed. He said no. The Assistant chief told him that his uncle had reported that he had defiled his uncle's daughter, that his uncle said it was his wife who had reported the incident to him. He demanded to be escorted to hospital for examination. His uncle left him there saying he was going to look for doctor. He was detained at Kimnai AP Post for two days. He was later then taken to Kapsowar Police station and later to Iten Police station from where he was brought to court. He was charged and he denied the charges.

16. In her judgment of the 2nd October 2019, the learned trial magistrate found that penetration was proved, age of the complainant was proved, and that the appellant had been placed at the scene by the complainant. This is what the trial magistrate recorded:

"*The evidence before court is that the complainant was at home alone when the accused went and told her to lie on the sofa, removed her panties and defiled her twice. Her mother went and found her crying and examined her private parts. PW3, the father to the complainant confirmed that the accused was his nephew and had been at his home on the material day with him. It was only that evening when his wife told him that the accused had defiled his daughter. PW3 was very drunk that day so he couldn't recall if he had seen his daughter. His daughter was mentally challenged and so didn't raise alarm when the incident happened. The accused spent the night in his house and was arrested the following day. The evidence was corroborated by that of PW2 a neighbour who stated that she was told the accused had defiled the complainant. They examined the complainant and saw a whitish discharge."*

17. On 17th October 2019, he was sentenced to 20 years' imprisonment.

18. Aggrieved, the appellant filed this appeal on the following Grounds of Appeal;

1. *THAT the trial court erred in law and fact as it failed to observe that the charge sheet was defective.*

2. *THAT the trial magistrate erred in both law and facts by failing to accord this case a fair trial.*

3. *THAT the pundit trial magistrate erred in law and facts by convicting the appellant relying on the evidence of incredible witnesses.*

4. *THAT the prosecution side did not prove its case beyond any reasonable doubt.*

5. *THAT the learned trial magistrate erred in both law and facts by failing to hold that the prosecution (prosecutors) in this case were incompetent in accordance to Section 85(1) Cap 75 Laws of Kenya.*

6. *THAT the sentence imposed against the appellant was deterrent, unfair and unjust hence unconstitutional based on Supreme Court's decision.*

7. *THAT the allegation was foundationed (sic) from the grudge due to the debt.*

8. *THAT the trial court disregarded and dismissed the appellant's defence evidence without any promising cause.*

19. This being a first appeal the appellant is entitled to a review of the evidence and for this court to draw its own conclusions; always bearing in mind it never saw nor heard the witnesses. See **Okeno vs Republic (1972) EA 372** where it was stated**;**

"*It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."*

20. The appellant filed written submissions and made oral submissions at the hearing of the appeal. The state was represented by Mr. Chacha prosecuting counsel**.**

21. The issues presenting for determination are; ***whether the charge sheet was defective, whether the prosecutor was incompetent, whether the appellant was accorded a fair trial, whether the prosecution proved its case beyond a reasonable doubt, whether the appellant's defence was dismissed without reason, whether the sentence was unconstitutional.***

22. On *whether the charge sheet was defective* the appellant submitted that he was originally charged under **Section 8(1) as read with 8(4) of the Sexual Offences Act** where the determinant age of the complainant is 16 to 18 years. However, on 20th June 2019 the prosecution, for no apparent reason applied and were allowed to amend the charge to now read **section 8(1) as read with 8(3)** where the determining age is between 12 and 15 years, and to change the complainant's age in the charge sheet to read 14 years. He argued that it was unlawful for the prosecutor to change the age of the complainant contrary to the evidence that was given by the doctors. Dr. Kimosop had indicated in the P3 that the complainant's age was 15 years old at the time of examination, on 15th June 2016, while Dr. Simiyu later, in 2019 testified and established the age of the complainant to be approximately 17 years**.** In addition, that the complainant testified that her age was 9 years, that the trial court had accepted that testimony and proceeded to take her unsworn evidence. The court record states:

"*…the minor can talk but is physically challenged and she seems to have some mental challenges. She may proceed unsworn".*

23. He submitted further that complainant's father's testimony on the other hand was that complainant was 15 years old. It was his position that the prosecutor's application was unlawful and rendered the charge sheet defective. He also submitted that the prosecution brought the wrong charge against him. That the correct charge was under **Section 7 of the Sexual Offences Act** which reads:

"S. *7. Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities.*

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person

with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."

24. His argument for this was that the trial court had noted that the complainant had mental challenges; her own father testified that she was mentally unstable, and the Doctor who filled the P3 testified that she was mentally retarded and not able to communicate well. On these grounds, he submitted that he was wrongly charged, and that the conviction was unsafe. He relied on **Yego vs Republic (1983) KLR** and in **Sigilai vs Republic (2004) 2 KLR 480** where it was held that:-

> "*The principle of the law governing the charge sheet is that an accused person should be charged with an offence known in law. The offence charged should be disclosed and stated in clear and unambiguous manner so that the accused person may be able to prepare his defence."*

25. He argued that the defect was not a minor mistake curable under **Section 382** of the **Criminal Procedure Code** but a violation of his rights under **Article 25 of the Constitution 2010.**

26. In responding to the appellant's submissions the prosecution did not address this issue except to submit that the age assessment of 17 years was arrived at three years after the commission of the offence hence the deduction that the complainant must have been 14 years at the time of the offence was justified.

27. It is not in doubt that the prosecution did apply and was granted leave to amend the charge sheet to change the complainant's age. However, the prosecution gave no reasons at all for that proposed amendment. No evidence was produced to support the application. The evidence on age assessment was called after the amendment had already been sought and granted. Worse still the court did not explain to the appellant that he had a right to have any of the witnesses who had testified recalled, either to testify afresh or for cross examination on the change of age despite the fact that it was going to dramatically affect the sentence he would get by an additional five years. The court simply read the amended charge, entered plea of not guilty, and would have proceeded to take Dr. Simiyu's evidence save that the appellant informed the court that he was mourning his father who had recently passed on and could not proceed with the hearing.

28. It is trite that on the outset the age of a complainant in sexual offences is center stage in determining the sentence that an accused person gets if found guilty and convicted of the offence. That is why the establishment of the victim's age is crucial even in the wake of the *Francis Muruatetu* case on the constitutionality of on mandatory minimum sentences. The age of the victim must still be proved. When the court and the prosecution proceeded about that fact as though the accused person in the case had no say about it, that spoke to the question about the fairness of the trial, as provided for under **Article 50 of the Constitution**. In addition, the appellant was not represented, and though ours is an adversarial system, the court has the inherent duty to ensure that the mechanisms set by statute and the Constitution to ensure a fair trial are complied with, and in particular where the accused person does not have legal representation . In this case, it was imperative for the learned trial magistrate to inform the appellant that he had the right to request for any of the witnesses who had already testified before the amendment of the charge, be recalled for him cross-examine them on the new facts introduced by the amendment. This is what **Section 214 of the Criminal Procedure Code** speaks to: **Variance between charge and evidence, and amendment of charge;**

> *(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that:-*
>
> *(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*
>
> *(ii) where a charge is altered under this subsection* ***the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate,*** *and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination. (Emphasis mine)*
>
> *(2)…*
>
> *(3)…*

29. It is clear from the above provision that for the accused person to be able to exercise his right under **Section 214 (1) (ii)** he must be notified of the same by the court allowing the amendment or the substitution of the charge. To the extent that that was not done, the amendment was prejudicial to the appellant, but did not render the charge defective.

On the second limb of the submission, it is true that the Doctor was of the view that the complainant suffered from mental retardation and could not communicate well. He stated in the P3 that it was her father who actually gave the history of the offence during the medical examination. Her father testified that she was mentally unstable. Never the less that did not bring the charge under **Section 7 of the Sexual Offences Act** which provides for the offence where the sexual offence is committed in the presence of a person with mental disability. Again, to that extent, the charge sheet was not defective, neither was it prejudicial to the appellant.

30. In fact what this evidence did was to bring to the fore the **vulnerability** of the complainant, a fact both the court and the prosecution were obligated to explore before proceeding with the trial. That is the import of **Section 31 of the Sexual Offences Act**. That besides, I am unable to agree with the appellant's submissions that because of that evidence the charge was defective.

31. On the questions as to ***whether the prosecutor was incompetent*** the appellant in arguing this ground submitted that **Section 85(1) of the Criminal Procedure Code** provides that ***"all police officers other than administration police officers of the rank of Assistant Inspector***

or above are appointed Public Prosecutors for Kenya generally ". That contrary to this provision his case was prosecuted by a Corporal Maeba and Police Constable Wanjiku Karanja, each of whom, going by the quoted **Section 85(1) of the Criminal Procedure Code** was obviously incompetent.

32. The Court of Appeal in **Isaac Mutuma Irikia v Republic [2017] eKLR**, reiterated the position that for a prosecution to be lawful it has to be conducted by a qualified prosecutor and if it is not, that trial becomes a nullity. In that case, the Court recalled its decision in 2003 in **Roy Richard Elirema & another vs Republic [2003] eKLR** followed by many others including **John Odhiambo Kapteng vs. Republic (2005) eKLR** and **Nicholas Shirao & Another vs. Republic (2005) eKLR,** where it held that, police officers below the rank of Assistant Inspector, were incompetent prosecutors**,** and any prosecutions conducted by them rendered the said trial a nullity. Speaking on the import of the provision of law cited by the appellant, the Court of Appeal in the **Elirema** case above the court had rendered itself thus:

> ***"This narrative shows that a large portion of the prosecution was conducted either by corporal Kamotho or by corporal Gitau. It is, however, true that an inspector Wambua also conducted part of the prosecution. But if a police corporal does not, in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid [i.e the part conducted by inspector Wambua] while at the same time holding that the other parts [i.e. the parts conducted by corporals Kamotho and Gitau] are valid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated.***
>
> ***Going by the provisions of the Code which we have already fully set out, it is clear that the Attorney General has no power to appoint a police officer below the rank of an assistant inspector to be a public prosecutor.***
>
> ***Corporals Kamotho and Gitau were clearly acting as public prosecutors.***
>
> ***They were clearly purporting to prosecute as public prosecutors pursuant to the provisions of section 86 of the Code. They were clearly not entitled to act as public prosecutors."***

33. The law was amended in 2007 whereby it allowed the appointment of persons to act as prosecutors. In the **Issac Mutuma** case the Court found that by **Act No. 7 of 2007, Section 85(2)** was amended leaving it lawful for *"any person employed in the public service"* capable of being appointed a public prosecutor to be appointed as such and proceeded to find that a Police Inspector had been clothed with the powers to prosecute, and there was no impropriety in his conduct of the prosecution. Further that **The Statute Law (Miscellaneous Amendments) Act, No. 12 of 2012**, changed the definition of the prosecutor stating that;

> ***"Public prosecutor" means the Director of Public Prosecutions, a state counsel, a person appointed under section 85 or a person acting under the direction of the Director of Public Prosecutions."***

34. **Section 85** was accordingly amended to give the powers of appointment to the DPP. **Act no 2 of 2013** provides for the appointment of Police Officers as prosecution assistant defining them as "**Prosecution assistant"** to mean **"an officer in the National Police Service gazetted as a Public Prosecutor".** This the DPP may appoint under the powers in the **ODPP Act no 2 of 2013** and **Section 85 (1) of the Criminal Procedure Code** which states:

85. Power to appoint public prosecutors

> ***(1) The Director of Public Prosecutions, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.***

35. The question is whether these two officers were gazetted as public prosecutors. The unfortunate thing is that, again, the prosecuting Counsel did not, in his reply, address this very crucial issue yet it goes to the root of the legality of the proceedings. There is nothing on the record to indicate that the two Police Officers were gazetted to prosecute, or as prosecution assistants, and my search for that information from the online Kenya Gazette brought up naught. Hence, clearly this prosecution was conducted by incompetent prosecutors, as there was nothing to show that they were gazetted by the DPP despite their ranks, to prosecute.

36. ***On whether the prosecution proved its case beyond a reasonable doubt*** the appellant submitted that is the cardinal duty of the prosecution side to ensure that the allegations against the accused person are proved beyond reasonable doubt. Credible and consistence witnesses in criminal trials are paramount. That in this case the prosecution witnesses displayed the kind of inconsistency likely to suggest that they were not credible at all. Pointing to the record of Appeal, he submitted that the minor averred that the ordeal occurred on 13th June 2016 at about 5.00 p.m. (page 15 line 21). That it was her testimony under cross examination that the accused, the appellant herein had come home with her father and after asking for the whereabouts of her mother, whereby she told him that her mother had gone to fetch water, that her father had left together with appellant (page 16 lines 14 – 16). He submitted that this evidence showed that he, the appellant came home with complainant's father from the drinking spree, found that his wife was away fetching water, and they left together. He submitted that this evidence clearly showed that there was no time he was alone with the minor, and he could not therefore be the one who defiled her.

37. A perusal of the record supports the appellant's submission that the complainant stated under cross examination that her father came home with the appellant , they found that her mother had gone to fetch water and they left together to check out posts in the forest. It also placed complainant's father at home with the appellant right from the drinking spree, a contradiction to his testimony that when they came from the drinking spree he parted ways with the appellant, who went home alone while he left for Paulo's. Again, it is noteworthy that the complainant's father's statement to the police showed that he was at home at 6:30 pm, before leaving to go and check posts. This contradicts his evidence that he went straight to Paulo's place from the drinking spree and did not come home until 8:00pm. It confirms the appellant's defence that indeed they went home together and left together as testified to by the complainant. Perhaps that is why there was no explanation given by the PW3 why he would tell the appellant to go home alone while they had spent the whole day together. Further the

complainant's father's statement to the police that he went home from the drinking spree then left at 6:30pm, and the defilement happened at around 5pm while he was with the appellant creates another loop hole as to whether indeed it was the appellant who did it. Relying on **Section 165 Evidence Act** and **Richard Appella vs Republic CA No. 45 of 1981**, the appellant pointed out that contradiction in any event cannot support conviction. In that case it was held that:

> "*Two contradictory statements cannot be admitted in a court of law as evidence of truth, either one is not or both of them are not true due to their contradictory nature hence no possibility for both of them to be admissible.*"

38. It is evident that all this creates the doubt as to whether it is the appellant who committed the offence as there appears to be a conscientious effort by the complainant's father to place him at the scene. This is also seen from the story the victim's father said was told to him by the wife. That while he was away at Paulo's and she was at the river, the appellant defiled their daughter. The child testified that the appellant left with her father. Her father said he was with the appellant all the while. That is what he said he told his wife when she reported to him that the appellant had defiled their child. This evidence also contradicts what PW2 said she was told by Josephina, that the appellant had come home alone and found the complainant alone and defiled her.

39. It is noteworthy that neither J nor the complainant's mother testified. Their evidence remains hearsay. Josephina is described as the person who was designated as the complainant's care giver. There are so many unanswered questions about her and her report to PW2. She is the one who reported the defilement to PW2. How did she know about it? Did the complainant tell her? Did she find the offence being committed? Why did she J not report to the mother or father of the complainant? How did she identify the defiler? PW2 said she never saw the appellant person. So, how did PW2 ascertain that it was the appellant that the complainant was talking about? If the appellant left with the complainant's father, then who defiled the complainant?

40. It is also noteworthy that the complainant testified that the person who defiled her was a person who stays at their home. According to the doctor who examined her, the report he received was that the person who defiled the minor was known to her and to her parents. One cannot tell whether there was a person who was actually staying in the home of the complainant different from the appellant who according to the complainant's father, had arrived the same day of the alleged defilement. Hence the evidence on the identity of the person who allegedly committed the offence remains of doubtful credibility as the only eye witness, the victim, removed the appellant from the scene at the time of the alleged offence. The other witnesses did not testify.

41. Regarding the issue of penetration, it is not in dispute that the complainant had injuries in her private parts as described by the doctor. However, as to whether it is the appellant who inflicted the injuries, the evidence on record does not meet the threshold of beyond a reasonable doubt. The complainant was taken to hospital the next day, the same day the appellant was arrested. Nothing stopped the doctor from taking specimens for forensics to determine whether or not the person accused of committing the offence was the one at whom fingers were pointed at. The appellant was never presented to the hospital for examination and for nay forensics. The investigating officer did not testify so crucial evidence remained out.

42. The appellant, citing **Jennison vs Backer (1972) 1 ALL ER 1006,** where the court stated *"The law should not be seen to sit simply while those who defy it go free and those who seek its protection lose hope,* **"** put it very well. That the police and prosecution had the duty to see to it that they presented a proper case to court.

43. Regarding the age of the complainant, the appellant took the position that this was *multi age* case where the complainant was 9, 14, 15 and 17 years at the same time. She was 9 years according to herself (page 15 line 6) 14 years based on charge sheet, 15 years by her father and 17 less three years according to the age assessment. It is evident that the complainant may not have been certain about her age in years due to her mental condition. Her father testified to her age on oath and I did not find anything on the record as a reason why the court doubted his testimony and sought to have her age assessed. Be that as it may, the doctors were bound to testify as to her mental age, which would assist in determining her level of understanding. Once again, she was failed by the criminal justice system because in her case it was as much about the number of years she had lived on earth, and her mental age. Nevertheless, it is now trite that failure to prove the actual age of a complainant is not fatal to the case the court could still proceed based on the apparent age. In this case, the father's evidence on oath was unchallenged.

44. As to whether the trial magistrate considered the appellant's statement of defence, it is evident that it was not analysed vis a vis the prosecution's case. His testimony that he was with the complainant's father PW3, the whole time is supported by PW3 himself. He told the court that the issue was about his uncle PW3, taking his phone, and his having reported him at the Kimnai AP Post. The prosecution's case is that the appellant was arrested by KPR who took the appellant to Kimnai AP Post. No officer was called from that Police Post testify to this. Is it possible it is because the issue of the phone would have come to the fore? It is possible. The appellant spent the night in the complainant's home. He was not confronted by any one, for the reason that he had been with the appellant the whole time.

45. There is no doubt that someone caused the injuries in SJ's private parts. However, the totality of the evidence is such that the identity of the person who did it was not established, as both the complainant's testimony and that of her father exculpated the appellant.

46. The appellant's defence was not considered.

47. He was not accorded a fair trial.

48. His prosecution was conducted by incompetent prosecutors.

49. The evidence given by the prosecution witnesses fell short of the standard of proof of beyond a reasonable doubt.

50. The conviction was unsafe. The same is quashed. The sentence set aside

51. Should the appellant be retried? Case law on this issue abounds in our jurisprudence. For instance in the case of **Opicho vs Republic [2009] KLR 369,** the Court of Appeal held as follows:

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."*

52. In this case, the trial was not only a nullity, but prosecution failed to establish that the appellant committed the offence. Hence a retrial would not be appropriate.

53. The appeal succeeds. The appellant is to be set at liberty unless otherwise legally held.

54. Right of Appeal 14 days.

Dated and delivered virtually this 31st December, 2020.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Martin

Court Prosecutor: Ms. Limo Prosecuting Counsel

Appellant: Present.

Ms. Limo: PC Wanjiku was not a Police Constable but a Prosecuting Counsel. We seek that we be supplied with the proceeding and Judgment as we intend to appeal.

Court: The prosecution be supplied with the proceedings and the judgment.

Judge.