REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 30 OF 2018

ONYANCHA FELIX OMBOGA........................1ST APPELLANT

DUNCAN OKEYO ONDIEKI...........................2ND APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(An appeal from the Judgement of the Mavoko Senior Resident Magistrate – L. KASSAN in Criminal Case No. 7 of 2015 dated 28/2/2018)

BETWEEN

REPUBLIC...PROSECUTOR

VERSUS

ONYANCHA FELIX OMBOGA...............................1ST ACCUSED

DUNCAN OKEYO ONDIEKI...................................2ND ACCUSED

JUDGEMENT

1. The appellants, **Onyancha Felix Omboga** and **Duncan Okeyo Ondieki** were charged before Mavoko PM's Court in Criminal Case No. 7 of 2015 with the offence of gang defilement contrary to section 10 of the ***Sexual Offences Act. No. 3 of 2006***. The particulars for the main charge were that on the 13th day of February, 2015 in Athi River District within Machakos County, jointly with others not before Court, the Appellants jointly and intentionally caused their male genital organs (penis) to penetrate into the female genital organ (vagina) of TKP a girl aged 8 years.

2. They were alternatively charged with the offence of indecent act contrary to section 11(1) of the same Act the particulars being that during the same period in the same area, the appellants. According to the PRC intentionally and unlawfully caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of **CB**, a girl aged 9 years.

3. After hearing, the Learned Trial Magistrate found that there was evidence that the complainant's vulva and the same was red and there were lacerations on her genitalia was penetrated. Accordingly, the court was satisfied that there was sufficient proof of penetration of the complainant's vagina. The court further found that the 2nd appellant aided the 1st appellant who defiled the complainant. It was further found that the appellants were positively identified and there was no question of mistaken identity. Accordingly, the court found that both the appellants had common intention to defile the complainant. They were accordingly convicted the 1st appellant to life sentence and the 2nd appellant to 15 years imprisonment.

4. Being dissatisfied with the conviction and sentence the appellants have now appealed to this court citing the following grounds:

> 1. The Learned Senior Principal Magistrate erred in both law and fact in finding and holding that the appellant had committed the offence of gang defilement. When NO evidence or no sufficient evidence had been adduced in that regard.

2. The Learned Senior Principal Magistrate erred in both law and fact in failing to find that to hold that the complainant's evidence against the appellant had not been corroborated and/or adequately corroborated as by law provided.

3. The Learned Senior Principal Magistrate erred in both law and fact in failing to find and to hold that crucial evidence exhibits, including the clothes worn by the complainant, and which the appellant was alleged to have removed to facilitate defilement of the complainant by others, was/were NOT produced in court.

4. The Learned Senior Principal Magistrate erred in both and fact in failing to Note, to find and to hold that the case before him had NOT been properly /adequately investigated in that NO evidence was presented to the court regarding the scene of crime (the building) which the appellant was alleged to have guarded as the complainant was defiled by others.

5. The Learned Senior Principal Magistrate erred in both law and fact in failing to find and to hold that both the main and the alternative charges had NOT been proved against the appellant.

6. The Learned Senior Principal Magistrate erred in both and fact in convicting and sentencing the appellant against the weight of evidence adduced in court.

7. The Learned Senior Principal Magistrate erred in both law and fact in basing his findings on assumptions.

8. The sentence meted out against the appellant is excessive and lawful.

5. In support of its case the prosecution called eight witnesses.

6. After *voir dire* examination, PW1, the complainant, though found to be sufficiently intelligent, was found not to understand the meaning of an oath due to her tender age. She accordingly gave unsworn statement.

7. According to her, on 13th February, 2015, a Wednesday, at 5.00 pm, she was from Voice of Jesus Church when she came across three men with whom they were staying in the same plot as neighbours standing on the road. As the tree were standing in a line, she decided to pass by the side at which point one of them got hold of her, carried her while covering her mouth. They then took her to an incomplete house. It was her evidence that she knew them by name as Dan, Felix and Bonny. According to her, it was the 2nd appellant who placed his fingers in her mouth while Bonny and the 1st appellant carried her. However, the 2nd appellant urged the others to let her go home and they did so.

8. Two days later on Friday, she met the same people and the same place. According to her the 2nd appellant covered her moth while the other two carried her to the same house. While Bonny was instructed by the 1st appellant to watch out for coming people, the 2nd appellant also left to go and keep Bonny company. However, before then, the 2nd appellant removed her shirt and panties and they laid her down while the 1st appellant removed his trousers and all his clothes. With the 2nd appellant holding her, the 1st appellant removed his organ which he uses to urinate and inserted it in the complainant's organ for urinating. At this point the 1st appellant told the 2nd appellant to go and keep guard at the entrance and the 2nd appellant did so leaving the 1st appellant with the complainant. After that the three left the complainant and went away after which the complainant got up, put on her panties and skirt and dragged herself home as she was in pain. She could not tell how long the 1st appellant was with her.

9. The following day, Saturday, the complainant reported the incident to her pastor, **EM**, who accompanied her home and reported the incident to the complainant's mother. On Monday, her mother reported the matter to the police at Utawala and they were referred to Mlolongo Police Station after which her uncle, **C**, took her to the Hospital where she was admitted for two days. Upon her discharge, she was issued with a P3 form which was filed at Athi River Healthcare Centre after which she was taken back to Mlolongo Police Station. Later, on Friday, the 1st and 2nd appellants were arrested and taken to Mlolongo Police Station. The complainant identified the appellants as **Felix** and **Dan** respectively.

10. According to the complainant she was staying in the same plot as the appellants and while the 2nd appellant and Bonny was staying together, the 1st appellant used to visit them. Later, the complainant and the 2nd appellant moved out of the plot but Bonny remained there. According to her she knew the house where the 2nd Appellant moved to since he saw him on her way to her aunt's place. She however stated that she did not report the first incident to anyone due to fear of being beaten by her mother. The day of the second incident she however arrived home after dark though she usually arrived home at 5.00 pm. She however did not inform anyone at home about the incident.

11. PW2, **MK**, the complainant's mother testified that the complainant was 9 years old in August, 2015 and referred to the complainant's birth certificate which showed she was born on 21st September, 2006. According to her the report of the incident was relayed to her by her pastor, **EM**, on 15th February, 2015 to who the information had been given by the complainant naming Felix, Dan and Bonny as the culprits. According to her information, the 1st appellant was the one who defiled the complainant while the 2nd appellant and Bonny held her. Thereafter, PW2 reported the matter at the police post where the complainant confirmed the incident in the presence of the pastor after which the complainant was taken to the Hospital by her uncle, TK, since PW2 had a young child. At the Hospital, the complainant was admitted for 3 days and was discharged on 19th February.

12. According to her evidence after the incident, the complainant became moody and did not want to talk to anyone though she complained of pain in the stomach and her private parts. On that day, PW2 noticed that the complainant was bleeding and had pain in the lower tummy. According to her, she knew the complainant's assailants who were her neighbours having known them for 2 months. She identified the appellants.

13. In cross-examination, PW2 stated that the complainant used to go to the church daily from 3.00pm to 5.00pm and would be taken home by the pastor. However, on the material day this did not happen and when she inquired from the pastor, the pastor informed her that she was not in church that day. On that day the complainant arrived home at 7.30 pm, was unhappy and was disturbed and did not eat as usual though she did not divulge what had happened. The following day, the complainant did not go to church being a Saturday though she went to sleep after lunch but did not disclose her problem. It was only the following day, Sunday that the complainant returned from church at 4.00 pm with the pastor that the incident was made known and the next day the same was reported. According to her, she washed the clothes which the complainant was wearing on the day of the incident. It was her evidence that the complainant mentioned the appellants and Bonny as her assailants but she had not seen Bonny for a long time and was unaware of his whereabouts.

14. PW3, **TK's** role in the matter was limited to transmitting the Occurrence Book from Githunguri Police Station to Mlolongo Police Station on 16th February, 2015. Upon reaching Mlolongo, he was given a document to take to the Hospital. It was his evidence that he got a small paper with the OB number which he took to Nairobi Women's Hospital. He also took the complainant to Nairobi Women's Hospital, Kitengela on 16th February, 2015 where she was admitted for examination and remained there for 3 days. According to hi, though the complainant was badly off she never complained of any pain or fatigue. He identified the documents they were issued with at the Hospital, P3 form. According to him the complainant pointed the 1st appellant as the person who defiled her on the day of arrest when he accompanied **PC Munyao** to arrest him.

15. PW4, **EM**, was a pastor of Voice of Jesus Lord Worship Centre in Githunguri, Utawala. According to her, on 15th February, 2015 after finishing service, the complainant went to her office to drink water. She then informed the complainant to go home as it was getting late but the complainant informed her that she could not do so as some three people known to her were waiting for her on the road to her home, one of whom was her neighbour. She however did not disclose their names. According to PW4, the complainant revealed that the said men had held her, took her to a house and removed her clothes but she had not informed her mother about it. PW4 then took the complainant to her home and asked her to narrate to her mother what had happened. In her presence the complainant narrated that the three men took her to an incomplete house, removed her clothes and one of them inserted his fingers into her mouth, removed her panty and lay on her upon removing his trousers. She said the man slept with her by inserting his penis into her vagina. The complainant however narrated the incident in details to her mother while crying.

16. According to PW4, when the complainant went into her office she noticed that she was walking with difficulty which was not normal and informed her she feared going home alone and that she had pain between her legs. According to the complainant the assailants were staying in their plot. PW4 however did not know the appellants though the complainant informed her in court that they were the ones who defiled her. It was her evidence that before the incident, the complainant used to go home alone but after that she started taking her home. In cross examination, she stated that the complainant did not mention the 2nd appellant or any other person apart from the fat that she was assaulted by three men, one of whom was their neighbour.

17. PW5, **Pauline Kimeu**, a clinical officer at Athi River Health Centre was called to produce the PF form on behalf of her colleague, **Martha Maitha** who was unwell and with whose handwriting she was familiar. According to her the P3 form was issued to the complainant who was 8 years old and went to hospital on 19th December, 2015 alleging that three known people had sexually assaulted her on 13th December, 2015. According to the witness, the complainant was in a fair general condition but upon examination it was found that the hymen was torn and there were lacerations on the vaginal wall (vulva) which were hyperaemic. In her view this could have been caused by defilement. High vaginal swab carried out at Nairobi Women's Hospital revealed some epithelial cells though no spermatozoa was seen. All the other tests were negative.

18. PW6, **Mathew Maingi Kiilu**, was the assistant Chief, Githunguri sub-location who, based on the information received from the complainant, assisted the police in apprehending the appellants.

19. PW7, **Ruth Kangethe**, a clinical officer based at Nairobi Women's Hospital, Kitengela was called to produce the PRC Form which was prepared by her colleague, **Christine Kiteshuo**. According to her the complainant was seen in the facility on 16th February, 2015 at 6.00 am. According to the report the complainant had no physical injuries but the vaginal examination revealed lacerations on the outer genitalia with reddish vulva. Further he vagina had foul smelly discharge and the hymen was torn with a notch at 11.00 O'clock. The rest of the examination returned negative results.

20. PW8, **Cpl Elizabeth Mbithi**, the investigation officer testified that after the matter was reported on 16th February, 2015 the complainant, aged 8 years, was advised to report the same at Nairobi Women's Hospital where the complainant was admitted for 2 days. She was then issued with a P3 form which was filled at Athi River Sub County and returned to the police. After that the prosecution witness' statements were recorded after which the appellants were arrested and charged with the offence but the third person was still at large.

9. Upon being placed on their defence, the 1st appellant who testified as DW1 stated that he was arrested in the house on 20th February, 2015 at 5 am. According to him, during his arrest, the police officers were accompanied by the 2nd appellant who was tied around his hands at the back, the complainant's uncle called K. Upon seeking an explanation from the 2nd appellant, the second appellant informed him that he had been asked by police officer to bring take them to the 1st appellant's house but he was unaware of the reason. The 1st appellant was also tied and were taken to a plot where the complainant was called after which they were taken to AP post. On being asked what the matter was, the complainant mentioned the 1st appellant's name, the 2nd appellant and Bonny saying that she had been gang raped. It was his evidence that a police officer called **Kerucho** then said that he knew **Bonny** and called after which Bonny went with *boda boda* but the complainant said he was not the one though she insisted that the other person was **Bonny**, the 2nd appellant's brother. According to the 1st appellant, **Bonny** was at home in Kisii during December, according to his brother, the 2nd appellant and was not present at the time of their arrest.

10. According to the 1st appellant the 2nd appellant had stayed with him a lot in Utawala and in 2014, he took his uncle to Mombasa. However, following their differences over the 2nd appellant's motor cycle, in November, 2014, they were not on talking terms. It was his evidence that at the time of the incident, he had gone to Ruiru to apply for a job and only returned on 19th February, 2015 and the following

day he was arrested. He however confirmed that he came to know the complainant in 2014, 3 months before the incident since they were living in the same plot. He also knew the complainant's mother.

11. However, in cross-examination he stated that in February, 2015 when the incident occurred, he was living in Utawala and was operating as a motor cycle cyclist. It was his evidence that he used to see the complainant when he used to visit the 2nd appellant and he had seen her for 3 months before he differed with the 2nd appellant. Though he knew her father and mother as well he stated that he had not differed with her family. He confirmed that the 2nd appellant was a close friend to him though they later differed. He also knew Bonny, the 2nd appellant's brother who stayed for a month in December before leaving for his rural home. He however insisted that he was in Ruiru with their uncle where he had gone to apply for a job at the time of the incident.

12. On his part, the 2nd appellant testified that he was arrested on 20th February, 2015 by people in the company of the village elder and 2 police officers. Upon being asked whether he knew the 1st appellant's house he confirmed and took them to the 1st appellant's house, and though they were close friends, at the time he was not in talking terms with the 1st appellant. Upon reaching the 1st appellant's house they were informed that he had and they were directed to a new house. Where they found him and he was also arrested and they were taken to AP post. On the way the 1st appellant mentioned Bonny and said that the complainant at identified them both. He also mentioned Bonny. However, the village elder said he knew Bonny and called but the person who appeared was a man called Finny and the complainant stated that he was not Bonny. According to the 2nd appellant no one said Bonny was his brother apart from the complainant.

13. It was the 2nd appellant's evidence that on 13th February, 2015 he woke up and went to his motor cycle business and transported goods from one hardware to another. At midday his cousin called, **Moraa**, him and informed him that her mother, the 2nd appellant's aunt, **Esther Momanyi**, wanted him to drive them in their car. Between 2-3 pm, he met **Moraa** at MC Utawala and he drove them to Waithaka, Kikuyu to condole with a relative. According to him, they arrived in Waithaka at 5pm and that that night he was with his said Aunt **Esther Momanyi** and cousin, **Moraa**. It was therefore his evidence that he was not at the scene and did not know why the case against him was fabricated

14. The 2nd appellant confirmed that he had known the complainant for three months having stayed in the same compound with many other tenants though they never differed. He also knew her family.

15. In cross-examination he confirmed that Bonny was his younger brother with whom he had lived for a month.

16. DW3, **Ronald Amosa**, the 2nd appellant's uncle, married to the 2nd appellant's aunt, testified that on 12th February, 2015, his mother, **Joyce Ariga**, passed away and on 13th February, 2017, his relatives went to his residence to condole with him. On that day the 2nd appellant drove his uncle to his place and they arrived between 4-5 pm in the company of DW3's sister in law and a niece. According to him, he was at his residence till 8pm as the 2nd appellant had suggested that they should delay due to jam. According to him the 2nd appellant was at his place throughout.

17. DW4, **Esther Musaro**, the 2nd appellant's aunt testified that on 13th February, 2015 she was called by her husband, an uncle to the 2nd appellant at 9.00 am and was informed that her sister in law had died. She then called her daughter to get in touch with the 2nd appellant to drive them to the place of the funeral. According to her the 2nd appellant turned up at 3.pm after which they went to Waithaka at 5pm and left at 8pm to Utawala where they arrived at 10pm.

18. DW5, **Charity Moraa**, confirmed that she was called by DW4, her mother on 13th February, 2015 and was asked to inform the 2nd appellant to take them to her uncle's place. The 2nd appellant arrived at 3pm and they arrived in Waithaka at 5pm and left the place at 8pm. According to her the 2nd appellant never left them at the said place till they returned home at 10pm. According to her at the time she was using mobile phone number [xxxx] registered in the name of **Dennis Momanyi** which she had used from High School. It was her evidence that she was born in 1997 hence was a minor as at December, 12 2015.

19. After producing the death burial permit and the statement from Safaricom, a mobile telephone service provider, the defence closed its case.

20. In this appeal, it was submitted by the 1st appellant based on **<u>Peter Mwangi Kariuki vs. Republic [2015] EKLR</u>** that the 1st appellant was improperly convicted based on the weakness of his defence rather than the strength of the prosecution's case. It was contended that to give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt since a single circumstance creating reasonable doubt in a prudent mind about guilt of an accused is sufficient. In this case, it was submitted that the prosecution did not prove beyond doubt that the 1st Appellant committed the alleged offence.

21. It was submitted that the charge sheet was defective in that it did not contain the words ne "after the other" or "in turns" in describing the manner in which the alleged gang defilement was committed. It was submitted that the failure to give the particulars of the offence greatly prejudiced the 1st appellant as it was only when PW1 was testifying that the 1st appellant became aware that it was purported that he is the one who inserted his penis in PW1.

22. It was further submitted that the offence of gang defilement is unknown under the ***Sexual Offences Act*** since section 10 thereof provides for gang rape and not gang defilement. It was therefore submitted that Parliament did not contemplate an offence of gang defilement hence the 1st appellant ought to have been charged with the offence of defilement hence the 1st appellant was charged with an offence not known to law.

23. It was further submitted that the prosecution case was full of material contradictions that went to the root of its case. The 1st appellant

then proceeded to point out what in his view were the said contradictions and contended that the evidence of PW1 was totally at variance with that of PW2 and PW4 and that in some instances the evidence of PW2 was at variance with that of PW4. To the 1st appellant, these variations and contradictions were signs of fabrication.

24. It was further submitted that in relying on the P3 form and PRC form which were not produced by the authors, the learned trial magistrate based his judgement on hearsay evidence.

25. It was further submitted that though the 1st appellant raised a defence of alibi which cast doubt on the prosecution's case, the prosecution did not rebut his assertion that he was with his uncle. It was therefore submitted that in the instant case, the Trial magistrate shifted the burden of proof from the prosecution to the defence. It was submitted that since the prosecution severally sought adjournment in order to avail Call Data Records, it was duty bound to investigate the same so as to ascertain the location of the accused persons during the alleged offences. The court was therefore urged to draw adverse inference against the prosecution for failing to avail to the 1st appellant his Call Data Records.

26. Based on **Martin Charo vs. Republic [2016] eKLR**, it was submitted that the learned trial magistrate shut out the available defences in the case of this nature which he ought to have considered before arriving at his conclusion.

27. It was further submitted that the learned trial magistrate in meting out the sentence of life sentence failed to consider the 1st appellant's mitigation. Based on the decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, it was submitted that the indeterminate life imprisonment sentence imposed on the 1st appellant was manifestly harsh in the circumstances and the court was urged to substitute it with 15 years imprisonment in the event that the court disagreed with the appellant on his submissions relating to conviction.

28. On behalf of the 2nd appellant, it was submitted that from the evidence of the complainant, the 2nd appellant did not have any intention to harm the complainant and that no evidence was tendered to show that the 2nd appellant was convinced by the others to follow them. To the 2nd appellant, it beats logic to have said forgive the child and let her go home then go ahead to insert fingers into the complainant mouth and aid in her defilement. It was further submitted that from the evidence, it was not clear whether the second appellant was guarding the entrance or aiding in undressing and holding the complaint.

29. It was pointed out that for an offence of gang rape to be proved, the prosecution ought or must prove that offence of rape or defilement was committed in association with another or others. It was submitted that from the evidence, the place where the complainant was waylaid must have been populated hence the appellants would not have grabbed the complainant without anyone seeing them. It was submitted that no photographs of the scene were produced and the incomplete house that the appellants are alleged to have taken the complainant was not described or any photos taken to show the court where exactly the crime took place. Similarly, the clothes that the complainant was wearing that day were not produced as evidence. It was submitted that the appellants were not taken to hospital to get the DNA samples taken to match them to the crime. During cross-examination, it was submitted that the complainant stated that she was exaggerating that Dan inserted his fingers into my mouth as she recorded. Therefore, the complainant was clearly lying.

30. It was submitted that the prosecution had not proven that the second appellant committed the offence and if he did it in association with others.

31. The second element of the offence, it was submitted was that the appellant, with common intention was in the company of another or others during the commission of the alleged offence of gang rape. In this case it was submitted that at first the complainant indicated that the 1st appellant was with her when Dan followed Bonny and said he was going to guard the door. It could not be possible for him to be guarding the door and at the same time undressing the complainant. It is clear that Dan did not have a stake in the defilement of the complainant. The fact that the complainant stated that the 2nd appellant & Bonny run away, it was submitted meant that they did not participate in the defilement.

32. As regards identification, the 2nd appellant relied on the case of **Mwendwa vs. R (1989) KLR 464** where it was held that whenever the case against an accused person depends wholly or substantially on the correctness of one of more identification of accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.

33. According to the 2nd appellant the evidence adduced did not point out the fact that the 2nd appellant participated in the offence as the evidence relating to his arrest was never corroborated and it was not indicated that he was identified as one of the perpetrators.

34. It was further submitted that crucial evidence/exhibits, including the clothes worn by the complaint, and which the appellant was alleged to have been removed to facilitate defilement of the complainant by others, was/were not produced in court. Further, the complainant did not give a clear description of what the assailants were wearing, height but went ahead to just mention one name each. That the officer who visited the scene that is **APC Munyao** did not file any statement, photographs of the area where the complainant was grabbed and the incomplete house. In addition, DNA samples from the appellants were not taken for analysis to determine their involvement in the defilement.

35. It was submitted that **PW8** stated that she did not record the appellant's version of statement as they did not give him time to record. The investigation officer had access to both complainant and the accused and could not purport not to have been given time to get their alibis. Further, PW8 did not remember the date she visited the scene of crime in the company of **APC Munyao**.

36. It was therefore submitted that both the main count of gang rape and the alternative one of indecent act with a child had not been proved

37. To the 2nd appellant, the trial magistrate convicted him based on uncorroborated evidence and a prosecution case that had a lot of gaps. In

his Judgement, the trial magistrate tries to fill in the gaps and also give evidence on behalf of the prosecution. Based on **Kassam Ukiru vs. R (2014) eKLR,** it was submitted that the failure to get the safaricom data was not the 2nd appellant's fault as safaricom wrote a letter to the effect that it could not furnish the same after expiry of 30 days. Failure to produce the safaricom data doesn't automatically make the 2nd appellant guilty. In this regard, the 2nd appellant relied on **Sekitoliko vs. Uganga (1967) EA 53**.

38. It was submitted that though the defence case by the 2nd appellant according to the trial magistrate was weak, but they have no legal duty to fill the gaps in the prosecution case. He deserved the benefit of doubt arising from the prosecution as held in the case of **Samson Lorema & Others vs. Republic Criminal Appeal No. 2 of 2016.**

39. The 2nd appellant therefore prayed that the appeal be allowed the conviction be set aside and the sentence quashed.

40. In opposing the appeal, the Respondent, through learned prosecution counsel, **Ms Mogoi**, submitted that in this matter, the Appellants were being charged with the offence of gung defilement. The offence is provided for under section 10 of the ***Sexual Offences Act*** which states:

> ***"any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life."***

41. It was submitted that for the offence of gang rape or defilement to occur, there has to be an element of the offence having been committed in association with another or others. In this case, it was the testimony of PW1 that she met the two appellants and another on her way home and they carried her to unfinished house and the 1st Appellant defiled her while the 2nd Appellant kept guard. The foregoing classified this defilement as a gang defilement hence they were correctly charged.

42. On the issue of the age of PW1, it was submitted that PW1's birth certificate which showed that she was born on 31st September, 2006 hence was 8 years at the time of the commission of the offence was produced as prosecution exhibit 1 by PW2 and as such, the issue of age was proved beyond reasonable doubt and the same if not disputed by the Appellants.

43. On the issue of penetration, it was PW1's testimony that she went to church on Friday and on her way back home, she again met the three men she had met on Wednesday at the same sport.

44. The 2nd Appellant held her and took her to incomplete house and while doing so, he inserted his fingers in her mouth so that she could not shout while the 1st Appellant and Bony carried her to the said incomplete house while Bonny was told by the 1st Appellant to guard the entrance so that no one entered the place.

45. The 2nd Appellant removed her the skirt she was wearing and the panty, they laid her down and the 1st Appellant removed his trouser and his other clothes while the 2nd Appellant was still holding her. The 1st Appellant then removed the thing that that he uses to urinate and inserted it into her thing that she uses to urinate. At this point, the 1st Appellant told the 2nd Appellant to go and guard at the entrance while he remained with PW1 and defiled her.

46. From PW1's evidence, it was submitted that it was clear that the 1st Appellant did penetrate her vagina using his penis. PW1's evidence on penetration is corroborated by the evidence of PW5 and PW7 who testified in relation to the P3 form and PRC forms respectively that had been filled on behalf of PW1 after medical examination. According to the medical examination more so the vaginal examination of PW1, the outer genitalia had laceration and the vulva was reddish, the vagina had a foul smelling discharge and the hymen was torn with a notch at 11:00 o'clock.

47. The medical report confirmed conclusively that PW1 had been penetrate hence the element of penetration was proved.

48. On the third issue of whether the penetration was cause by the Appellants, it was submitted that the offence took place in the evening when PW1 was on her way back home from church hence it was during day time and PW1 was able to see her assailants clearly and identified them.

49. It was the evidence of PW1 that she knew the Appellants very well a fact that is admitted by the Appellants who also admitted in their defence of having known PW1 and her family since they lived in the same compound with the 2nd Appellant. PW1 testified that the 1st Appellant was a friend of the 2nd Appellant and that he used to visit the 2nd Appellant in their compound a fact that is also admitted by both the Appellants.

50. Further, PW1 testified that the two Appellants were in the company of Bonny a brother to the 2nd Appellant a fact that is admitted by both Appellants that the 2nd Appellant had a brother who had lived with him by the name Bonny.

51. PW1 in her testimony was very clear as to the identity of her assailant that even when a different Bonny was called, she clearly stated that he was not the Bonny she was referring to but the brother of the 2nd Appellant.

52. The identification of the Appellants was that of recognition considering that the offence took place during day time and by people PW1 knew very well hence there was no mistake as to their identity and identification.

53. The testimony by PW1 that she was defiled by the 1st Appellant who was in the company of the 2nd Appellant and one **Bonny** remained consistent from the first person she reported to and to the others that she narrated the incident to.

54. PW1 was a minor aged 8 years and from her testimony, the testimony of the other prosecution witnesses and the testimony of the defence witnesses, she had no reason to make up this case against the Appellant. Neither PW1 nor her family had differed with any of the Appellants and even the Appellants did confirm that they did not have any grudge against the family of PW1 hence no reason at all for PW1 to fabricate the case against them. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan and Sachdeva, JJ** held that:

> **"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?"**

55. Further, it was the evidence of PW1 and PW4 that PW1 was afraid of going home alone after the incident and this fear can only be attributed to the fact that indeed she had been defiled as her testimony indicated and was genuinely afraid of going home alone less the same incident happens to her again.

56. It is worth noting that that both the Appellants were represent by an able counsel all through the hearing of the prosecution's case. Considering the foregoing, was submitted that the defence counsel was aware of the requirement that alibi defence should have been brought up at the earlies opportunity. However, throughout the prosecution's case the defence never brought up any indication that they had an alibi defence meaning that the alibi defence at the defence stage was purely an afterthought that did not shake the prosecution's evidence considering the 1st Appellant did not call any witness or any evidence in support of his allegation that he was in Ruiru at the time of the commission of the offence. The evidence by the 1st Appellant as to his whereabouts on the material date remains to be mere allegation that were not substantiated.

57. Though the 2nd Appellant's alibi defence had corroborated evidence in support, it was submitted that the same was not brought to the prosecutions attention at the earliest opportunity to enable the prosecution to investigate the same. Further, the said defence did not shake at all the prosecution's evidence especially the evidence of the victim (PW1) which remained consistent throughout, believable and unshakable.

58. Both Appellant claim that they were not taken to scene but they kept on disputing that the scene was as described by PW1, one wonders that since they were not taken to the scene, how could they know the exact place and even testify about it?

59. The prosecution's evidence on record proved the element of gang defilement and proved that indeed PW1 was defiled and that the offence was committed by none other than the Appellants herein and another.

60. It was therefore submitted that the prosecution's evidence was consistent, direct, clear and without any doubt whatsoever that the appellants committed the offence charged with. According to the Respondent, the trial Court duly analysed the evidence led by the Prosecution and Defence and was satisfied that it led to the irresistible conclusion that the Appellants did commit the offence hence convicted the Appellants. The decision of the Court was well reasoned and supported by evidence.

61. In view of the foregoing, the Respondent urged this Court to uphold the conviction of the Lower Court and confirm the sentence considering the age of the victim.

Determination

62. I have considered the evidence adduced before the trial court. This is a first appellate court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. 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 witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

63. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; 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 witnesses."**

64. The offence with which the appellants were charged was gang rape contrary to section 10 of the ***Sexual Offences Act*** which states:

"any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life."

65. According to the 1st appellant, the charge with which the appellants were charged was defective since it did not it did not contain the words ne "after the other" or "in turns" in describing the manner in which the alleged gang defilement was committed. If I understand the submission correctly, the 1st appellant contends that the charge sheet ought to have stated the sequence in which the defilement occurred. With due respect the actual penetration, according to the evidence, was only perpetrated by the 1st appellant. Accordingly, there was no sequence in the act of penetration as it was perpetrated by one person, the 1st appellant. The charge facing the appellants was that they jointly and intentionally caused their male genital organs (penis) to penetrate into the female genital organ (vagina) of TKP a girl aged 8 years. Therefore, they were aware that evidence would be led that they penetrated the complainant. Considering the evidence adduced, the 1st appellant against whom evidence of penetration was led cannot therefore be said to have ben prejudiced by the manner in which the charge was drawn.

66. It is true that section 134 of the ***Criminal Procedure Code*** requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It provides that**:**

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

67. Interpreting this provision, it was held in **Isaac Omambia vs. R, [1995] eKLR** that**:**

"the particulars of a charge [form] an integral part of the charge."

68. However, the test in such cases was set out in **Cherere s/o Gakuli vs. R [1955] EACA 622** in which it was held that:

"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity".

69. It was therefore held in **Paul Katana Njuguna vs. Republic [2016] eKLR** that:

"In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."

70. Dealing with the framing of a criminal charge in the case of **Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391],** the Supreme Court of India held that:

"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent…We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands … but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. … The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way…Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

71. Other jurisdictions have also dealt with similar issues of defective charges. **In The State vs. Matlhogonolo Masole, 1982 (1) BLR 202 (HC) the High Court of Botswana,** citing with approval **(R vs. Greenfield, (1973) 57 Cr. App.Rep. 849)** while handling a similar situation, the court opined thus:

"...there is, however, one over-riding matter to be considered and that is whether or not the accused was prejudiced by the duplicity in the charge, as duplicity in a count is a matter of form, not a matter of evidence (R v Greenfield, (1973) 57 Cr.

App.Rep. 849).”

72. Dealing with a submission similar to the one made by the 1st appellant herein the Supreme Court of New South Wales in the case of **R vs. Fenwick, [1953] 54 S.R [N.S.W. 147],** in a case where two men were charged in one count with raping the same woman, held that:

> **“It mattered not whether they acted in pursuit of a common purpose or each raped the woman independently of the other.”**

73. Similarly, in **Isaac Nyoro Kimita & Another vs. Republic [2014] eKLR**, it was appreciated that:

> **“In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have *“jointly”* defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complaint. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants’ constitutional right to a fair trial.”**

74. In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** the Court expressed itself as hereunder:

> **“I have said elsewhere that the answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:**
>
> > ***…. 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 injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***
>
> **The proviso to Section 382 provides that in determining whether the 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. Next, then, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given pointers. Two cases are pertinent: the case of *Yosefa v. Uganda [1969] E.A. 236* – a decision of the Court of Appeals – and *Sigilani v. Republic [2004] 2 KLR 480* – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. Sigilani held:**
>
> > **‘The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.’**
>
> **As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him" In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice" I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence. At the end of the day, therefore, the test is not at all a formalistic one but a substantive one. On my part, I have adopted a test that looks at the trial process in its totality rather than the retail defects separately. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal. Applying this approach to the facts of the present case, I can confidently say that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to “cure” it under section 382. If one needed evidence of that, one would begin with the very fact that the Appellant never raised the objection – including on appeal. That must be because he knew the charges he was facing. Second, a perusal of the Court record shows that the Appellant participated vigorously in the trial process and was well aware of the charges he was facing. All in all, I am certain that the trial process was fair and the Appellant had sufficient notice of the charges facing him.”**

75. Applying the same test to the present case I am similarly satisfied that no miscarriage of justice was occasioned by the purported technical defect in the charge sheet which in any case is, in my view, curable under section 382 of the ***Criminal Procedure Code***.

76. It was further submitted that the offence of gang defilement is unknown under the ***Sexual Offences Act*** since section 10 thereof provides for gang rape and not gang defilement. It was therefore submitted that Parliament did not contemplate an offence of gang defilement hence

the 1st appellant ought to have been charged with the offence of defilement hence the 1st appellant was charged with an offence not known to law.

77. Under section 10 of the ***Sexual Offences Act***, the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.

78. In this case since the victim was a child under the ***Children Act***, the offence ingredient would be that of defilement. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

79. In this case there is no doubt about the age of the complainant which was proved both by oral and documentary evidence to have been 8 years at the time of the offence.

80. As regards the penetration, the complainant stated that the 2nd Appellant removed the skirt she was wearing and the panty, they laid her down and the 1st Appellant removed his trouser and his other clothes while the 2nd Appellant was still holding her. The 1st Appellant then removed the thing that that he uses to urinate and inserted it into her thing that she uses to urinate. At this point, the 1st Appellant told the 2nd Appellant to go and guard at the entrance while he remained with PW1 and defiled her. From PW1's evidence, it is clear that the 1st Appellant did penetrate her vagina using his penis. PW1's evidence on penetration is corroborated by the evidence of PW5 and PW7 who testified in relation to the P3 form and PRC forms respectively that had been filled on behalf of PW1 after medical examination. According to the medical examination more so the vaginal examination of PW1, the outer genitalia had laceration and the vulva was reddish, the vagina had a foul smelling discharge and the hymen was torn with a notch at 11:00 o'clock.

81. Section 2 of the ***Sexual Offences Act*** provides that:

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

82. This was explained in the case of **George Owiti Raya vs. Republic [2013] eKLR** where it was held:-

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane…It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."**

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

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

84. It is therefore clear that there was penetration of the complainant's genital organ.

85. Was the penetration by the appellants and by what means. In this case, the only eye witness evidence connecting the appellants with the offence was that of the complainant, a child aged 8 years. On the issue of whether the evidence of a minor requires corroboration, the law is quite clear: it does. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** [Emphasis added]

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

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

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

> **"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:**
>
>> ***"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."***
>
> **The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."**

88. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

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

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

> **"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."**

90. Whereas, the trial court ought as much as possible state in express terms that it is satisfied that the child is stating the truth, there are no prescribed words as long as the court is clear in its mind that it believes that the child was stating the truth. One such instance would be where, for example, the court states that the child's evidence was credible since credible evidence must necessarily mean that the evidence is truthful.

91. In this case, the learned trial magistrate found that the complainant's evidence was unwavering and was well corroborated by other prosecution witnesses. He further found that the complainant's version of what happened on that day was correct. Whereas, the learned trial magistrate could have done better than this, it is clear that a holistic reading of his judgement shows that he believed that the complainant was telling the truth.

92. In **Keter vs. Republic [2007] 1EA135**, the Court held *inter alia* that:-

> **"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."**

93. Dealing with similar circumstances the Court in **Tito Kariuki Ngugi vs. Republic [2008] eKLR** expressed itself as follows:

> **"I am satisfied and I agree with Mr. Mugambi that the allegation of a frame up is an afterthought. The Appellant's own daughter especially did not have any reason to frame up her father."**

94. In this case there was no doubt that the complaint knew the appellants well. There was no grudge either between the complainant and the appellants or between the complainant's family and the appellants. No reason was given as to why the complaint would pick on the appellants and one **Bonny** as the people who defiled her. In fact, to prove that the decision by the complaint was not arbitrary, when a person was availed as being the third assailant, **Bonny**, the complaint clearly exonerated the said person. She further stated that on the first day,

nothing was done to her by the appellants. To my mind this shows a witness who knew her assailants very well and did not simply set out to nail anyone who was presented to her. Her identification of her assailants in those circumstances, considering that the offence took place at 5.00pm and the offence was committed the day after an attempt had been made to do so, leaves no doubt that the complainant knew her assailants very well.

95. Even without considering the presence or otherwise of medical evidence, it is my view that an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. My position in this regard is fortified by the holding of the court of appeal in **Martin Nyongesa Wanyonyi vs Republic** **Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maranga, D. Musinga& A. K. Murgor JJA** citing **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated:-

> **"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."**

96. From the evidence adduced by the complainant the organ or instrument of penetration was the 1st appellant's male sexual organ. It therefore follows that penetration as defined under the ***Sexual Offences Act*** was proved.

97. In the written submissions, the appellants challenged the complainant's veracity because of the time taken before she disclosed the appellants'. In my view this delay in naming the appellants as her assailants, in these circumstances, cannot be used against her, considering her age and the circumstances under which the crime was committed. It is only understandable that the complainant was traumatised and feared even to disclose the incident to her parents and only did so to her pastor. The Court faced with a similar situation in the case of **Elmada Omollo Owaga vs. Republic [2011] eKLR** accepted the evidence of a 7 years old female who had been defiled and failed to disclose the assailant at the first instance. The court admitted her evidence and stated as follows:-

> **"We have anxiously considered these submissions and have come to the conclusion that the complainant was a credible and truthful witness and we find no reason to impeach her evidence. The fact that she did not immediately disclose the name of the assailant to the first persons she met - her grandmother and mother - was explicable by her age and the trauma inflicted on her by the assailant. We also accept as the two courts below did, that she disclosed the identity of the assailant to her doctor who also examined the appellant and the police who subsequently managed to arrest him."**

98. There was also the issue of discrepancies in the evidence of the complainant. According to the appellants, the evidence that was adduced in court to prove the charge was largely inconsistent and uncorroborated. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of **David Ojeabuo vs. Federal Republic of Nigeria {2014} LPELR-22555(CA),** where the court (**Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA)** stated as follows:-

> **"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."**

99. Whereas we appreciate that there were minor discrepancies in the evidence of the witnesses it is our respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

100. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

> **"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."**

101. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

> **"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."**

102. In the case of **Njuki vs. Rep 2002 1 KLR 77**, the court said the following in respect of discrepancies in the evidence of witnesses:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."**

103. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

> **"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."**

104. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> **"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."**

105. In **Erick Onyango Ondeng' vs. Republic [2014] eKLR**, the Court of Appeal held that:

> **"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

106. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

107. In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."**

108. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that a clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (**Nyakisia v. R**. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal). In this case I have myself subjected the evidence adduced to fresh scrutiny and I am unable to find that the alleged inconsistencies were material enough to warrant interference with the decision.

109. The appellants also took issue with the fact that no DNA samples were taken from them to prove whether they were the offenders. However, in **Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR** the court held that:

> **''As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.''**

110. It was submitted that since the prosecution severally sought adjournment in order to avail Call Data Records, it was duty bound to investigate the same so as to ascertain the location of the accused persons during the alleged offences. The court was therefore urged to draw adverse inference against the prosecution for failing to avail to the 1st appellant his Call Data Records. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:

> **"Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."**

111. The question that arises therefore is whether the prosecution had in its possession the said Call Data Records. Apart from the intimation by the prosecution that it was seeking the said Call Data Records, there is no evidence that the prosecution actually got possession of the same. Accordingly, no adverse inference can be made against the prosecution in that regard.

112. Based on **Martin Charo vs. Republic [2016] eKLR**, it was submitted that the learned trial magistrate shut out the available defences in the case of this nature which he ought to have considered before arriving at his conclusion. However, in this case the appellants' case was a complete denial of the offence. There was no allusion to the said defences. Therefore, the decision in ***Charo Case*** does not assist the appellants.

113. However, the appellants raised the defence of alibi. *In the case of* ***Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR)*** *the Court held that:*

> ***"an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged."***

114. In **Wang'ombe vs. The Republic [1980] KLR 149**, **Madan, Miller and Potter, JJA** held that:

> **"…in** *Ssentale vs. Uganda [1968] EA 365, 368* **[Sir Udo Udoma CJ]…said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it…In England, in order to distribute the burden of the prosecution fairly, the Criminal Justice Act, 1967, section 11(1), provides that on a trial on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi. Under section 11(8) 'the prescribed period' means the period of seven days from the end of the proceedings before the examining justices. Section 11(1) applies where the defendant alone is to testify that he was elsewhere at the material time; see R vs. Jackson and Robertson [1973] Crim. LR 356…The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy's evidence. To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendantize. What other approach is there? Judicial officers are not clairvoyant!"**

115. In **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal stated thus:

> **"It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja v Republic [1983] KLR 501 this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought."**

116. In **Elizabeth Waithiegeni Gatimu vs. Republc [2015] eKLR** where the Nigerian case of **Ozaki & Another –vs- The State** was relied, where it was held that:

> **"Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible…"**

117. In **Uganda vs. Sebyala & Others, [1969] EA 204** the learned Judge citing relevant precedents had this to say:-

> **"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."**

118. In the case of ***Adedeji vs. The State [1*971]1All N.L.R 75** it was held that:

> ***"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

119. The South African case of **Ricky Ganda vs. The State, {2012} ZAFSHC 59**, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held:-

> **"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses…it is acceptable in totality in evaluating the evidence to consider the inherent probabilities…The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."**

120. It was however appreciated in **R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

> **"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."**

121. In **Festo Androa Asenua vs. Uganda, Cr. App. No. 1 of 1998** the Court made the following:

> **"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."**

122. In this case the issue of alibi was raised for the first time in the defence. According to the 1st appellant, on the day of the incident, he was away having gone to look for a job in Ruiru at the invitation of his uncle. While the burden of disproving an alibi falls on the prosecution, there must be some credibility to the defence. Any wild suggestion made by an accused, in my view, cannot be seriously treated as an alibi so as to exonerate an accused. In this case apart from that bare allegation that the 1st appellant was in Ruiru no attempt was made to authenticate this. Further, the issue ought to have been raised at the earliest opportunity. In this case it was contended that the appellants' statements were never taken, a contention which seems to have been supported by the prosecution witnesses. However, since a defence case starts during cross-examination, the issue of alibi ought to have been put across to the prosecution witnesses so as to put the prosecution on notice as to the nature of the defence, the appellants intended to rely on. I therefore agree with the learned trial magistrate that the alibi defence raised by the 1st appellant was an afterthought.

123. As regards the 2nd appellant, it was his case that he accompanied DW4 and DW5 to a funeral in Waithaka where they arrived at 5.00pm and that he was there till 8.00 pm. His evidence was supported by the evidence of DW3, DW4 and DW5. The learned trial magistrate found this evidence to have been an afterthought due to the fact that it was raised late in the day and the witnesses in questions were related to the 2nd appellant. There is nothing inherently objectionable about relatives testifying on behalf of an accused especially when the testimony relates to an alibi defence. It may well be that the only people who can positively testify as to where the accused was are his relatives. In this respect in **Keter vs. Republic [2007] 1EA135**, the Court held *inter alia* that:-

> **"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."**

124. In this case the 2nd appellant even went further and called for the records from the mobile phone service provider, Safaricom, but the said records were found to be unavailable due to time lapse. In my view, the 2nd appellant having not only called witnesses in support of his case but went an extra mile in attempting to get the records from the mobile phone service provider, this was a clear case in which the Respondent ought to have taken advantage of the provisions of section 309 of the ***Criminal Procedure Code*** which provides as follows:

> ***If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.***

125. In the case of ***Adedeji vs. The State*** **{1971} 1 All N.L.R 75** it was held that:

> ***"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

126. To my find further evidence, particularly, placing the 2nd appellant at a place other than at the said funeral at the time of the said offence would have cast serious doubts as regards the 2nd appellant's evidence in totality and his alibi defence in particular, since as was stated in in the court of appeal case of **Ernest Abanga Alias Onyango vs. Republic CA No.32 of 1990**.

"In <u>RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226,</u> the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect". This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it`s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent availably".

127. In this case the prosecution lost an opportunity to conclusively rebut the appellant's alibi defence. As I have held before the objective of the investigators and prosecutors is not to obtain conviction at all costs. They are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. They must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. Neglect to make a reasonable use of the sources of information available or failure to take the necessary steps to secure evidence which ought to have been secured may well amount to the failure to prove the guilt of an accused person beyond reasonable doubt.

128. What has further caused me concern is the casual manner in which the cross examination of the 2nd appellant's alibi witnesses was conducted. In the questions put to the said witnesses, the prosecution's case was never put to them and it was not contended that their testimony was fabricated. In fact, in the questions put forward to the said witnesses, no challenge was made to the substance of their evidence at all. This should have been necessary taking into account what has been stated hereinabove with respect to alibi defence and the burden of disproving the same.

129. In this case I am not satisfied that the alibi defence put forward by the 2nd appellant was satisfactorily rebutted. This court, in the exercise of its judicial mandate is under a duty to point out slips on the part of the trial court. Having so stated, it is not for the court to prop up cases which fail to achieve the statutory threshold for conviction in criminal cases, - proof beyond reasonable doubt. Having so pointed out the gaps in the judgement, the only option for the court is to acquit since the court ought not to base its decision on speculations and conjectures. In the case of **<u>Michael Mugo Musyoka vs. Republic [2015] eKLR</u>** it was observed by the Court of Appeal that:

"**Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child...we find that the case against the appellant was based on a mere suspicion. In <u>Mary Wanjiku Gichira v Republic</u>, Criminal Appeal No 17 of 1998, this court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."**

130. See also **<u>Joan Chebichii Sawe vs. Republic [2003] eKLR</u>**.

131. I also associate myself with the position adopted by the Supreme Court of Indian in the case of **<u>State of Punjab vs. Jagir Singh</u> <u>[1974] 3 SCC 277</u>** that: -

"A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged…In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts..."

132. Therefore, in acquitting the accused, the court does not necessarily make a definite finding that the accused is factually innocent of the offence with which he is charged. It simply makes a finding that the prosecution has failed to prove his guilt and he is therefore constitutionally deemed to be innocent. That is what our law provides. While some people may be unhappy with the presumption of innocence, it is a time tested principle in all jurisdictions which apply democratic principles and unless we opt to go the dictatorship way, we have no option but to endure it.

133. Since the Constitution of Kenya prescribes the rule of law as a binding national value, then the law is paramount and as was appreciated in **<u>Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006)</u>,** at page 12:

"... the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public…We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy: our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In dictatorship, we could simply round up all these persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decision."

134. I associate myself with **<u>Bagmall, J</u>** in **<u>Crowcher vs. Crowcher [1972] 1 WLR 425, 430</u>** that:

"the only justice that can be attained by mortals, who are fallible and are not omniscient is justice according to the law: the

justice that flows from the application of sure and settled principles to proved or admitted facts."

135. What has caused me concern is the sentence in section 10 of the ***Sexual Offences Act*** under which gang rape is defined as the commission of the offence of rape or defilement under the Act in association with another or others, or the company of a person during the said commission with common intention of the commission of the offence of rape or defilement. Such a person is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life. The first problem is as regards the term "is liable".

136. **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

> **"The wording used throughout the code is "*shall be liable to*" but a consideration of the various sections shows in our judgment, that the use of the words "*shall be liable to*" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."**

137. The predecessor of the Court of Appeal went further in **Opoya versus Uganda [1967] EA 752** at page 754 where **Sir Clement DeLestang V.P**. picked up the conversation inter alia thus:

> **"It seems to us beyond argument that the words "*shall be liable to*" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."**

138. A similar position was adopted in **D W M vs. Republic [2016] eKLR** where the Court held that:

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

139. The term "is liable" has therefore been generally agreed to impose a maximum sentence. Here the ambiguity is due to the fact that the said phrase is employed together with *a term of not less the fifteen years*. Apart from that it is not lost to me that section 8(2) of the ***Sexual Offences Act*** provides that:

> ***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

140. Clearly, there is some unreasonableness in the sentencing under section 8(2) vis-à-vis section 10 of the said Act. The unreasonableness is due to the fact that where a person who, for all intent and purposes commits an offence under section 8(2) aforesaid may well "get away" with a lighter sentence simply because he was in the company of other persons. On the converse "a lone ranger" who commits an act which for all intent and purposes amounts an offence under section 10 thereof faces a prima facie mandatory life sentence. Such sentencing may well be challenged on the ground of unfairness. However, as I was not fully addressed on the issue in this appeal, I will go no further than that.

141. In this case, however, the 1st appellant was sentenced to the maximum prescribed sentence. No reason was given for this option. Though the Act permits the court to enhance the sentence to imprisonment to life it is my view that in opting for the maximum prescribed sentence where the law provides for a minimum and maximum sentence, the court ought to give a reason for so doing. In the absence of such a reason such a sentence must be deemed to have been arbitrarily meted.

142. In this case the 1st appellant was a first offender. This Court however does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

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

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

143. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violates the right to dignity as the offenders are thereby treated as a bunch rather than as individuals. This does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having

done so nothing bars the court from imposing such sentence.

144. In this case, the 1st appellant without any provocation waylaid the complainant, a young girl of 8 years, who was coming from church. There is evidence that the first time he was talked out of harming the complainant. He, however seemed not to have given up and the following day he was at it again this time round making sure that he harmed the innocent soul for his own personal gratification. The whole experience must have been very traumatising for the complainant. In my view, though the law provides for a minimum sentence, the circumstances of this case do not warrant mercy and leniency. While I appreciate that the maximum sentence ought not to have been meted against him, the minimum sentence is similarly not appropriate for the heinous act of the 1st appellant.

145. In the case **R vs. Scott (2005) NSWCCA 152** **Howie J Grove and Barr JJ** stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."**

146. In a New Zealand decision namely **R vs. AEM (200)** it was decided that:

> **"… One of the main purposes of punishment…is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."**

147. In **R vs. Harrison (1997) 93 Crim R 314** it was stated:-

> **"Except in well- defined circumstances such as youth or mental incapacity of the offender…Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed."**

148. Having considered this appeal, I hereby allow the 2nd appellant's appeal, set aside his conviction and quash the sentence imposed against him and set him at liberty unless otherwise lawfully held. As for the 1st appellant, I find that his conviction was proper. He in the company of other persons defiled the complainant hence committed an offence under section 10 of the ***Sexual Offences Act***. He is lucky that he was not charged with an offence under section 8(1) and (2) of the same Act. I however set aside the sentence of life imprisonment imposed against him and substitute therefor a sentence of 20 years imprisonment. Pursuant to section 333(2) of the ***Criminal Procedure Code***, the said period will run from 20th February, 2015 when he was taken into custody.

149. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 25th day of June, 2019.

G V ODUNGA

JUDGE

In the presence of:

Miss Muendo for Mr Mutua for the 1st appellant

Mr Nthiwa for Mrs Nzei for the 2nd appellant

CA Geoffrey