REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 47 OF 2019

EDWARD MUTHAMA KIILU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Appealing from The Judgement of Hon. K. Kibelion, Senior Resident Magistrate

at Machakos delivered On 18/03/2019 In Criminal Case No. 71 of 2016)

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD MUTHAMA KIILU.....ACCUSED

JUDGEMENT

1. The appellant, **Edward Muthama Kiilu**, was charged before the Machakos Principal Magistrate's in Criminal Case No. SO 7A of 2016 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the ***Sexual Offences Act***. The particulars of this charge were that on the 4th day of April 2016 at [particulars withheld] Secondary School he intentionally and unlawfully caused his penis to penetrate the vagina of LMN a girl aged 17 years old.

2. He also faced an alternative of indecent act with a child contrary to section 11 of the same Act. The facts being that on the said day at the said place, he intentionally and unlawfully committed an indecent act by allowing his male genital (penis) to come into contact with the female organ (vagina) of LMN, a child aged 17 years.

3. Particulars for the main charge were that on the 4th day of April, 2016 at [particulars withheld] Sec. School within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of LMN, a child aged 17 years old.

4. The prosecution called a total of 12 witnesses and after hearing both the prosecution and the defence case, the court found that the prosecution had proved its case against the Appellant beyond reasonable doubt and sentenced him to serve 15 years' imprisonment.

5. PW1, the complainant testified that she was 17 years old. She was also the deputy head girl at her school. On 4th April, 2016, she was in class at around 4:00pm when the Appellant, her School Principal, went there and called her into his office. She accompanied him into his office and when they arrived, he gave her a school wind breaker and told her that they had introduced new school uniform and he wanted her to go and show it to other students so that they could buy it in the coming term. She took the windbreaker and showed it to other students, class by class while relaying the information given to her by the Appellant. After that she went back to her class.

6. At around 4:30, PW3, PW1's classmate went to the class and told PW1 that she was being called by the Appellant. Upon going to the office, the Appellant inquired from her whether she had carried out what the Appellant had instructed to do and she confirmed having done so. Thereafter, the Appellant rose from the seat and walked towards her and told her that he had been waiting for that day. PW1 asked him what day and he told her that he had been missing her so much. The Appellant then locked the door and grabbed PW1, holding her tightly.

Despite PW1's struggles and protestations, the Appellant went ahead and unzipped his trouser then raised PW1's skirt. According to PW1, she then lost consciousness and when she came to, she found herself lying on the table on the Appellant's office. She found the Appellant standing next to her and her panty was wet and a fluid mixed with blood was flowing from her vagina. She realized, from the pain she was feeling in her vagina and from the said fluid, that the Appellant had forcefully had sexual intercourse with her.

7. The Appellant grabbed PW1 on her breasts and held her tightly then told her to go back to class and to never disclose anything. As PW1 felt unwell, after the incident, she went to the dormitory and slept. The following day, PW1 did not attend the morning prep since she was still feeling unwell and decided to disclose to the dorm captain, PW4 what had transpired after the morning prep. PW4 took her to the teacher on duty (PW2) but they never disclosed to him what had happened since PW1 was unsure that any action would be taken. Accordingly, instead of disclosing the incident, she told the teacher that she was sick just to get permission to go seek medication which she was given. Accompanied by PW4, they went to Masii Health Centre and they reported the incident to the doctor who referred them to Masii Police Station where she reported what had transpired. Upon returning to the Health Centre in the company of two police officers, PW1 found the Appellant there and he pleaded with her not to disclose what had happened. The Appellant however left after the said police officers intervened.

8. According to PW1, she was attended to after which they returned to the police station. She was also attended to at Mwala Sub County Hospital. After the hospital, they went back to the police station where PW1 found her parents and she informed them of what had happened. PW1 identified the P3 form, PCR form, photos, lab request form and treatment notes that were marked MFI-1, 2, 3, 4 and MFI-5 respectively. She also handed over the sweater she was showing to the students to the police and identified the same before court and was marked MFI-6. She also identified the Appellant in court. According to her, she had been in the school from form 1 to form 3 and had been deputy head girl for two terms.

9. In cross-examination, PW1 testified that they were 44 in her class when the Appellant went to call her and that all the 44 were girls. On the material day, it was cloudy when PW1 went into the Appellant's office, it was raining. Two students had recorded their statements and one was the girl who had been asked to go call PW1. PW1 denied that the story was fabricated in collusion with PW2 and PW4. Though it was raining heavily, since the Appellant's office and PW1's class were in the same corridor, she was not rained on. According to her, when she was called by PW3, she left her in class as she went into the Appellant's office. Since she went alone, she was not sure whether someone saw her there. It was her evidence that the secretary's office was next to the principal's office while the staffroom was near and one could access the Appellant's office through the staffroom. She was however unaware whether there were teachers in the staffroom but the secretary was not at her desk. The secretary's office and the accountants' were both locked. Further, she did not know whether the staffroom was locked since they were not passing through there.

10. PW1 testified that the Appellant's office was next to form four then their class was next. Accordingly, form four and the office shared a wall since the two are next to each other but PW1 did not know whether or not there were students in the class. According to her, it took less than a minute between her class and the Appellant's office. She could not tell whether anyone else heard since there was no one in the office. She testified that when the Appellant held her, she first shouted that he should not do anything to her then she screamed.

11. According to PW1, though she handed over her underpants to the police to be used in their investigations, it was not in court at the time of her testimony. The doctor, however, took blood sample from PW1 and gave her the results after the analysis. According to her, when she regained consciousness, she found herself well-dressed but she could feel blood flowing from her vagina. She reiterated that she did not report the incident to the matron but disclosed the incident to the dorm captain. Since the head girl was a day scholar, she was not in school at the time of the incident.

12. After seeking permission, she left school at around 7:30am. In her evidence PW1 explained that it was not a policy for one to be accompanied by the matron and they never engaged in other sexual act with third parties along the way. According to her, she went to the hospital first then she was referred to the police station.

13. In re-examination, PW1 testified that she went around showing the students the windbreaker but she could not tell who was in and who was out. In her evidence, there was only one class that separated PW1's class and the Appellant's office.

14. PW2, **AM**, a student at Mount Kenya University on school based programme testified that he was a teacher at [particulars withheld] High School under Board of Management. It his testimony that on 5th April, 2016, he was the teacher on duty so he was in school from morning. At round 7:20am, PW1, accompanied by PW4 went to the staff room, crying and she sought permission to go and seek medication. Though PW2 tried to convince PW1 to tell the matron who was in the kitchen what had happened since that was the procedure, PW1 declined and similarly declined to disclose to PW2 what had happened. According to PW2, he granted PW1 permission and directed that she be accompanied by PW4 to the hospital. According to PW2, he thought PW1 was crying because of a boil that PW1 had a week before.

15. According to PW2, the deputy arrived at around 8:00am and PW2 briefed him about the whereabouts of PW1 and PW4. Later, the Appellant arrived and went for a prize giving ceremony. However, since by 4pm, PW1 and PW4 had not returned, PW2 got concerned and expressed his concern to and was informed by the deputy head that he should not worry. Later at about 7:30pm, the two arrived accompanied by PW1's mother. Upon inquiring the reason why, they had taken long at the hospital and that is when he was informed what had happened. PW4 informed PW2 that PW1 was saying that she had been defiled.

16. Once PW1 and her mother left, the Appellant called PW2 and asked him whether he had heard the rumours spreading about him. The Appellant directed PW2 to go to PW1's home and get for him her mother's number claiming that his name was being tarnished.

17. In cross-examination, PW2 testified that he came from the same village with PW1 and that he had known her for more than 10 years. He also knew her parents. On the material day, the matron was present and the procedure was that if female students had personal issues, they would tell the teacher on duty who would then inform the matron. In this case, though PW2 referred PW1 to the matron, she refused. Pw2 reiterated that PW1 never disclosed to him why she was crying and neither did PW4 tell him anything about PW1. From his observation, since the two would have gone with or without his permission, he gave the two leave out sheets. According to PW2, since PW1 was not able

to walk alone, he allowed PW4 to accompany her. In his testimony, he knew that PW1 had a boil since she had told him the previous week and he had believed her when she told him she had a boil. He believed her as well when she told him that she was unwell.

18. According to PW2, he was informed by one Peter that he was sent by the Appellant to go ask PW2 to go to PW1's home and get her mother's number.

19. In re-examination, PW2 testified that the teacher on duty was allowed to give students permission to leave the school. When PW1 went to him, PW2 noticed that she was limping, crying and had a swollen face.

20. PW3, **VK**, testified that on 4th April, 2016 at around 4:20pm after they had finished their continuous assessment test, she continued with her revision while the other girls went to the dormitory. After about 20 minutes, she was on her way to the dormitory and on approaching the assembly ground, she found the Appellant talking on phone near the flag mast. The Appellant then he told her to go and call for him PW1. According to PW3 ran to the dormitory and relayed the Appellant's information to her after which PW1 went to where the Appellant was. PW3 however remained in the dorm doing her other activities and the next time PW3 saw PW1 was on 6th April, 2016 on which day, PW3 was told by PW4 that PW1 had been raped by the Appellant.

21. According to PW3, at the assembly ground there was no teacher or student since the teachers were leaving school at 4pm. It was her evidence that it was raining, though not heavily.

22. In cross –examination, PW3 testified that she heard in the morning of 6th April, 2016, the day of closing that from PW4 that PW1 had been raped. When she went to call PW1, it was her testimony that she found PW1 sitting on her bed and she with other students whom she could not remember. It was however her evidence that she did not see any teacher leave the school at 4pm on the material day and did not know where they were at the time of calling PW1. PW3 disclosed that she did not see PW1 at the dinning on the material day or in class that evening but found her sleeping that night but did not talk to her.

23. PW4, **EMM**, testified that on 5th May, 2016, she went to take shower in the bathroom and found PW1 also taking shower. Though she talked to PW1, the latter but she did not respond and she was not happy or jovial as usual. After the shower, PW4 went to class and after few minutes, at around 7.00 am, PW1 went and called her out of class, informing her that she was sick and wanted PW4 to accompany her to the hospital. When PW4 inquired from PW1 what was wrong, PW1 disclosed to her that on 4th April, 2016, at around 4.30pm, PW1 was called to the office by the Appellant. During that time it was raining heavily and that after PW1 went to the office, the Appellant locked the door and raped her. They then proceeded to PW2 and asked for permission to go to the hospital and upon being asked what the problem was PW2, PW1 stated that she was suffering from a headache and they were given permission after which they went to Masii Health Centre. Since PW1 did not want the story to leak out, she told PW4 not to tell disclose the incident to the said teacher. During that time, according to PW4, PW1 was limping.

24. On arrival at the said Hospital, PW1 went to see the doctor accompanied by PW1. After narrating her ordeal to the doctor, the doctor informed them that since the matter was a police case, they should report to the police station. They then proceeded to the nearby police post after narrating what happened to PW1, a police officer accompanied them back to the hospital where the Appellant found PW4 seated on a bench while PW1 was being attended to. Upon being directed to where PW1 was, PW4 testified that the Appellant then went outside the doctor's room where PW1 was and grabbed her by the hand but on intervention of a police officer, the Appellant left. At the conclusion of the tests, PW1 and PW4 in the company of the two police officers returned to the police station where PW1's mother was called by the police and she went together with PW1's uncle and they were informed of what had happened. Later at 7.30pm, they were later taken to the school. The following day they returned to the police station in the company of PW3 and they went to record their statements.

25. In cross-examination, PW3 testified that she never knew PW1 before she joined the school though their homes were a walking distance from each other's her home. According to PW4, on the material day between 4pm -6pm, PW1 with their teacher one **Mr. C**, arranging on how they would go back to school for tuition after close of school. According to PW4, on 4th April, 2016, PW1 was in school throughout and she never saw anything unusual with her. However, at 4pm PW1 left the class but returned. At about 4.30pm, she was called by PW3. PW4 went to the dorm at 4pm to change but PW1 and PW3 did not follow her there and after changing, it started raining so she remained in the dormitory but did not see PW1 there. Accordingly, PW4 did not know where PW1 was at around 4:30pm since they were not in the same dormitory.

26. It was however, PW4's evidence that PW1 was in class during that evening preps though she did not talk to her. PW4 did not however witness the Appellant do anything to PW1 and although PW1 informed her that she was unwell, PW4 was not aware that PW1 had a boil and averred that they never went to a private place to confirm the allegations by PW1. According to her evidence, she never saw the clothing that PW1 had the previous day.

27. It was the evidence of PW5, **GUM**, that on 5th April, 2016 while on duty at Masii Hospital, she attended to PW1, a 17 years old female, who was accompanied by a fellow student. PW1 reported having been sexually assaulted by the Appellant on 4th April, 2016 and narrated what happened prior to the defilement and after. According to PW5, she sent PW1 for HIV test and thereafter gave her medication for prevention of HIV and STI's after which she sent her to Mwala for the filling of P3 form and for high vaginal swap. PW5 however, did not do any examination on the injuries that might have been sustained. She however, prepared the treatment notes and produced the same and the laboratory request form as exhibits.

28. In cross-examination, PW5 testified that the booklet neither had the name of the patient nor indicate the date nor was it signed. It however bore the stamp from the facility. According to PW5, the life span of spermatozoa is 72 hours. At the time of the examination, PW5 was not aware whether PW1 had been seen by any other person at the facility. While admitting that it was necessary for the examination of PW1's private parts to have been undertaken, it was however her evidence that she did not do so and that the contents of the treatment notes were a narration by PW1. PW5 however did not have the laboratory technician's report though she prescribed drugs for PW1.

29. Referred to the laboratory request form, PW5 stated that it neither had the outpatient number nor the history given. Further, the name of the person who carried out the test was not indicated.

30. PW6, **FT**, PW1's mother recalled that on 5th April, 2016 at about 4:45pm, she received a call from Masii Police Station informing her that PW1 had been defiled and asking her to go to the station. She accordingly called PW1's uncle to accompany her to the station. At the station PW6 found PW1 and PW4 and PW1 narrated to her what had happened in relation to the offence. PW1 did not feel the Appellant defiled her since she had fainted but she had found her panty soaked with blood when she went to the toilet. From the hospital, they went to school where PW1 picked her books and they went home. The following day, they went to Mwala Hospital where the P3 form was filled in.

31. It was the evidence of PW6 that PW1 was born on 2nd June, 1998 and exhibited her birth certificate to that effect.

32. In cross-examination, PW6 testified that PW1 learnt that she had been defiled when she saw blood in her pants. PW1 told PW6 that she lost consciousness hence did feel being defiled. PW6 was however not present when PW1 was being examined. She asserted that though she knew PW2 the said witness was not married to PW1 or had a relationship with her.

33. PW7, **DM**, PW1's uncle testified that on 5th April, 2016, he was called by PW6 who requested him to accompany her to Masii Police Station since she had received information the PW1 had been defiled. They then proceeded to the said police station where they found PW1 and some of her fellow students. PW1 told them that she had been defiled by the Appellant. According to PW7, PW1 was a daughter of PW7's brother and his said brother was not around since he had gone to work.

34. In cross-examination, PW7 testified that PW6 went to his house to pick him to accompany her to the station and that she did not call him. PW7 never accompanied PW1 to the hospital and he did not read the report made by PW1 to the police. In re-examination, PW7 testified that PW1 explained to them how she was defiled by the Appellant.

35. PW8, **Leon Kaguo Ogoti**, the medical superintendent Mwala Sub – County hospital applied to be given time to avail the maker of the P3 form hence he was stood down before completing his examination in chief.

36. **PC David Mbugua**, who testified as PW9, was in the records office at Masii Police Station on 5th April, 2016 when at 11.53 am, when **PC Kanda** went there with two students and PW1 reported what had transpired the previous day on 4th April, 2016. PW9 recorded the report and filled a P3 which he gave to **PC Chelio** who accompanied him to Masii Health Centre. On arrival at the facility, PW9 established that PW1 had been treated there and was advised to go and report to the police. PW9 then left PW1 with **PC Chelimo** and went outside to talk with the other staff members at the facility who informed him that they knew the Appellant. According to him, the Appellant emerged from the gate and went straight to where PW1 was waiting to be attended to and pulled her aside. PW9 went there and introduced himself and told the Appellant to leave PW1 alone. PW9 then took the Appellant outside and left PW1 crying. He then went back and reassured PW1 that she was safe.

37. Once they were done from the hospital, they went back to the station and while there, the Appellant also went to the station and held PW1 but was warned by **Cpl. Karanja**. Later that evening PW1, her mother and the witness went to the school to collect the blood stained biker which was forwarded to the government chemist by **Cpl. Khamisi**. They also took the sweater which PW1 had been told to show the other students. The following day, they took PW1 to Mwala Level 4 Hospital for filling of the P3 form and extraction of specimen that were to be forwarded to the government chemist for analysis. According to him, PW1's birth certificate was availed which indicated that she was 17 years old at the time.

38. It was PW9's testimony that he visited the scene and took photos of PW1's office which had two chairs and a table.

39. In cross-examination, PW9 testified that on 5th April, 2016 he was not manning the report office. He was not at the report office but **PC Kanda** had asked him to interview PW1. PW9 was the one who received and entered the report. PW1 told PW9 that the Appellant raised her skirt but thereafter she did not know what happened. The report was made less than 24 hours later and PW1 explained what had happened on 4th April, 2016 at about 4:00pm when she visited the Appellant's office. However, the photos were taken on 7th April, 2016 and when PW9 visited the office, which was clean and well arranged. He however did not preserve the scene. It was his evidence that on the day of the visit the office was clean and well arranged and he did not see any blood spots.

40. According to PW9, PW9 told him that the biker was cream in colour though PW9 never saw the said biker in court. It was the evidence of PW9 that the biker was taken to the government chemist but the report got misplaced at the government chemist together with the exhibits.

41. According to him, he saw the Appellant pulling PW1 on two occasions and warned him since according to him, the Appellant was trying to interfere with the case by attempting to intimidate the witness. From the P3 from, PW9 was satisfied that an offence had been committed hence he made a decision to charge the Appellant. The P3 form was filled at Mwala level 4 hospital by a lady and PW9 had gone to the hospital but has never found the officer who filled the P3. According to him, there was interference at the hospital and they received information on the interference from the secretary. PW9 saw the P3 from that had been filled for PW1 and they intend to tender it as exhibit.

42. Referred to the P3 form, he stated that Part one thereof indicated that PW1 was defiled severally by people known to her. It was the evidence of PW9 that the P3 was not misleading when it referred to several times. Also, PW1 never gave the date of defilement. It was the evidence of PW9 that the report by PW1 was misleading. The reference of the P3 form was OB 18/5/4/2016 related to PW1. The information in the copy of the P3 form did not have the signature and stamp. The copy supplied to the defence did not have the date and signature. The signature was inserted when they referred the P3 from at Mwala which was after they had supplied the defence with the documents and that the P3 form supplied to the defence was neither signed or stamped. PW9 indicated that the copy was stamped at the end.

43. In re-examination, PW9 testified that DMFI-1 was not dated on page 2 but PMFI-1 was dated on page 2 and the reason was that when they realized that it was not signed, they took it back to Mwala hospital with the original and called it to be viewed by the officer but did not stamp on the date. The copy supplied to the defence was stamped at the back but they were never supplied with the dated copy.

44. The P3 form was addressed to clinical officer Masii Health Centre but they did not fill it because the specimen were to be taken at Mwala Hospital. PW1 was first seen at Masii Health Centre. They established during the pendency of the case that there was interference at Mwala Hospital. They had not been able to trace the officer who filled the P3 form. He further stated that the hospital's patient records could not be traced. PW9 had tried to trace the clinical officer who left employment in 2016 but had not been able to trace her.

45. PW10, **Dr Eunice Sammy**, testified that in the 2016, she was stationed at Mwala District Hospital. She had a P3 form filled for PW1 who had been referred to the hospital with an allegation of having been defiled by a person known to her. In her evidence, the P3 form was from Masii Police Station. From examination, the clothes were clean, no tears. PW1 had changed clothes and showered. She did not have history of any chronic illness. She was however limping and she associated it with rape. She had a dull face and looked worried. The head, neck and limbs were normal and there were no obvious tears or lacerations though the hymen was broken and the cervix was closed. There was a whitish discharge but no blood discharge. They did a swab and from it they noted pus cells and epithelial cells. There was however no presence of spermatozoa. PW10 signed the P3 form on 6th April, 2016 and stamped it.

46. According to PW10, no injuries were noted and at the time of filling the P3 form and she relied on the information from the patient. It was her evidence that she was presented with two P3 forms but the carbon was wrongly placed. She testified that she filled the P3 form the same day and she produced the P3 form as prosecution exhibit 4. In her evidence, she could not conclude that there was penetration since the hymen was already broken. Signs of penetration was evidence due to broken hymen. From the history given, PW1 had not sought treatment elsewhere.

47. In cross-examination, PW10 testified that she examined PW1 but could not remember the exact date. In 2016, PW10 was stationed at Mwala level 4 as a medical officer. The P3 was addressed to Masii Health Centre and not Mwala Level 4 Hospital.

48. During her visit to Mwala Hospital, PW1 was accompanied by two officers. The P3 form was stamped 6th April, 2016 and she reiterated that from her examination, she could not conclude that there was penetration.

49. It was PW10's testimony that she signed the P3 form the same day but acknowledged that the one the defence had was not stamped, signed or dated. In her view, signature might have been accidently omitted. Though the handwriting on the P3 form was hers, she admitted that there were alterations and cancellation in the P3 form. According to her, the cervix was closed but it had been indicated that the cervix was open and there were no injuries noted.

50. In re-examination, PW10 testified that she signed and dated the P3 form on the 6th April, 2016. She examined the patient and treated her. The alterations on the P3 form at section C arose as she made the entries and these were normal errors and that she was the one who made the cancellations. She stated that PW1 visited the facility on 5th April, 2016 at about 5:00pm and she filled the P3 form the following day on 6th April, 2016.

51. In examination by the Court, PW10 testified that PW1 was limping when she went to the hospital but PW10 did not find anything unusual to explain the limping though she looked traumatized.

52. It was the evidence of PW11, **IP Ndunda Moses**, that on 9th May, 2010 at around 10:30am, he accompanied the **DCIO Mwala** and **Cpl. Hamisi** to [particulars withheld] Secondary School to take photos. He then took photos of the principal's office then the general administration block. Photograph 7-11 showed a closer view of the inside of the principal's office and the table PW1 had alleged to have been defiled on. On 27th May, 2016, he took the film to DCI for processing. The same were processed under his supervision and he prepared and signed the certificate.

53. In cross-examination, PW11 testified that he was a specialist of crime scene management where they process the scene. According to him, he was requested to visit the scene and he did visit two weeks after the incident. PW11 never saw any evidence of blood and the table was never subjected to any further analysis. PW11 was never given any clothing material alleged to have been worn by PW1. PW11 had submitted a report to the DCIO Masii in respect of this case and the report was from the government chemist but he did not make reference to the said report. It was his testimony that PW1 was not present when PW11 photographed the area and no student was at the scene at the time of the taking of the photographs. PW11's role was simply to take the photos and process them.

54. In re-examination, PW11 testified that they do not usually call witnesses at the time of taking photos.

55. It was PW11's evidence that he picked the report from the government chemist but never read it.

56. PW12, **Cpl Mohammed Hamisi**, testified that in the year 2016, he was working at DCI Masii Mwala Sub County, Machakos County. On 5th April, 2016 at about 11:55am, PW12 was on duty at the station when he received a report from PW1 a student at [particulars withheld] secondary school that she had been sexually assaulted by her head teacher on 4th April, 2016. The initial report had already been made at the station and the same had been booked in the OB. PW12 was assigned to conduct investigations alongside **PC Mbugua**.

57. It was his evidence that he recorded the statement of PW1 and other witnesses. During the interrogation, PW1 narrated to PW12 what transpired on 4th April, 2016 in relation to the offence committed. Upon inquiring about PW1's age, PW1 informed him that she was 17 years old. PW6 later availed her birth certificate which confirmed that PW1 was 17 years having been born on 2nd June, 1998. PW12 collected the sweater that PW1 had been given to go advertise and produced the birth certificate as exhibit 7 and the sweater exhibit 6. Since PW1 indicated that at the time of the incident, she was wearing a biker, PW12, **PC Mbugua** and the DCIO went to the school and collected

the biker from the dormitory. A high vagina swab was done and some sample of blood was collected from the Appellant and PW1. PW12 prepared the exhibit memo form and forwarded them to the government chemist together with the biker for analysis. The items were received at the government chemist and PW12 went back to the station to wait for the results but before the said report was ready, PW12 was transferred.

58. The report and the biker could not be traced since they had both disappeared from the DCIO's office. PW12 had never seen the report or the biker. Later, the DCIO was also transferred.

59. In cross-examination, PW12 testified that as he stood in court, there was no DNA report from the government chemist. PW12 never saw the report and was not aware whether it was sent to Masii.

60. From the OB, PW1 had stated that after the door was closed, she could not remember what happened thereafter. PW1 told PW12 that after the Appellant closed the door an unzipped his trouser, PW1 could not tell what happened thereafter since she lost consciousness.PW12 never recorded in the OB that PW1 saw the male organ penetrate her. PW12 visited the scene but did not see any blood stains on the table. PW12 also visited the dormitory and took the biker that PW1 was wearing at the time of the incident but the same was clean. It had been hanged at the hanging lines.

61. It was PW12's evidence that the case had too many interferences at the station level and that is why the OCS requested the CID to take over.

62. PW12 confirmed that part 1 of the P3 form indicated that PW1 had been defiled several times by a person known to her. Under section B, 1 PW12 could not tell the signature. He further agreed that the P3 form supplied to the defence was not signed. In section B part 3, there were some alterations that were not counter signed.

63. In re-examination, PW12 testified that part 1 of the P3 form is usually filled by the investigating officer and in this case, the part was filled by **PC Mbugua**. Part B of the P3 form was signed by the medical officer.

64. PW12 was not the one who filled the initial report, the same was filled by **PC Mbugua** while PW12 recorded the statement of PW1 and other witnesses. From the statement of PW1, an offence was established.

65. PW12 visited the scene on 6th April, 2016. He saw the biker in the cloth line having been washed in the dormitory.

66. The prosecution closed its case after the testimony of PW12 and the court upon evaluation of the evidence on record, found that the prosecution had made out a *prima facie* case against the Appellant and placed him on his defence. Appellant opted to give sworn testimony.

67. In his defence, the Appellant testified that he was not working having been interdicted by the Teachers Service Commission. He stated that the main charge as well as the alternative was not true. It was his testimony that the allegations were not true and that he did not penetrate the vagina of PW1. It was the testimony of the Appellant that on 4th April, 2016 at around 10:00am, he was at [particulars withheld] School as the principal. A supplier of sleeveless sweater went there with a sample. The Appellant was supposed to involve the students hence he liaised with the school secretary on how they could make the students see the sample. They agreed to give the sample to a prefect.

68. At about 2:30pm, the Appellant sent the secretary to call any prefect and she called PW1. The Appellant gave PW1 the sample and she left the office with it.

69. At about 4:30pm, the Appellant wanted to get the feedback from PW1 so he sent PW3 to go call PW1. PW1 went and the Appellant asked how the students' reaction was towards the sweater and PW1 told him that it was good. The Appellant told PW1 to go back to the class and she walked out of the office. The Appellant testified that at the time PW1 left his office, the school was still in session and the Appellant continued working in his office until 5:30pm.

70. The following day, there was a prize giving day at [particulars withheld] Secondary School which was nearby and they usually attended such occasions in the other school. The Appellant first passed through his school and he was informed that two students, PW1 and PW4, had left to the hospital without permission. As per the rules of the school, whenever a student leaves for hospital, they were to be accompanied by the matron and since these one did not, the Appellant treated it as a discipline case. He instructed the deputy to deal with the issue and report back to him once he was back then he left for [particulars withheld] Secondary School. Later, the Appellant was told that there were students at Masii Police Station so he got concerned so he left the meeting and went to the station where he met **PC Mbugua** who informed him that there were allegations of sexual harassment that pointed at him. The Appellant told the said officer that the allegations were malicious. The officer referred the Appellant to the student. It was the Appellant testimony that the never tried to grab PW1 and if he would have, the police would have arrested him.

71. The Appellant inquired from the OCS what the matter was and he was informed that a case had been reported and that it involved him. PW1 was taken to the hospital and later, the Appellant was called and asked to provide lunch for the students. He gave them Kshs 200.

72. They went to the OCPD's office where PW1 was called and they talked in the presence of the OCS, OCPD, DCIO and PC Mbugua. Later PW1 was asked to step out and the Appellant was asked to respond to the allegation and he refuted the claim. The DCIO and OCPD later asked the Appellant to meet them somewhere outside Mwala.

73. They met at Kaani Market and the DCIO demanded for Kshs. 500,000 before the following day. It was the contention of the Appellant that if the allegations were true, the police would have arrested him. The Appellant never gave the money since he believed in his innocence.

74. The following day, the Appellant reported to the DCIO but he was not present so the Appellant was handled by PW12. The Appellant recorded his statement and his blood samples were taken at Mwala Sub County Hospital. He testified that on 6th April, 2016, Appellant was locked in the cells and arraigned in court the following day. Appellant stated that the evidence by PW1 was untrue and was malicious since he never defiled her as alleged. According to him, the allegations were a game to remove him from the office by the deputy and some teachers and PW1 was used as an instrument to attain the objective. It was his testimony that the Appellant had indiscipline issues with PW4 and the said PW4 had undertaken to revenge on the administration.

75. It was the evidence of the Appellant that the first block of the school is the staffroom, next to it is the deputy principal office where there is a corridor leading to the principal's office. Before it is the secretary office and the bursar which is partitioned by cardboard then next is form three class. The bursar was in the office and so were the other teachers. It was his view that with the kind of proximity, it was not possible for an event as described by PW1 since the school was in session. The Appellant produced the OB report as Dexhibit - 2.

76. The Appellant testified that the P3 form supplied to him by the state was not signed and stamped which is different from Pexhibit – 1. It was the testimony of the Appellant that the P3 form supplied to the Appellant and the P3 form produced by the prosecution were both fake documents only calculated to perpetrate the frame up since the P3 form had a lot of alterations. The Appellant produced the P3 form as Dexhibit 1.

77. The Appellant swore that he did not commit the offence, he stated that the never touched PW1's body in any manner.

78. During cross-examination, the Appellant admitted that PW1 went to his office on the material day, he gave her a sweater and she went back later alone and the Appellant was also alone in his office. According to him, PW1 went out of the school the following day which school was fenced. He reiterated that he received some report and he went to the police station and at that time, the report had not been booked in the OB. The officers demanded for Kshs. 500,000 but the Appellant never reported to the EACC. He got arrested the following day.

79. The Appellant recorded his statement on 7th April, 2016. According to his testimony, his office was lockable from outside and although he did not produce any layout, photos of the office had been produced. He confirmed that the back of Dexhibit 1 contains a stamp of Mwala Sub County hospital and is dated 6th April, 2016 and it is signed.

80. In re-examination, the Appellant testified that at page 4, Dexhibit 1 has a stamp.

81. Aggrieved by the said judgement, the Appellant herein appeals against the said decision based on the following grounds:

> **1. That the learned trial Magistrate erred both in law and fact by convicting the Appellant when the charge against him had not been proved beyond reasonable doubt.**
>
> **2. The trial court erred both in law and fact by convicting the Appellant notwithstanding the fact that the evidence tendered by the prosecution was full of gaps, loose ends and doubts.**
>
> **3. The trial court erred both in law and fact by exhibiting open bias against the Appellant and this is clear from the opening paragraphs of the judgment.**
>
> **4. The trial court erred both in law and fact by finding that the complainant had been penetrated yet the complainant's evidence taken together with the medical evidence tendered by PW10 exonerated the Appellant.**
>
> **5. The trial court erred both in law and fact by failing to consider the Appellant's submissions and even fell into a grave error by framing issues for determination some of which are unrelated to the charge facing the Appellant.**
>
> **6. The trial court erred both in law and fact by failing to state the specific charge it convicted the Appellant of thereby prejudicing him.**
>
> **7. The learned trial court violated the Appellant's constitutional right to a fair trial by proceeding to rely on prosecution's documentary exhibit (P3 form) that had been outrightly forged and tampered with.**
>
> **8. The trial court erred in law and fact by failing to exhaustively evaluate the Appellant's defence and the exhibits thereof.**

82. It was submitted on behalf of the Appellant that evidence tendered by the prosecution witnesses did not link the Appellant to the commission of the alleged offence. According to the Appellant, the offence is alleged to have occurred at about 4.30 p.m. on the 4th May 2016, and the complainant was examined on the 5th April 2016 by the doctor. PW 10 a **Dr. Eunice Sammy** who examined the complainant at Mwala District Hospital and filled the P3 form confirmed that there were no tears and/or lacerations noted on the complainant. The said Doctor also established that there was no spermatozoa found in the complainant's vagina neither could she ascertain that the complainant had been penetrated despite the fact that the hymen was broken.

83. According to the Appellant, it was not possible that the evidence would have been lost within such period of time. To the Appellant, the doctor did not give details if the hymen was freshly broken and whether the same was broken by penetration or other factors such as injuries and or cycling.

84. In this regard, the Appellant referred to section 2 of the ***Sexual Offences Act*** which defines "penetration" as the partial or complete

insertion of the genital organs of a person into the genital organs of another person and submitted that for the offence of defilement to be proved, evidence must show that the Appellant inserted his penis into the vagina of the complainant. In this case, however, the complainant did not see and or feel the Appellant penetrate her and upon examination by PW 10, no sperm was found despite alluding that her pant was wet. It was therefore submitted that in view of the evidence adduced by the Respondent herein, it is obvious that there was no penetration of the complainant's genital organs hence the charge of defilement was not proved.

85. It was noted that it is trite law that for the accused person to be convicted of the offence of defilement, certain ingredients must be proved and these are first, whether there was penetration of the complainant's genitalia, second is whether the complainant is a child, and finally whether the penetration was by the Appellant. In this regard the Appellant relied on the case of **Charles Wamukoya Karani Vs Republic in Criminal Appeal No. 72 of 2013.**

86. In this case it was submitted that the prosecution evidence was full of contradictions and gaps to warrant the conviction of the Appellant herein and these contradictions and inconsistences regarding the evidence of PW2, PW3, PW4 vis-a-vis of the complainant were glaring. It was noted that PW1 stated in her evidence in Chief and re-examination that she was in class at 4.30 p.m. when PW3 came to call her to the Principal's office. PW3 stated that the complainant was in the dormitory when she was called to the principal's office. PW4 told the court that between 4 p.m. – 6 p.m. the complainant was in class and that at 4.30 p.m. when PW3 came to call her she was at class. The same PW4 confirms that the complainant attended the evening preps and was seated in front of the class as PW4 maintained her back seat. The testimony of PW1 indicated that she was conspicuously missing from the dining hall and class that evening of 4th April 2016. The other discrepancy is noted between PW2 and PW4 in terms of leave out sheet. According to PW2 he gave out leave out sheets to the complainant. However, according to PW4 no leave out were issued to them as there were no copies available. It was further submitted that it is also unbelievable how PW2 knew that the complainant had a boil the previous week whereas PW4 who was very close to the complainant had no knowledge of the same.

87. To the Appellant, the fact that PW2 allowed the complainant and PW4 to leave school unaccompanied by the Matron who was present and available for accompaniment raises more questions than answers. It was further submitted though the complainant in the company of PW4 left school at 7 O'clock and arrived Masii Hospital at 7.30 and the duo were sent to the police station before being treated at Mwala District Hospital, they could not account where they were and what they were doing from 7 O'clock until 7.30 p.m. when they reported back to school. It was contended that there is a likelihood of the two having gone to engage in other activities and on realizing that they were late decided to fabricate their own stories. In this regard the Appellant relied on the case of **Dickson Elias Nsamba Shapwata & Another vs. the Republic Criminal Appeal No. 92 of 2007**.

88. In the Appellant's view, in this case the contradictions were so serious and glaring for the trial court to overlook them hence the reason why the trial court arrived at a wrong decision. It was reiterated that the prosecution failed to prove that the Appellant penetrated the complainant as defined under section 2 of the ***Sexual Offences Act*** and reliance was placed on **Criminal Appeal No. 60 of 2014 - Julius Kioko Kivuva vs. Republic**, where the court held that the evidence of sensory details, such as what the victim heard, saw felt and even smelled is highly relevant to prove penetration. It was noted that the P3 form submitted to court indicated no injuries were noted on the complainant's labia minora and vagina while the cervix was found to be closed. The complainant could not exactly tell exactly what happened to her on the 5th April 2016, a part from the pain she felt. Further there was no evidence that she had been drugged. To the Appellant, the pain could have been as a result of the boil that she had gotten a week before as confirmed by PW2. In addition, despite the fact that blood samples were taken from the Appellant and the complainant herein, the prosecution failed to carry out the test and/or use the blood as exhibit in court. In any event, the trial court erred in admitting and relying on a P3 form that bore alterations and cancellation without a counter signature from the maker who filled the P3 form. While the prosecution relied on two P3 forms which were filled on two different dates i.e. 5th April, 2016 and 6th April, 2016, the P3 form never bore the outpatient number nor was it stamped making it unauthentic for use as an exhibit.

89. The trial court proceeded to frame issues for determination upon hearing the 12 prosecution witnesses and the defence witness.

90. According to the Appellant, the prosecution produced a birth certificate which showed that the complainant was born on 2nd June 1998 hence was 16 years at the purported time of the commission of the offence. This fact contradicted the charge sheet which indicated that the complainant was 17 years old hence the issue of age was never corroborated.

91. It was submitted that the trial Magistrate should have warned himself of the dangers of convicting the Appellant on the uncorroborated evidence of the complainant as noted in the case of **Bernard Kebiba vs. Republic [2000] eKLR** where the court held that the trial Magistrate at no point warned herself of the dangers of convicting the Appellant solely on the evidence of the complainant. It was submitted that in the present case the trial court equally failed to expressly indicate how the complainant's evidence was corroborated.

92. It was contended that the trial court proceeded to convict the Appellant under section 215 of the ***Criminal Procedure Code*** without stating with clarity what exact charge succeeded and whether the sentence imposed was commensurate with the offence committed. To the Appellant, the evidence adduced by the prosecution was insufficient to sustain the charge of defilement where the prosecution is statutory bound to prove all the ingredients of the offence in order to secure a conviction. Indeed, the trial magistrate misdirected himself by purporting to rely on the complainant's testimony while convicting the Appellant herein. In view of the foregoing the Appellant relied on the case of **Ndambuki Muties & Another vs. The Republic in Criminal Appeal No. 89 of 2017**.

93. According to the Appellant, his evidence on record was consistent and unrebutted. However, the trial court elected to rely on the complainant testimony and disregarded that of the Appellant despite the fact that the Appellant was candid in his testimony without giving any valid reasons as to why he chose to rely on the complainant's testimony over that of the Appellant herein. To the Appellant, the refusal of the complainant to be accompanied by the matron to the hospital confirms that the complainant had ulterior motives. Reliance was placed on **Criminal Appeal No. 96 of 2017 –Michael Mumo Nzioki vs. Republic** while referring to **JOO vs. Republic (2015) eKLR**.

94. It was concluded that the Respondent's evidence was inconsistent and weak. The burden of proof was upon the prosecution and they never proved their case beyond reasonable doubt. In view of the foregoing, the Appellant prayed that the Appellant's appeal be allowed

followed by the setting aside of his conviction and the quashing of the sentence.

95. The appeal was conceded to by the Respondent through its learned counsel, **Ms Mogoi.** However, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."**

96. While conceding the appeal, it was submitted that from PW1's own evidence, she never felt the Appellant penetrate her since she lost consciousness before he could and by the time she regained, she was fully dressed but on the table. She believed she had been defiled since she felt pain and felt a fluid mixed with blood flow from her vagina. In a case like the instant one where the victim never felt or saw her perpetrator penetrate her, the medical evidence becomes very essential in proving the element of penetration. However, PW1 left school for hospital the following day after the defilement, she went to Masii Health Centre. It was the evidence of PW5 a clinical officer who attended to PW1 at Masii Health Centre that she was PW1 on 5th April, 2016. PW1 reported to have been sexually assaulted by the Appellant. However, PW5 did not examine PW1 on the injuries she might have sustained as a result of the defilement. PW5 did not examine PW1's private parts. She instead referred PW1 to Mwala for P3 examination and for high vagina swab. It was submitted that it is not clear why PW5 failed to conduct physical examination of PW1 especially in view of the fact that she was a victim of sexual assault and the fact that she was the first person to attend PW1. In the instant case, PW5 failed to collect the evidence on PW1 at the earliest opportunity.

97. It was the evidence of PW10 that PW1 was referred to Mwala Level 4 on 5th April, 2016 the following day after the commission of the offence. From her examination of PW1, PW1, did not have any history of chronic illness. She was limping, she had a dull face and looked worried. There were no obvious tears or laceration. The hymen was broken but the cervix was closed. They did vaginal swab and they noted pus cells and epithelia cells. There were no spermatozoa seen. It was the evidence of PW10 that no injuries were noted. Further, PW10 testified that from the P3 form, she could not conclude that there was penetration as they hymen was already broken. Further, the medical evidences showed no tear or laceration, no injuries were noted. Although the hymen was broken, it was the evidence of PW10 that the same was already broken meaning that it was not freshly broken. Further, no spermatozoa were seen.

98. It was submitted that in view of the medical evidence that showed no evidence of penetration, the only evidence on record that there was penetration, is the evidence by PW1 who only stated that she realized that the Appellant had defiled her due to the pain she was feeling in her vagina and the fluid she felt flowing from her vagina. All the evidence by other witnesses on the penetration was based on what they were told by PW1.

99. It was submitted that although it is possible to convict an individual based on uncorroborated evidence in sexual offences, the same cannot apply in the instant case because PW1 received medical attention the following day after the commission of the offence and considering the time within which PW1 was examined, it is not possible that all the evidence of penetration would have been lost completely within such a short time. At the least, there should have been the presence of spermatozoa to indicate that there was penetration since PW1 did not point to any indication that the Appellant could have had a condom. There was evidence that there were samples and exhibits that were sent to the government chemist for analysis and despite the report having been picked by PW11, the same report was never produced in court as the witnesses indicated that the report and the exhibits was either misplaced or lost at the DCIO's office.

100. It was however noted that reports from the government chemists are computer generated and the investigating officer would have easily gotten another copy from the government chemist but no explanation was given as to why the same was not done if indeed the report had been lost or misplaced as alleged. Further, it is not clear how PW11 would pick a report and fail to read it to even confirm that it was the correct report he had been given. Further, the reports from the government chemist are usually not issued while sealed in an envelope hence it is very easy for the officer picking it to have a look and see the results.

101. While PW9 in his testimony alluded to interference in the case from the hospital, it is not clear who was interfering with the case or how. According to the learned prosecution counsel, what is evident based on the evidence of record, it is that either there was great covered up on the case to protect the Appellant or there was a great conspiracy to fix the Appellant in this matter. It is not clear why the first medical officer who attended to PW1 did not examine her and fill for her the P3 or at the least, indicate in her medical notes the results of the examination. Further, the P3 form filled by PW10 and supplied to the defence had its own share of mistakes that were evident in the proceedings and no proper examination was given for the same. Further, no efforts were made to ensure that the report from the government chemist is availed in court. Not even the witness who received the reported wanted to indicate the outcome in court. This means that either the report was negative and they did not want it to get to the hands of the Appellant or to court, or that it was positive and they did not want it to see the light of the day in court. We can only be left to wonder what the results in the report were at this level.

102. It was noted that PW9 testified that he handled the medical evidence and formed the opinion to charge the Appellant based on the same medical evidence. He however did not indicate in his testimony the evidence of the medical report that made him confirm or conclude that the charge of defilement was supported.

103. It was submitted that in sexual offences, medical evidence is very critical and especially if it was conducted within 24-72 hours after commission of the offence because it helps in the corroboration of the victim's evidence of whether or not there was evidence of either complete or partial penetration. According to learned Prosecution Counsel, from the evidence of PW1 and the defence by the Appellant, while PW1 had no reason to give false testimony against the Appellant and if indeed she was defiled, she was let down big time right from the time she went to seek medical attention. She was let down by the medical officers who handled her case at the hospitals and she was let down by the investigative agencies such that the prosecution and the court were left with so little to work with in an effort to ensure justice for her.

104. In view of the foregoing, and in view of the fact that the medical examination that was conducted within 24 hours after the commission

of the offence did not support the element of penetration, it was submitted that the evidence on record was not sufficient to prove the offence the Appellant was charged with to the required standard and as such, the trial court erred in convicting the Appellant herein.

Analysis, Re-evaluation and Determination

105. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

106. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) 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.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.***

107. 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."**

108. As regards the age of the complainant, in **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

> **"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."**

109. The importance of establishing the complainant's age in defilement cases cannot be over-emphasised. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence."**

110. Closer home in the case of **Kaingu Elias Kasomo vs Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010** stated as follows:

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

111. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."

112. However, in **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

113. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact, according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich vs. Republic** - Criminal Appeal No. 89 of 2016.

114. What the Court frowns upon is mere averments of age without any documents in support thereof. In this there was oral evidence which was supported by the medical age assessment report that the complainant was 17 years old. Accordingly, I do not see any reason why that finding should be interfered with.

115. As regards the identity of the appellant, both the appellant and the complainant knew each other very well. The Appellant was the Complainant's Principal while the Complainant was the Deputy Head Girl. It was not denied that on the day of the alleged incident, the Appellant called the Complainant to his office. In those circumstances there cannot be any mistake as to the identity of the appellant.

116. With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim or circumstantial evidence. This position 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. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA** citing **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated that:

"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"

117. However, in **John Mutua Munyoki vs. Republic [2017] eKLR**, the Court of Appeal held that:

"Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt…The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:

'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'

The Court proceeded and stated that:

'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'

As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the Evidence Act aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."

118. In this case it is similarly important to produce the evidence of the Clinical Officer, PW5, verbatim. According to her evidence:

"We sent her to Mwala for P3 examination. We sent her to Mwala for High Vaginal Swab (HVS). I did history taking and the investigation. We did not do any examination on the injuries that may have been sustained."

119. In cross-examination she stated:

"The life span of spermatozoa is 72 hours. What the patient stated is what I recorded…I did not examine the patient's private parts. It was necessary."

120. On the part of PW10, she testified that:

"There were no obvious tears or laceration. The hymen was broken and cervix closed. There was a whitish discharge. There were no bloody discharge We did a swab then noted pus cells and epithelial cells. There were no spermatozoa seen…I cannot conclude that there was penetration as the hymen was already broken."

121. While it is true that the absence of medical evidence to support the fact of penetration is not decisive as the fact can be proved by oral evidence of a victim or circumstantial evidence, where there is in fact medical evidence which does not conclusively prove penetration, that is a factor which may be taken into account in determining whether or not there was penetration. In this case not only was the medical treatment of PW1 carried out in an unsatisfactory manner, but even the samples of the specimen taken for analysis were for some unconvincing reason not availed.

122. It therefore follows that the only evidence regarding penetration was that of the Complainant. However, the Complainant's evidence was that she never felt the Appellant penetrate her since she lost consciousness before he could do so and by the time she regained consciousness, she was fully dressed but on the table. She believed she had been defiled since she felt pain and felt a fluid mixed with blood flow from her vagina. Therefore, even from the Complainant's own evidence, there was no evidence of penetration. In a case like the instant one where the victim never felt or saw her perpetrator penetrate her, in absence of the medical evidence proving penetration, it would be simply a matter of speculation or conjecture to find that the pain and fluid mixed with the blood must have been due to the partial or complete insertion of the genital organs of the Appellant into the genital organs of the Complainant. In the case of **Michael Mugo Musyoka vs. Republic [2015] eKLR** it was observed by the Court of Appeal that:

"In Mary Wanjiku Gichira v Republic, 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."

123. I agree with the position in **Criminal Appeal No. 60 of 2014 - Julius Kioko Kivuva vs. Republic**, that the evidence of sensory details, such as what the victim heard, saw felt and even smelled is highly relevant to prove penetration.

124. In this case, I must agree with **Ms Mogoi**, learned prosecution counsel, that the complainant may have been let down by the manner in which the investigation was conducted. That said, it is clear that the prosecution failed to prove penetration as required by the law.

125. Just like in **John Mutua Munyoki vs. Republic** (supra) there was no evidence that the absence of the hymen could be attributed to the said penetration. While there were blood stains, PW10 was unable to attribute the same to the defilement hence was unable to form an opinion that there was penetration.

126. In my view neither the Complainant's evidence nor the medical evidence proved the allegation of penetration beyond reasonable doubt. **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated:-

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

127. Similarly in 1997, the Supreme Court of Canada in **R vs. Lifchus {1997} 3 SCR 320** suggested the following explanation:-

"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said

regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

128. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''

129. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

130. In this case the investigative agencies and medical personnel either by coincidence or by design or deliberately failed to take steps which they were reasonably expected to take. 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 abuse of discretion and power. This court, in the exercise of its judicial mandate is under a duty to point out slips on the part of the investigative agencies. Having so stated, it is not for the court to prop up cases which fail to achieve the threshold for conviction in criminal cases, - proof beyond reasonable doubt. Having so pointed out the gaps in the investigations, the only option for the court is to acquit since the court ought not to base its decision on speculations and conjectures.

131. 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.

132. 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 **Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006),** 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."

133. I associate myself with **Bagmall, J** in **Crowcher vs. Crowcher [1972] 1 WLR 425, 430** 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."

134. Where, as in this case the prosecution had within its powers the opportunity to gather evidence that would either have rebutted the appellant's case or confirmed it but failed to do so, the benefit of the prosecution's failure to present that evidence must benefit the accused, the appellant in this case. Where the investigations do not measure up to the required standards, it behoves this court to point out the same.

135. As was held in **Criminal Appeal No. 96 of 2017 –Michael Mumo Nzioki vs. Republic** while referring to **JOO vs. Republic (2015) eKLR**:

> **"It is not lost to this court that the offence which the appellant faced was such a serious once and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction."**

136. Therefore, as a result of the failure by the prosecution to prove penetration, I agree with the concession of the appeal by the Respondent and find that the appellant's conviction was for that reason unsafe and cannot be sustained.

137. In the premises this appeal succeeds, the conviction of the appellant is hereby set aside and his sentence quashed. He is set at liberty unless otherwise lawfully held.

138. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 30th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Nyantika for Mr Oeri for the appellant

Ms. Mogoi for the Respondent

CA Geoffrey