**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL APPEAL NO. 34 OF 2018**

**STEPHEN MUNYAO…..…….……..…… APPELLANT**

**VERSUS**

**REPUBLIC……...…….……RESPONDENT**

***(Appeal from original conviction and sentence in criminal case No. 13 of 2016 at Principal Magistrate's court at Loitokitok (Hon. M. O Okuche, SRM) dated 16th December 2016)***

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to section 8(1) (2) of the sexual offences Act No. 3 of 2006. Particulars were that on the 27th day of March 2016 at Nkama area in Kajiado South District of Kajiado County intentionally caused his private parts to penetrate the private parts of RW, a child aged 4 years.

2. The appellant denied the charge and after a trial in which the prosecution called 6 witnesses and that of the appellant who called one witness, the appellant was found guilty, convicted and sentenced to life imprisonment. Aggrieved with both conviction and sentence, he lodged this appeal raising the following grounds of appeal which can be summarized as follows:

> ***1. That the trial court erred in law and fact in convicting the appellant on a wrong section of law yet he was below 18 years of age;***
>
> ***2. That the trial court erred in law and fact in convicting the appellant on an offence that was unknown in the Sexual Offences Act.***
>
> ***3. That the trial court erred in law in convicting the appellant on wrong procedure of plea taking in violation of Article 50(1) and 2(b) of the Constitution***
>
> ***4. That the trial court erred in law and fact by convicting the appellant in violation of his right to information guaranteed under Article 50 (2) (g), (h), (j) and (k) of the Constitution;***
>
> ***5. That the trial magistrate erred in law and fact in that the voire dire examination conducted on the complainant was faulty;***
>
> ***6. That the trial court erred in law and fact in convicting the appellant without considering the fact that essential witnesses were not called;***
>
> ***7. That the trial court erred in law and fact by convicting the appellant on unreliable and discredited evidence;***
>
> ***8. That the trial court erred in law by convicting the appellant when the prosecution did not prove an essential ingredient of the offence namely penetration and failed to consider section 124 of the Evidence Act;***
>
> ***9. That the trial court erred in law and fact in failing to properly evaluate prosecution evidence and consider the contradictions on such evidence*** *and*
>
> ***10. That the trial magistrate erred in law by disregarding the appellant's defence of alibi.***

3. During the hearing, the appellant who was represented opted to proceed with his appeal in the absence of his advocate arguing that his advocate had not been attending court and therefore wished to proceed with his appeal in person. He argued that failure by his counsel to attend court was delaying his right to justice. He relied on his written submissions that he had filed and urged the court to consider the

submissions and allow his appeal.

4. In his written submissions, the appellant submitted that he was under age when he was charged and since his age was estimated to be 18 years it was only an estimate. He relied on the case of ***Anthony Kirimi Kirubi v Republic*** (CRA No. 42 of 2009)**.**

5. The also submitted that the offence he was charged with was non-existence arguing that the prosecution had a duty to ensure that the charge was correctly drafted in all respects. In the appellant's view, the charge ought to have read contrary to section 8(1) as read with section 8(2). He argued that the charge against him did not state as it ought to have stated. He also relied on the holding in ***Sigilani v Republic*** [2004] 2KLR 480 for the submission that the principle of criminal law that an accused should be charged with an offence known in law and that the offence should be disclosed and stated in clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand and will enable him to prepare his defence.

6. The appellant argued that the charge against was unlawful because it omitted an important word in the law. According to the appellant, the charge sheet omitted the word **"unlawfully"** in the particulars of the offence. He relied on ***Peris Wairimu Gichuru v Republic*** (Criminal Appeal No. 352 of 2014) where it was held that due to the omission of the word, the charge did not disclose an offence. He argued relying on other decisions including ***Achoki v Republic*** [2000] eKLR that a charge of this nature must allege in its particulars that sexual intercourse was unlawful and was without the consent of the woman or girl. Any conviction based on a defective charge cannot stand.

7. The appellant further relied section 134 of the Criminal Procedure Code which requires a charge or information to contain sufficient statement of the offence. He therefore argued that based on the authorities and the law, the charge he faced before the trial court was defective and he was therefore wrongly convicted.

8. The appellant further contended that the judgment that was read to him included an alternative charge that was however not read to him and was not in the charge sheet. The appellant argued that he is not aware of any amendment having been made to the original charge read to him. The appellant submitted that he was not informed of his right to defend and challenge the prosecution evidence. He argued that although the court ordered that he be supplied with witness statements this was not done. He relied on ***Daniel Chege Magotho v Republic*** [2014] eKLR where the court held that the appellant's right to fair trial had been violated and allowed the appeal on that ground alone.

9. He also argued that witness statements and all other documents were not availed to him and therefore his right to fair trial was violated. He relied on ***Francis Muniu Kariuki*** [2017] eKLR page 22-23 on the point of witness statements and reasonable facilities.

10. The appellant further submitted that no proper *voire dire* examination was conducted on the victim before she was stood down as a vulnerable witness. According to the appellant, this prejudiced his trial. He relied on the case of ***Onserio v Republic*** [1985] KL 618 for the submission that where a witness appears to be a child the court should inquire whether the child was capable of understanding the nature of the oath and whether he was possessed of sufficient intelligence to satisfy the reception of his evidence though given on oath.

11. The appellant further contended that important witnesses were not called and relied on ***Donald Majiwa Achilwa & 2 Others v Republic*** [2009] eKLR on the need for the prosecution to call witnesses including those whose evidence may be adverse to its case. The appellant submitted that the ingredient of penetration was not proved beyond reasonable doubt and relied on text book and decisions including that of Supreme Court of Appeal of South Africa in ***James Azwindini Nedzamba & the State*** Case No. 911 of 2012**.**

12. The appellant further argued that there was no corroboration given that the intermediary contradicted PW2's evidence. He also faulted the trial court for failing to consider his defence of ***alibi*** and relied on ***Peter Kioko Kisilu*** Criminal case No. 547/2005 and ***Kiarie v Republic*** [1984] KLR 739 (page 745) for the submission that an alibi raises a specific defence and an accused who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that it is not unreasonable.

13. Mr. Meroka, learned Principal Prosecution counsel opposed the appeal and relied on their submissions dated 6th November, 2018 and filed in court on 9th November, 2018. He supported the conviction and sentence. In counsel's view, the prosecution proved the case beyond reasonable doubt; the evidence on record supported and proved the charge and the intermediary was appointed to testify on behalf of the victim in compliance with section 31 of Sexual Offences Act.

14. In the written submissions it was submitted that the prosecution's duty to establish the ingredients of the offence of defilement was discharged, that is penetration, age, identification of the perpetrator and reliability of the victim. According to the prosecution, penetration as defined in section 2 of the Act is partial or complete insertion of genital organ of a person into the genital organ of anther which was proved. It was submitted that PW5 noted that the PRC pex4 noted spermatozoa cells, absence of hymen and foul smell discharge concluded that there was penetration, This in the prosecution's view, corroborated the evidence of PW1, the intermediary, as recorded by the trial court and that of PW2.

15. On age, it was submitted that this ingredient was proved by the evidence of PW2 through immunization card, pex1. It was submitted that PW1 also testified that the minor was 4 and half years old and that age assessment report also confirmed this fact. On reliability of the victim, the prosecution submitted that although the minor could not testify due to her vulnerability, her narration taken in totality with other evidence concluded that she was truthful.

16. According to the prosecution, soon after the ordeal, the minor's mother observed that her cloths including the skin tight was not properly dressed an indication of hurried dress up, that her account was corroborated by PW2 and PW3 and that they proceeded to the video shop where the owner informed them that it was the appellant who had accessed the room using the rear door. It was also submitted that the physical description given by the minor about the assailant of a tall person with a Rastafarian cap was enough and led to the arrest of the appellant

17. Mr. Meroka therefore prayed that the appeal be dismissed, conviction, upheld and sentence affirmed.

18. I have considered this appeal; submissions by both the appellant and the respondent and authorities relied on. This being a first appeal, it is the duty of this court, as the first appellate court to reanalyze, reevaluate and reconsider the evidence afresh and come to its own conclusion on that evidence giving reasons for it. The court should however be mindful of the fact that it did not see the witness testify and give due allowance for that.

19. In ***Kiilu& Another vs. Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"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. 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."*** (***See also Okeno v Republic*** [1972] EA 32***).***

20. The Supreme Court of India underscored this duty in ***Garpat vs State of Haryana (2010) 12 SCC59*** stating that: "***The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other."***

21. **PW1 No. 61347 CPL Jackson Kariuki,** a police officer attached to Illasit police station, appointed as an intermediary, told the court that he saw the minor when the appellant was brought to the station and a report was made that the appellant had defiled the minor. He testified that the minor told him that the appellant had taken her to video show, gave her biscuits and sweets; that the appellant later took her to a dark place, removed her cloths, put her on top of a bicycle and defiled her. When she went home, her mother asked her why she was wet and that is when she informed her mother what had happened. Nobody was present when the appellant defiled her.

22. According to the witness, the minor told him that this was not the first time she had been defiled and that she had been defiled before. He told the court that when he saw the victim, she was fearful. He carried her to hospital and examine and that she was 4 years old; that when the appellant and the minor were taken to the station at around 8 pm he was present but the minor did not see the appellant. He told the court that the minor was examined at the hospital. Cross-examined by the appellant, the witness told the court that he was brought to the station and placed in cells but he found the minor outside the cells. According to the witness, the minor had said it was the appellant who had taken her to outside a video show and defiled her.

23. **PW2 JM** mother to the victim told the court that the minor who was born on 25th February 2012 was 4 and half years old. She testified that on 27th March, 2016 at around 6.50 pm she had gone to buy vegetables and when she went back, she saw the video show open. She saw the victim come from the rear door of the video show room which is used by the owner of the shop. The minor was trembling; was not talking and her jacket was not buttoned and her skintight was not properly dressed. She went home with the minor and when she removed her pants the pants and private parts had sperms stains. She informed her mother in-law (PW3) and both went to the video show where she found the owner of the shop who told her that it was Munyao (the appellant) who had used the rear door. Her mother in law (PW3) and her husband (PW4) went to look for the appellant and arrested him. She testified that the minor identified the appellant as the person who had defiled her. After which they took the appellant to the police station together with the minor's cloths. They were referred to hospital where the minor was examined. The appellant was also taken to hospital for examination. It was confirmed that the minor had been defiled and infected with a sexually transmitted infection. The minor was treated and a P3 form was filled for her.

24. In cross-examination, the witness stated that she met the minor along the corridor and took her home. She also told the court that she saw a person enter the shop and the owner of the shop confirmed that it was the appellant.

25. **PW3 RK** told the court that on 27th March, 2016 at 7 pm PW2 went to her house with the minor and asked her to examine the minor's private parts. When she examined the minor she found spermatozoa. She then went to the video shop's rear door and found the owner who told her that it was only the appellant who had entered the shop through the rear door. She asked to be shown the appellant; called the minor's father and together with the owner of the shop they went looking for the appellant. The minor told her that she had been defiled by a tall man; that the appellant was brought by members of the public including the minor's father and the minor confirmed that it was him who had defiled her. She called the police who came and took the appellant and the minor to the police station and later to hospital. She identified Munyao as the appellant.

26. **PW4 – WK,** father to the minor, testified that on 27th March, 2016 at about 6.30 pm he was in his father's butchery when PW2 went and informed him that their daughter had been defiled. PW2 gave him the description of the person who had defiled the minor. From that description, he knew the person. With the help of members of the public, he traced the appellant in a hotel. He took him to where the minor was and the minor identified him as the person who had defiled her. They took him to the police station and later both the appellant and the minor were taken to hospital and examined. According to this witness, the defiler was wearing a rastafarian cap. He told the court that he had known the appellant and even where he lived. In cross examination the witness told the court that the minor had given her attacker's description.

27. **PW5 – Alexander Mwai,** a doctor attached at the Loitokitok Sub County Hospital, testified on behalf of Dr. Mutiso who examined the minor, that the complainant aged 4 years old was seen at the hospital on 27th March, 2016. On examination, there was discharge on her inner garments. The hymen was absent and there was discharge in her private parts. The injuries were hours old. The minor was put on antibiotics and the weapon used was blunt. Dr. Mutiso confirmed defilement. According to the witness the appellant was also examined and was found to have discharge in his private parts with presence of epithelial cells but had no injuries around his anus *(sic).* Dr. Mutiso filled the P3 form on 4th April, 2016. The minor's age was assessed as 4 and half years. Post Rape care (PRC) form filled on 27th March, 2016 showed presence of discharge in the minor's clothes as evidence that no condom was used. The discharge had a foul smell and the minor

had not changed clothes or taken a bathe. The hymen was absent and investigations showed that this was not a fresh penetration. She was put on a PEP and HIV test was negative. He produced P3 form Pex 2, lab request sheet pex 3(a) – (g), PRC pex 4 and age assessment report – Pex 5.

28. **PW6 No. 8304 CPL Halima Osman,** a police officer attached to Illasit police station and the investigating officer in the case, testified that on 27th March, 2016, the appellant was taken to the station on allegations that he had defiled the complainant and the minor said that she was defiled by a person she could identify; that the minor gave the description of the person who had defiled her and that the appellant was traced, arrested and brought to the police stations. The witness testified that the appellant was taken to hospital; examined and was found to have a sexually transmitted infection (gonorrhea). A P3 form was filled for her and the appellant charged in court. In cross-examination, the witness told the court that she took the victim's cloths and those of the appellant to the Government Chemist but had not received the results. According to the witness, the minor had said that attacker had hair style which was described as Balotelli.

29. When put on his defence, the appellant testified that on 27th March, 2016 he went to work at the hotel and that he closed at 7 p.m. and went to his aunt's place at 7.30 pm. He later went to Nkama and parked his bicycle outside the hotel. He however later found the bicycle missing. He went looking for it at the pool and video houses but did not find it. He went back to the hotel and informed his employer. Later, he heard someone calling him from outside. He went out and asked about the whereabouts of the motorcycle he had sold to the person earlier. The person asked him to accompany him but he did not know why the person was looking for him. The person slapped him and later framed him for an offence he had not committed.

30. **DW2, Nania Ndebia,** testified that on the material day 27th March 2016 the appellant was at her house from 6.30 pm and left at 8.30 pm. She was later called by her mother and asked to go to the police station and see the appellant who had been arrested during the night. She went to the police station and found the appellant at the station and he told her why he had been arrested.

31. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. According to the trial court, the prosecution had proved the ingredients of the offence, namely; that the victim was a child aged 4 and half years and that there had been penetration based on the medical evidence and the presence of spermatozoa. According to the court there was no way spermatozoa cells could be deposited in female genitalia except through a discharge by a male genitalia. The court found without doubt that it was indeed true that there was penetration into the minor's genitalia by male genitalia.

31. I have myself evaluated the evidence of PW2, the mother and that of PW5 the Doctor who testified on behalf of Doctor Mutiso who examined the minor. I have also perused the P3 form PEX 2 and the P R C form PEX.4. They confirmed that there was indeed penetration. I am satisfied that indeed the prosecution proved beyond reasonable doubt that there had been penetration. I do not find any fault on the part of the trial court with regard to this finding.

33. On age, there was no doubt that the victim was a minor. The evidence of PW2, the mother, who told the court that the victim was born on 25th February 2012, the immunization card and the age assessment report confirmed that indeed the victim was a minor in terms of SOA. This ingredient was proved too.

34. The trial court then confronted the last and critical question of whether the appellant was the perpetrator and stated:

> ***"The other question to be asked by the court and replied to is who caused this penetration. The minor described the accused. The accused was arrested. He was also taken to the hospital for treatment. It was the evidence of PW5 that when the accused was examined there was foul smell on his thighs. He was also subjected to clinical analysis of his urine… spermatozoa cells exhibited in his urine. The text (SIC) in both the minor and the accused showed that they were both infected with sexually transmitted Infections."***

35. After discussing the evidence of tests and asking itself about the coincidence of the presence of spermatozoa and sexually transmitted infection in both the minor and the applicant, the trial court concluded:

> ***´The medical evidence ascertains the prosecution case that it is indeed the accused who committed this offence. He states that he was at the home of DW2. However, all evidence on record proves that if (SIC) it is the accused who defiled the minor, in a nutshell, I do not find his defence plausible and I shall dismiss it entirely."***

36. The determination of this appeal therefore turns on this single issue of who the perpetrator was. The prosecution was required to prove this ingredient beyond reasonable doubt to expect a conviction. The law in this country, as in many other countries, is that the prosecution bears the burden of proving its case against an accused person beyond reasonable doubt.

37. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, **Lord Denning** stated on this standard of proof:

> ***"Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***

38. The Supreme court of Nigeria, **Oputa, JSC.** also stated in ***Bakare v State (***1987) 1 NWLR (PT 52) 579:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the***

***person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probabilities."***

39. From the above pronouncements, the prosecution was to prove beyond reasonable doubt that the appellant was the person who defiled the minor. This was to be done through direct, cogent or circumstantial evidence that was conclusive but not speculative. The trial court concluded that on the evidence before it the prosecution had proved that the appellant was indeed the perpetrator. In arriving at this conclusion, the trial court was satisfied that the appellant was positively identified because the minor gave the description of her attacker which led to the appellant's arrest.

40. I have anxiously considered the evidence on record and the conclusion reached by the trial court on that issue. The minor did not testify. She was declared a vulnerable witness and therefore her evidence was not taken. The court appointed an intermediary who testified on her behalf. I will return to this later in this judgment.

41. PW1, the intermediary, PW2, mother to the minor, PW3 grandmother and PW4 father to the minor were the people who testified and told the court that the minor gave a description of her attacker which led to the appellant's arrest. They were not present when the minor was defiled. Whatever they told the court was what the minor told them as none of them witnessed the incident. There was no direct or cogent evidence that victim knew the appellant except that she gave his description.

42. The evidence by those witnesses could not have corroborated each other's evidence given that the minor did not testify. In that regard, the prosecution did not lead direct and credible evidence through these witnesses to connect the appellant with the minor's attack except what they said the minor told them. The only other evidence was the medical evidence by PW5 who testified on behalf of Doctor Mutiso who attended to the minor. That evidence was not also conclusive that the appellant was the person who defiled the minor. The evidence left loose ends that were not tied to connect the appellant with the offence.

43. On the basis of the above evidence, I am unable to agree with the trial court that the prosecution discharged its burden of proof that the appellant was the attacker. First, no direct evidence connected the appellant as the attacker. That is, no witness saw him commit the offence. Second, the medical evidence merely found that the appellant had foul smell from his thighs, spermatozoa in his urine and presence of STI. The fact that there was presence of spermatozoa in his urine and an STI could only be considered circumstantial but was not proof beyond reasonable doubt that it was the appellant who defiled the minor. There was need for corroborative evidence to conclusively connect the appellant to this offence.

44. The trial court's reference to the evidence of PW6 that the STI was gonorrhea was also speculative. PW6 was a police officer and not a Doctor. PW5, the Doctor, did not state at all that the STI was gonorrhea and, therefore, not much value could be attached to the statement by PW6 that the STI was gonorrhea. Moreover, PW6 told the court that she forwarded clothes and samples from both the minor and the appellant to the Government Chemist for analysis but did not get back the results.

45. This, to my mind, is clear indication that the prosecution did not lead direct and conclusive medical evidence connecting the appellant with the offence. The trial court relied on possibilities which are not the same as proof beyond reasonable doubt in criminal trials. The prosecution at best relied on circumstantial evidence. However as the court of Appeal stated in ***Sawe v Republic*** [2003] eKLR

***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."***

46. That is the prosecution should have dispelled the notion that the minor could not have been defiled by any other person and infected with STI except the appellant. This called for other independent evidence which the prosecution did not lead.

47. It is unfortunate that no proper investigations were conducted in this matter. Witnesses arrested the appellant and took him to the minor before they took them to the police station. Even then, the police never carried out any investigations and did not attempt to get results on the analysis of the samples from the Government chemist to tie up their case and connect the appellant with the offence if he was the perpetrator. This is one case of poor police investigation. It is possible that the appellant could have been the perpetrator; he had an STI and foul smell from his thighs. He also had spermatozoa in his urine but had no injuries in his anus ***(sic).*** However, this on its own could not be taken as proof beyond reasonable doubt that he was the only one who could have defiled the minor and infected her..

48. This, in my respectful view, remained suspicion and the law in this country is that in a criminal trial suspicion however strong cannot form the basis for a conviction. This was aptly put in ***Sawe v Republic*** (supra) that:

***"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."***

49. As I stated earlier, the victim who was the minor did not testify. The court appointed PW1 as the intermediary to testify on her behalf because she was considered vulnerable. The intermediary testified on how the minor was brought to the station having been defiled. According to the record the intermediary was not assisting the minor to answer questions or convey answers to the court. He took an oath and testified on what he said the minor told him.

50. The Constitution and the law allow appointment of intermediaries to assist victims testify in court in the interest of justice. (Article 50 (7). Section 31 of the Sexual Offences Act allows a victim of a sexual offence to have the services of an intermediary. Under section 31(2) the court may on its own motion or on the prosecution's request or that of any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare witness, other than the accused, a vulnerable witness if in its opinion the witness is likely to be vulnerable on grounds such as age, intellectual, psychological or physical impairment; trauma or such other reasons or factors as the court may consider relevant.

51 Appointment of an intermediary is therefore at the discretion of the court where circumstances allow. Section 2 if the Act defines an intermediary as *"**a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."***

52. An intermediary in a criminal trial is not the mouthpiece of the complainant. Section 31(7) of the Act is clear that an intermediary is to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.

53. In ***MM v Republic*** [2014] e KLR, the Court of Appeal stated;

> ***"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."***

54. The Court was clear that the trial court must ascertain;

> ***"…the expertise, possession of special knowledge or relationship with the witness through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings." (Emphasis)***

55. The above exposition of the law suggests that an intermediary's role is limited in a criminal trial and the trial court must give directions on the extent of his role. That is why the Court of Appeal observed that;

> ***"The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties."***

56. The trial court appointed Corporal Jackson Kariuki, PW1, as the intermediary and who testified. The record is silent on whether any directions were given before this witness testified. The record does not also show that the trial magistrate conducted voire dire examination on the minor and satisfied itself that the victim was vulnerable witness.

57. Even if the trial court did, there is no record that it gave directions on the role of the intermediary. The witness was not even examined on his suitability as an intermediary but simply took the oath of a witness and testified as PW1. The record does not show that he put questions asked to the victim and relayed answers to those questions to court including the important question of the description of her attacker. This denied the appellant an opportunity to cross examine the victim and test the credibility and reliability of the prosecution evidence that the victim had given the description of the defiler.

58. As the Court of Appeal observed in ***MM v Republic*** (supra);

> ***"The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness."***

59. Since the victim did not testify PW1 could not satisfactorily answer the appellant's on the description she had given about her attacker which disadvantaged the appellant and infringed his right to a fair trial. This is so because the record does shows that PW1 was testifying but not helping the minor testify. That denied the appellant the opportunity to ask questions given that he was arrested on the basis of what he minor told PW2 and PW3.

60. There is one more issue that the appellant has raised in this appeal regarding the charge he faced. He submitted that the charge read to him omitted the word "**unlawful"** which, he contended, rendered the charge unsustainable. The respondent did not respond to this submission. I have perused the charge sheet and it is clear that it does not contain the word unlawful.

61. Section 8 under which the appellant was charged provides as follows:

***"(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.***

62. The section criminalizes the act of penetration of a minor's genital organ by another person's genital organ called defilement. Such an act is unlawful if intentional. Sections 5, 6 and 7 of the Act use the intentionally and unlawfully. The charge the appellant faced omitted the word **unlawfully. In *Daniel Nyareru Achoki v Republic*** [200] eKLR. the Court of Appeal was of the view that it is appropriate for the prosecution to use both words **intentionally** and **unlawfully.** The charge in that case was however attempted rape.

63. That can be distinguished from the present case given that rape or attempted rape can only occur in the absence of consent or if consent is procured by force or deceit. There cannot be consent in the case of defilement and therefore all the prosecution has to prove is the intentional act which then becomes unlawful. I do not think the charge as framed caused the appellant any prejudice.

64. Having considered the appeal submissions and the authorities, it is clear to me that the prosecution failed to prove its case against the appellant as required by law beyond reasonable doubt. Given the seriousness of the charge the appellant faced and severity of sentence on conviction, it was unsafe to convict the appellant on the evidence on record. I am therefore satisfied that this appeal has merit and succeeds.

65. Consequently, the appeal is allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

**Dated, Signed and Delivered at Kajiado this 29th day of November 2019.**

**E. C. MWITA**

**JUDGE**