REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 28 OF 2016

AMIN MOHAMMED NGIRO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 55 of 2014 of the Senior Principal Magistrate's Court at Kilifi – D.W. Nyambu, SPM)

JUDGEMENT

1. The Appellant, Amin Mohammed Ngiro was tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act, 2006 (the Act).

2. He appeals to this court on the grounds that he was convicted on inconsistent and incredible prosecution evidence; that the trial court relied on uncorroborated evidence of the complainant; that the trial magistrate failed to warn herself that she had not seen or heard the complainant testify; that the medical evidence was inadequate and adduced by the wrong witness; that the trial court shifted the burden of proof to him; that the trial court failed to accurately record the evidence given during cross-examination; that the judgement was devoid of a reasoned analysis; and that the sentence was unreasonably excessive in the circumstances of the case.

3. The appeal was urged by way of written submissions. This being a first appeal the court has the onus of looking into the evidence afresh, reconsidering and reevaluating it in order to reach its own conclusion taking into account the fact that the trial court had the opportunity and advantage of hearing the witnesses and observing their demeanour - see **Okeno v Republic [1972] EA 32, Pandya v R., 1957 EA 336** and **Peters v Sunday Post, 1958 E A 424.** Secondly, the court must be guided by the principle that a finding of fact made by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles - See **Chemagong vs Republic [1984]KLR 611** and **Gunga Baya & another v Republic [2015] eKLR.**

4. The Appellant was in the main count charged with defilement allegedly perpetrated against NHI an 8 year old male on diverse dates between 1st May, 2013 and 25th January, 2014 in Kilifi County through intentionally and unlawfully inserting his penis in the complainant's anus. The alternative charge was that of committing an indecent act with a child contrary to Section 11(1) of the Act. The particulars being that on the date and at the place mentioned in the main count, the Appellant touched the penis and anus of the complainant using his hands.

5. The complainant who testified as PW1 stated that he was in class 2 and resided with his grandmother and uncle. He stated that sometime in May, 2013, the Appellant did bad things to him when he went to the mosque near their home. He elaborated that he gave him a white concoction leaving him feeling dizzy and thereafter removed his trouser. PW1 felt pain in his abdomen and anus and was warned by the Appellant not to tell a soul. He stated that the bad things he did to him was give him drugs. On 26th January, 2014 after his uncle enquired he told him that every time he went to the mosque the Appellant would do bad things to him and give him drugs. That the Appellant had done so more than once. He added that the Appellant would mix the concoction at their house where he lived with others and did the bad things to him at a path used by people. He identified the Appellant in the dock.

6. At cross-examination PW1 explained that the homestead the Appellant resided in had three houses. He also explained that he went to the mosque with other children including his step-cousin. He elaborated that he was not friends with the Appellant and never visited him nor did the Appellant visit them and they only met at the mosque. PW1 stated that he once heard that the Appellant was mentally sick. Further, that the Appellant would make noise at the mosque refusing to leave. He would become hostile and threaten to beat people who tried to remove him and would sometimes be bound with ropes. According to PW1 the Appellant did the bad things to him when he got better but that nobody had informed him that he got better.

7. PW1 further testified that the incidents occurred at the mosque and that the drugs were in the Appellant's pocket. He explained that the first time it occurred, the Appellant compelled him to remain behind as the other children left. The Appellant held him by the hand and led

him to his house. PW1 could not run off and neither did he call out for help on being detained as he feared the Appellant who was armed with a knife and had threatened to kill him. The Appellant carried him to their house where the Appellant's parents were and did the bad things to him outside the house but nobody saw him. PW1 saw the drugs at the house and not at the mosque. According to PW1, the Appellant mixed a white substance in a bottle that had water and forced PW1 to take it. According to PW1, he did not want to partake of any medication as he was not unwell but the Appellant forced it into his mouth. He clarified that the statement he made at the police was that the incident occurred in the house and had stated so as there was a wall around the compound but the incident occurred outside.

8. It was the complainant's testimony that the Appellant gave him drugs daily from May, 2013. He further stated that after being given the concoction of a white tablet mixed with water he would feel dizzy. The Appellant then gave him liquor in a bottle. He had two bottles. The Appellant also forced him to smoke a cigarette before letting him go whereby PW1 would, in his dizzy state, walk in a stupor, staggering and falling. His guardians never noticed his drunken stupor. At re-examination PW1 clarified that they were alone when the incident occurred and that he would get drunk thereafter and go home straight away. He explained further that he used to bathe himself. Upon further enquiry by the court, PW1 explained that he could not tell whether or not the Appellant inserted his penis into his anus but that he would feel pain in his abdomen and anus. He never told anyone about the pain. PW1 used to go to school and no one asked him if there was a problem. He further stated that the Appellant would give him drugs everyday during the five prayer times. PW1 would sleep for a short while and then regain his composure.

9. PW2, A. F., the cousin to PW1 testified that he was the chair of the mosque mentioned by the PW1. His mother and PW1's father were siblings. PW1's parents resided in Mandera. He therefore resided with PW1. On 26th January, 2014 PW1 refused to attend madarassa classes despite being urged by PW2 and another man. He complained of being in pain. PW2 had previously received complaints about PW1 not attending the madarassa classes and school. The complaint from the school was that PW1 preferred sitting on the floor instead of sitting at his desk or sat with his legs raised. The one from the madarassa was that his behaviour had changed and he was unsettled and he was urged to find out what the problem could be. They therefore decided to discipline him. Therefore on 26th January, 2014 PW2 pressed PW1 to find out the underlying issue. PW1 informed him that the Appellant gave him liquor, a white tablet mixed with water and had sex with him and also threatened him with a knife. PW2 reportedly fainted on hearing this and when he came to, he reported to the village elders who escorted PW1 to hospital where he was informed that PW1 had been injured in the anus. It occurred to PW2 then that PW1 would on several occasions scratch his anus region and was withdrawn. The Appellant was known to PW2. The Appellant's house was near the mosque and he attended the said mosque daily where PW2 used to see him. He identified the Appellant by name.

10. At cross-examination PW2 testified that PW1 would leave school at 4.00 p.m. and would not be seen at home until 6.00 p.m. That he would not be playing with children his age which raised some concerns. The area they resided had drug peddlers such as his neighbour. Hence when PW1 revealed that he had been drugged he was not confounded. He understood that the white tablet was a drug; that the substance wrapped in green paper to be bhang and; that the brown liquid to be mnazi mixed with liquor.

11. PW2 explained that when he noticed the behavioural changes in PW1 he never suspected drugs as he could not fathom how a child his age would be involved in such and more so as he had only come across older persons but not a child of such age with such problems in the said area.

12. PW2's testimony was that he knew the Appellant well, as a drug addict but he never saw him walk about like a mad person nor saw him tied up at the mosque. He never knew him to be mentally unstable or under treatment for mental issues. According to PW2's testimony, a drug addict is mentally sick. He further stated that a child of PW1's age would be withdrawn and behave abnormally if they went through such an ordeal. It was also his testimony that the child was examined in Kilifi and attended counselling in Mombasa. At re-examination he emphasised that he took the child to Kilifi where the P3 form was filled.

13. PW3, Sergeant Dorcas Kaguiria, the in-charge of the gender desk at Kilifi Police Station, received a sexual assault report on 26th July, 2014 at 12.00 p.m. from PW1 accompanied by PW2. The child was then referred for treatment in hospital and a statement recorded. The police officer established that the child was on diverse dates from May, 2013 given a tablet mixed with water in a bottle and mnazi mixed with bhang and other drugs by the Appellant at a mosque. That the Appellant sodomised him and no one came to his rescue when he cried out. The process repeated itself each time the Appellant took the child and that the Appellant repeatedly defiled him throughout the year. The child became withdrawn, addicted to drugs and was always drowsy in class. In 2014, his relatives noticed that he had become withdrawn, shy and could not face them. He was last defiled on 25th July, 2014. The age assessment revealed that the child was 8 years old and a P3 form and a post rape care (PRC) form were filled confirming the sodomy. The Appellant, who was in the dock, was re-arrested when he was taken to the police station and was subsequently charged. At some point in her testimony PW3 clarified that the correct date of filing the report with the police was in January, 2014.

14. At cross-examination PW3 stated that the last time the school going child was abused was on 25th July, 2014 and that the Appellant was arrested on that date. That the exact date the abuse allegedly first occurred was never recorded but was in May, 2013. PW3 never visited the scene of crime and did not know if the Appellant resided alone. According to the investigations, the Appellant would take the child to a room whenever he went to the mosque and defile him but that the child did not know the frequency of the assault. The child appeared drowsy at the police station. According to PW3, the child may not have been able to distinguish between the Appellant's home or that of his his parents. The police officer further stated that the area near the said mosque was known to be a drug den and children had drug problems. The investigations revealed that the child would exhibit peculiar behaviour after the incidents. He would become withdrawn, hide himself, not play with other children and was always alone. His uncle stated that he had no friends. The Appellant appeared normal when he was arrested and PW3 spoke with him though his father stated that he at times ran mad. At re-examination the officer stated that she did not evaluate the mental status of the Appellant.

15. PW4, Dr. Daisy Juma, gave the medical evidence. PW4 laid the foundation by stating that she had worked at Kilifi District Hospital for one and a half years with the doctor who had examined and filled the P3 form and was acquainted with the doctor's handwriting and signature. The said doctor was undertaking further studies in Nairobi. The P3 form was filled on 27th January, 2014. It indicated that the child did not maintain eye contact and that he had a loose anal sphincter injury, there was no spermatozoa present, no injury to the external genitalia or discharge around the anus and there were no additional notes entered in the form.

16. The PRC form, also filled on 27th January, 2014, indicated that there was injury to the anal region and there was loose anal sphincter. It was also indicated that the anal area was not bruised and that the child had changed his clothing, taken a bath and gone for long and short calls. It was further noted that he avoided eye contact.

17. The P3 form and the PRC form were produced in evidence. PW4 also produced the age assessment report dated 27th January, 2014 indicating the child's age as 8 years.

18. At cross-examination PW4 stated that the P3 form was filled in with reference to the PRC form dated 27th January, 2014. The child was examined on 27th January, 2014. The doctor explained that though spermatozoa takes hours to clear, it clears if the victim defecates. PW4 further explained that the anal sphincter is an elastic muscle in the anus and it expands during defecation then relaxes. Its tone is examined using a finger; that it can be loose, normal or extremely tight. It was elaborated that the sphincter became loose if one has hard stools and suffers constipation repeatedly or consistently like having **"3 times daily constipation repeated through the week"**. The doctor opined that the loose sphincter confirmed an abnormality but stated that from the notes one could not tell if the patient's sphincter was loose and that it was not important to ascertain the degree of looseness of the same.

19. The defence case was presented by a chief registered nurse specialist in psychiatry from Kilifi District Hospital, one Leonard Chiriba Nasoro who testified as DW1. DW1 first examined the Appellant in April, 2013. He had been taken to the psychiatry clinic bound with rope on account of causing disturbance at the village. The Appellant's history included use of narcortic drugs and admission at Hola District Hospital on account of the same complaint, that is being aggressive and destructive. DW1 attended to him and administered medication advising that he be seen monthly. On 31st May, 2013 he was brought back. This time he was not bound with rope, was calm, sat down and was laughing and talking to himself but did not cause any destruction. He was attended to and drugs were administered to him. He was advised to come back on 28th June, 2013 but he never paid another visit. According to DW1 the Appellant suffered a mental illness and his actions were in tandem with a person suffering from a mental illness. He explained that mental illness relapses when one stops taking medication. A report prepared by DW1 and dated 15th February, 2016 was produced in evidence. He also produced the treatment notes dated 31st May, 2013 from Kilifi District Hospital and a discharge summary from Hola District Hospital covering the period between 20th March, 2012 to 22nd March, 2012.

20. Cross-examined, DW1 explained that he had read the treatment notes from Hola District Hospital. The Appellant had been put on anti-depressants. He further explained that the Appellant would regain control when he was on the drugs and that his mental disorder was a psycho-substance abuse disorder and was drug-induced. It was DW1's evidence that he did not see the patient after 31st May, 2013 and thought he had recovered and that he may have recovered. At re-examination he explained that the condition is reverseable upon treatment and rehabilitation. Part of the rehabilitation was isolation from the source of drugs.

21. In his submissions, the Appellant emphasized that PW1's evidence was unreliable as it was not credible or believable. According to him the child was inconsistent stating that the drugs were at the mosque and switching to say that they were in the house. That the complainant also stated that the incident occurred inside the house then stated that it was outside. The Appellant queried how the child, who was intelligent, would agree to persuasion of a mad person, who was not his friend, to accompany him or why he failed to call out for help when detained by such a person. He further questioned the probability of committing the offence at his parents' place without being found out. The Appellant then faulted the trial court for failing to establish during the voire dire examination if the child understood the consequences of lying.

22. The Appellant also took issue with the action of the trial court of taking into camera with the child, in the absence of the prosecution, the Appellant or his counsel and members of public, when he refused to respond to the questions in chief and later came out able to do so. According to the Appellant this action was prejudicial to him.

23. It was further submitted that the child never stated that the Appellant had defiled him and that the alleged pain in the abdomen and anus was never detected during the medical examination. It was emphasised that the loose sphincter was not conclusive evidence of penetration as other factors could cause the problem.

24. The Appellant took issue with the evidence of PW4 stating that he was not the proper witness to produce the medical evidence. That this prejudiced his case as he could not obtain satisfactory answers from the witness. The Appellant took issue with trial court for failing to insist that the maker of the P3 form attend court terming it a misdirection on the part of the court. Further, that in any case, the said evidence did not conclusively prove penetration.

25. The Appellant also submitted that the evidence of the investigating officer was confusing as she referred to a report filed on 26th July, 2014 over events that occurred in May , 2013 and 2014 without giving an exact date. That the witness had stated that the child was last defiled on 25th July, 2014 correcting the reporting date as January, 2014. According to the Appellant, he was in custody since the date of arrest on 25th January, 2014 to the finalisation of the case and could not have committed such acts on 25th July, 2014, hence another person may have defiled the child.

26. It was further submitted by the Appellant that the trial court never put on record all the testimony given at cross-examination. The Appellant concluded that the contradictions and the totality of the evidence raised doubts as to his committing the offence.

27. On its part, the State through the DPP submitted that the Appellant was rightly convicted and sentenced and that the appeal was incompetent. It was submitted that judgement and sentencing was a matter of judicial discretion based on evidence and application of legal principles. Reliance was placed on the High Court case of **Fatuma Hassan Salo v Republic** to buttress this point. The proper case citation was not provided. It was further submitted that the onus lay upon the prosecution to prove aggravating factors during the sentencing. The decisions from Botswana of **The State v Muller, Ivan, Andries** and **The State v Mpho Mpelegang** were cited in support of this point. The proper case citations were also not provided.

28. In addition, it was submitted that the identity of the perpetrator could be supported by the fact that the accused person puts forward a false albi. The Court of Appeal decision in the case of **Samuel Kilonzo Masau v Republic [2014] eKLR** was relied upon to support the assertion. It was emphasised that the Appellant was the only person in control of and had power over the child. The court was called upon to presume this fact as per Section 4 of the Evidence Act. The State further called upon the court to apply the proviso to Section 124 of the Evidence Act in this matter and to protect vulnerable children from sexual predators as per Section 15 of the Children Act.

29. The main issue by the Appellant is that there was insufficient evidence to warrant the conviction and subsequent sentence. The other issues are: the defence not being taken into account; the need to disregard PW4's evidence for not being a proper witness; not calling all witnesses; the emerging issue of the child being privately taken aside; that not all evidence was recorded; the decision not being well reasoned; and the court not establishing whether or not the child understood the consequences of telling lies.

30. Now the offence of defilement is found in Section 8 (1) of the Act which provides that:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

31. The offence is therefore comprised of 3 ingredients: the victim must be a child, there has to be penetration and the perpetrator must be identified. For a conviction to arise, all the three ingredients must be proved by the prosecution beyond reasonable doubt.

32. A child is defined under Section 2 of the Children Act as "**any human being under the age of eighteen years."** The trial court when conducting the voir dire examination was able to determine that the child was of tender years which is defined under the Children Act as "**a child under the age of ten years**." The PRC form indicated that he was born in 2006 and the P3 form indicated that he was 8 years of age. PW1 stated that he was 8 years old and PW2, one of his guardians corroborated this. Further, an age assessment report gauged the alleged victim, PW1, as being 8 years old as at 27th January, 2014.

33. The Court of Appeal held as follows in **Stephen Nguli Mulili v Republic [2014] eKLR**:

> **"From the facts of the present case we note that the complainant gave testimony that she was 13 years at the time of the offence. PW2 and PW3 corroborated the same. The "Diagnostic HIV Testing and Counseling Patient/Client Card", the "General Out Patient Record" and the P3 form, which were all presented as exhibits, stated the complainant's age as 13 years. Therefore, applying the law to the facts of the present appeal, we are satisfied that the complainant's age was proved to the required degree. This view is fortified by the fact that during trial the defence did not question the age of the Complainant as offered before court. "**

In the case before me, the evidence placed before the court sufficiently proved that the complainant was eight years old and thus a child.

34. Penetration is defined under Section 2 of the Act as "**the partial or complete insertion of the genital organs of a person into the genital organs of another person.**" PW1, indicated that he did not know whether or not the Appellant inserted his penis into his anus. He, however, testified that he felt pain in his anus after the incidents. He also testified that when the incident took place for the first time, the Appellant removed his (the complainant's) pair of trousers. The P3 form and PRC forms indicate that his sphincter was loose and the medical expert, PW4, explained that a loose sphincter was indicative of an abnormality. It was not noted that the child had suffered constipation or hard stool consistently so as to lead to a loose sphincter.

35. The Appellant deemed PW4 as not being a proper witness and called for the disregarding of his evidence. It is, however, on record that although the Appellant through his counsel had initially insisted that the maker of the P3 produce it, he conceded to PW4 producing it. He also agreed to the production of the PRC form by the said witness and did not object to the production of the age assessment report by the witness. It is submitted that he reluctantly agreed to the production as he was in custody. The Appellant had been granted bond terms. There was therefore no prejudice suffered by him. Furthermore, all the documents produced were in their primary original form.

36. Section 77(1) of the Evidence Act provides that documents prepared by certain persons such as medical practitioners can be used in evidence. The P3 form had been prepared by a medical practitioner. The Appellant never argued that the documents were not prepared by the persons said to have authored them.

37. PW4 laid a basis for the production of the P3 form stating that she had worked together with its maker at the hospital the victim was examined and that she was acquainted with the handwriting and signature of the maker.

38. The P3 form having passed the test of sections 67 and 77 of the Evidence Act was properly produced. Hence going by the said evidence, the only viable explanation for the painful anal region and the loose sphincter was an abnormality other than constipation or hard stool. However, was it occasioned by penetration as defined in Section 2 of the Act? Piecing the evidence together, it emerges that the victim would be given substances that would induce a state of dizziness, drowsiness, sleep or stupor and when he came to he would be feeling pain in his anus. During the first encounter he recalls his pair of trousers being pulled off. It can only lead to one logical conclusion that the anus was interfered with during those instances and not by constipation or hard stool.

39. The doctor who examined the child and filled in the P3 form concluded that the probable reason was recurrent sodomy as did the medic who filled in the PRC form. The reason for the removal of the pair of trousers finds its answer and corroboration in the medical conclusion reached. There were no injuries to the anus and the external genitalia was found to be normal as it was indicated in the PRC form that the acts were 'consensual'. Consensual here can only mean that there was no force used and as PW1 explained he would feel drowsy, sleep and when he came to he would feel pain in that region. One can therefore say that no force was used but that does not mean that no crime was committed.

40. The trial court also applied the proviso to Section 124 of the Evidence Act in finding that the evidence was corroborated and truthful and that PW1 was consistent. I concur with the Appellant that the magistrate who made this conclusion never had the opportunity to observe the demeanour of the minor. However, the evidence presented corroborates that of PW1 and does point to penetration. Consequently, in my view, penetration was proved as per the standards required in criminal trials.

41. PW1 was categorical that the Appellant was the perpetrator. He knew him from attending the same mosque and was able to identify him in the dock. According to the Appellant this evidence is doubtful as PW1 had indicated that the Appellant suffered mental illness. PW2 had also conceded that the Appellant took drugs and such a person was mentally ill and the medical evidence tendered by DW1 indicated that the Appellant's mental instability was induced by taking of drugs. The Appellant therefore submitted that it was improbable that the two would have fraternized to the point that the alleged victim would have accompanied him without calling for help. It is however noted that PW1 offered an explanation that he feared the Appellant as he had threatened to harm him using a knife.

42. To further lay doubt in the prosecution's case, the Appellant also called to question the probability of the incidents taking place at the Appellant's home as PW1 had indicated that the Appellant's parents also resided there. It is unfortunate that the investigating officer never paid a visit to the scene of crime to give a clear picture as to the probability or otherwise of such acts taking place without one being noticed. Nevertheless, this does not imply that the opportunity was not present and was acted upon despite the alleged presence of others.

43. The court is also urged to adjudge the evidence of PW1 as being unreliable. PW1 clarified that he had informed the police that the incident occurred inside the house due to the wall running around the compound. It is not in doubt that the substances that elicited a state of dizziness, drowsiness, sleep or stupor on PW1 were administered whether or not it occurred at the house, compound or mosque. PW3 testified that on the day of filing the report with the police PW1 appeared drowsy corroborating PW1's evidence that sleep or stupor inducing substance had been given to him.

44. The voire dire examination reveals that PW1 understood the consequences of lying according to his religion hence the Appellant cannot fault the trial court for allegedly failing to establish that the child understood the consequences of lying. In my view, the evidence of PW1**,** though scattered as would be expected of a child of tender years , was not inconsistent and was therefore reliable. Further, PW1's evidence found corroboration in the evidence of PW2 that the Appellant partook of drugs and PW4 that the complainant was sodomised. I find that the evidence on the identity of the perpetrator was solid and that the Appellant was the said person.

45. The Appellant was unhappy about the private session PW1 had with the trial court. It is on record that the court requested for the same to establish the cause of PW1's failure to respond to the prosecutor and did so in the presence of the court assistant. It is also on record that the Appellant had not opposed the private session. There is nothing to show that the trial magistrate coerced or cajoled the child into giving false testimony against the Appellant. I find that the Appellant was not prejudiced by the said action.

46. The Appellant also claims that not all evidence was recorded. This was not raised at the point of trial or even during submissions. It is also not specifically indicated what evidence was left out save to state that not all evidence at cross-examination was recorded. This court cannot gauge what was left out at all. The record appears complete and one can only conclude that the Appellant is shooting in the dark.

47. The Appellant's other ground of appeal is that the trial court did not give a reasoned decision. I have perused the said decision and find that the honourable magistrate looked into the evidence by both the prosecution and the Appellant and applied the relevant principles of the law to reach the conclusion made. This ground of appeal therefore fails.

48. The Appellant's defence was that he had a drug-induced mental disorder at the material time. The law presumes that every person is of sound mind until the contrary is proved. In this regard Section 11 of the Penal Code provides that:

> "Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

49. However the law does not place culpability upon a person who is not of sound mind. Section 9(1) of the Penal Code generally provides that:

> "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

50. And the defence of insanity is provided for under Section 12 of the Penal Code which elaborates that:

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

51. The Court of Appeal in **Leonard Mwangemi Munyasia v Republic [2015] eKLR** held that:

> **"It is a rule of universal application and of criminal responsibility that a man cannot be condemned if it can be proved that at the time of the perpetration of the criminal act he was not master of his mind. To begin with and as a matter of general rule, the law presumes that every person is sane and responsible for his actions at all times including when he is alleged to have committed an offence because sanity is the normal and usual condition of mankind."**

52. It is this defence of insanity the Appellant was leaning on. The Court of Appeal also held that the presumption of sanity is rebuttable. This is what the Appellant attempted to do via the evidence of DW1. In my view, the said defence could not avail to the Appellant. DW1 testified that he first attended to the Appellant in April, 2013 and diagnosed his condition as being drug-induced. It was however not indicated the type of drug that would trigger it. While it is also an established fact that DW1 examined the Appellant on 31st May, 2013 and that he was laughing and talking to himself, there was however no evidence laid that prior to this date, but during that said month or after that date, the Appellant had exhibited the said disorder so as to include the likely period in which he was said to have defiled the child. No evidence was adduced by the Appellant to show that he suffered insanity from June 2013 to January, 2014 being the period he was said to have defiled the child. The medical expert did not also indicate whether or not the said disorder would cause the Appellant not to know the nature and quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong.

53. The Court of Appeal in **Leonard Mwangemi Munyasia** (supra) further held that:

> **"...Under the rule (McNaughten Rules) insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."**

54. It went on to hold that :

> **"Both** section 12 **aforesaid and the McNaughten Rules recognize that insanity <u>will only be a defence if it is proved that at the time of the commission</u> of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. <u>The test is strictly on the time when the offence was committed and no other.</u> Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime."** (own emphasis)

55. In the defence of insanity time is therefore of essence. The relevant period is between May, 2013 to 25th January, 2014. DW1 testified that the first time he attended to the Appellant in April, 2013 he issued him with medication but the only documentary proof of this relates to events on 31st May, 2013. There are no hospital records produced that proved that the Appellant was attended to by DW1 in April, 2013 and the report prepared by DW1 does not also refer to April, 2013. There is also no proof that in the month of May, 2013, save for 31st May, 2013, the Appellant exhibited the disorder which was purely drug-induced. There is also no proof that he exhibited the said disorder after 31st May, 2013.

56. The trial court found that since DW1 did not treat the Appellant after 31st May, 2013 it meant that he was normal noting that his mental disorder was drug-induced. The court further held that, **"[i]f he was not of sound mind he would have been taken to hospital and DW1 would have treated him. He was arrested on 25th January, 2014. I am therefore not satisfied that the accused committed the offence while ill. He was of sound mind and very capable of committing the offence."** I would agree with the trial court that as the illness was drug- induced the Appellant ought to have been taken for treatment during the relevant period if he had partaken of the drugs that triggered the ill state. There was no evidence adduced to show that he was treated for his condition during the time he molested the complainant.

57. In a nutshell there is no prove that the Appellant was, during the material time, labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

58. The trial court found the Appellant guilty for the offence of defilement under Section 8(1) as read with 8 (2) of the Act and convicted him. Section 8 (2) of the Act provides that :

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

The court meted out the mandatory sentence of life imprisonment as provided by the law. The trial court did not err in passing the sentence and any issue raised on the severity of the sentence fails.

59. The age of the minor must also be proved for purposes of sentencing as the appropriate punishment is dependent upon the various statutory categories of age of the victim. It was proved that the victim was eight years at the time. The sentence passed was therefore not excessive. It was also lawful.

60. Due to all the aforestated, I find that the appeal has no merit. The appeal is dismissed.

Dated, signed and delivered in Malindi this 25th day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT