REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 92 OF 2017

IBRAHIM ONZARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the original conviction and sentence in of **Honourable L K Gatheru**- RM dated 29th May, 2017 in Mariakani Criminal Case No. 291 of 2015)*

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

IBRAHIM ONZARE.....ACCUSED

JUDGEMENT

1. The appellant, **Ibrahim Onzare**, was charged in the Mariakani Criminal Case No. 291 of 2015 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that on 19th day of April, 2015 at around 0330 hours at Mackinon Road Trading Centre, Mackinon Road Location, Kinango District of Kwale County within Coast Region, the appellant intentionally and wilfully caused his penis to penetrate the vagina of **CM**, a child aged 15 years. He was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act, the particulars being that on the same day at the same place at the same time, the appellant intentionally and wilfully caused his penis to touch the vagina of **CM**, a child aged 15 years.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the principal offence, convicted him accordingly and sentenced to him to 20 years which in the opinion of the Trial Court was the minimum sentence provided by the law.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

1. THAT the Learned Magistrate erred in law and in fact in proceeding with a trial and basing a conviction on a charge that was defective.

2. THAT the Learned Magistrate erred in law and in fact in finding that the facts as narrated by the Complainant amounted to an offence under section 8(2) of the Sexual Offences Act.

3. THAT the Learned Trial Magistrate erred in law and in fact in failing to comply with the law, particularly as regards the evidence of minors.

4. THAT the Learned Trial Magistrate erred in law and in fact in failing to seek corroboration of the Complainant's evidence and in reaching a conviction without such corroboration.

5. THAT the Learned Trial Magistrate erred in law and in fact in basing a conviction on the evidence of a single child

evidence without warning himself as required.

6. THAT the Learned Magistrate erred in law and in fact in finding that the evidence availed supported the charge and in convicting the Appellant against the weight of evidence.

7. THAT the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's defence.

8. THAT the Learned Trial Magistrate erred in law and in imposing a severe and excessive sentence.

9. THAT the Learned Trial Magistrate erred in law and in denying the Appellant the benefit of doubt.

4. At the hearing of the case the prosecution called seven witnesses.

5. PW1, **CM**, the complainant was before her testimony subjected to a *voir dire* examination in which she stated that she was 15 years in standard 8 and was a Christian who was attending church at House of Kings Church with **Pastor Catherine**. According to her she knew what sin was which in her view was telling a lie. She also disclosed that she believed in God and that sinful people go to hell yet she would like to go to heaven. She stated that in order to avoid sins in court she should tell the truth.

6. The Court was therefore satisfied that PW1 could be sworn as in the Court's opinion she understood the importance and all the nature of speaking the truth.

7. In her testimony, the complainant stated that on 19th April, 2015 at 01.00 hours they were at a function at Madukani in Mackinon Road for a Somali wedding ceremony with her cousin, **J**, brother, **PW4**, **K** both of whom were older than her and cousin, **F**. On their way with **PW4** they met a person who held her hand, assaulted Joseph and told them that he was a police officer. Thereafter the said person took her to a room in a lodging at Mackinon Road, manned by a watchman whom she did not know, removed her clothes, put on the lights and then off, removed the complainant's skin tight and inner pants and told the complainant to climb on the bed, removed his clothes and penetrated the complainant. In the meantime, the assailant warned the complainant not to scream threatening her that he would strangle her if she did so. According to the complainant, the assailant did not use any protection and could not remember the number of times the assailant penetrated her.

8. Thereafter the assailant forced her to take shower though the complainant did not see anything. After the complainant showered, the assailant did the same and the complainant opened the door and ran away. At the gate, she found her brother and her cousin and narrated to them what had happened to her after which they went back and found the watchman who was at the entrance who denied them entry. However, when the police came, the watchman opened the gate but they did not find the assailant in the room. The complainant was then told to go home and report the next day to record her statement which she did at Mackinon Road Police Station where she was issued with a P3 form which they took to Samburu health Centre on 20th April, 2015.

9. It was the complainant's evidence that though he saw the assailant's face when the lights were put on, she did not know the person who raped her and could not identify him physically or even identify him in court. It was her evidence that it was dark and they had no torch. She stated that even the entrance to the lodging was dark. She stated that there was someone who got out of the lodging and ran away but the watchman said that he did not know the person. She reiterated that when her assailant went into the bathroom she ran out of the room and got out alone and that the assailant only put on the lights momentarily.

10. PW2, **Geoffrey Nyangira**, was a watchman at Juchem Bar in Mackinon Road and on 19th April. 2015 at 0100 hours he was on duty there when the appellant, whom he knew as **Ibrahim Onzare**, also went in the company of a lady in a *lesso* whom he did not know looking for a room. According to him there was no commotion when the two arrived and the area was dark. He proceeded to direct them to room no 6, at the back in a lit area after the man paid Kshs 250/=. It was his evidence that they two left at 02.42 hours and at 03.19 hours a group of people went alleging that a girl had been raped within the rooms by a teacher from Kafgen called Charles. The group demanded to be let in and even broke the outer gate after which he called a police officer staying in Voi but based at Mackinon. Upon the arrival of three police officers, he opened, in the company of his colleague, Yvonne, who was sleeping earlier on, opened the gate and they got in and he showed them the room but there was nobody therein. PW2 confirmed that it was the appellant who went to the Hotel and that he had known him for six months as they were both from Kisii. He however denied that anybody ran out of the Hotel.

11. PW3, **Athman Chiro**, a Clinical Officer at Samburu health Centre filed in a P3 Form on 19th April, 2015 for the complainant who was taken there with a history of having been defiled by a person well known to her within 4 hours and 45 minutes. According to him, upon examination, the body had no injuries, she had no tear on the vagina, no bruises and no hymen. She was however in her menses since 17th April, 2015 which was still flowing. Since she had taken birth, no spermatozoa was noticed. Accordingly, PW3 placed her on antibiotics and birth plans and filled in the P3 Form. The witness could not however tell when the hymen was broken and it was not fresh.

12. PW4, **JMM**, a form 2 student, was on 19th April, 2015 at about 0102 hours with the complainant on the road when they were stopped by a person who held a phone torch. The person held the complainant by the hand saying he was a police officer and was taking her to the police. The person told PW4 to go away and PW4 realised that he was a teacher whom he knew from a local school. The person then attacked him with slaps and kicks and then led the complainant by hand away. PW4 however followed them from a distance as they went to a Guest House which has a bar. PW4, then called his brother C who did not pick his call and then called one **J** who arrived with other people after 30 minutes. Thereafter the complainant came from the Guest House crying holding clothes though he could not confirm whether they were her clothes. According to him, they later saw the appellant hiding in a corner. In the meantime the security guards had called the police but in the meantime the appellant escaped by running out of the Guest House and their attempts to trace him failed. According to him the complainant alleged that she had been raped by the teacher. PW4 testified that he knew the teacher for a while as he had opened wines and spirits shop nearby. PW4 confirmed that it was dark and that the appellant had lit his phone on them. According to him, he had never been a student at the school where the appellant was teaching and never worked at the appellant's shop. According to PW4, he never saw his uncle,

the complainant's father that night.

13. According to PW4, they were denied entry by the watchman who opted to call the police instead. However when the police came they only managed to access the compound but not the room which was only accessed by the police. It was his testimony that Juchem Bar & Guest House has a perimeter wall with one door for the guest house and a gate for vehicles and at the time of the escape they were inside the compound. He however denied that he mentioned the name "Charles" at the gate and denied that there were people calling out Charles. According to him, he knew the appellant as Ibrahim though they did not disclose the name to the watchman as the watchman did not allow them in. It was his evidence that he identified the appellant during the time the appellant hit him by which time the appellant was next to him.

14. PW5, **Joyce Dalu**, testified that on the night of 18th April, 2015, there was a ceremony at her home and the complainant and her mother were present. When they ran out of cooking oil, she sent the complainant and her brother at 9.00 pm to go and buy the same and they left in a group. Later at midnight, after the oil was brought by the complainant's brother, **K** as the complaint and her friends had been left behind at another wedding ceremony. As they were preparing to go to sleep, some young men, in the company of PW4, went and informed them that the complainant had been raped. They then took the complainant to the police. According to her, when the complainant, who was 15 years old came back she was walking by herself. It was her evidence that she never knew who raped the complainant nor did she get to hear of his name. Similarly, she did not know the appellant. It was her evidence that though she saw PW4 the following day, she did not ask him about the incident and PW4 did not tell her about the incident.

15. PW7, **ADM**, the mother of the complainant was on the material day asleep when she was woken up by her sister who informed her that the complainant had come home crying saying that she had been raped. According to her both herself and the complainant were new in the area and the complainant had not identified the assailant. They then went to the village elder and to the police station after which they went to the Hospital. According to her the complainant was 15 years old and was born in April, 2000. She however testified that she did not know the appellant and neither saw nor identified the assailant.

16. PW7, **PC Justus Kahindi**, the Investigating Officer was on 19th April, 2015 at around 0550 hours at the Report Office when the complainant reported that at 03.30 am she was on her way home when she met a man who introduced himself as a police officer from Mackinon and informed her that's she was under arrest. The person however took her to a guest house and sexually assaulted her. PW7 took down the complainant's statement and referred her for treatment and had the P3 form filled by the doctor. According to him the appellant had disappeared by then until 10th June, 2015 when he was arrested at Kinango and was charged with the offence. It was his evidence that the age of the complainant was established by way of a clinical card and age assessment.

17. Though PW7 did not visit the scene and none of the officers who did so recorded statements, the complainant was put in room 6 but they never inspected the room though in cross-examination he admitted that they could have gathered evidence had they visited the room. PW7 however confirmed that the complainant, the mother and the aunt did not identify the complainant's assailant as they were not at the scene though the P3 form stated that the complainant knew her assailant.

18. Though PW7 denied that he brought charges against the appellant due to pressure, he admitted that the family members were putting pressure for the arrest of the appellant. As was appreciated by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR**:

> **"Another issue raised by the appellants is that there was massive intermeddling with the investigations and the prosecution of the case. The power to prevent and detect crime including investigations is vested in the Kenya Police. A prosecutor is required to produce all evidence whether favourable or unfavourable to his case…In my mind a time is unlikely to come when anyone will ever be able to say that perfect fairness has been achieved once and for all. However, it is important to protect the process of the administration of justice from interference and intermeddling by third parties. The prosecution must be firmly on the driver's seat when a complaint is made in respect of any crime no matter who is involved. In this case, the three police officers who were directly concerned with the matter expressed grave difficulties in the management and the control of the case. They blamed their superiors for not giving directions and they also blamed third parties who were directing police as to the circumstances and mode of investigations. There was a departure from the central principle which is that there must be independent and impartial investigations. Such a departure is a ground for concern and would damage a significant aspect of public interest in the administration of justice. In my view, the role of third parties must be restrained, measured and carefully tailored for the just process in the whole matter. In truth, of course, almost all prosecution evidence is or is intended to be damaging to the prosecution. However, it is important to guard against express interference in order to achieve one goal which is to fix the accused persons. It is impossible to overrate the importance of keeping the administration of justice from interference, participation, direction, guidance, control and manipulation which is likely to raise suspicion of unfairness. In such circumstances, the question that arises is whether the appellants enjoyed their rights or were deprived their basic rights by virtue of the facts the investigations were being driven and conducted at the behest of third parties. It is reasonable to say that there was no impartial, fair, professional and objective investigations devoid of vested interests designed to attract publicity. There is here, I apprehend substantial and well founded allegations of real likelihood of bias or lack of control on the part of the police in the manner the investigations, charging and trial was conducted. No doubt the conduct of police in this matter was imperceptible and unconscious. However, nothing is to be done which creates even suspicion that there has been an improper interference with the course of justice."**

19. Upon being placed on his defence, the appellant gave sown testimony in which he stated that he was 35 years old and a teacher by profession. According to him in April, 2015 he was teaching at Mwembeni Primary School where he had been for more than a year. On 18th April, 2015, a weekend, he was at Mackinon Road where he lived and between 18th and 19th April, 2015, his friend Said Mohamed, invited him for a wedding of his sister which he attended at mid-day and thereafter at 2.00pm they went to Top Life Bar for beer drinking and *khat* chewing till late in the night. According to him at about 2.30am to about 3.30 am he had a female friend, called **Purity**, whom he had invited, but whose contact he lost. According to his information the lady was living in Moshi, Tanzania He then left his friend with the lady and went to book a room at Juchem Bar and Restaurant and later picked the lady and they went to the room and had fun. According to him, the lady was dressed in a *buibui*. After that they left together.

20. According to the appellant he did not disappear but left for Kisii as he had booked a vehicle for 4.00pm as it was during school holidays though he had been made aware that some police had gone looking for him. It was however his position that if the police wanted to arrest him they would have done so as he was around till 4.00pm. To the best of his knowledge he booked room 6 and did not run away from the Hotel as no one was chasing him. It was therefore his case that he was wrongly implicated just because he was within the premises on the material night.

21. The appellant admitted that PW2 was well known to him as he knew him for about two years though they were not related. According to him he only came to know PW2 when the later went to work at Juchem. He however denied that he compromised PW2. It was his evidence that he was arrested on 10th June when he went to Kinango Police Station to inquire whey the police were looking for him.

22. In his judgement, the Learned Trial Magistrate stated that the most fundamental ingredient for defilement include proof of intentional unlawful penetration of the complainant and that age and identification of the perpetrator are the incidental to the crime. Based on the Child Clinical Card and oral evidence of the complainant's mother, the court found that the complainant's age of 15 years had been proved. On penetration, the court believed that the complainant was telling the truth that she was defiled on the material night. While appreciating that there were several contradictions in the prosecution's evidence, the court found based partially on the evidence of PW4 and circumstantial evidence that the appellant was the perpetrator of the offence.

23. The appellant submitted that the following needs to be looked at when one looks at the weakness of the prosecution case:

a) The incident occurred at night ordinarily making identification difficult.

b) The complainant victim being secured in circumstances and certainly experiencing a difficult moment was clearly denied the soberness to identify the person.

c) The complainant had not met the assailant before and by the time that help came, the assailant could not be found.

d) The complainant herself said that she was not in a position to identify the assailant and was unable to identify the appellant in court.

e) The watchman himself was not helpful as he said the appellant did not go with the Complainant to the lodging as was alleged.

f) The watchman says the initial allegation was than a man called Charles was the assailant.

24. The Court was urged to note that the complainant being a minor ordinarily required that her testimony be corroborated. It was further contended that thought be complainant testified after examination, her examination was not geared towards establishment of whether she understood the nature of the act. The Court was therefore urged to disregard her evidence. To the appellant, the medical report was not helpful either and that the age of the complainant was not proved. It was submitted that the appellant gave clear evidence that was not controverted hence he is entitled to the benefit of doubt.

25. In his oral highlight **Mr Magolo**, learned counsel for the appellant expounded on these submissions.

26. On behalf of the Respondent it was submitted that the Trial Court properly conducted the *voir dire* examination on the complainant and satisfied itself that the complainant understood the importance of speaking the truth hence the Court strictly adhered to the provisions of the ***Oaths and Statutory Declarations Act***. It was further submitted that the complainant's evidence was corroborated by the evidence of PW2, PW3 and PW4. The Respondent further relied on section 124 of the ***Evidence Act***. As regards the identification of the appellant it was submitted that PW4 recognised the appellant as a teacher from a local school and that the appellant was also identified by PW2. As regards the evidence of the appellant it was submitted that the same was untrue and not entirely reliable. It was noted that the appellant did not call his friend, **Said**, to confirm his testimony. Nor did he call his girlfriend, Purity and that he failed to produce his bus ticket. It was therefore the prosecution case that the judgement of the Trial Court was clear that she carefully evaluated the appellant's defence hence the Court ought not to interfere with both conviction and sentence and should dismiss the appeal as lacking in merit. These submissions were highlighted by **Miss Ogega**, Learned Counsel for the Respondent.

Determination

27. I have considered the material placed before the Court. This is a first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

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

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

29. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

30. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:

'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"

31. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

32. The appellant urged this Court to disregard the evidence of the complainant on the ground that *voir dire* examination was not properly conducted. How, then is *voir dire* examination to be conducted? The Court of Appeal gave its guidance on the issue of *voir dire* examination in **Johnson Muiruri vs. Republic [1983] KLR 447** at pages 448-450 as follows":-

"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.

In *Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported) we said:*

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."

A similar opinion was expressed by the Court of Appeal in England recently in *Regina v Campell* (Times, December 10, 1982):

"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in *R v Lal Khan* [1981] 73 Cr App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen....

There Lord Justice Bridge said:

'The important consideration... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.'

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life."

It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in *Oloo s/o Gai v R* [1960] EA 86 the Court of Appeal said that it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath; since the judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand.

In *Gabriel s/o Maholi v R* [1960] EA p 159, again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

In *Kibangeny Arap Kolil* [1959] EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial judge to warn himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal."

33. It is therefore clear as was held in **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (unreported) the purpose of *voir dire* examination is to enable the Court to form an opinion whether the child understands the nature of an oath in which even his sworn evidence may be received. It is not simply to gauge the religious belief of a child though the two are invariably interconnected. Therefore to simply gauge the religious leaning of a child without interrogating whether the child understands the nature of the oath does not in my view strictly satisfy the intention of carrying out a *voir dire* examination.

34. In **Macharia vs. Republic [1976] KLR 209**, **Kneller & Platt, JJ** (as they then were) held that:

"It [*voir dire*] must be a preliminary examination of a witness by the magistrate in which the witness is required "to speak the truth" with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth). A finding on these points after the person of tender years has testified will not do. The irregularity is not fatal. These girls were aged thirteen and twelve years, attending a primary school and in standard VII. Their answers to questions were coherent and revealed that they were intelligent. They were competent."

35. However, it is now settled that failure to observe the provisions as to *voir dire* does not automatically vitiate the conviction. See Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR** where it was held as follows:

"We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014. Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. Voir dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary. But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; ".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence" (our emphasis)

Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and

sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v **Msa Criminal Appeal No.373 of 2006.**

It is clear to us from the record that the trial Magistrate deliberately did not conduct voir dire examination for he believed, erroneously, that the complainant was not a child of tender years. The record reads thus;

"PW1 F/c (Female child) not of tender years sworn states in Kiswahili." The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."

See Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015 On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement.

36. On my part I have considered the manner in which the *voir dire* examination was undertaken by the Learned Trial Magistrate and it is my view that the same fell short of what is expected in a voir dire examination as it fell short of interrogating the complainant whether she understood the nature of the oath. However, strictly speaking the complainant was not a child of tender years. As was held by the Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR**:

"The definition of a child of 'tender years' differs; for under section 2 of the Children Act No. 8 of 2001, a child of tender years is defined as a child under the age of 10 years. However, for purposes of criminal trial and practice, a child of tender years is a matter determined on a case by case basis, the essential element being that the trial court must satisfy itself that the child understands the meaning of oath. If not, voir dire must be conducted regardless of whether the child is as young as 10 years old or as old as 14 years (see. In Kibangeny Arap Kolil v. Republic [1959] EA 92 where this Court held that the term 'tender years' could include a child as old as 14 years. See also Patrick Kathurima v Republic [2015] eKLR) where the term 'tender years was also given a wide berth and not limited to the 10 years stipulated under the Children Act)."

37. That notwithstanding, it is clear that the evidence of the complainant, a minor, required corroboration. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction since section 124 of the ***Evidence Act*** makes this quite clear:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added]

38. Dealing with the said section, the Court in **Sahali Omar vs. Republic** (supra) held that:

"The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be

corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful."

39. In the same case the Court opined that:

"It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR). In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

40. Similarly in **Mohamed vs. R, (2008) 1 KLR G&F 1175,** the Court held that:

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

41. In this case, it was submitted that the Learned Trial Magistrate did not give reasons why she believed the evidence of the complainant. While it would be helpful for the Trial Court to state explicitly the reasons for believing the uncorroborated evidence of a minor in sexual offences committed against the minor, there is no prescribed manner in which those reasons are to be framed. In my view as long as those reasons can be discerned from the judgement, the appellate should not unsettle the decision simply because a particular style or format was not adhered to. In this case the Learned Trial Magistrate expressed herself as hereunder:

"The complainant explained her version of the story and was cross-examined on it. She gave a steady and consistent story. She reported the incident to her brother and cousin who already were suspicious that she was in danger. Her allegations match her conduct. Despite the inconclusive medical report, I believe the complainant was speaking the truth. I find no apparent reason why she would have made up the story. No doubt the complainant was defiled on the material night as narrated by her."

42. It was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."

43. Just as the Court of Appeal found in **Sahali Omar vs. Republic** (supra), as the appellant has not taken any issue with the reasons recorded by the trial court, I am satisfied that the judgment of the trial court satisfied the proviso to section 124 of the ***Evidence Act.***

44. 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."

45. As regards the importance of proving age in sexual offences, the Malindi Court of Appeal in criminal appeal No. 504 of 2010 - **Kaingu Elias Kasomo vs. Republic** 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."

46. It was therefore held in **Alfayo Gombe Okello vs. Republic [2010] eKLR** that:

"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 M A 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."

47. What constitutes evidence of age was however discussed in **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** 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. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

48. That notwithstanding 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."

49. 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.

50. What the Court frowns upon is mere averments of age without any documents in support thereof. In this case, the prosecution produced the complainant's Child Clinical Card. Apart from that there was oral evidence from the complainant's mother as to when the complainant was born. In my view there was sufficient material placed before the Court on the basis of which the Court could and did find that the complainant was aged 15 years at the time of the commission of the offence.

51. As regards penetration, section 2 of the ***Sexual Offences Act*** provides that:

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

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

"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."

53. In this case PW3 who examined the complainant found that her body had no injuries, she had no tear on the vagina, no bruises and no hymen. She was however in her menses since 17th April, 2015 which was still flowing. Since she had taken birth, no spermatozoa was noticed. Accordingly, PW3 placed her on antibiotics and birth plans and filled in the P3 Form. The witness could not however tell when the hymen was broken and it was not fresh. While the lack of spermatozoa could be explained on the fact that the complainant had been forced to take birth, the fact that the complainant's body had no injuries, there was no tear on the vagina, she had no bruises and the hymen which was broken was not fresh despite the examination having been done within 4 hours and 45 minutes, leaves more questions than answers as regards the issue of penetration. 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. Did the prosecution discharge this task? According to the appellant the prosecution failed in this undertaking, whereas the respondent is of a different view. Apart from the testimony of the complainant, there was no other evidence linking the appellant to the crime. The only reason why the appellant was the prime suspect was because he was the last person to be seen with the complainant. Much reliance was placed on the evidence of the complainant despite having been discredited by the evidence of the clinical officer. 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. 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."**

54. In **Dominic Kibet Mwareng vs. Republic [2013] eKLR** it was held that:

> **"The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time. According to the Medical Examination Report produced as MF1, there were no obvious tears on the Complainant's genitalia. There was however evidence of old penetration. In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence. The Complainant in the instant case testified that the Appellant was previously known to her. She even claimed that he had defiled her on two previous occasions, although she had not reported the previous defilements. According to the charge sheet, the Complainant was defiled on 20th June 2011 and from the Medical Examination Report, she was examined on 24th June 2011 at which point she showed evidence of old penetration with no obvious tears. The Court was therefore unable to reconcile the alleged defilement by the Appellant on 20th June 2011 with the Medical Examination Report. The Court treated the Complainant's evidence that the Appellant had defiled her on two previous occasions with extreme caution as it could well have been intended to fill in gaps in the Prosecution case."**

55. It is trite that all the three elements in the offence of defilement must be proved beyond reasonable doubt the burden falling squarely on the prosecution to do so. In this case the PW7 conceded that had they visited the room in which the offence was committed it was possible that they could have gathered evidence. Without evidence showing in which room the complainant was defiled there is therefore a doubt as to whether it was the same room that the appellant had been booked in. Why the police chose not to do this remains a mystery. One cannot but agree with the appellant that the charges may have been preferred against him as a result of the pressure that was exerted by the complainant's family. That there was such pressure was admitted by PW7. What is clear is that there is serious doubt as to whether it was the appellant who committed the offence. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** held that:

> **"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 guilt beyond reasonable doubt."**

56. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one 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. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

57. In **Elizabeth Waithiegeni Gatimu vs. Republc [2015] eKLR** it was held that:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not**

guilty… Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

58. That brings me to the issue whether it was proved beyond reasonable doubt that it was the appellant who penetrated the complainant even assuming that penetration was proved, which in my view was not.

59. In this case it is clear that the evidence against the appellant is circumstantial in nature based on the evidence of PW4 since nobody else testified that it was in fact the appellant that defiled the complainant. However, there is no evidence that PW4 immediately reported the fact that it was the appellant who defiled the complainant to anybody. In **Maitanyi vs. Republic (1986) KLR at page 198** the Court of Appeal held:

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description."

60. The court proceeded to hold further that:

"In this case J admitted that she did not give the description of the 1st appellant before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions."

61. It is however admitted that at the time of the abduction of the complainant, it was dark. In fact even the gate to the Hotel was dark. The only means by which PW4 allegedly identified the appellant was from the phone light/torch which was held by the appellant. That light was however directed towards PW4 as opposed to the appellant. Though PW4's evidence was that of recognition, in **Wamunga vs. Republic (1989) KLR 424** the Court of Appeal held that:

"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

62. The rationale for this according to the Court of Appeal in **Ogeto vs. Republic (2004) KLR 19** is due to the fact that:-

"it is possible for a witness to be honest but to be mistaken."

63. It was therefore held in **Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima vs. Republic**, as follows:

"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends do occur."

64. In the case of **R –vs- Turnbull and others (1976) 3 All ER 549**, an English case, **Lord Widgery C.J**. had this to say:-

"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

65. In **James Tinega Omwenga vs. Republic [2014] eKLR** it was held by the Court of Appeal that:

> **"We are of the considered view that the crux of this appeal is whether the evidence on identification was proper and safe to warrant the conviction of the appellant. This because from the evidence on record no one witnessed the incident and it is only M who testified that she was able to identify her attacker. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult… In this case, it is not in dispute that M was attacked at around 6:00 p.m and that she was brutally assaulted. We are of the view that the circumstances that prevailed during the incident were difficult due to the brutality involved. We find that it was necessary for the two lower courts to test the evidence of identification with the greatest care. We find that the two lower courts did not correctly test the identification evidence. We say so because firstly, it was the prosecution's case that the incident took place at around 6:00 p.m in a thicket. Therefore, what was the intensity of light and/or degree of visibility in the thicket" The answer to the said question was imperative in determining whether the identification of the appellant was free from error and there wasn't a case of mistaken identity. The prosecution did not tender any evidence as to the intensity of the light in the thicket. Based on the foregoing we are unable to determine whether there was sufficient light at the scene to afford a positive identification of the assailant."**

66. In this case the source of light was from a phone. There was no evidence either of the size of the phone or its intensity and for how long it was kept on since at one point PW4 alleged that he was kicked and slapped.

67. In this case I am not satisfied that two ingredients necessary to prove the offence of defilement were proved beyond reasonable doubt and these were penetration and identity of the perpetrator as the appellant. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR**:

> **"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."**

68. In this case the appellant was sentenced to serve 20 years in prison.

69. With due respect a lot of premium was placed on the failure by the appellant to call the persons with whom he alleged to have been. A simple answer to this is that there was no burden on the appellant to prove his case if the prosecution's case was weak. As was held in **Okethi Okale vs. Republic [1965] EA 558 at page 559**:

> **"…the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think no single piece of evidence should be weighed except in relation to all the rest of the evidence."**

70. In the premises I find merit in this appeal, which I hereby allow, set aside the appellant's conviction and quash the sentence. The appellant is at liberty to be set free forthwith unless otherwise lawfully held.

71. It is so ordered.

72. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Mombasa this 17th day of December, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Mutai for Mr Magolo for the Appellant

Miss Ogega for the Respondent

CA Lavender