



**JM v Republic (Criminal Appeal 24 of 2016)
[2017] KEHC 4859 (KLR) (20 June 2017) (Judgment)**

JM v Republic [2017] eKLR

Neutral citation: [2017] KEHC 4859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL 24 OF 2016**

JN KAMAU, J

JUNE 20, 2017

BETWEEN

JM APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from original conviction and sentence in Criminal Case Number 884 of 2015 in the Senior Resident Magistrate’s Court at Voi delivered by Hon E. M. Kadima (RM) on 8th March 2016)

The detention of a child at a maximum security prison is a violation of the child’s constitutional right under article 53 of the Constitution

The court addressed the significance of a voire dire examination and the importance of the court in ensuring that a child understood what an oath was before recording their evidence. Additionally, the court restated that where the prosecution failed to call a critical witness, any gaps in the prosecution’s evidence were resolved in favour of the accused person.

Reported by Moses Rotich

Constitutional Law – *Bill of Rights – rights of a child – the right of a child offender to be held separate from adults - where the appellant who was a minor was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act - where the appellant was convicted of the offence of defilement and sentenced to 20 years imprisonment-where the appellant, being a minor was detained at a maximum security prison-whether the detention of the appellant at a maximum prison violated his constitutional right under article 53 of the Constitution-whether the sentence of 20 years imprisonment meted on the appellant who was a minor at the time of commission of the offence was lawful-Constitution of Kenya 2010, article 53 (1) (f); Children Act, 2001 section 190 (1)-Sexual Offences Act, No. 3 of 2006 sections 8(1) and 8(3).*



Criminal Law – trials – evidence – burden of proof – where the prosecution failed to call a critical witness - where there were gaps in the evidence adduced on the prosecution on linking the appellant with the commission of the alleged offence of defilement-whether the prosecution proved its case of defilement against the appellant beyond reasonable doubt-Evidence Act, Cap 80 Laws of Kenya sections 107 and 143.

Brief facts

The appellant (a minor) was charged 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 (Sexual Offences Act). After a full trial, he was convicted of the offence of defilement and sentenced to 20 years' imprisonment.

Being dissatisfied with the decision of the trial court, the appellant filed an appeal challenging both his conviction and sentence. It was the appellant's argument that the sentence of 20 years' imprisonment imposed on him was unconstitutional for violating the provisions of section 191 of the Children Act, 2001 (Children Act).

Further, the appellant contended that the trial court erred in failing to consider that he was a minor at the time of commission of the offence thereby sentencing him to a harsh and excessive sentence.

Issues

- i. Whether the prosecution proved its case of defilement against the appellant beyond reasonable doubt.
- ii. Whether the sentence of 20 years' imprisonment meted on the appellant who was a minor, violated his constitutional rights under article 53 of the Constitution of Kenya 2010 and section 190 (1) of the Children Act.

Held

1. There was an irregularity in the way the *voire dire* examination was conducted. The complainant adduced evidence on oath despite having informed the trial court that she did not understand what an oath was. A child witness ought to indicate that he understood the importance of saying the truth and his knowledge of what an oath was before the oath was administered. Where a minor had no knowledge of what an oath was, the trial court ought to clearly set out the same in the proceedings. The issue of adducing evidence on oath for a child was not a matter to be taken lightly because an accused person could be found liable of a sexual offence based on sworn evidence of such a child.

3. Notably, the appellant was given an opportunity to cross-examine the complainant. Therefore, it could not be said he was prejudiced by the irregular procedure that was adopted by the trial court. A retrial would not be suitable in the circumstances of the appellant's case.

4. The appellant's argument that there was no proof of the complainant's age was not correct. It was evident from the birth certificate that was adduced in evidence in the trial court that the complainant was born on June 9, 2002. The complainant was therefore aged 13 years and 4 months at the time of the alleged incident.

5. Under the provisions of section 8 (3) of the Sexual Offences Act, the penalty for defiling a child between 12 to 15 years old was 20 years' imprisonment. It was therefore immaterial that the complainant was aged 12 years and 4 months old at the time of the alleged incident as alleged by the appellant.

6. DNA evidence was not mandatory when proving a sexual offence. That was particularly true where there was some other direct or circumstantial evidence to corroborate a victim's evidence. Where there was no such material evidence, the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya (Evidence Act) required the trial court to record the reason why it believed such a victim's evidence as it would ordinarily be the victim's word against that of his or her perpetrator.

7. It was not clear why the complainant contradicted herself on the time of the alleged incident of defilement as she was not a child of tender years. In her examination in-chief, the complainant stated that the alleged incident occurred at around 5.45 pm. During cross-examination, she stated that it was about 7.00 pm. Also, PW2 stated that she had sent her at around 7.00 pm. The inconsistencies in the time was material as it was daylight at around 5.45 pm and 7.00 pm. That inconsistency made the court to treat her evidence with caution.



8. The court wondered how the complainant's sister who had supposedly run away was able to take PW2 directly to the unfinished house at night when lighting conditions were not favourable. The complainant never mentioned what happened to her sister who she said she had been with when the appellant pulled her into the unfinished house.

9. Whereas the court was aware of the provisions of section 143 of the Evidence Act which provided that the prosecution had the discretion of deciding the number of witnesses to prove a fact, it was the court's view that there was a gap of how PW2 came to know where the complainant and the appellant were. Indeed, there was no indication of how old the complainant's sister was to satisfy the court that she would have been able to trace her way back to the unfinished house in the darkness as PW2 had testified that the house was about 50 metres from the main road. The complainant's sister was a crucial witness. In her absence, the court was not satisfied that the prosecution closed the gap in the evidence of how PW2 found the appellant with the complainant in that unfinished house.

10. The court was concerned about corroboration of the complainant's evidence regarding the appellant's identity. The complainant testified that she knew the appellant as he used to pass by their house while PW2 testified that she saw it was the appellant with the help of a torch or her phone. In view of the fact that PW2 had only known the appellant for about 6 months and the complainant stated that the appellant ran away when PW2 and her sister came to the unfinished house, the court found that the prosecution did not fully explore how PW2 identified the appellant in the dark.

11. There was no documentary evidence that was tendered to show the unfinished house. The unfinished house was a critical evidence as it was the scene of the alleged crime and PW4 testified that she visited the said scene. Although that was not fatal to the prosecution's case, it would have shown the thoroughness in the investigations in demonstrating that the unfinished house existed.

12. While it was evident that the complainant's hymen was absent, PW3 could not establish that the same was caused by the appellant. In view of the gaps in the prosecution's case, the court was hesitant in making a conclusive finding that the appellant defiled the complainant.

13. The age assessment report indicated that the appellant was aged 17 years at the time of the alleged offence of defilement. The trial court could not be faulted for having sentenced the appellant as an adult as the age assessment report it was furnished with showed that the appellant was 18 years old at the material time.

14. If the appellant's conviction had been upheld, he would have been sentenced by considering any of the penalties provided for under section 191 of the Children Act. The appellant could not be incarcerated at a maximum prison by virtue of his age. It was immaterial that the appellant had attained the age of majority at the time of appeal. The incarceration of the appellant at a maximum prison was a violation of his constitutional rights.

15. The trial court could not entirely be blamed for that state of affairs as it relied on an age assessment report that was prepared by a medical officer. The power to call for additional evidence as provided for in section 350 of the Criminal Procedure Code, Cap 75 Laws of Kenya came in handy in the instant case as the court was able to consider the appellant's age once again with a view to resolving the appeal.

Appeal allowed.

Orders

i. The conviction of the appellant was quashed.

ii. The sentence of 20 years' imprisonment imposed on the appellant by the trial court was set aside.

iii. The appellant was to be set free unless otherwise lawfully held.

Citations

Cases

Kenya

1. *AML v Republic* Criminal Appeal 74 of 2011; [2012] KEHC 2554 (KLR) - (Explained)



2. *Kathurima, Patrick v Republic* Criminal Appeal 131 of 2014; [2015] KECA 539 (KLR) - (Explained)
3. *Muiruri, Johnson v Republic* [2013] eKLR - (Explained)
4. *Odbiambo v Republic* Criminal Appeal No 280 of 2004; [2005] 1 KLR - (Explained)

Statutes

Kenya

1. Borstal Institutions Act (cap 92) In general - (Cited)
2. Children Act (cap 141) sections 2, 190, 191 - (Interpreted)
3. Constitution of Kenya article 53(f)(i)(ii)- (Interpreted)
4. Criminal Procedure Code (cap 75) section 350- (Interpreted)
5. Evidence Act (cap 80) sections 68, 79, 124, 143 - (Interpreted)
6. Oaths And Statutory Declarations Act (cap15) section 19 - (Interpreted)
7. Penal Code (cap 63) section 14(3) - (Interpreted)
8. Sexual Offences Act (cap 63A) sections 8(1)(3)(7); 11(1) - (Interpreted)

Advocates

Miss Karani for the State

JUDGMENT

1. The appellant herein, JM, was tried and convicted by Hon EM Kadima, Resident Magistrate for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve twenty (20) years' imprisonment. He had also been charged with the alternative offence of committing indecent act with a child contrary to section 11(1) of the said *Act*.
2. The particulars of the main charge were as follows:-

“On the 9th October 2015 at [particulars withheld] in Taita Taveta County, intentionally caused your male genitalia organ (penis) to penetrate the female organs (vagina) of I W a child aged 13 years.”

Alternative Charge

“On the October 9, 2015 at [particulars withheld] in Taita Taveta County, intentionally touched the female genitalia organ (vagina) of I W a child aged 13 years with your penis.”

3. Being dissatisfied with the said judgment, on July 1, 2016 the appellant filed a notice of motion application seeking a review of the judgment That had been imposed on him by the Learned Trial Magistrate on the ground That it was unconstitutional having violated the provisions of section 190 of the *Children Act*. He contended That he was aged sixteen (16) years having been born on March 23, 1999 and a pupil in Standard Seven (7) at [particulars withheld] School in Taita Taveta County.
4. As the state was also not opposed to the appellant's notice of motion application filed on July 1, 2016, on October 7, 2016, this court directed That he be escorted to Taveta Sub-County Hospital for a comprehensive age assessment. On the same date, it also allowed his Notice of motion application That was filed on October 6, 2016 seeking leave to be allowed to appeal the judgment of the learned trial Magistrate. The petition of m appeal was deemed as having been duly filed and served.
5. The appellant's grounds of appeal were as follows:-



1. That the learned magistrate erred in law and fact by finding to consider That no age assessment or birth certificate was produced to prove the age of the complainant.
2. That the learned magistrate erred in law and fact by failing to consider That both the conviction and sentence were founded on a defective charge sheet.
3. That the learned magistrate erred in law and act by failing to consider That the sentence was excessive as he was minor below the age of 18 at the time of arrest.
4. That the learned magistrate erred in law and fact by failing to consider That the age of the injuries did not connect to the time of the offence.
5. That the learned magistrate erred in law and fact by failing to consider his defence.
6. On October 21, 2016, Dr Felix Kimotho, the Medical Superintendent of Taveta Sub County Hospital informed this court That it did not have the capacity to conduct a comprehensive age assessment whereupon it made an order That the appellant be escorted to Coast General Hospital for the said assessment.
7. The Age Assessment Report dated November 1, 2016 and filed in court on November 16, 2016 showed That the appellant was aged approximately nineteen (19) years at the time of the said age assessment. As a particular test had not been conducted, the appellant was referred back to Coast General Hospital.
8. An Age Assessment Report dated November 22, 2016 by Dr Sumbi of Coast General Hospital was subsequently furnished before the court and it showed That the appellant was aged eighteen (18) years at the time of the said assessment. It was therefore evident from the said Age Assessment Report That the appellant was aged seventeen (17) years at the time of the alleged incident.
9. The court directed the appellant to file his written submissions. Instead of doing so, on February 15, 2017, he filed written submissions and amended grounds of appeal. The state filed its written submissions dated March 7, 2017 on March 8, 2017. The appellant's response to the State's Written Submissions was filed on April 19, 2017.
10. The amended grounds of appeal were as follows:-
 1. That the learned hon trial magistrate erred in law and fact in convicting and sentencing him and eventually taking him to an institution which had adults without considering That he was under age hence a violation of his constitutional rights.
 2. That the learned hon trial magistrate erred in law and fact in convicting and sentencing him while relying on the alleged age of the victim which was not established beyond reasonable doubt.
 3. That the learned hon trial magistrate erred in law and fact in basing his conviction and sentence on the produced and exhibited medical evidence which failed to prove the prosecution case to the required standard.
 4. That the learned hon trail magistrate erred in law and fact in giving him a harsh sentence without humbly considering his age as a juvenile.
 5. That the learned hon trial magistrate erred in law and fact in not considering his defence evidence which he gave before court That created a reasonable doubt on the prosecution case whereby the benefit ought to have been given to him.



11. When the matter came up on April 19, 2017, both the appellant and counsel for the state asked this court to rely on their respective written submissions in their entirety, which submissions were not highlighted. The Judgment herein is therefore based on the said written submissions.

The Appellant's Case

12. The appellant contended That the age of the complainant I W (hereinafter referred to as 'PW 1') was not proven as there was no Birth Certificate or scientific evidence to prove her age and consequently, the same could not be relied upon to sustain his conviction.
13. To buttress his argument, he pointed out That E W (hereinafter referred to as "PW 2") testified That her daughter PW 1 was born on June 9, 2002 making her age twelve (12) years and four (4) months as at the time of the alleged offence which contradicted the age of thirteen (13) That was indicated in the charge sheet.
14. He wondered why PW 1 went to the hospital five (5) days after the alleged incident. He added That the medical evidence That was presented before the trial court failed to support and prove the prosecution's case. He stated that the medical notes were not on any official document and did not have a stamp from Moi Hospital Voi and were therefore forgeries.
15. He also averred That Dr Nashat (hereinafter referred to as "PW 3") testified on behalf of a Dr Katana while the treatment notes showed That PW 1 was attended to by a Mr Reuben Kililo. It was also his contention That the name of the police officer who appeared in the P3 Form was different from That of the Investigating Officer, Sgt Lucy Macharia (hereinafter referred to as 'PW 4').
16. He submitted that the prosecution failed to prove its case beyond reasonable doubt and therefore urged this court to allow his appeal. He also asked this court to find that the sentence that was meted upon him was harsh, manifestly excessive in the circumstances of the case as he was aged seven (17) years at the time of the alleged incident which required That he ought to have been sent to a Borstal institution in accordance with the law.

The State's Case

17. On its part, the State submitted that the learned trial Magistrate conducted a proper *voire dire* examination as was envisaged under section 19 of the *Oaths and Statutory Declarations Act* cap 15 (Laws of Kenya). It relied on the case of *Patrick Kathurima v Republic* [2015] eKLR where the Court of Appeal rendered itself as follows:-

“We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of *cap 15*. We are aware that section 2 of the *Children's Act* defines a child of tender years to be one under the age of ten years. The definition has not been applied to the *Oaths and Statutory Declaration Act*, cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”.

18. It pointed out That PW 1's age was proven as her Birth Certificate That was adduced as evidence during the trial showed That she was born on June 9, 2002 which confirmed That she was aged thirteen (13) years at the time of the incident. It added That her evidence was corroborated by her younger sister J and PW 2 who found the appellant defiling her in an unfinished house which fact was confirmed



by PW 4 who visited the scene of the incident and by P3 Form which indicated That her hymen was not intact.

19. It stated that it was not necessary for medical evidence to prove the rape. It relied on the case of *Aml v Republic* [2012] eKLR where the court held as follows:-

“The fact of rape or defilement is not proved by the way of DNA test but by way of evidence. This was further affirmed in the case of *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 Mombasa where the court stated;

“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proven by way of oral evidence of a victim of rape or by circumstantial evidence and so is the offence of defilement (emphasis mine)”

20. It submitted That there was nothing on record to suggest That PW 1 was treated by a Dr Katana on October 10, 2015 but That he was the one who completed the P3 Form. It contended That the appellant did not object to PW 3 adducing the P3 Form on behalf of the said Dr Katana or request That the author of the said P3 Form produce the same in court.

21. It pointed out that the appellant his mother failed to tender evidence That he was aged sixteen (16) years at the time of the alleged offence despite being summoned by the trial court and consequently, the learned trial Magistrate was justified in sentencing him as an adult, to twenty (20) years in line with section 8(3) of the *Sexual Offences Act*. The same provides as follows:-

“A person who commits an act of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years.”

22. It was its argument section 14(3) of the *Penal Code* cap 63 (Laws of Kenya) put criminal liability of males being capable of carnal knowledge at twelve (12) years and as section 8(7) of the *Sexual Offences Act* provided That where a person charged with an offence is under the such age of eighteen (18) years, the said person would be sentenced in accordance with the provisions of the *Borstal Institutions and Children Act*.

23. It submitted that the prosecution proved its case beyond reasonable doubt and therefore urged this court to dismiss the appellant’s Appeal.

Legal Analysis

24. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held That:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself That it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

25. Having looked at the appellant’s and state’s written submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the prosecution had proved its case beyond reasonable doubt. However, there were certain sub-issues That That emerged therefrom. The same were dealt with under the headings shown hereinbelow.



I. Proof Of The Prosecution's Case

A. *Voire Dire* Examination

26. Before delving into the evidence that was adduced by the prosecution witnesses, this court noted right at the outset That there was an irregularity in the way the *voire dire* examination was conducted. This court noted That PW 1 adduced evidence on oath despite having informed the Learned Trial Magistrate That she did not understand what an oath was.
27. It is abundantly clear that a child witness must indicate that he understands the importance of saying the truth and his knowledge of what an oath is before the oath is administered. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out in his proceedings. Indeed, the issue of adducing evidence on oath for a child witness is not a matter to be taken lightly because an accused person can be found liable of a sexual offence based on sworn evidence of such a child.
28. The importance and seriousness of a *voire dire* examination was addressed in the case of *Johnson Muiruri v Republic* [2013] eKLR where the Court of Appeal stated as follows:-

“We once again wish to draw 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 it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking 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 (sec.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.”...

29. Having said so, this court also noted that the appellant was given an opportunity to cross-examine PW 1. He could not therefore be said to have been prejudiced by the irregular procedure that was adopted by the learned trial Magistrate. A re-trial would then not be suitable in the circumstances of the case herein.

B. Proof Of Pw 1's Age

30. Amended ground of appeal no(2) was dealt with under this head.
31. It was not correct as the appellant had argued that there was no proof of PW 1's age. It was evident from the Birth Certificate That was adduced in evidence in the trial court that PW 1 was born on June 9, 2002. She was therefore aged thirteen (13) years and four (4) months at the time of the alleged incident.



32. As can be seen from the provision of section 8(3) of the *Sexual Offences Act*, the penalty for defiling a child between twelve (12) years to fifteen (15) is twenty (20) years. It was therefore immaterial That she was aged twelve (12) years and four (4) months at the time of the alleged incident as had been contended by the appellant which had contradicted the age of thirteen (13) yearsthat had been indicated in the charge sheet.
33. In the premises foregoing, this court found that amended ground of appeal no (2) was not merited and the same is hereby rejected.

C. Medical Evidence

34. Amended ground of appeal no (3) was dealt with under this head.
35. This court carefully perused the Hospital Attendance Notes from Moi District Hospital Voi in respect of PW 1 and note that contrary to the appellant's assertions, the same bore the stamp from the said hospital. The P3 Form also bore a stamp of the Medical Superintendent Moi Hospital Voi.
36. There was also no indication in the Hospital Attendance Notes That PW 1 was examined by Dr Katana. Instead, as was rightly submitted by the State, Dr Katana was the doctor who completed the P3 Form. PW3 explained That he was on duty in another department. Although the appellant argued That he was a lay person and would not have known That he could have objected to PW 3 adducing the P3 Form, this court took judicial notice of the provisions of section 68 of the *Evidence Act* That provides That secondary evidence may be adduced where the original document is a public document within the meaning of section 79 of the *Act*.
37. In the circumstances foregoing, amended ground of appeal No (3) was not merited and the same is hereby dismissed.

D. Evidence of the Prosecution Witnesses

38. Amended ground of appeal No (5) was dealt with under this head.
39. As was rightly submitted by the state, DNA evidence is not mandatory when proving a sexual offence. This is particularly true where there is some other direct or circumstantial evidence to corroborate a victim's evidence. Where there is no such material evidence, the proviso to section 124 of the *Evidence Act* cap 80 (Laws of Kenya) requires that the trial court records the reason why it believed such a victim's evidence as it would ordinarily be the victim's word against That of his or her perpetrator.
40. The proviso to section 124 of the *Evidence Act* provides as follows:-

“...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.”
41. Evidently, the proviso to section 124 of the *Evidence Act* is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied That such alleged victim is telling the truth. Such a trial court must record the reasons for believing That witness and not the alleged perpetrator.
42. It was PW 1's evidence That on October 9, 2015, she was coming from the shop when the appellant grabbed her and took her to an unfinished house. In her examination-in-chief, she stated that this was



- about 5.45 pm. During her Cross-examination, she stated that it was about 7.00pm. PW 2 stated that she had sent her at about 7.00pm.
43. It was not clear why PW 1 contradicted herself on the time as she was not a child of tender years. Indeed, the inconsistency in the time was material as it was daylight at about 5.45 pm but night at 7.00pm. This inconsistency made this court to treat her evidence with caution.
 44. However, assuming that the time was 7.00 pm as she and PW 2 told the trial court, this court was wondered how PW 1's sister, Joyce, who had supposedly run away was able to take PW 2 directly to the said unfinished house at night when lighting conditions were not favourable. Indeed, PW 1 never mentioned what happened to her sister Joyce who she said she had been with when the appellant pulled her into the unfinished house.
 45. Whereas this court was aware of the provisions of section 143 of the *Evidence Act* that provides that the prosecution has the discretion of deciding the number of witnesses to prove a fact, it was the view of this court that there was a gap of how PW 2 came to know where PW 1 and the appellant were. Indeed, there was no indication how old the said Joyce was to satisfy this court that she would have been able to trace her way back to the unfinished house in the darkness more so as PW 2 had testified that this house was about fifty (50) metres from the main road. She was a crucial witness. In her absence, this court was not satisfied that the prosecution closed the gap in the evidence of how PW 2 found the appellant with PW 1 in that unfinished house.
 46. This court was also concerned about corroboration of PW 1's evidence regarding the appellant's identity. She testified That she knew him as he used to pass by their house while PW 2 said That she saw it was him with the help of the torch of her phone. In view of the fact that PW 2 had only known the appellant for about six (6) months and PW 1 stated that the appellant ran away when PW 2 and the said Joyce came to the unfinished house, this court found and held that the prosecution did not fully explore how PW 2 identified the appellant in the dark.
 47. Going further, there was no documentary evidence that was tendered to show the unfinished house. This was a critical piece of evidence as it was the scene of the alleged crime and PW 4 did testify that she visited the said scene. If indeed there was such a house, nothing would have been easier than for her to have adduced photographic evidence. Although this was not fatal to the Prosecution's case, it would have gone to show the thoroughness in the investigations in demonstrating that the said unfinished house did in fact exist.
 48. It could also have assisted this court in determining if PW 1 could have been helped by passers-by or neighbours, if any. Notably, she admitted in her cross-examination that she never screamed and the appellant was not armed with any knife to threaten her and thus impede her escape.
 49. PW 2 confirmed That PW 1 had an infection. It was not clear what had caused this infection as PW 3 never mentioned the same. There was need for PW 4 to have conducted further investigations to establish if the same had been caused by the appellant herein. Indeed, in sworn evidence, the appellant gave mixed signals as to whether or not he was infected with HIV. In his examination-in-chief, he stated That he was an HIV sufferer but in cross-examination, he stated That he was not aware That he was infected with HIV.
 50. Be that as it may, while it was evident that PW 1's hymen was absent, as the state rightly pointed out That, PW 3 could not establish that the same was caused by the appellant herein. In view of the gaps in the prosecution's case, this court was very hesitant in making a conclusive finding That the appellant defiled PW 1.
 51. In the premises foregoing, this court found amended ground no (5) was merited.



II. Sentence

52. Amended grounds of appeal nos (1) and (4) were dealt with under the following heads.
53. As was seen in the Age Assessment Report, the appellant was aged seventeen (17) years at the time of the alleged incident. The Learned Trial Magistrate could not be faulted for having sentencing the Appellant as an adult as the Age Assessment Report he had been furnished with by the Moi District Hospital showed That the appellant was aged eighteen (18) years at the material time.
54. Section 191 of the *Children Act* provides as follows:-

“In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

- a. By discharging the offender under section 35(1) of the Penal Code (cap. 63);
 - b. by discharging the offender on his entering into a recognisance, with or without sureties;
 - c. by making a probation order against the offender under the provisions of the Probation of Offenders Act (cap 64);
 - d. by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;
 - e. if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
 - f. by ordering the offender to pay a fine, compensation or costs, or any or all of them;
 - g. in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
 - h. by placing the offender under the care of a qualified counsellor;
 - i. by ordering him to be placed in an educational institution or a vocational training programme;
 - j. by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (cap 64);
 - k. by making a community service order; or
 - l. in any other lawful manner.
55. In addition, section 53(f)(i) and (ii) of the *Constitution of Kenya, 2010* expressly prohibits the incarceration of minors together with adults. The said article provides as follows:-

“Every child has the right

- f. not to be detained, except as a measure of last resort, and when detained, to be held-



- i. for the shortest appropriate period of time; and
- ii. separate from adults and in conditions that take account of the child's sex and age.”

56. It was therefore the view of this court that if it had upheld the appellant's conviction, it would have considered any of the penalties provided in section 191 of the *Children Act, 2001* as he could not have been incarcerated at a maximum prison by virtue of his age. It was irrespective That he had attained the age of majority at the time of appeal. His incarceration at the Manyani G K Prison which is a maximum security prison was an infringement of his constitutional rights.

57. The learned trial Magistrate could not be entirely blamed for this state of affairs as he relied on an Age Assessment Report that was prepared by a medical officer. The power to call for additional evidence as provided for in section 350 of the *Criminal Procedure Code* cap 75 (Laws of Kenya) came in handy in this particular case as this court was able to consider the appellant's age once again with a view to resolving the appeal herein.

Disposition

58. For the foregoing reasons, the upshot of this court's decision was That the appellant's appeal That was lodged on October 8, 2016 was successful and same is hereby allowed. The doubts That were raised in the mind of this court led it give the appellant benefit of doubt That led to hereby quash the conviction and set aside the sentence that was meted upon him by the trial court as it would be clearly unsafe to confirm the same. The court hereby orders That the appellant be set free forthwith unless held or detained for any other lawful reason.

59. It is so ordered.

DATED AND DELIVERED AT VOI THIS 20TH DAY OF JUNE 2017

J. KAMAU

JUDGE

In the presence of:-

Johnson Magare-Appellant

Miss Karani-for State

Josephat Mavu- Court Clerk

