REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 90 OF 2016

FKW……..... APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

JUDGMENT

The appellant **FKW** was initially charged with incest by male contrary to section 20 (1) of the Sexual Offences Act 2006 to which he pleaded not guilty on 19th June 2014. This was substituted on 22nd July 2014.

According to the substituted charge sheet dated 19th June 2014 emanating from Tumutumu Police Patrol Base and signed by the trial Magistrate Hon. S. Mwayuli, R.M., the appellant **FKW** was charged with Defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the charge were that on the 16th June 2014 in Nyeri County he intentionally caused his penis to penetrate the vagina of **JNW** a child aged 11 years and 10 months by locking her in the bedroom, removing her clothes, laying her on the bed and causing his penis to penetrate her vagina.

In the alternative he was charged with indecent assault with a child c/s 11(1) of the sexual offense Act 3 of 2006. The particulars of which were that on 16th June 2014 in Nyeri county intentionally touched the buttocks and vagina of JNW age 11 years and 10 months with his hands.

P.W.1 BWK the mother to the complainant testified that she was married to the accused person as his second wife. When she got married to him she already had two children, the complainant and IK, the 9-year-old. Between them they had two children SN aged 7, DW aged 3 at the material time. They lived in a two roomed house in Karatina where she did sold vegetables in Karogoto market while he had a shop in Karatina.

On 17/6/2014, around 6:30am, she was in the bedroom with the appellant when JNW started crying complaining of stomach ache. When asked what the problem was she responded: -

"*Mama, Baba ananifanyiaga tabia mbaya"*

The accused person asked her to go outside so they would talk but she refused. When the accused left she enquired further from the child what the issue was. The child told her that when she (P.W.1) was away, the accused would send the other children to the other room then he would remove her clothes and sleep with her.

She took the child to Karatina District Hospital, where she was referred to Karatina Police Station. Two female police officers escorted them back to Karatina District Hospital. They later went to Tumutumu Police Station. She identified the P3, PRC from and the treatment notes.

In cross examination she told the court that they lived at Karogoto in a two roomed rental house. One room was both the parents' bedroom and sitting room while the other doubled up as the kitchen and the children's bedroom. That the two rooms were separated by a stone wall and it was not possible to hear one calling from one side if the kitchen door was locked That the other children were present when the complainant told her about the accused person sleeping with her. That she was the 2nd wife of the accused, as the 1st wife lived in Ngobit.

That the accused sold cereals at Karatina Market and would leave home at 6.15a.m. on market days, and 7. 00a.m on non-market days coming back at 8.00p.m. She said they had ancestral land where she cultivated her crops but she did not have a house there yet. She denied that she felt spiteful because the 1st wife had a house in the village while she did not.

She conceded that it was not in her statement to the police that the accused wanted them to go out and discuss the issue and she refused. It was also not in her statement that the other children were present when the child said these things to her. She denied that this case was a fame up and admitted to going back to her parent's home taking with her everything in their house leaving only the accused's clothes with the land lord.

The trial court after conducting *voire dire* and taking the child through the process of knowing the court officers, asked the child whether she could identify her parents. She identified her mother, and the record shows that when she identified the accused as her father she broke down into tears. The court took some time for the child to calm down. The trial court deemed her capable of telling the truth and had her give sworn testimony.

JN was 11 years, in class 4 at [Particulars Withheld] Primary School, prior to which she was in OB Academy. Her parents worked late. She and her siblings would normally be revising while waiting for their parents. Her father would come home around 7.00p.m. and fetch their mother from her place of work at 8.00p.m. at some point in all this her father had begun to defile her. He would come home, call her into the other room, and defile her.

On the 16th June 2014 he came home about 7.00p.m. She was studying with her siblings. He told her to go to the other room, closed the door, removed his shoes, pulled up her dress, removed her panty and slept on her. He opened his zip, took his urinating thing and put it in hers. He finished, gave her cake and warned her not to tell to anyone.

The following morning as she was checking for the other siblings' school uniforms and in the presence of her father she broke down and began to cry, telling her mother what her father had been doing to her. Her mother took her to hospital and later to the police station. She said she did not tell on her father before because he had warned her not to say.

On cross examination the child testified that she had attended four different primary schools- K. Primary School, N. Primary School, O.B. Primary School and at the material time, M Primary School. One of her siblings was in class 2, the other in class 1, while the other was yet to begin school. She said that her father took her to the room where she slept with her siblings as the parents' room was also the sitting room where they were all sitting. That the cake he gave her was in his pocket. She denied that she and her mum had fabricated the story against her father.

P.W.3 Dr. Stanley Wahome testified that he was a medical officer attached to Karatina District Hospital in charge of OBS/GYN. On 17th June 2014 about 7.00p.m. while at home he was called to go to the hospital to examine a patient. On arrival he found the child who had allegedly been sexually assaulted by the father. She complained of abdominal pains and had history of vaginal sexual assault.

She had already gone for a short call, long call and had bathed. There were no injuries seen on the external genitalia. Her hymen was not intact proof of penetration, there was no discharge. A high vaginal swab revealed no spermatozoa and pus cells which were an indication of infection. He produced the PRC form, the P3 form, the lab requests form.

On cross examination the Doctor told the court that the child was defiled on 15th June 2014 about 7.00p.m. and brought to the medical facility on 17th June 2014 about 12;40p.m. That spermatozoa can stay in a woman's vaginal canal for 72 hours but after 48 hours one may not get them, that pus cells are waste products from bacteria which could be from a sexual transmission. That his examination confirmed that the child was born with a hymen but it had been broken. That it would be broken in the cause of playing sports but the characteristic of such a break was different from that of repeated penetration.

P.W.4 No.71034 P.C. Peter Odinga was attached at Kiamachibi Police – Tumutumu Police Patrol Base station at the material time. On 17th June 2014, he received the complainant and her mother who had been referred from Karatina Police station. The complaint was that the child had been defiled by her father. In the company of his colleague P.C. Amugune they visited the scene and gathered information that the culprit was the child's father. That both parents were involved in business one at Karatina, one at Karogoto. That the father would come home earlier than the mother. After gathering the medical evidence, they arrested the accused person and escorted him to their Patrol Base where they charged him with this offence. He produced a scanned copy of the birth certificate for the child.

On cross examination he told the court that he had visited the scene and confirmed that the family lived in two rented rooms; that there were three other children but they were too young and he did not interrogate them; that the accused did not say anything about the offence; that he did not follow up on the alleged domestic quarrels over land and house between the accused's 1st and 2nd wife; that he did not cause the accused to give any blood samples because that was the work of the doctor. The prosecution closed its case.

On 4th August 2015, the matter was taken over by Hon. Kachuodho, R.M. from Hon. S. Mwayuli R.M. After hearing submissions on no case to answer, and considering the same, Hon. Kachudho put the accused on his defence on 3rd March 2016. The accused reiterated his plea of not guilty.

He testified that he had two wives BW the mother of the complainant and PWK his 1st wife. That he had bought land in Laikipia, where P lived while BW and her children lived in a rental house in Karogoto in Karatina. He ran a general shop in Karatina while BW sold groceries at Karogoto Market.

On 15th June 2014 he traveled to Laikipia to see Pauline. He did not tell BW he was travelling. He arrived in Laikipia around noon. He remained there till 18th June 2014 when he left at 10:00a.m. He worked at the shop till 5.00p.m. when he left for Karogoto. He found BW. She was very angry with him and asked him angrily where he had been. He collected her luggage and went they home. At home he went to take a shower, and while dressing up heard a loud bang at the door. He peeped and saw it was the police. They told him it is him they wanted. They arrested him and took him to Tumutumu police station where they told him that he had defiled JNW.

At the time of arrest both the child and her mother were in the house. He blamed the mother of JNW for fabricating the case against because he had visited his 1st wife, and secondly because he had not bought her a piece of land like he had done for the 1st wife. He said that even his 1st wife was very hostile but he still managed to live with her through wisdom and skill. He confirmed that between him and BW they had two children and that he had raised the complainant from the time she was breast feeding.

On cross examination he said on the material date he left his bicycle at the stalls where he usually worked. On other days he would leave work at 5.00p.m. and go to collect his wife between 6-6.30p.m. He would then take her home because it would usually be dark.

D.W.2 his 1st wife PW testified that her husband went to Laikipia on 15th June 2014 and left on 18th June 2014. He rang her on 18th June 2014 saying that he had been arrested for allegedly defiling the child of the 2nd wife. She said she knew BW as the 2nd wife of her husband. That BW had been pushing to live with her in Laikipia but their husband had told her to wait for her own parcel of land. She said the complaint was 14 years.

In the judgment delivered on 7th December 2016 by Hon E. Michieka P.M. on her behalf, the trial magistrate found that the ingredients of the charge had been proved; the age of the child the act of penetration and the perpetrator was identified.

The trial magistrate made a finding that the evidence of the child was credible, consistent had not been challenged by the prosecution. The magistrate was of the view that the appellant's alleged alibi had been displaced by the evidence presented by the prosecution, that his defence was not persuasive, that BW the mother of the complainant, who had cohabited with her father for over 7 years was pushed by jealousy and resentment of a co-wife to fabricate this case against him. Further that it was not believable that a child of 11 years could be a party to the alleged scheme and the appellant had not adduced any evidence upon which he could build a case of conspiracy.

During the hearing of the appeal the appellant chose to represent himself and disengaged his counsel Mr. H.K. Ndirangu. He relied on his amended grounds of appeal and submissions filed on 3rd may 2017. He had three grounds of appeal; he faulted the trial magistrate for relying on the evidence of the complainant and her mother BW while their evidence was doubtful; convicting him on a non-existence provision of the law i.e. s.8(1)(2), and rejecting his defence which the prosecution had failed to dislodge as required by s.212 of the Criminal Procedure Code.

Appellant's Submissions

The appellant argued grounds 1 and 2 together. He submitted that the complainant had not described his specific genital organ. That the court misdirected itself by presuming that ***"Kitu yake ya kukojoa"*** meant the appellant's penis/genital organ. That it is only the penetration/partial penetration by a genital organ that can give rise to the offence of defilement. That without the child even pointing at where this alleged ***"kitu ya kukojoa"*** is located or where hers was located the court acted on presumption that the child by saying ***"kitu ya kukojoa"*** proved that it was indeed the appellant's penis. It is possible that anything else could have penetrated the complainant's ***'kitu ya kukojoa'*** whatever that was. That therefore without proof that what the appellant is alleged to have inserted into the complainant while lying on top of her was a 'penis' the offence of defilement cannot be said to have been proved.

He argued further that the failure by the prosecution to call the complainant's siblings aged 9 and 7 to testify can only draw the inference that their evidence would not have supported the case for the prosecution. He did not accept the explanation that they were too young to testify, and urged the court not to.

Citing the doctor's evidence that;

> "*there was no physical injury on the outer genital organ but the hymen was not intact, an indication of penetration. There was no discharge.*"

The appellant argued that the medical evidence was inconclusive of any sexual activity on the part of the complainant on the alleged day. That the prosecution failed to prove that there was either partial/complete insertion of the appellant's genital organ into the genital organ of the complainant. He argued that there was no evidence to prove that he, an adult had penetrated a child of 11yearsand left no mark at all. Secondly that the allegation of repeated penetration for 1 (one) year had not been proved. He pointed out that the P3 did not indicate the approximate age of the injuries, or type of weapon or degree of injury, there was no discharge, no blood, no evidence of infection. That the doctor's evidence that one's hymen would break due to engaging in sports threw doubt to the prosecution's case that a missing hymen was proof of penetration.

He submitted further that the trial court failed to consider the evidence of P.W.1 *vis a vis* that of the complainant. That P.W.1 simply stated that on 17th June 2014 the child told her;

> "*mama, baba ananifanyianga tabia mbaya" ("Mama, baba does bad manners to me")*

The purport of this was that the father had a habit of doing tabia mbaya to her. However, the evidence placed before this court was of an incident alleged to have happened on the 16th June 2014, with some evidence being that it was on 15th June 2014. That the prosecution had not produced any evidence of this alleged repeated "tabia mbaya".

The appellant further submitted that there was clear evidence of grudge held by the complainant's mother against him. While stating that she was not spiteful of her co-wife whom the appellant had bought land she said *"I have waited patiently for 8 years for him to buy me a shamba"* which to him was an indication of her spite because she felt that appellant was not treating her the same as her co-wife. Secondly the fact that took everything from their rental house save for his clothes which she left with the landlord when he was released on bond, was

sufficient demonstration of how strong the grudge was.

With regard to non-existent charges the appellant relied on the case of **Michael Lennos Odero Vs. Republic Criminal Appeal No. 2 Of 2016**

Where the court held that;

> *"The principle of law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence to the charge."*

On the 3rd ground the appellant submitted that it is the burden of the prosecution to prove the charge beyond a reasonable doubt. That the investigating officer failed to properly investigate the matter and to avail crucial witnesses. That the trial magistrate failed to consider that the prosecution did not dislodge his alibi.

Respondent's Submissions

The state through Ms. Jebet opposed the appeal.

On the 1st ground on insufficient evidence the prosecution submitted that the complainant testified how her step father defiled her and that she even broke down in court. That her testimony was corroborated by that of her mother and the doctor. That the investigations supported the evidence of the child.

On the issue of the proof of the ingredients of the charge, she submitted that proof of age of child was made through the birth certificate. Penetration was proved through the medical evidence, and the child had lived with the perpetrator for 8 (eight) years so she knew him.

On the appellant's defence, the state's view was that that defence had not shaken the case for the prosecution. That the appellant would have raised the defence that he was at his 1st wife's place earlier in the trial. That the court did not believe the appellant's defence of a grudge between him and his 2nd wife.

Appellant's Rejoinder

In his rejoinder the appellant submitted that he was living in a rental house and there were other children in the house, there were neighbours. None of these were called to testify.

- He was away at his other wife's place
- There was no evidence to prove that had penetrated the child
- The child did not name the thing she alleged penetrated her
- He was not medically examined to confirm that he was the one who had committed the offence.

Analysis and Determination

The duty of the 1st appellate court is well settled in numerous authorities.

In **Erick Otieno Arum v Republic [2006] eKLR,** the judge in recognizing this position stated;

> *It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same. There are now a myriad of case law on this but the well-known case of* **Okeno v. Republic (1972) EA 32** *will suffice. In this case, the predecessor of this court stated:*
>
> *"The first appellate court must itself weigh conflicting evidence and draw its own conclusions* **(Shantilal M. Ruwala vs. R (1975) EA 57)**. *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; 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."*

I have carefully considered the evidence and submissions made by both the appellant and the state.

I will begin with the issue of the charge.

Section 134 of the Criminal Procedure Code provides what the charge sheet should contain in the following terms;

> *Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

In **Michael Lennos Odero Vs. Republic Criminal Appeal No. 2 Of 2016**, the court held;

> *"The principle of law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence to the charge" (see also **Sigilani -Vs-Republic (2004) 2 KLR 480)***

The appellant's submission that the charge was defective is correct. The charge ought to have read section 8(1) *as read with* section 8(2) of the Sexual Offences Act. However, this poor drafting did not occasion the appellant a miscarriage of justice or prejudice. The offence **is** defined as defilement. The particulars of the charge very well describe the acts allegedly committed by the appellant in more than necessary detail, and the age of the child is stated. There is no doubt that the charge the appellant was facing is defilement.

Next the appellant pin pointed the insufficiency of evidence on a key ingredient of the offence of defilement, penetration, as is defined under section 2 of the Sexual Offences Act.

The child testified:

> *"On 16th June 2014 daddy came at around 7.00p.m. I was studying with my sister and brothers… he told me to go to the other room… came and closed the door that gets into the room… instructed me to go to the other room and he closed the door. He removed my clothes and slept on me. (he pulled up my dress and removed my panty) when he slept on me he **"alinifanya tabia mbaya"** opened his zip **alichukua kitu yake ya kukojoa akaingiza kwa kitu yangu ya kukojoa"** …my siblings were in the other room reading… he finished… he gave me cake and told me not to say anything to anyone…" It was not the first time daddy was doing this act to me. He has done it severally…"*

Section 2 of the Sexual Offences Act defines "penetration" to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person; hence the duty of the prosecution was to prove that there was;

- insertion, partial or complete

- of a genital organ of a person

- into the genital organ of another person.

Except for the anus, the other genital organs are not named in the Sexual Offences Act. It simply states

> *"genital organs" includes the whole or part of **male or female genital organs** and for purposes of this Act includes the **anus;***

Hence neither the word vagina nor penis appears in the SOA, and it must be left to inference as to what the complainant is talking about.

P.W.1's testimony must be considered with the complainant's testimony. Hers was that the child told her that her father had been defiling her. This was on morning of the 17th June 2014. Apparently the child did not tell her that the father had defiled her that night or the night before. That same day the child was taken to hospital and the PRC states that she reported that the father had been defiling her for the more than one year, that the latest incident was on Sunday 15th June 2014 at 7:00pm, contrary to the charge and the child's testimony, and the mother's in cross examination that it had happened on the night of 16th June 2014. The prosecution proffered no explanation of this discrepancy in the dates on which the offence is alleged to have been committed It takes great significance when the appellant's' statement of defence is considered.

While any form of sexual assault has been established to leave more than just physical scars on the victim, unfortunately, the courts rely almost 100% on the physical evidence; i.e. injuries on the genital organs, presence or absence of semen or spermatozoa, STIs, etc. Hence, it would be safe to presume that if it was true that the child had been defiled repeatedly for over one year, then it would be futile to expect tell-tale fresh physical injuries. If the defilement took place two days before the examination there would possibly be some or no physical evidence at all, but less than 24 hours, there could have been some physical evidence, but except for the missing hymen there was no evidence of recent sexual activity.

The appellant argued that the court proceeded on the assumption that penetration took place as defined by law. His view is that the complainant's testimony left a gap by not pointing out where this *kitu ya kukojoa* was on her's or his body. That is ingenious. One needs little imagination to figure out what *kitu ya kukojoa* (the thing used for passing urine/urination) is to a child and an adult. The child's testimony was that the appellant lay on top of her and put his urinating thing inside her urinating thing. There cannot be a clearer description from a child who has grown up in a society that will not call its sexual organs by their names.

On consideration the credibility of the evidence of the complainant and her mother, the mother's response to the child's report stands out as raising doubts as to the whole case.

This is the scenario painted by the prosecution. She was in the bedroom with the appellant. The child came in to find her sibling's uniform. Then she told her in the presence of the appellant that he, the appellant had been defiling her. There was no response or reaction from her at all. In fact, according to her testimony it was the appellant who requested her to step outside to talk. And she refused. Then he left for work.

Without any explanation for her not reacting or responding to this devastating information, the questions it begs are many. How is that possible? She heard this for the very first time. She did not confront him. She said nothing to him. She just let the appellant leave for work as if the child had said nothing? The complainant in her cross examination also testified when she disclosed to her mother what had been happening to her, the parents did not fight or speak to each other. Her father just left for work. And it is after he left, that she quietly took her child to hospital, without talking to even a single friend, neighbour or relative. In addition, she only mentioned the alleged defilement of 16th June 2014 under cross examination. It never came up in her evidence in chief.

This evidence weighed against the circumstances of this case and, and without any explanation renders it unconvincing, and doubtful.

It is also the complainant's testimony that when she made this complaint against her father her siblings were present. They heard. They immediately became key witnesses. It is them who would have confirmed the simple fact of their father regularly coming home and calling their sister into the other room. They would have confirmed that their father and sister would be there a while even though they may not have known what was going on there. They would even have confirmed that the previous night he had called their sister into the other room and stayed with her there for a while before going to collect their mother. The explanation by the Investigating officer that they were too young to be interrogated does not hold water. These were the best evidence witnesses to two very crucial facts in the case. The regular disappearing of the father and daughter into the other room, and specifically, the disappearing into that room either on the 15th or 16th June 2014. They were present in the house with the sister. What did they see? On the 17th June 2014 they heard their sister accuse their father. They would have told that to the court. They would also have testified as to the presence or absence of their father at home on the 15th or 16th June 2014.

The failure to call the school going children left a gnawing gap in the case for the prosecution.

I found that the case was not investigated at all. The case for the prosecution started on the premise of a step-father who had been defiling his step daughter more than a year. This turned out to be a mere statement of allegation as no iota of evidence was given in court to support that allegation. This aspect was crucial to the case for the prosecution because, it formed the basis for the missing hymen and the presumption based that on that allegation, that the hymen was missing because there was repeated penetration. It was the ground upon which the evidence of the incident alleged to have happened on the 15th or 16th June 2014 stood.

It goes without saying that defilement is a very serious charge and in this case it gave the appellant a life imprisonment. That allegation of repeated penetration is not supported by any evidence and ought to have been rejected as the basis for this alleged present charge.

The testimony of the complainant and her mother about the appellant's bicycle brought further doubt into their testimony in light of the appellant's defence. The mother's testimony was that every day the accused would pass by her place of work, leave his bicycle there, go home and return to her place of work at 7. 00p.m or 8.00pm to collect her. That on the night of the alleged defilement he left his bicycle at her place of work as usual and went home as usual. He returned at 8.00p.m. On the contrary the complainant testified that her father came home with his bicycle, left it outside the house, defiled her, then went to collect their mother.

This contradiction is noteworthy. The appellant's defence was that he left Karatina on the 15th June 2014 leaving his bicycle at his place of work, and returned on 18th June 2014 when he was arrested. P.W.1 in her cross examination actually stated that her husband had slept out the previous night to the 17th June 2017. Asked why she refused to talk to her husband upon his request after the child had accused him of defiling her she had said

> *"I refused to go out and talk to my husband because how would I leave the child and talk to his (sic) father. My husband had even slept outside that night…"*

Is it possible that then he was telling the truth that he had been away as he alleged in his defence? Could this be the explanation to the contradiction in the testimony of the mother and the child with regard to the appellant's bicycle? The bicycle could not have been at home and at the P.W.1's place of work at the same time. This creates doubt as to the presence of the appellant in his home on the nights of 15th and 16th June 2014.

That brings us to the appellant's defence. The trial court did not analyse the appellant's defence and especially the fact that his alibi remained unchallenged.

His testimony of having been in Laikipia at his 1st wife's place was corroborated by her testimony. The state was of the view that this alibi ought to have been raised earlier. There is no provision as to what specific point in a trial an accused person can raise an alibi.. The prosecution always has the opportunity to dislodge it.

In **Victor Mwendwa Mulinge Vs. Republic [2014] eKLR** the Court of Appeal stated

> *It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja V Republic [1983] KLR 501.*

Section 309 of the Criminal Procedure Code provides for circumstances such as this one

> *If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.*

The prosecution cannot be heard to say that the appellant raised his alibi late. There is no late. They still had the opportunity to ask for time to put in evidence to rebut it. They never did and some of the contradictions in the case for their case give credence to the appellant's defence.

The appellant also alleged a grudge against him by P.W.1 for his failure to settle her down. That this was demonstrated by the fact that BW carried everything from their home to her parent's home save his clothes when he was released on bond. Though he could not, upon his release on bond have expected a warm welcome following the allegations of defilement, the circumstances of the case make it a possibility.

The foregoing analysis points out to gaps in the case for the prosecution that renders the conviction unsafe on the charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act.

What about the alternative charge?

From the foregoing and the evidence on record, the evidence is doubtful as to whether there was any contact between the child's genital organs and any part of the appellant's body.

Having reviewed and re –assessed the evidence on record, the appeal is allowed.

I find that the conviction is unsafe. It is hereby quashed. The sentence is set aside.

The appellant is to be set at liberty unless otherwise legally held. Right of Appeal explained.

Dated, delivered and signed this 13th December 2017 at Nyeri

Teresia Matheka

Judge

In the presence of:

The appellant

Ms. Miano for h/b for Mr. Ndirangu

Mr. Gitonga for state