REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 35 OF 2008

JOHN OTIENO MUMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 460 of 2007 of the Chief Magistrate's Court at Kisumu)

J U D G M E N T

The appellant herein was charged in the lower court with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya, in that **"on the 19th day of August 2007 in Kisumu East district, within Nyanza province, caused penetration with his genital organ of a child namely A. A aged 10 years".**

The appellant also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya in that **"on the said date, month and year and place committed an indecent act with a child namely A.A by touching her genital organs".**

A perusal of the record reveals that the appellant denied the charge and evidence was tendered. PW1 the victim complainant gave evidence after being affirmed. She gave a graphic description of the events that she was grazing a goat near the appellants home. The appellant came at 6.00 p.m. and grabbed her by her dress and inner wear and then dragged her to his house, removed her inner wear and threw it on the floor and then put her on his bed and made her lie on her back on his bed. He then lay on her and inserted his penis into her private parts. She felt pain and tried to scream but appellant held her neck and threatened to kill her with a knife and for this reason she was not able to raise an alarm. It is her testimony that the appellant did not lock the door. After he had finished he promised to pay her Kshs. 50/= if she did not tell

the mother. Added that after the appellant was still defiling her, the mother came and found him. The mother raised an alarm and her uncle came. She then ran away to her home fearing that she would be beaten by the mother. The next day she, appellant and a chief came to see the OCS Kisumu police station. She was taken to the hospital and a medical report filled. She identified the appellant as the person who had dragged her to his house and defiled her.

PW2 the mother of the complainant confirmed the evidence of the complainant to the effect that her daughter PW1 went out to graze a goat and when, it got late, she PW2 decided to go and check on her daughter and on the way she passed by the accused's house and through the opening as well as the door which was open, she peeped through the hole, and saw the appellant lying on her daughter on his bed. He had removed his trouser halfway and when she saw this, she raised an alarm and people came. Accused came out and her daughter ran away. She took accused's bicycle to her husband and accused followed her. Her husband wanted to cut accused but he was restrained. The matter was reported to the village elder. The victim who had run away came back at night. The mother interrogated her, examined her and saw blood stains and a discharge. The next day the appellant was taken to the chief by the village elder, and she and the daughter accompanied the village elder to the police station where appellant was handed over to police. The victim was taken to hospital, treated and released to the mother. She confirmed the appellant was the person she had found defiling her daughter.

When cross-examined, she maintained she found the appellant who had removed the trouser half way lying on her daughter on his bed. The daughter came with her underwear later, and that the underwear had blood stains. She admits having bathed the child not knowing that it would interfere with the evidence and for this reason the underwear was not there. It is her testimony that even if the blood stained underwear was not there, she PW2 had seen the appellant defiling her daughter and even appellant admitted the offence when they went before the chief.

PW3 is a clinical officer who examined the victim a day after the incident observed tears on the labia and blood from vagina. There was infection and spermatozoa were not seen since the complainant had bathed before examination. When cross-examined he stated he did not examine the appellant.

PW4 a police officer received the appellant from the assistant chief with the allegation of defilement and then booked him with that offence. PW5 is the area chief who received the appellant from the village elder and members of the public with a complaint of defilement and that upon interrogation, the appellant admitted having defiled the minor. When cross-examined he stated that he could not have escorted appellant to police if he had not admitted committing the offence.

The appellant gave an unsworn statement to the effect that he was arrested because he and others had ploughed land near out growers farms and after deliberations by elders, those who paid a fine of Kshs. 500/= were released. He was not released because he was unable to pay the fine. He was then tied on to a tree and the village elders swore to ensure that he is jailed. It is his first time in court and needs assistance.

Against the said background information the learned trial magistrate made the following findings on the evidence:-

(i) PW3 examined PW1 and found tears on the labia of PW1 and she PW1 was discharging blood from the vagina.

(ii) That appellant did not deny that the complainant was defiled.

(iii) The appellant did not deny that PW2 found him defiling the minor.

(iv) PW2 raised an alarm and members of the public responded.

(v) The child's labia could not have been torn if the child had not been defiled.

(vi) Discharge of blood from the vagina is evidence of penetration and proof of defilement.

By reason of the afore setout reasons the learned trial magistrate found the evidence against the appellant overwhelming and on that basis convicted the appellant and sentenced him to serve twenty years imprisonment.

The appellant became aggrieved and he has appealed to this court citing five grounds of appeal namely:-

(1)He pleaded not guilty to the charged offence and still maintains the same.

(2)The learned trial magistrate erred in law and fact in arriving at a finding of guilt and a sentence of 20 years imprisonment when the evidence on record did not sum up to the required standard of proof beyond reasonable doubt.

(3)It is difficult to discern if it should be taken as a valid conviction against me since the offence was being claimed to have been committed in Nyando district not in Kisumu district, I was supposed to be charged within the district of the incident. PW4 in this matter had known the dispute which had transpired amongst us concerning land and that is why he hasted with this issue upto Kisumu in order to conceal what could have been discussed within Nyando.

(4)The lower court erred in both law and facts by not considering that there were some credibilities which he was supposed to view before reaching a finding of guilt i.e.

(i) The vital people that were alleged to have been with PW4 did not testify. Perhaps they could have been the witnesses who could have un-earthed what was ditched in this matter to withstand my defence (the two clan elders and others).

(ii) The pant was spotted bloodish as per the evidence of PW2, but it was not brought before the court as an exhibit to uphold the conviction. This process that learned trial magistrate over looked and her judgment should not be considered fair.

At the hearing of the appeal, the appellant filed handwritten submissions. The court has perused them and the following has been stressed:-

- In as much as a court of law has to ensure that those who commit crimes are punished, it is also duty bound to ensure that the rights of people charged with those criminal offences especially human rights guaranteed by the constitution are respected.

- Contends his rights guaranteed by section 72 (3) were infringed as he was arrested on the 19th day of August 2007, and brought to court on the 28th day of August 2007, and since the police failed to explain the reason for the delay, the entire trial should be nullified.

- There was mention of independent witnesses who were allegedly around during the incident and yet they did not come to testify as to what they knew about the incident.

- The court, should have taken note of the fact that it should have made sure that if there was any witness required to shed light on the evidence is called to give the said evidence before the case is closed.

- The court should have noted that evidence which requires corroboration cannot be used as corroborative evidence.

- It is his contention that the trial magistrate did not make any findings on the alibi which he had raised which was fatal enough to secure an acquittal.

- The learned trial magistrate should have taken note of the fact that the decision to put an accused person on to his defence should not depend solely on the fact that there is some evidence on record but it should depend on whether there is some evidence to sustain a conviction.

- By reason of the appellants submission above, it is the appellants stand that the prosecution did not prove its case beyond reasonable doubt and for this reason the appeal should be allowed so that he is set free.

In his oral submissions to court the appellant added the following:

- The person to whom the incident was reported to never testified.

- M.A who alleges to have raised an alarm and people came there never gave the names of the people who came to the scene neither did they come to give evidence in court.

- It is his submission that no medical examination was conducted on him to confirm that he had committed the offence he had been charged with.

- No exhibit was produced in court.

In response, the state stressed the following:-

-They oppose the appeal and ask the court to confirm the sound conviction because of the following reasons:-

(i) PW2 found the appellant at the scene defiling her daughter. The Identification is one of recognition because the appellant was known as he was from the neighbourhood.

- Medical evidence tendered in court through the P3 showed that the child had been defiled.

- Infringement of constitutional rights can be pursued separately in terms of compensation.

- It was not mandatory that the appellant be medically examined.

- The conviction is sound as it was not hinged on circumstantial evidence.

- That it is not mandatory that many witnesses come to give evidence to prove a fact as the same can be proved by a single witness.

For the reasons given, the court is urged to find that the convictionis sound and to confirm the same.

This court has given due consideration to the rival arguments herein, and in its opinion the following are own framed questions for determination in the disposal of this appeal:-

1) What is the mandate of this court with regard to this appeal?

2) What offence did the appellant face in the lower court?

3) What findings were made by the lower court with regard to the said offence?

4) What complaints have been raised by the appellant against those findings?

5) Are there any principles of law applicable to this case, if so what are they?

6) What final orders are to be made herein?

The courts responses to own framed questions 1, 2, 3 and 4 above is that these are already reflected on the record in the form of the nature of the offence that the appellant was charged with, the findings on the evidence by the learned trial magistrate which grieved the appellant leading to the filing of this appeal, and the grounds of appeal forming the basis of the complaint's raised by the appellant against the learned trial magistrate's findings.

The principles of law applicable to these proceedings have now crystallized by decisions of the court of appeal and as dutifully followed by the superior court as well as subordinate courts. The starting point is section 19 of the oaths and statutory declarations act cap 15 Laws of Kenya, it reads:-

(1)"Section 19 (1) where in any proceedings before any court or person having by law or consent of the parties authority to receive evidence, any child of tender years called as a witness does not in

the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not given upon oath if in the opinion of the court or such person he is possessed of sufficient intelligence to justify the reception of the evidence, and understand the duty of speaking the truth and his evidence in any proceedings against any person for any offence, though not given on oath but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be a deposition within the meaning of that section…."

A child of tender years has not been defined by section 19 of the oaths and statutory declarations act afore said, but has now been defined by section 2 of the Children's Act number 8 of 2001 as **"Any child of 10 Years and below"**.

The weight to be attached to evidence of such a child has now crystallized in the amendment to section 124 of the evidence act cap 80 Laws of Kenya. It reads:-

" Section 124 not withstanding the provisions of section 19 of the oaths and statutory declarations act, where the evidence of the alleged victim admitted in accordance with that section on behalf of the prosecution 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"

These two provisions have now been construed by case law emanating from the Court of Appeal. There is the case of **Jacob Odhiambo Omumbo –VS- Republic Kisumu Criminal Appeal No. 80 of 2008** decided by the Court of Appeal on the 5th day of December 2008. At page 10 of the said judgment the law lords of the Court of Appeal revisited the provision of the provisal to section 124 of the evidence act Cap 80 Laws of Kenya set out herein, section 8 (1) of the Sexual Offence Act No. 3 of 2006, which contains the definition of a sexual offence as:-

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

At the same page 10 line 11 from the top the learned Law lords of the CA made the following observation:-

"From the above definition it is clear that "penetration" is an important ingredient in a charge of defilement under the sexual offences act which must be proved by the prosecution".

At the same page 10 line 6 from the bottom, the court went on to state thus:-

"Though Phyllis's evidence was that of a child of tender years, the court can convict on it by virtue of the provisal to section 124 of the evidence act cap 80 Laws of Kenya as amended by act No. 5 of 2003…"

There is also the case of **John Otieno Oloo – VS- Republic, criminal appeal No. 350 of 2008** decided by the Court of Appeal on the 9th day of October 2009. At page 11 of the said judgment, line 9 from the top, the learned law lords of the CA made the following observations:-

"In our view, the second, third and fourth grounds of appeal revolve around two main complaints which are first, whether the evidence of Claris, Jared and Alice should have been subjected to what in law is referred to as *voire-dire* examination before being received and to determine in what way such evidence would be received whether on oath or not on oath. The second complaint is as to whether the evidence of C, J and A required corroboration, then whether the court could after warning itself find whether in the matter before us there was corroboration of their evidence on material aspects. It is clear from the record that none of the three was subjected to any examination to ascertain as to whether they could understand the nature of an oath or whether they were sufficiently intelligent to give evidence not on oath, that not withstanding all the three gave evidence on oath".

At page 13 of the judgment, the law lords set out the provisions of section 19 of the oaths and statutory declarations act with regard to the mode of reception of the evidence of a child of tender years already set out herein, and at page 14 set out the definition of a child of tender years as set out in section 2 of the children's act No. 8 of 2001, already set out.

At pages 14-16 the learned law lords revisited own decisions on the subject where the same question had arisen and been determined. There is the case of **Johnson Muiruri –VS- Republic 1983 KLR 445,** where the said court had held thus:-

"The matter whether a child is of tender years or not is of the good sense of the court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression child of tender years, for purposes of section 19 of the oaths and statutory declaration act cap 15".

The above is followed by observations on the case at line six from the top:- **"In our view whereas we agree that as concerns Claris who said she was 13 years old, the trial court should have out of caution formed an opinion in *voire-dire* examination whether she understood the nature of an oath before she could be sworn, we do not agree with the superior court that failing to do so could not have occasioned miscarriage of justice had that been the only witness on the issues that were before the court. It goes without saying that if a witness who does not understand the nature of an oath is made to swear, her evidence will have higher probative sense than if the same evidence was given unsworn. However, in this case we note that apart from Claris, there was the evidence of J who was 15 years old, and A who was 17 years old. In our view those two were young persons but they could not in our view be treated as children of tender years".**

(At page 16 line 4 from the top made observation that):-

"In our view corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence".

At the same page 16 quoted with approval the case of **Johnson Muiruri –VS- Republic (Supra)** where it had been held that:

"Where a child of tender years gives unsworn evidence then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence no corroboration is required but the assessors must be directed that it would be unsafe to convict when there was no corroboration".

Then the case of **Kibangeny arap Kolil –VS- Republic [1959] EA 92,** where it had been stated:-

"But even where the evidence of a child of tender years is sworn (affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if un corroborated without warning itself and the assessors if any of the danger of doing so".

After consideration of the afore set out principles of case law on the subject, the court went on to provide the following guidelines at the bottom of the same page 16 line 2 from the bottom:-

"In short we are of the view that, in law, evidence of a child of tender years given on oath after *voire-dire* examination requires no corroboration in but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration for it. Evidence of a child of tender years not given on oath must in law be corroborated. In this case however even if we ignore the evidence of Claris, which was taken without *voire-dire* examination by the trial court, there was still evidence of J and A. These two witnesses were firm that they saw the appellant in the house of the complainant where they were……."

This court has given due consideration of the aforesaid guiding principles as gathered from the cited cases and applied them to the own framed question for determination in the disposal of this matter and the court proceeds to make the following findings on the same:-

The appellant has been charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act. He is alleged to have defiled a girl aged 10 years. It is therefore necessary to establish the age of the complainant. Nowhere in the record does it show that any document like a birth certificate or birth notification card or baptismal card was produced to show when the said complainant was born. During examination to determine her intelligence and ability to speak the truth, she told the court she is 9 years of age. The P3 gives the age of 10 years. PW2 the mother did not mention any thing about the age of the child or when the child was born. In the absence of any other contrary evidence, the court has no alternative but to go by the age given in the P3 of 10 years. This being the case, the court is satisfied that the offence charged was properly anchored on section 8 (1) and 8 (2) of the Sexual Offences Act No. 3 of 2006.

Being a child of tender years, it means that the learned trial magistrate was obligated to observe the requirements of the provisions of section 19 of the oaths and statutory declarations Act cap 15 of the Laws of Kenya by conducting a ***voire-dire*** examination before moving to receive the evidence of the minor. A perusal of the court record at page 2 of the typed proceedings, and 5 of the record, line 12 from the top reveals that the learned trial magistrate was alive to this requirement and complied with the same. It means that in terms of principles of case law cited herein, the evidence of PW1 was properly received on record. Going by the responses made by PW1 both on examination in chief and cross-examination, there is a demonstration that indeed the witness understood the nature of the oath and the obligation to speak the truth as well as understanding of the nature of the proceedings, hence the learned trial magistrate rightly affirmed the complainant before reception of her testimony.

It is on record that the appellant has raised a complaint that the standard of proof or the burden of proof was shifted on to him to discharge it contrary to the provisions of the law applicable and that his alibi was not considered and had the same been considered then it would have earned the appellant an acquittal. This court has judicial notice of the fact that the law on the standard of proof in a criminal trial and the weight to be attached to an alibi raised as a defence has now been crystallized by case law decided by the court of appeal and as dutifully followed by the superior court as well as subordinate courts. There are numerous authorities on this but the court will sample a few only. There is the case of **Wangombe –VS- Republic [1980] KLR 149** where the court of appeal held ***inter-alia*** that **"when an accused person raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the**

burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an un sworn statement at his trial, the prosecution or the police ought to test the alibi…."

Also the case of **Karanja –VS- Republic [1983] KLR 500** where the court of appeal reiterated the earlier stand in the case of **Wangombe –VS- Republic (Supra)** which was a restatement of an already crystallized principle as shown by the holding in the case of **Ssentale –VS- Republic [1968] EA 365** whose holding is to the effect that:-

"An accused person who puts forward an alibi does not assume any burden of proving that alibi and it is a misdirection to refer to any burden resting on the accused in such a case". In Karanja –VS- Republic (Supra) the court laid down the following guiding principles regarding alibis:-

(a)When raised all it means is that all that the accused person is saying is that, he was not at the scene as at the time the offence was committed.

(b)When raised at the plea stage, the prosecution has a duty to test it during cross-examination of witnesses.

(c) **When raised for the first time during an un sworn testimony, the court has a duty to test it and weigh it as against the totality of the evidence tendered by the prosecution and determine whether it is ousted or not**.

A revisit to the record reveals that the appellant gave unsworn evidence and raised the issue of fabrication of the case against him because he failed to pay the Kshs. 500/= fine imposed by clan elders for ploughing land next to out growers land illegally. The learned trial magistrate was alive to that defence as the same is reflected at page 2 of the judgment and rejected the same at page 3 of the judgment. The learned trial magistrate found as a fact that the child had been defiled and that PW2 had found the appellant defiling the child.

The question for determination now is whether the learned trial magistrate had justification for ousting that alibi. This court has revisited the record and perused the appellants cross-examination of PW2, the mother of the complainant, PW1 the victim, and PW5 the assistant chief who received him from the village elders and took him to the police station, and finds that the issue of fabrication of the offence because the appellant and another had ploughed land near out growers land was not raised and the court finds that this was raised for the first time in the un sworn defence. Appellant was entitled to raise it as his defence but when weighed against the totality of the prosecutions evidence, it stands ousted. The reasons for it being ousted are as follows:-

(a) It was not put to PW2 and 5 in their cross-examination to raise the issue of there being a reason to falsify a case against him appellant.

(b) As found by the learned trial magistrate, there was no dispute that the child had bee defiled.

(c) The appellant and PW1 and 2 were neighbours. The offence took place in the evening when there was still daylight. PW2 talked to the appellant and PW1also saw the appellant. The learned trial magistrate rightly found that this was a case of recognition fortified by the absence of any reason as to why PW1 and PW2 would fabricate a case against their neighbour. It is to be noted that the appellant did not put to PW1 and 2 in cross-examination that they had fabricated a case against him for this reason the

appellant's belated alibi stands ousted.

The appellant also raised the issue of his constitutional rights having Been breached in that he was arrested on 19-8-2007 and it wasn't until 23-8-2007 when he was taken to court and that this should be considered in his favour so that the trial is rendered null and void. The court does agree with appellant's submissions that the court as much as it is interested in ensuring that the rights of the victims of crime are vindicated. It is also duty bound to ensure that the rights of those accused of committing crimes are also protected. The appellant may be having a genuine complaint, but in this court now that the complaint has been addressed to a wrong forum. It should be addressed to a civil court where the appellant can seek compensation by way of damages. Herein the court's jurisdiction is limited to a determination as to whether the conviction is sound or not and whether the sentence imposed is legal. In saying so this court would like to draw inspiration from a decision of the Court of Appeal where the court of appeal dealt with a similar issue which had arisen for the first time in a second and final appeal. It is the case of **Julius Kamau –VS- Republic Nairobi Criminal appeal No. 50 of 2008** decided by the court of appeal on the 8th day of October 2010.

At page 6 of the said judgment the law lords of the court of appeal made observation that they had dealt with a similar question previously in the case of **Albanus Mwasa Mutua –VS- Republic criminal appeal No. 120 of 2004 (unreported), In the Mutua case, it had been argued on his behalf that his (Mutuas) having been held in police custody for 7 months before being charged with the offence of robbery with violence which carries a death penalty rendered the trial and the conviction a nullity.**

At the same page 6 of the judgment line 16 from the bottom in a summary form, the court upheld Mutua's argument for the reason that

"At the end of the day it is the duty of the court to enforce provision of the constitution otherwise there would be no reason for having those provisions in the first place. Further that:- "an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of thereafter".

At page 6-7 of the same judgment the court made observation of their own decision in the case of **Ndede -VS- Republic [1991] KLR 57** where the appellant had been illegally detained in communicado for 30 days after arrest and had further been tortured intimidate and forced to make un in equivocal plea of guilty. At line 10 from the top on page 7 of the judgment the court made observation that the appeal in the Ndede's case was allowed because of the unlawful detention and other circumstances which raised reasonable doubts about the voluntariness of the apparent plea of guilty were not considered by the first appellate court.

Between pages 7 – 12 of the said judgment, the court carried out a survey on other decisions of the same court on the subject. The case of **Paul Mwangi Murunga =vs- Republic Nakuru Criminal Appeal number 35 of 2006 (LR)** where the appeal was allowed because there had been an unexplained delay of ten (10) days from the date of arrest to the date of arraignment in court. The case of **Gerald Macharia Githuku =vs= Republic Criminal Appeal number 119 of 2004** where the court allowed the appeal on the ground that a delay of three days was in violation of the constitutional right of accused despite there being evidence to support a charge of robbery with violence and a death sentence.

At page 8 – 9 of the said judgment, the learned law lords of the court of appeal made observation that the trend in the handling of cases where such complaints had been raised had changed in the case of **Samuel Ndungu Kamau and another =vs= Republic Nairobi Criminal Appeal number 223 of 2006 (UR)** rejected the appellants plea, observing that:-

"A complaint with regard to violation would either be raised at the trial or in an application under Section 84 of the Constitution where witnesses are normally called or affidavit evidence is presented to prove or rebut a factual position when such a complaint is raised for the first time before this court, it may not be possible to investigate the truth or falsely of the allegation"

The case **of Dominic Muitie Mwalimu =vs= Republic Criminal Appeal No. 2179 2005 (LR)** where the same court declined to entertain a ground of breach of Section 72 (3) (b) raised for the first time in the appeal, where appellant who being represented by counsel failed to raise such complaint in the trial court saying that in such a case, appellant must be treated to have waived his right to complain about the alleged violation of his constitutional rights before he was brought to court.

At pages 9 – 12 the court also explained the trend in the decisions made by the superior court with regard to the same issue. Mutungi J as he then was, in **Ann Njogu and 5 others =vs= Republic HCC MISC APPLICATION NO. 551 of 2007** where applicant had been detained in police custody for 24 hours and charged in court slightly over 48 hours had their constitutional application alleging that the unlawful detention rendered the charge a nullity was allowed. In allowing the application, the learned Judge is noted to have stated that **"There is as yet no known cure for the nullity that results from attempted prosecution of any person in this country. Once it is shown that his/her constitutional rights were violated prior to the purported institution of the criminal proceedings complained against. Nor is there any room for extension of the constitutionally provided for period of 24 hours. It could as well come after a year. Either way such prosecution is a violation on the right of the arrested or detained person and is illegal and null and void".**

The case of **Amos Karuga Karatu high court (Nyeri) criminal case No. 12 of 2006** where on a submission by counsel that accused be acquitted of the charge because he had been held in police custody for 5 months before being arraigned in court, and he was so acquitted in so acquitting the accused, the learned judge is said to have made the following observation:-

"A prosecution mounted in breach of the law is a violation of the rights of the accused and is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the period required to arraign him in court. Finally it matters not that the evidence available against him is weighty and overwhelming as long as that delay is not explained to the satisfaction of the court the prosecution remains a nullity".

In **Republic –VS- George Muchoki Kungu Nairobi criminal case No. 49 of 2007** Mutungi –J as he then was upheld a preliminary objection to a prosecution on a charge of murder where the accused had been detained for 106 days before being arraigned in court, and rejected the prosecution's plea to dismiss the preliminary objection on account of murder being a severe offence, that accused should not be released before the case is heard on its own merits, and that releasing the accused would result in bad law and lastly that such release would be against the public interest. In upholding the said preliminary objection, the learned judge is indicated to have stated thus:-

"Upon discovery of the constitutional violation, the court has no jurisdiction to continue hearing an illegality, and or a nullity. That is the basis for the court's firm holding that any proceedings instituted outside the 14 days stipulated on section 72 (3)(b) are void irrespective of the weight of evidence that the prosecution might have……"

At page 11 of the judgment the learned law lords of the court of appeal noted the existence of a

descending voice in the superior court in a decision made by **Anyara Emukule** judge in the case of **Republic-VS- David Geoffrey Gitonga criminal case No. 79 of 2006 (Meru)** (UR) where it was submitted on behalf of the accused after conclusion of the entire case that the trial was a nullity since the accused was detained for 140 days before he was charged in violation of the rights guaranteed by section 72 (3) (b). It is noted that the learned judge declined to acquit the accused and in doing so made the following observation**:- "I am aware that contrary opinion have been expressed by others in this court. I do not share those views. I hold the considered view that such a trial is not a nullity at all. These are my reasons. Firstly the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order and indeed nullity is non-curable. Secondly for a trial to be void in law, it must be shown either that the offence for which the accused is being tried is non existent or the authority of courts seized of the matter has no authority to do so. It is a public policy of all civilized states that offenders be subjected to due process in respect of define offence and by duly competent counts or tribunals.**

A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy, if rapacious rapists and a serial killer will not be allowed to go scot free, because either deliberately or inadvertently the prosecution authority has not deemed it fit to have him brought before a court within 24 hours or as case may be within 14 days".

Lastly, Osiemo J as he then was (now retired) where on an appeal the appellant on an appeal against both the conviction and sentence for defilement, raised a preliminary objection (issue) in essence that the trial and conviction were a nullity since he was unlawfully detained in police custody for more than 24 hours in violation of Section 72 (3), in dismissing the preliminary objection, the learned Judge as he then was made the following observation:-

"The appellant having failed to assert his right from the time he appeared in court and through out the proceeding, he must now be treated as having waived the alleged violation of the constitutional right and I reject this ground and further no prejudice to the appellant has been established. Secondly a deliberation that the accused's right has been violated does not automatically entitle accused to an acquittal. As often said Justice must be seen to be done by the watchful eye of the public. The court must constantly balance the claim of the accused against the possibility is proven and un provable in many cases that delay has been procured or encouraged by someone acting on the interest of the accused".

At pages 12 -20 of the judgment the court carried out a survey of similar provisions and judicial pronouncement on allegations of violation of constitutional rights in criminal prosecution within the common wealth, to which this jurisdiction is a member. This court has schemed through the content of that exploration and in its opinion the following have been set out as broad principles applicable. At page 17 the learned Judges extracted observations by **MC Lachlin J** in the famous Canadian case of **Republic –VS- Morris [1972] 15LR 771** a supreme courts decision thus:- **"On the one hand stand the interest of society in bringing those accused of crimes to trial. Of calling them to account before the law for their conduct even the earlier and most primitive of society insisted that the law bring to justice those accused of crime. When those charged with criminal conduct are not called to account before the law, the administration of justice system, victims will conclude that justice has not been done and the public feels apprehension that the law may not be adequately discharging the most fundamental of its tasks.**

On the other side of the balance stands the right of a person charged with an offence to be tried within a reasonable time when trials are delayed justice may be denied. Witnesses forget, witnesses disappears, the quality of evidence may deteroriate. Accused persons may find their liberty and security limited much longer than necessary or justifiable such delays are of consequence not only

to the accused but may affect the public interest in the prompt and fair administration of justice.

The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the social interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge before staying charges must be satisfied that the interest of accused and society in a prompt trial outweighs interest of society in bringing accused to trial".

Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceeding on account of delay, because the consequences of delay are not great. On the other hand where the accused has suffered clear prejudice which cannot be otherwise be remedied, the balance may tip in the accused favour and justice may require stay.

At page 18 of the judgment there is quoted with approval the case of **Martin –VS- Taurans District court [1995] 2 LRC 788** in which the following observations were made:- **"It was not suggested in argument that there is or could be an intentional norm of what constitutes undue delay expressed in form of a specific period of weeks or months".**

From page 20-21 of the judgment the law lords started interrogating the meaning of the "charged" and reviewed a wealth of case law on the subject from the common wealth jurisdiction as well as applicable provisions of law. The principle drawn out in a summary form is that a charge means a charge ordinarily under the domestic jurisprudence and the commencement in commutation in determining whether a reasonable time has elapsed starts when the defendant is either charged or served with summons as a result of information being called before a magistrate.
At pages 21-22 their lordships dealt with case law and provision of law dealing with the standard of proof of infringement of the right to trial within a reasonable time. At page 22 The court quoted with approval the case of **Republic -VS- Lord Advocate [2003] 2 LRC 51** at page86 paragraph 92 which was decided on the basis of the European Convention on human rights. It was observed:- "The convention seeks to identify a common minimum standard of protection applicable internationally to the state parties to the convention The period it set must give rise to real concern. The complexity of the case, the conduct of the accused and the manner in which the case has been handled by the administrative and judicial authorities have then all to be assessed. An unreasonable time is one which is excessive inordinate and unacceptable. At page 22 line 2 from the bottom quoted with approval the reasoning of **Sopinka Judge in Republic – VS- Morris(supra)** thus**:- "The right to a trial within a reasonable time can be abused and transformed from a protective shield to an offensive weapon in the hands of the accused and stated that the right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused…..in reality an accused person may have no real interest in having the charge against him determined promptly and may invoke article 6 (17) of the convention, not in order to benefit from its fulfillment but rather in the hope of benefiting from its breach by avoiding being convicted".**

At pages 23-29 thereof the court discussed the provision of law and case law on an appropriate remedy for infringement. Some of the remedies suggested are:-

(a) Questioning of the conviction but in deciding whether to do so or not the court has to take into account considerations of evidence against the accused in relation to the commission of the offence charged.

(b) Expediting of the trial rather that having it aborted.

(c) It could be met by an award of monetary compensation that would also respect victims rights and the public interest in the prosecution to trial of alleged offenders.

(d) A stay of the proceedings may be acceptable.

At page 29-31 the court of appeal drew out the jurisprudential principles gathered from the case law in the assessment and which this court would like to associate itself with by reflecting them on record these are:-

(i) The trial within a reasonable time granted is part of international human rights law and although the right may not be critically un identical terms in some countries the right is qualitively identical.

(ii) The right is not an absolute life right of the accused. It must be balanced with equally fundamentally societal interest in bringing those accused of crimes to stand trial and account for their actions.

(iii) The general approach to the determination whether the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.

(iv) There is no international norm of reasonableness. The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.

(v) Although an applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden may shift depending on the circumstances of the case. However the court may make a determination on basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.

(vi) The standard of proof an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay cab be categorized an un reasonable.

(vii) Although the procedure for raising a violation of the right varies from one jurisdiction to another, the violation of the right should be raised at the earliest of possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver whether where applicable.

(viii) The purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.

(ix) The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.

(x) (a) The remedy for the violation of the right varies from jurisdiction to jurisdiction. In some jurisdiction such as Canada and Newzealand it seems that permanent stay of proceedings is the normal remedy for violation of the right.

(b) Under the common law and under the jurisprudence of European court of human rights a permanent stay of proceedings is considered a draconian remedy only granted where it is demonstrated that the breach is so severe that a fair trial cannot be held.

(c) In most of the commonwealth countries with bill of rights and a constitution based on West minister model, and in South Africa the remedies are flexible, courts can grant any relief it considers appropriate in the circumstances.

(d) In some jurisdictions where the applicant is already convicted, the quashing of conviction is not considered a normal remedy, and the court, could take into account the fact that the applicant has been proved guilty of a crime the seriousness and prevalence of the crime and design an appropriate remedy without releasing a dangerous criminal to the society"

At page 32 of the judgment, line 12 from the bottom, the court paused the following question **"The underlying question in this appeal is whether an unconstitutional extra judicial incarceration by police before the suspect is charged in court either entitles the suspect not to be tried for the offence for which he was arrested or if tried, whether he is entitled to a discharge or an acquittal? simply put in another way whether a breach of section 72 (3) (b) by depriving a suspect of his personal liberty by police before being charged in court entitles the suspect to go scott free for the offence allegedly committed or about to be committed This is a fundamental question of great public importance".** This was followed by a review of local decisions on the subject already set out herein where sections **72(1) (3) (b) (5), 77 (1), 77 (2) (a)** have been construed in this jurisdiction and similar provisions construed in other jurisdictions and then went on to make the following observation at page 34 of the judgment:- **"In our view the right of a suspect to personal liberty before he is taken to court under section 72 (3) (b) are clearly distinct from the rights of an accused person awaiting trial under section 77 (1)…. The breach of right to personal liberty is not trial related. It is a right to which every citizen is entitled. It is the intention of the government to ensure that the citizens enjoy the right……. Section 72 (b) provides a remedy by way of damages to a person who is unlawfully arrested or detained.**

In contrast the right to a trial within a reasonable time guaranteed by section 77 (2) is trial related. It is related to the trial process itself and is mainly designated to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court which has the control of the trial to ensure that the right to speedy trial is observed.

In our view it is not the duty of the trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violation of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognisance of such pre-charge violation of a persons liberty if the violation is limited to or affected by the criminal process…..".

At page 35 line 5 from the top, the court went on to hold that they agree with the decision of Emukule judge in the case of Republic –VS- David Geoffrey Gitonga (supra) that even where a violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuring prosecution is not a nullity and that a prosecution would only be a nullity of only the circumstances stated in the case subsist…."

At page 36 line 8 from the top went on:- "lastly had we found that the extra judicial detention was unlawful, and that it is related to the trial, nevertheless we would still consider the acquittal or discharge as a disproportionate, unappropriate and draconian remedy, seeing that the public security would be compromised. If by the time an accused person makes an application to the court the right has already been breached and the right can no longer be enjoyed, secured or enforced as is in variably the case, then the only appropriate remedy under section 84 (1) would be an order for compensation for such breach.

The rationale prescribing for monetary compensation in section 72 (6) was that the person having already been unlawfully arrested or detained such an unlawful arrest or detention cannot be undone, hence the breach can only be vindicated by damages. Again we respectfully agree with Emukule judge that breach of section 72 (3) (b) entails the aggrieved person to monetary compensation only".

This court has endeavored to set out the reasoning of the court of appeal in extenso because the said judgment is a land mark judgment on the issue of infringement of a constitutional right in relation to a criminal trial its reasoning as well as the principles both of case law, provision of law and human rights instruments interrogated were relevant to the subject the appellant raised herein. It was also the appellant's right to have that issue given the seriousness it deserves in the assessment of the issues raised by him an appeal coming back to this court's assessment, of the said case law, it is of the opinion that the following are the guidelines provided by that case law which are relevant to the complaint raised by the appellant:-

(1) Court of this jurisdiction namely in Kenya in terms of both the superior courts as well the Court of Appeal have prior to the afore said decision, been pursuing two different paths when it come to dealing with complaints raised in criminal proceedings concerning infringement of constitutional rights in a criminal trial may they be original or appellate one front stated categorically that once a breach is established an acquitted has to follow. While the other holds the view that the issues of breach of constitutional rights should be treated distinctly from the criminal process which should concern itself solely with issues of whether the offence charged has been proved or not.

(2) That faced with the afore said conflicting stand some of them decision of the Court of Appeal itself, the court set out to explore the law and then provided guidelines, on the subject. In developing the guidelines the court drew inspiration from decision of other jurisdictions within the common wealth.

(3) The central theme in the guidelines provided in a summary form is to the effect that

(i) Dealing with the issue as to whether a trial should be faulted on account of breach of constitutional rights to an accused person, he should be by the court societal needs of a society's desire to call upon criminals to account for their action and the need to vitiate the criminal process simply because the complainants rights had been violated.

(ii) The complaint if intended to fault the criminal process, should be raised at the earliest opportunity otherwise it will be defeated by the doctrine of waiver.

(iii) The right forum for such complaints should preferably be courts other than courts seized of

the criminal trial

(iv) Where the complaint has been raised after the breach, and or violation has already taken place, then the best remedy for such a breach is not the criminal process leading to a discharge or acquittal or quashing of the conviction, but an action for compensation by way of damages.

(v) Preferably such complaints should be raised promptly.

These guidelines have been applied to the appellants complaint with regard to breach of constitutional rights and this court proceeds to make the following findings on the sane:-

(a) The appellant faced a criminal charge and he is duty bound to account to society for his conduct and it is the duty of the society to ensure that appellant accounts to it for his conduct . This court has no doubt that it is the wish of the society that there should be no defilement of minors and that is why there is a law in place proscribing such conduct. It follows that if appellant broke that norm, he has to account to the same society for his conduct. The society had a right to demand that account from the appellant and that is why the matter was reported to the authorities leading to him being processed through the criminal process

(b) The appellant has raised the complaint belated on appeal. It should have been raised immediately upon being arraigned in court. However, this belatedness not withstanding, the appellant is at liberty to pursue compensation in a civil litigation. This is the appropriate remedy because the violation allegedly suffered by the appellant cannot be undone.

Issue of the place of trial was also raised by the appellant. He alleged that he should have been tried by Nyando court as opposed to Kisumu Law Courts, and that the shifting of the place of trial to Kisumu was to shut out vital evidence which would have been tendered in favour of the appellant. This court will seek guidance from the provision of section 66 of the Criminal Procedure Code which states thus:- "Section 66 **"Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya or which according to law may be dealt with as if it had been committed within Kenya and to deal with the accused person according to its jurisdiction".** This court's construction of the above section is that, it gives general authority to courts exercising criminal jurisdiction to try offences committed in areas other than those the particular courts have jurisdiction over. Side by side with section 66 is the provision of section 67 of the same CPC which gives the court concerned authority to make an election to return an escapee to the court of the area where the offence was committed, or to try him.

This court has construed and considered the above two provisions, and applied them to the appellants complaint regarding the place of trial and the court is satisfied that the Kisumu court was properly seized of the matter more so when the appellant did not raise that issue at the trial. There is no proof that summons were applied for, for any witnesses whom the appellant intended to call to testify in his favour and the court declined to issue the summons to that witness or witnesses. In view of the above, the court is satisfied that no prejudice was occasioned to the appellant by holding his trial at Kisumu Law courts. The Kisumu Law courts rightly exercised its jurisdiction to try a case originating from Nyando.

Complaint was also raised about failure to medically examine the appellant in order to confirm his involvement in the commission of the offence. Indeed medical examination of an accused person is vital in proceedings where offences such as the one appellant faced in the lower court and is still facing an appeal are involved, but where such a procedural step has not been undertaken, it is not to be taken as being fatal to the entire prosecutions case, because if it had been undertaken then the resultant medical evidence would have been additional to any other evidence adduced and relied upon by the prosecution as either incriminating or exonerating the appellant in relation to the commission of the crime. In the

absence of such evidence, the court has no alternative but to go by the evidence on the record.

The learned trial magistrate relied on the oral testimony of PW1 and PW2 as well as medical evidence through PW3 to confirm the defilement as well as the penetration of the defiled minor. This court has revisited the said finding on the evidence and it agrees with the state counsel that the said finding was based on sound evidence. It is sufficient to support a conviction.

Issue was also raised about failure to call independent witnesses especially those who responded to the distress call of PW2. Indeed these were not called, but as submitted by the state counsel there is no legal requirement for any number of witnesses required to testify to prove a fact. Herein the learned trial magistrate relied on the testimony of PW1 and PW2. Of importance was the fact that the appellant was their neighbour, the offence was committed in the evening and therefore it was still daylight and that this was a case of recognition. This court would like to add that the evidence on the record does not tend to bring out any existing reasons as to why PW1 and 2 should frame up the appellant in connection with this offence alleged to have been committed. This court is satisfied as did the lower court that the evidence on the record before it was sufficient to and infact did support a conviction.

There was also issue raised about the missing blood stained underpant of the victim. It is on record that it was not produced as an exhibit. PW2 explained that she did wash it due to ignorance and in this court's view this is a reasonable explanation. Had it been produced it would have added weight to the commission of the offence. Limited to the tears but not proof of the fact of it being blood stained. Its absence like the absence of medical evidence from the appellant linking appellant to the commission of the offence is not fatal. It simply means that with the absence of such evidence adduced on the record the lower court in the first instance and this appellate court in the second instance had and has no alternative but to confine themselves to the evidence on record when this is done, this court is satisfied as did the lower court that absence of production of the underpant as well as evidence of medical examination of the appellant not withstanding there was sufficient evidence to sustain a conviction.

As for the sentence, it is noted that the appellant was sentenced to serve 20 years imprisonment. This court's attention has been drawn to the provision of section 8(2) of the Sexual Offences Act which reads:-

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life". Herein, the minor was 10 years old and so she falls within that bracket. It means that the imprisonment of 20 years is not proper. Although neither the state nor the appellant did not appeal against the sentence, this court has jurisdiction to invoke its revisionary powers donated by section 364 CPC to correct an illegality. The sentence will be revised to one of life imprisonment.

For the reasons given in the assessment, this appellate court is satisfied that the conviction is sound and the same is confirmed. The sentence imposed of 20 years imprisonment does not comply with the legal requirements in section 8 (2) of the Sexual Offence Act No. 3 of 2006, and the same is revised under section 364 CPC and set aside. It is substituted with the sentence provided for in the said section of life imprisonment which is mandatory.

Appeal dismissed in its entirety.

Dated, signed and delivered at Kisumu this 29th day of March 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/va