



**Onalo v Republic (Criminal Appeal E328 of 2023)  
[2025] KEHC 10459 (KLR) (Crim) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10459 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E328 OF 2023  
MW MUIGAI, J  
JULY 10, 2025  
(CHIEF MAGISTRATE'S COURT CRIMINAL  
CASE S.0 14 OF 2019)**

**BETWEEN**

**FRANCIS SIENE ONALO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant was charged with offence of defilement contrary to Section 8[1] & 8[2] of *Sexual Offences Act* No 3 of 2006
2. The Particulars of the offence are that on 10th June 2019 and 13/6/2019, the accused, one, Francis Siene Onalo, at [particulars withheld] area in Ruaraka within Nairobi County intentionally and unlawfully caused his penis to penetrate the vagina of Z.A. a child aged 4 years old
3. The Alternative Charge is committing indecent act with a child contrary to Section 11[1] of *Sexual Offences Act*.
4. The particulars of the offence are that on 10th June 2019 and 13/6/2019, the accused, one, Francis Siene Onalo, at [particulars withheld] area in Ruaraka within Nairobi County intentionally and unlawfully touched the vagina of Z.A. a child aged 4 years old with your penis.



5. The charge sheet/Information was read to the Accused and he pleaded not guilty to both charge and alternative charge and was advised by the Trial court to write to Legal Aid Service Board for Legal Representation.

## Hearing

The hearing commenced before Trial Court Hon. E.Rianny SRM on 18/7/2019 as follows;

6. PW1 Z.A underwent voir dire examination and gave Unsworn Statement that she was 4 years old and lived in Naivas and she had 1 sister Z and brother K. They lived in a Court and there were stairs inside the Court where the Accused lived, PW1 knew him and he lived near them. They were playing on the balcony when the Accused person carried PW1 on his shoulders to his house. He removed his clothes, his sweater and vest and 'suruali' and then panty; 'akanifanyia tabia mbaya' he kissed her in the bedroom 'kukiss mtu ni tabia mbaya'. He kissed her on the mouth and this was after closing the door. They slept. Francis is also known as Boo. He kissed her on the mouth and then 'nikavua nguo'
7. The Trial Court, stood the child down as she was crying and the Prosecutor sought adjournment for PW1 to testify on another day when the child was more relaxed. Since the Complainant and family moved from the place, they lived, the Court approved bail/bond of the Accused person.
8. On 6/8/2019, PW1 was recalled and she testified that her mother is H and her Teacher is R, they were living in Naivas but moved to another house. Her mother sold stockings in Town. PW1 stated Francis who hurt her is also called Boo. She was playing with her sister and he took her to his house. Initially, she refused but 'akanichukua kwa nguvu' to his bedroom and removed her clothes, her panty, sweater and trousers; 'akanifanyia tabia mbaya akatoa kitu yake ya kususu akaniwekea hapa penye nachuchu nayo akanifanyia tabia mbaya halafu' he took tissue and wiped her. He opened the door and told Z and her to get out. This was after, she dressed. Francis house had 2 beds not double decker; his sister sat on a chair.
9. When she left, she told her mom at night when they were going to sleep that Francis 'alinifanyia tabia mbaya'. Her Mum said she would call Police in the morning which she did. She went to hospital 'nikapimwa susu' [points to vagina] she felt pain 'akinifanyia tabia mbaya' she cried. She was also given drugs. She did not know the name of Francis's Sister.
10. Prior to that she went to Francis house and played with him. In their sitting room he had a Computer and Francis taught her how to play computer games. Their house was down and Francis was upstairs and she would go to play at the balcony. Francis had pulled Z but she got hurt on her finger, it was pinched by the door. PW1 pointed to the Accused person - Francis.
11. In cross examination PW1 wrote her name down and stated Francis took her when she was playing at noon. That day she went to school and came home. Her Mom told her she would buy her a motorbike. She went to Francis' house with Z where he did bad manners to her, Z was there and she screamed and when he finished, she put her clothes. When she left Mama Shadi was there as she cried. At home she told K, the Accused did bad manners to her and he told their mom that night. She said she would call Police the next day. Police came and asked her Francis house; she did. Later, Police asked her 'nani amenifanyia tabia mbaya' and she said it was Francis and he was arrested. She was taken to hospital and was examined her 'susu'. She went to Police Station with her Mum; she spoke to Police and she came to the Police the next day and she told the Police things and the Officer wrote down. Her Mum washed her and her pant. They did not go to any other hospital. K her older brother and Francis knew each other and played ball with Francis. Francis did bad manners to her twice. At home when he took her by force when she was with Z was the 1<sup>st</sup> time. She could not recall the 2<sup>nd</sup> time. She used to go to Francis



- house and stay in the sitting room playing. The room has a chair and a computer and a bed. She was examined by a lady doctor. There is a paper she gave her Mom and the drugs she was given were small and white she took in the morning. Following day , she went to school.
12. PW2 ZK mother to PW1 testified that on 13/6/2019, her child Z was bleeding on her private parts and was raptured. On asking her twice, she remained mum. She washed her she went to school another day she said Mum bado chuchu yangu inatoka damu she asked her what happened she remained mum. Just within the week on a Thursday they went to sleep and at midnight she said she was in pain. She woke up and washed her. As she bathed her and checked her vagina it was torn on the lower side. She kept mum. When she became hostile she said the boy Francis from upstairs called her but she refused, he pulled her and did bad manners. He put her on the mattress and then removed his chuchu [dick] and put it in hers
  13. On Thursday again Francis came knocked the door and another child, Z opened he asked for Z. He took her on his shoulders to his house removed her pant and defiled her. She took her to Mathare Hospital where it was confirmed and then went to Ruaraka Police Station and reported the matter.
  14. Francis, the Accused was arrested on a Saturday morning; the child was called she explained what happened. At the hospital she was given PEP. PW2 identified the Accused as Francis in Court. She did not know him, she used to go to work and she left children at home. The week the incident happened she did not have a house-help and the children remained alone. When they went to his house, there were 4 boys and PW1 identified the Accused person as defiler.
  15. In cross examination PW2 stated the she sells clothes; and that day, she left the children alone in the house. They went to school and on coming back were alone in the house. PW2 said PW1 was defiled twice. She said what PW1 told her and Z is the one who opened the door for Francis. The incident took place in a span of 1 week. The child had been bleeding. The child woke her up to bathe and she said she was in pain. It is Zeitun and not K who told her what transpired. PW2 kept asked PW1 what happened she kept mum. When they went to Mathare hospital the child was tested. The MSF is in Mathare. The Ambulance was called while they were in Mathare and it took them to MSF.
  16. When PW1 had tears the doctor that she would heal and gave her medicine for 1month. PW2 administered the drugs to PW1. The P3 Form was filled in Nairobi area. After the arrest, the Accused person's family came home and talked to her husband but not to her. PW2 stated in her statement she referred to the Accused person as boy. The children used to play with the Accused and they called him boy. It is after the arrest that PW2 knew the Accused was called Francis. She said that she told the child that she would buy her a bicycle if she said the truth in Court since she was terrified. When, the Accused defiled her, he threatened to beat her if she told anyone. She went to Mama Lucy Hospital with the child. PW2 identified the Accused person both at his house and at the Police station.
  17. PW3 Sadia Hassan Abdi from Mama Lucy Kibaki Hospital. On 4/11/2019 she saw ZA aged 4 years 6 months who reported to have been defiled by a neighbor well known to her. She initially went to Mathari MSF and came for P3 Form at Mama Lucy with her parent. 1<sup>st</sup> incident was 10/6/2019 & 2<sup>nd</sup> was 13/6/2019 specific time was not known. She examined the genitalia which was normal but abrasion was on the vulva specifically Labia Majora. There was tear of the hymen at 7 o'clock abrasion of the urethra and discharge noted. The P3 Form showed she was put on medication and there was no physical injury. P3 Form -PMFI-1
  18. In cross examination, PW3 stated the patient was examined at MSF Mathare and not at Mama Lucy and hence the reason for no out-patient number. PW3 explained that they examine patients but also the timing matters. PW3 did not examine the patient based on physical findings but she had no reason



- to doubt findings from MSF and she also confirmed with the patient. Since time lapsed even if she did physical examination the finding would not have been the same.
19. She filled what was in the PCR Form after interviewing the child. It was a month ago and the minor had no other infection. The P3 Form verifies if a person is injured or not. The patient was brought to her after a month. PW3 stated that if a minor of 41/2 years is defiled by an adult the findings are normally different depending on the level of penetration and that is why she talked of lacerations in the urethra. A child would walk but with difficulty but heal with time. If the injury is/was not grievous one would not be admitted.
  20. On 28/1/2020, the matter proceeded before Hon E. Kimilu PM after the prosecution presented 3 witnesses. Section 200 CPC was applied. Mr. Molla for the Accused person sought that the matter/hearing starts afresh, the [new] Court was to observe demeanor of the witnesses and he was the same Defense Counsel.
  21. The Prosecution objected to the application of the matter starting de novo because the victim a child aged 41/2 years testified and was cross-examined. It took a lot of time to get evidence from the minor and minors get a memory lapse. The Investigation Officer was on transfer and only 2 witnesses were remaining. The Investigation Officer's transfer would bring challenges in recalling the witnesses from his new station.
  22. The Defense Counsel, Mr Molla stated that if the offence happened, the minor could not forget. They suspected that the minor was coached on her evidence. There would be no prejudice if witnesses were recalled. The Trial Court ruled that Defense Counsel was present during trial and cross-examined all witnesses who testified on all issues. There was no new issue[s]the Defense wished to raise in further cross-examination and as [confirmed] by the Court record. The Court appreciated that the Complainant was a minor who must have been traumatized by the alleged commission [of the offence]
  23. The finding of the Trial Court was that the Defense did not advance persuasive grounds for a de novo hearing and the matter was to proceed from where it reached. The Court appreciated the victim is a minor who must have been traumatized by the alleged commission [of the offence] The Defense Counsel cross-examined the witnesses on all issues and there were no new issues the Defense wanted to raise in further cross-examination. Right of appeal of the Ruling was granted 14 days thereof.
  24. PW4 CPL Christantus Ondieki from Ruaraka Police Station testified on 15/6/2019 at 9. 30am he accompanied colleague PC Irene Luseno and with PC driver CPL Muthamia and PC Asugo all went to Mathare-North behind Naivas Super market along Outer ring Road. PC Luseno called victim's mother [PW2] for directions and on arrival she pointed to the door of Accused person's house. The Complainant lived on 2<sup>nd</sup> Floor and the Accused person the 3<sup>rd</sup> Floor. He knocked the door and a young person opened who looked scared to see strangers, he tried to close the door but they entered the house. Inside was a mattress on the floor and in the inner room he found 3 young men and there were 2 beds. He woke all men up and they were 4 men. He was not able to identify the suspect and he sent for victim/minor PW1. She came and he asked her who among the 4 men defiled her and she promptly pointed to the accused person. He informed him why he was being arrested and escorted him to the vehicle and took him to Ruaraka Police Station. He recorded his statement. He identified the Accused person in Court as the one he arrested.
  25. In cross examination by both Defense Counsel Mr Molla and then Mr Kimosop, the witness reiterated his examination in Chief, they went to Accused person's house, directed by victim/minor's mother PW2 and on entering the house which was within same building as victim's home, found 4 men and the minor pointed to the Accused person and he arrested him. He further stated that they arrived at the house at 6 o'clock, inside the house, the outer room had a mattress on the floor Inner room had 2



- rooms. The minor was brought by her mother. The victim spoke Swahili fluently, after Accused person was identified, he gave him his name. PC Asugo handcuffed the suspect. He was the Arresting officer. The victim was walking.
26. PW5 PCW Irene Wabukala, from Industrial Area Police formerly from Ruaraka Police Station. On 14/6/2019 while at the Gender desk at the Station, [PW2 and PW1], a female juvenile accompanied by her mother and came to report that a minor had been defiled by a person known to her who is also a neighbor. On 13/6/2019, she realized her daughter had a problem in her private parts. She told her the perpetrator had defiled her at his house. She took her to hospital. She took her statement and referred her to MSF and called MSF hotline and they were picked. The victim was issued with a PRC Form and she issued her with a P3 Form. She went to Dr Maundu but he could not fill the P3 Form. She went to Mama Lucy Kibaki Hospital for filling of P3 Form in the company of Defense Lawyer. The nurse told them that the P3 Form ought to be filled in by the Medical Officer who examined the victim. They went to MSF Hospital and after deliberations the P3 Form was filled in.
  27. PW5 accompanied colleagues on 15/6/2019 at 6.30am to the Accused person's house. With the help of victim's mother, they went to the suspect's house and found 4 men. The Complainant was called and she positively identified the Accused person and they proceeded to the station. The suspect admitted he knew the victim but he denied committing the offence.
  28. PW5 produced the ID Parade Form -Exhibit 2 that showed that the victim identified the Accused person among 8 suspects by touching him. The suspect changed positions and the victim identified him. The Complainant's mother brought the Child Notification of Birth Card Exh 3 [a] and Immunization Card Exh 3 [b] The date of birth of the victim was 24/8/2014.
  29. In cross examination, PW5 clarified that mother of the victim and victim reported on 14/8/2019. She had taken the child to hospital in 13/8/2019. PW5 recorded the mother's statement, the victim was taken to hospital before reporting. She advised them to seek treatment at MSF. They did not have documents. She called MSF hotline and directed them to Hospital. Initial treatment was at Mathare hospital. They were referred to MSF and I referred them as well for purposes of filing of PRC form. PW5 confirmed she was part of team during arrest of the suspect and was in the company of PC Ondieki, PC Asugo, and Police driver accompanied the mother of the victim directed them to suspect's house. She called her on phone. In her Statement she indicated, they were shown the Accused door by the victim but were directed by the victim's mother.
  30. The Report had stamp but not dated. At the time of arrest, they knocked the door and they requested to see Francis. The victim's mother had asked for the name of the suspect. The victim knew the suspect as 'Boi'. The mother asked who 'Boi' was among the 4 men found in the house. They introduced themselves as Police Officer. She denied her Statement. The Accused admitted he knew the victim but denied the offence. The house had 2 rooms. The outer room had a mattress on the floor and inner room had 2 beds. The boys were asleep. The minor came in with her mother and positively identified the Accused person as her perpetrator. The minor was walking and asked her to identify suspect. PC Ondieki as well as asked victim to identify suspect among the four. She positively identified the Accused in his room.
  31. At the Police Station, Identification parade was conducted on 16/2/2019. They had 8 members of the parade and they were in variance of physical structure and appearance. The Accused person had a jacket at first then later he removed the jacket. The victim identified the suspect in both rounds. The ID parade was on 16/6/2019 and the stamp on the form is on 8/7/2019 and the ID parade [Form & entry] was not forged.



32. The P3 Form was issued on 15/6/2019 on the day of arrest and had the stamp of the station. She accompanied mother and daughter to Nairobi Area. P3 Form was filled in at Mama Lucy Hospital and it was after plea was taken. PW5 was not aware of any compensation by victim's mother, she took the witness and did her investigations.
33. PW5 did not know the victim prior to the case. On 15/6/2019, they were led by victim's mother to the Accused's house. The victim and elder brother woke up. K followed them upstairs, they entered the house with Ondieki; PC Asugo and victim mother were at the door together with K. The victim came walking PC Asuga handcuffed the Accused.
34. PW6 Salano Barbara Kere, Clinical Officer with MSF San Frontier, with Gender Based Recovery Centre in Mathare. The victim's mother had medical certificate & PRC of Zeituni Ajob. Her date of birth was/is 24/8/2014. She was seen on 14/06/2019 in the company of her mother at around 11am and presented history of being sexually violated on 13/6/2019 at unspecified place in Mathare North by one known person. "Nikakataa akanivuruta akanipeleka kwao na kunifanyia tabia mbaya. Aliigiza kitu yake ya kukojoa hapa [pointing at her genital] vile alimaliza alinipaguza na tissue na kuniambia nisiambia mum"
35. At the time of examination, she appeared calm, all her vital signs were normal and on physical examination she was normal. On genital examination, there were vulva abrasions on labia majora bilaterally with a tear posterior porche. The vagina had a creamish mucal discharge and urethral abrasions. The hymen was reddened with a minor notch at 7 o'clock position. Anal exam was normal.
36. Laboratory tests were done. She was put on treatment for prevention of HIV, PEP Antibiotic cover for prevention of sexual transmitted infections and she was advised to continue with Counselling and PW6 produced the Medical Certificate as PExh 4 & PRC Form as PExh 5. She prepared and signed the document on 14/6/2019. Additional Information on the PRC, the victim did not remove clothes as she had taken a bath. There was no presence of spermatozoa seen on vuval swab.
37. In cross examination, Defense Counsel produced in Court a Notice of alibi defense and the Trial Court ordered the same be filed formally in Court.
38. PW6 stated the victim presented physical signs and emotional reactions compatible with violence. This was consistent with victims of assault especially when they do not understand the extent of violence and degree of penetration. The patient was traumatized she said she was assaulted on 13/6/2019.
39. PW6 relied on mother's history, survivor's testimony and physical exam and concluded that she was sexually assaulted. PW6 confirmed to be a registered Clinical Officer with Clinical Officers Council of Kenya. The genital injury depended on the degree of force and there were abrasions on labia majora PW6 confirmed she worked for 10 years and she had interacted with victims below the age of 5 years. repeated the injuries observed as recorded in the medical documents and stated in the examination in chief. The baby stated the perpetrator wiped her vagina with tissue after violation. The absence of spermatozoa did not rule out sexual violation.
40. PW6 stated the penetration might have been partial as per injuries in this case were not caused by a finger. An object inserted in a vagina can cause injuries whether penis, object or finger can cause injury. She had never heard a mother hurt a child vagina while taking a bath. She advised Counselling and she did not do follow-up to confirm whether they went back. She did not know the victim and/or her mother prior.
41. PW7, Emily Okworo, Government Analyst from Government Chemist and holds Master's degree in Chemistry from U.O.N. On 15/7/2019 acted on request by P.C. Irene Mukali of Ruaraka Police



Station received vaginal swab in khaki envelope marked -H; belonging to the Complainant Z, a luminous green under pant, yellow flowered patch in khaki envelope labelled – marked Z.A. On 15/7/2019 at the Lab of Government Chemist, another swab was obtained from Francis Onalo who is the Accused. These were the findings On examination, the vaginal swab had neither semen nor blood stains. She produced Report -PEXh 6 [a] & Memo PEXh 6[b].

42. In cross examination, PW7 confirmed there was no semen stains noted from the samples availed and could not state there was no defilement as she dealt only with items submitted for analysis.
43. The Defense Counsel applied that the Trial Court recuse itself from hearing the matter. The Trial Court ordered Formal application to be filed within 7 days. The Prosecutor left the Trial Court to give ruling. The Ruling was delivered on 19/5/2022. The Trial Court did not recuse itself.
44. The Defense Counsel applied for recall of PW6 under Section 146 & 150 of Evidence Act and cited case-law to aid the grant of the application for recall of witness. The application to recall witness PW6 was granted.
45. PW6 Barbara Kere, Clinical Officer with MSF San Frontier, Mathare East Leigh who was recalled and asked if an object/finger can cause the injuries in the P3 Form and she answered in the affirmative yes it can but.... PW6 was also asked; if a mother is washing a girl and the finger goes in if it can cause the same injuries and PW6 indicated that an object or finger with manner of force can cause said injuries not necessarily from a mother.

The Trial Court found prima facie case and the Accused person was placed on his Defense.

### **Defense Case**

46. The Accused person Francis Onalo Siele testified and made sworn statement and he produced Student ID KCA University; Defense Exh -1. He lived with his brother Japheth Tabo, Kelvin Mwaniki & Anthony Otiato. On 10/6/2019 a Monday he had 2-3-hour classes that morning. He left home for university at 7am with Anthony Otiato; the 1st class was from 9am-11am; the 2<sup>nd</sup> Class was from 2 pm and he produced Signed Sheets to confirm Class attendance as Defense Exhibit 2[a] & 2 [b] and his name No 7 in the Sheets. After class he went for lunch upto 2.30 pm and joined Christian Community and after Bible Study went home 6.30-7pm. Anthony and Wabwire walked home he stayed to type songs for choir practice and he got home at 9.30 pm.
47. On 17/6/2019 he was arraigned in Court and 24/6/2019 he was in custody. On 13/6/2019 he had 1 class from 8 am and left home with Anthony at 7am at 11am he went to work in Constance Mwenesi's shop at Allsops Outer ring and closed at 9.30pm walked home. He denied commission of the offence and stated they fixed him. He did not know the child or the mother.
48. In cross-examination by Prosecution, he reiterated facts as stated in examination in chief. He was a student at KCA University admitted Sept 2018 He had no letter of admission but he presented Student Card He studied Procurement & Logistics and confirmed the 2 class sheets. The sign Sheet was not on letterhead of KCA but it was written University. The Sign Sheets were of different classes He was No 8 on the sheet of 17/6/2019 but he did not sign he was arrested but the Sign Sheet shows different units and different Lecturers.
49. DW2 Erick Otieno an employee at KCA University Assistant Registrar and produced Staff Card DMFI -2 [a], signed Sheet of Class Attendance that was system generated with KCA logo with format for details and signature of the student to confirm attendance. The Sign Sheet for Attendance is generated through ERP and it was issued on 13/5/2019 and belongs to KCA University. The accused person was/is No 7 Francis Omolo Siene.



50. In cross examination he confirmed, he was authorized to testify in Court and signed Class Attendance sheet emanated from the KCA University and was filled by students in Class with Lecturer. He checked the Sign Sheet as of 2019 and could not trace it. He produced what he was asked to produce under the Notice to Produce. DW2 stated that he was not in the class.
51. DW3 Anthony Otiato, cousin to the Accused person and they lived together from 2018-2022. In 2019 he was in KCA university and produced Student ID DExh 4. On 10/6/2019, he woke up 6.30 am prepared and went with the Accused person to the University. They attended morning Prayers at 8 am and parted to their respective classes. Each had 2 classes; 8 am- 11am and 11am-2pm. At 11am the Accused person came to his class and they went home. After lunch they left home and went to prayers, 'jumuiya' cell groups at School. From 4pm and finished at 7 pm. He left with Francis & Wabwire and got home at 8 pm. Bernard and Francis copied songs and he prepared supper and Bernard left at 10 pm. Francis never left the house.
52. On 13/6/2019, the accused had 1 class after going for morning devotion. After class, he came and DW3 gave him keys and went home. His classes ended at 1-2 pm and he remained for choir practice. He called Francis [Accused] who said he was at Connie's where he assisted, he went home left Francis there who came later at 8 pm. The charges are not true.
53. In cross-examination, DW3 admitted that he took Business Management & Bachelor of Commerce while Francis [accused person] studied Procurement & Logistics and he would not know whether he was in class or not.
54. DW4 Bernard Wabwire HR Associate but in 2019 he was a student at KCA and produced student card DExh 5. On 10/6/2019 as Chairperson KCA Catholic Association he conducted 'jumuiya' meetings from 4.30 pm -6.30 pm he accompanied Francis & Anthony to their house at 6.30 pm for Bible Study. They went to Francis home as he had a computer and they wanted to print songs for prayers. He knew Francis since 2018 and as a member of the Association. He did not know what he was in Court for until he came to Court. The evening of 10/6/2019 I left Francis and Anthony in the house.
55. In cross examination he admitted that he did not have the 'Jumuiya' Meeting Program, the same was available at the University. He had since graduated. He confirmed there were hours he was not with Francis.
55. The Defense hearing was closed under Protest after the Defense took over a year to avail All witnesses.
56. On 6/6/2022, the Trial court delivered judgment and found the Accused person guilty of the offence of defilement as charged and later sentenced him to 30 years imprisonment.

### **Petition Of Appeal**

57. The Petition of Appeal was filed on 21/12/2023 raised 22 grounds condensed as follows;

### **Breach Of Appellant's Right To Fair Trial**

58. The Trial Court denied Appellant Constitutional and unalienable right of Fair Trial under Article 25 & 50 [2] CoK 2010 denying adequate time and facilities to prepare his Defense and the right to adduce and challenge evidence and denying the Appellant an opportunity to call 2 more witnesses one being an expert witness. The Prosecution was granted several adjournments to avail its witnesses while the Defense was denied a single adjournment to avail witnesses. This was discriminatory and contrary to Article 27 of CoK 2010



### **Trial Court Had Actual & Apparent Bias**

59. The Trial Court demonstrated through out the Trial actual and apparent bias against the Appellant person rendering the entirety of the fair trial unfair and moved from the seat of an impartial and independent umpire and getting into arena of an active adverse party by;
- a. Implying facts in the judgment that were never raised by Prosecution
  - b. Making substantive application and determination within the judgment on certificate of electronic evidence when the Prosecution waived such right by conceding admission of the evidence;
  - c. Selectively recording evidence presented leaving out important facts favorable to the Accused person
  - d. Appellant's breach of bail and bond terms during Corvid and was locked up in a warrant of arrest despite confusion due to Chief Justice directions.
60. The Trial Court's Ruling of 16/6/2023 imputing Accused person's Counsel's conduct as improper and unprofessional claiming it is the advocate who advised the client to ask the Court to recuse itself from the matter and the Trial court refused to recuse herself perpetuating bias through-out trial and breaching the Appellant's right to fair trial.

The Trial Court found the Prosecution ought to be given notice evidenced by notice to the prosecution is a breach of accused person Constitutional right.

### **Burden & Standard Of Proof**

61. The burden of Proof was shifted to the Defense. The Trial Court struck off Defense Exhibit 2[a] & [b] as exhibits even though a consent was entered for production of exhibits. The Trial Court ignored the weighty conduct of PW1 & PW2 who failed and deliberately refused to avail PW1 for examination despite the Court having issued an order for examination of the minor at Mama Lucy Kibaki Hospital. The Trial Court failed to consider/find contradiction and inconsistencies within testimonies of Prosecution witnesses contrary to the charges and evidence on record. The Trial Court did not consider the chargesheet was defective and the charges were not proved as against the Appellant as evidence adduced by PW1 & PW2 as to the date the alleged offence occurred only related to 1 day and the Prosecution did not lead evidence of offence committed on 2 separate dates.
62. The Prosecution did not prove its case beyond reasonable doubt. The Identification parade was a fabrication as the dates on the ID Form were not clear and the stamp was blurred. On penetration PW6 evidence gave possibilities of such injuries imposed by object or finger and PW7 Government Chemist analyst evidence was that the vaginal swab did not contain bloodstains nor semen.

### **Alibi Defense**

63. The Appellant took issue with the Trial Court finding that the defense of alibi ought to be evidenced by notice to the Prosecution and early enough yet the alibi notice was before PW5 testified, is a breach of right to fair trial particularly the right to refuse to give self- incriminating evidence and to remain silent as provided by Article 50 [2] [i] & [l] CoK 2010.
64. The Appellant objects to the finding that the alibi defense was not corroborated and sufficient and without any evidence from the Prosecution that the Appellant was at the scene of crime.



### **Evidence Recorded By Prior Trial Court**

65. The Appellant submitted that the Trial Court failed to warn herself taking into account provisions off Section 200[4] CPC she was not the Trial Court that took evidence of the minor and her mother and this prejudiced the Accused person.

The Appellant's trial was unsafe as the Trial Court failed to allow the matter start de novo under Section 200[3] CPC.

66. The Appellant sought prayers the appeal is allowed, the conviction and sentence of the Appellant is quashed and set aside and Appellant acquitted forthwith in the alternative, a new trial be ordered before a different Magistrate.

67. Both Prosecution/ODPP & Defense Counsel for the Appellant filed written submissions and made extensive oral submissions for and against the grounds of appeal raised in the Petition for Appeal.

### **Analysis & Determination**

68. This Court has considered and outlined the evidence adduced at trial in detail as it is the evidence on the Trial court record that is the subject of various grounds of appeal. The Court also considered the ODPP and Defense submissions and pleadings from interlocutory Applications filed and Rulings thereof. The issues that emerge for determination are;

1. Did the Prosecution discharge its legal duty of burden and standard of proof beyond reasonable doubt?
2. Did the Trial Court exhibit during trial actual and/or apparent bias instead of carrying out duty in a judicious manner?
3. Should conviction and/or sentence be set aside or appeal upheld?

69. This Court being the 1<sup>st</sup> Appellate Court, its duty is as set out in the case of *Okeno v Republic* [1972] EA 32 as follows:-

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

70. In discharge of legal burden and standard of proof, in criminal case the burden of proof solely rests with the Prosecution.

71. In *H.L[E] Woolmington v DPP* [1935] A.C 462 pp. 481, viscount Sankey L.C held that:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defense of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence



given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

72. The standard of proof is proof beyond reasonable doubt. According to Lord Denning on what is proof beyond reasonable doubt in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated that:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

73. The ingredients of defilement are highlighted in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where the court stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

74. The prosecution must prove all the three elements of defilement in *George Opondo Olunga v Republic* [2016] eKLR, that:

“The ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim”

75. PW1 testified on the events that led to the offence. The Trial Court conducted *voire dire* examination and though she understood to tell the truth, she gave unsworn statement. Her testimony is that they lived in the same building as the appellant. They were playing on the balcony when the Accused person carried her on his shoulders to his house. PW1 stated partly in Kiswahili, that the Appellant undressed and removed her pant and had carnal knowledge with her. When she left, she told her Mom at night when they were going to sleep that the Accused ‘alinifanyia tabia mbaya’. Her Mum said she would call Police in the morning which she did. She went to hospital ‘nikapimwa susu’ [points to vagina] She felt pain ‘akinifanyia tabia mbaya’ she cried.

76. The Court of Appeal in *PON v Republic* [2019] eKLR had this to say on direct evidence;

“In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased meet her death. There is no such evidence hence the recourse to circumstantial evidence...”



77. PW1 testified and gave direct evidence which was subjected to cross-examination. The complainant PW1 was a child of tender age and under Section 124 of the Evidence Act, her evidence required corroboration as a matter of law. Evidence Act [cap 80] Section 124 provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act [Cap. 15], where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

78. The evidence of PW1 was/is corroborated by PW6 who examined PW1 and filled the medical documents produced in Court as exhibits. PW6 stated that on genital examination, there were vulva abrasions on labia majora bilaterally with a tear posterior. The vagina had a creamish mucal discharge and urethral abrasions. The hymen was reddened with a minor notch at 7 o'clock position.

79. In cross-examination by the Defense Counsel and later upon being recalled by the Defense; PW6 stated that ‘if a mother is washing a girl and the finger goes in if it can cause the same injuries and indicated that an object or finger with manner of force can cause said injuries not necessarily from a mother.’

80. The evidence of PW2 mother of PW1 stated on 13/6/2019, PW1 was bleeding on her private parts and was raptured. On asking her twice, she remained mum. She washed her she went to school, another day she said Mum ‘bado chuchu yangu inatoka damu’. Just within the week on a Thursday they went to sleep and at midnight she said she was in pain. She woke up and washed her. As she bathed her and checked her vagina it was torn on the lower side. She kept mum. When she became hostile she said the boy Francis from upstairs called her but she refused, he pulled her and did bad manners. He put her on the mattress and then removed his chuchu [dick] and put it in hers.

81. Section 2 of Sexual Offences Act describes what constitutes penetration;

“partial or complete insertion of the genital organ of a person into the genital organ of another person”

82. The 1<sup>st</sup> Trial Court conducted a "voir dire" examination to determine if the child understands the nature of the oath and the seriousness of testifying. This ensured the child's testimony is reliable. It is on record that the said victim Z.K. is a girl of tender years who understands oath and that “lying is bad and God burns those who lie.....People come to Court to tell the truth...”. The 1<sup>st</sup> Trial Court examined PW1 and she gave unsworn statement.

83. The evidence on record by PW1 PW2 & PW6 cumulatively confirms penetration, carnal knowledge of PW1. Whereas the injuries depicted during examination by PW6 could be occasioned by an object or finger being inserted, no such evidence was adduced by or through Prosecution witnesses. The allegation that the child would have been similarly injured by her mother inserting a finger in her genitalia during washing her, this Court finds though a possibility it is not probable because if she was hurting and told her mother the 1<sup>st</sup> time and on being washed, she was injured, it is not reasonable in the circumstances that PW1 would have trusted and agreed to be washed again and possibly injured by her mother if she was already injured the 1<sup>st</sup> time. If as suggested she was injured the 2<sup>nd</sup> time, PW1



would not have implicated the Accused person of the 4 men in the house when she identified him during his arrest.

84. Secondly, it is alluded on record that the Complainant was couched, it is not clear by who and for what purpose, the evidence by PW1 is that she, her sister and brother went to play on the balcony where the Appellant and others lived, the Appellant showed her how to use his computer, and played computer games. The evidence on record by PW1, is that the Accused's house had 2 beds, a table and computer. It is more than a coincidence that the Arresting Officers, PW4 & PW5 found 2 beds and a mattress in the said house just as PW1 testified. This was a place the child knew well and did not conjure up the incident[s].
85. Thirdly, there was no evidence of prior circumstances or situation between PW1 and her family and the Accused's family/housemates depicting malice, misunderstanding, dispute or any ongoing bad feeling between them as neighbors to necessitate vendetta, settling scores or frame-up by PW1.
86. PW1's evidence on record is of graphic details and not a couched or conjured story more so that one wonders why of the 4 occupants/men in the house, when Arresting Officers arrived and asked PW1 to point at the perpetrator, she pointed at the Appellant only. All these factors do not cast doubt on the fact of carnal knowledge of PW1 but instead fortifies PW1 as truthful witness.
87. The age of PW1 was determined by testimony of PW2 her mother and PW5 the Investigating Officer who produced birth notification form and child immunization card Exh 3[a] & [b] confirming PW1 was born on 24/8/2014.
88. With regard to identification of the Appellant, PW1 Testimony on record confirmed that they lived as neighbors with Appellant in the same building, Appellant lived upstairs of her home. They played on the balcony, the Appellant had a computer and prior to the incident, PW1 went to Appellant's house and he taught her computer games. On 15/6/2019, PW4 & 5 went to arrest the suspect, PW2 gave them direction and on arrival, PW1 pointed to the Appellant. PW1 also stated that the Appellant was also called 'Boi' So the Complainant and Appellant were neighbors and had previously interacted and therefore it is a question of Identification by recognition of the suspect/Accused person. 89. In the case of Anjononi and others v Republic [1989] KLR, the Court of Appeal held that  

“recognition on of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”.
90. PW5 testified as to identification of the Appellant in this case, that an I.D parade was conducted with 8 persons, inclusive of the accused person. The conduct of ID parade was contested by Defense Counsel on the basis of being a fabrication, that it did not take place. The allegation was/is reinforced by dates and stamp for Ruaraka Police Station was said to be 8/7/2019 after the Accused person was arraigned in Court thus being inconsistent. This Court finds that the ID parade is challenged and the ID parade Officer did not testify or PW5 confirm she conducted the ID parade so as to confirm if the ID parade was conducted in accordance with the Force Standing Orders or not. In the absence of identification Parade Officer testifying and PW5 did not detail conduct of ID parade, the probative value of the ID parade document is negligible.
91. The defense challenged identification by Identification parade vide Court of Appeal case; Reuben Lukuru v Republic [2019]eKLR, the Court stated the sham identification parade considered to be of no consequence, cast doubt on the prosecution burden of proof beyond reasonable doubt as to the identification of the Accused person charged with committing defilement.



92. In the instant case, taking the circumstances that the victim knew the accused and he lived just a floor above them and they [with other children] played on the balcony, not once but from the evidence on record more than once. From the circumstances, PW1 had been their house before. Furthermore, the accused used to show the victim how to use a computer in his living room, it is not a case of identification but of recognition.
93. Although recognition is more assuring, it is nevertheless appreciated that sometimes mistakes may be made even in the case of recognition. However, from the evidence on Trial court record that PW1 knew the Accused person, had interacted with him before, she reported the incident to her mother and repeated the same information to PW6 and identified the Accused person to the Police there is no room for mistaken identity. PW1 told her mother it was Francis who lived upstairs who sexually assaulted her.
94. The Defense raised legal issues to impugn the Judgment and conduct of the Trial Court. The Defense took issue with admission and evaluation of Alibi Defense The Court in Patrick Muriuki Kinyua & Another v Republic Nyeri Criminal Appeal No. 11 of 2013 [UR] held that:
- “an alibi is a plea by an accused person that he was not there [was not present] at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.”
95. The burden of disproving the defense remains with the prosecution as was held by the Court of Appeal in victor Mwendwa Mulinge v Republic [2014] eKLR, thus:
- “It is trite law that the burden of proving falsity, if at all, of an accused’s defense of alibi lies on the prosecution.”
96. Despite the onus solely being on the prosecution, the defense of alibi must not be incredible. Odunga J.[as he then was] in Onyancha Felix Omboga & another v Republic [2019] eKLR stated:
- “...While the burden of disproving an alibi falls on the prosecution, there must be some credibility to the defence. Any wild suggestion made by an accused, in my view, cannot be seriously treated as an alibi so as to exonerate an accused...”
97. The Court of Appeal in the case of Ernest Abanga Alias Onyango v Republic [CA No.32 of 1990](#) stated that;
- “In Rafaeri Munya alias Rafaeri Kibuka v Reginam [1953] 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”. This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it’s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.



98. The South African Court in the case of Ricky Ganda v The State, {2012} ZAFSHC 59, Free State High Court, Bloemfontein where it was held that:-

“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality.....the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”

99. The Trial Court record confirms that the Defense Counsel served the Prosecution and the Court with the notice of alibi defense on 25/5/2021 during testimony by PW6. The ODPP noted service of alibi was after 2 years since trial started and relied on the case of R v Sukha singh s/o Wazer Singh & Others 1939 6 EACA145....

100. The Defense hearing consisted of 4 Defense witnesses who accompanied and were with the Appellant at KCA University on diverse dates attending classes and extra-curricular religious activities.

101. The contested Sign Sheet for recording class attendance by DW2 with KCA logo and stamp and the Appellant’s name prescribed in the Form. The Prosecution objected to the said Form as it lacked the Certificate prescribed under Section 106 of the *Evidence Act* as it was system generated copy. However, the Defense Counsel confirmed by virtue of Section 69 of the *Evidence Act* a Notice to produce was served on KCA University. DW2 confirmed he was authorized by the University testify and produce the Sign Sheets. It was later produced in Court by Consent of both Prosecution & Defense and hence there was no prejudice. However, it is not the legal position that a Court of law may not evaluate consider documents produced by consent. The Court considers all exhibits in terms of admissibility and reliability and probative value.

102. However, the defense alibi adduced, its weight was in question of probative value. The exhibit produced as “DMFI 2 [a] and [b]” lacked the required certification given they were electronic evidence. Subject to the *Evidence Act* [Cap 80] Section 78A:

“a. Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

103. The said exhibits 2[a] was dated on 20th of May 2019 whereas the incident had occurred on 10<sup>th</sup> June 2019 was irrelevant to confirm the Accused’s whereabouts. Additionally, 2[b] the attendance list provided had inconsistencies; the lecturer and the course recorded differed with courses taken, whereas the school/institution logo was not clear save for the word ‘University’ without any form of certification to prove its cogency and it being genuine.



104. Suffice is that the contents of the Form confirmed the classes that the Appellant attended and for the period he attended. The other times remain unaccounted for and more importantly, the Defense witnesses were with the Appellant most times but during different times. Therefore, the KCA Class Sheet Form would only confirm the specific lessons the Appellant took and signed on the sheet. The witnesses admittedly were not with the Appellant throughout the days in question when the incident took place. The Sign Sheet was objected to by Prosecution and objection was upheld by the Trial Court and later produced by Consent of both Prosecution and Defense Counsel. The 2 exhibits now admitted by Consent did not confirm the alibi of 10/6/2019 and 13/6/2019 were not confirmed as the classes were specifically at certain periods part of the day and the rest of the day was not accounted for. The alibi defense did not cast doubt on Prosecution case.
105. The Trial court took over proceedings after PW1 & PW2 testified .Court recorded under Section 200[3] CPC, the options available and the Defense Counsel sought the matter proceeds de novo and the Prosecution refused on the basis of minor's age and transfer of the Investigation Officer.
- Section 200 CPC provides;
- [1] Subject to subsection [3], where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
    - [a] deliver a judgment that has been written and signed but not delivered by his predecessor; o
    - [b] where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.
  - [2] .....
  - [3] Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
  - [4] Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.
106. The Trial Court record showed PW1 then 41/2 years old testified halfway through broke down, the Prosecutor sought adjournment to a later date when she testified. With this background, the Incoming Trial Court took into account PW1's age and what she underwent testifying and would be more traumatizing to recall her again and start de novo.
107. The Prosecution objected to recall due to transfer of Investigation Officer, PW1 & PW2 relocated elsewhere as per the evidence on record and probably difficult to get the witnesses. I find the Incoming Trial Court having not known or met PW1& PW2 and she found the evidence on record and she did not change anything but went on from there on or any evidence on record to show that the Incoming Court had any knowledge or information as to the case, interest/connection, the Trial Court had no interest or favor to carry for /with them; instead the Trial Court exercised judicial discretion in the interest of justice took into account child of tender age brought to testify the 3<sup>rd</sup> time and expeditious disposal of the matter, declined recall or de novo hearing.



108. The Defense stated that in the absence of recall of the 2 witnesses the Appellant suffered prejudice. With respect, the Trial Court was on official transfer, the evidence on record was taken in the presence of Counsel for the Appellant who had opportunity to cross examine the witnesses and test veracity of their evidence, the Trial Court record is not contested as manipulated or doctored. The right to recall witnesses is not absolute and herein the Trial Court considered the specific circumstances of the case and PW1's breakdown, was sufficient reason not to recall PW1 especially her tender age. In the absence of any other basis which was not brought before Court this Court finds exercise of Section 200CPC was in accordance with the law and circumstances of the case.
109. In *Joseph Kamau Gichuki v. R* CR. Appeal No. 523 of 2010, cited in *Nyabutu & Another v. R*, [2009] KLR 409, where the Court stressed that;

“By dint of section 200[1] [b] of the *Criminal Procedure Code* a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See *Ndegwa v. R*. [1985] KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded.”

110. The Appellant stated that Trial Court exhibited actual and/or apparent bias by;
- a) Implying facts in the judgment that were never raised by Prosecution- not shown facts that were introduced and were not on Trial Record. The Trial Court evaluated the evidence on record and made findings of fact and the law.
  - b) Making substantive application and determination within the judgment on certificate of electronic evidence when the Prosecution waived such right by conceding admission of the evidence; the Court has jurisdiction to consider all evidence on record and make legal finding and thereafter, the matter is considered under review or appeal. In this case the Court finds that the Student Attendance Sheet computer generated ought to have been produced with certificate under Section 106 b *Evidence Act* but was later produced by Consent and as part of evidence adduced was for evaluation by the Court.
  - c) Selectively recording evidence presented leaving out important facts favorable to the Accused person. The Trial Court recorded the evidence of Government Chemist Analyst PW7 on examination of vaginal swab that had no blood stains and no semen and this evidence is exculpatory yet it is on Trial Court record.
  - d) Appellant's breach of bail and bond terms during Corvid and was locked up in a warrant of arrest despite confusion due to Chief Justice directions. The versions on issuance of Warrant of arrest are varied. The Court record shows, the Appellant missed attending Court and issued



warrant of arrest. The Defense Counsel stated that due to Corvid 19 CJ directions were that Courts were closed but Trial Court stated Courts were open. The Corvid 19 period was one of confusion as normalcy was replaced by uncertainty. So, this Court cannot base the W/A issuance by and of itself as basis of actual or apparent bias.

111. Grounds for recusal are enumerated at Paragraph 21 of Judicial Service Commission [JSC] Judicial Service [Code of Conduct & Ethics] Regulations 2020

Bangalore Principles of Judicial Conduct 2.5

[a] A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where: [a] The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

112. In *Abdullahi Mohamed Omar v Republic of Kenya* [2021] eKLR, the Bangalore Principles of Judicial Conduct defines bias or prejudice as follows: -

“Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way, which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, that sways or colors judgement and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law.”

113. The standard in *John Brown Shilenje v Republic* [1980] eKLR as to whether there was reasonable apprehension of bias sufficient enough to transfer the matter to a different judicial officer. Hamilton CJ quoting the Calcutta High Court decision in *Dupeyron v Driver* I L R XXIII Cal 495 said at p68;

“I am not here concerned with an issue as to whether the magistrate was in fact likely to be partial or impartial and to believe that the accused would have received, I am perfectly prepared to believe that the accused would have received a fair trial at his hands. But the test to be applied in such cases as this has been settled in various cases in Indian courts and I would refer particularly to the judgment of the Calcutta High Court in *Dupeyron v Driver* .....where the judges say:

Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.”

114. In *Alliance Media Kenya Limited v Monier 2000 Limited & Njoroge Regeru* [2007] KEHC 2518 [KLR], as follows:

“In my understanding, the issue of disqualification is a very intricate and delicate one. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice...justice is deeply rooted in the public having confidence and trust in the



determination of disputes before the Court. It is of paramount importance to ensure that the confidence of the public is not eroded by the refusal of Judges to disqualify themselves when an application has been made.”

See also *Erdermann Property Ltd & 2 Others v EACC* [2022] KECA 860 KLR.

115. This Court notes that some of the issues raised herein on bias by the Trial Court were subject of application filed in the High Court and Ruling by Hon.L J D.Kavetsa in High Court Criminal Revision E532 of 2023 delivered on 31/7/2023 which dismissed the application. This Court is of equal, similar and competent jurisdiction as the said Court. Therefore, the matters in this Appeal and/or subject of said Ruling ought to be canvassed in Court of Appeal.
116. The Appellant deposed that the charge sheet was defective as the charges relate to 2 dates 10/6/2019 & 13/6/2019. The prosecution did not discharged burden of proof. The trial Court record confirmed PW2 was informed by PW1 on 13/6/2019 what happened that day, PW6 referred to events of 13/6/2019. The charge was/is not defective as the Prosecution led evidence of at least 1 date.
117. The Appellant stated that the Defense was not fairly treated contrary to Article 27 CoK 2010 as the Prosecution was allowed various dates to present witnesses and the Defense was not allowed to present last 2 witnesses 1 an expert. The Trial Court record confirms, the Defense proceedings commenced on 23/11/2022 DW1 testified; on 19/10/2023, Defense hearing was adjourned by Defense; on 1/3/2023 W/A issued against Accused person later on, W/A was lifted Accused person appeared. On 15/3/2023 Defense Hearing to continue on 6/6/2023, when DW2 D W3 & DW4 testified. The Defense sought adjournment to avail 2 witnesses and the Trial Court took the view Defense Hearing had taken 1 year and closed the Defense case. The lack of grant of adjournment by itself does not connote unfairness. The Trial Court outlined events and process of Defense hearing and of Prosecution which was hampered by transfer of Trial Magistrate hence the delay was unavoidable.
118. The Appellant took issue with the Trial Court that the burden of Proof was shifted to the Defense. The Trial Court considered the ingredients of the offence of defilement against evidence adduced by Prosecution.
119. Age of victim *Kaingu Elias Kasomo v Republic* [2010] eKLR the court held: “Age of the victim of a sexual assault under the *sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape or defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim. In this case the age of the victim was assessed by an expert doctor at Mama Lucy Kibaki Hospital, PW3 by MSF Mathare and the P-3 form which provided the age of the victim to be 4 years old.
120. Penetration of the female genitalia in *Daniel Maina Wambugu v Republic* [2018] KEHC 5656 [eKLR]. The penetration here is by way on male organ [penis into the sexual Organ of the female.
121. Similar views were repeated in the case of *Geoffrey Kioji v Republic*, Crim. App. No. 270 of 2010, where the Court stated:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We, however, hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict



an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

122. It is settled that the prosecution bore the burden of proving guilt beyond reasonable doubt under Section 107-109 *Evidence Act*. Hence, direct and circumstantial evidence prove the commission of the offence and the alibi to establish the nexus and whereabouts of the accused at the time of the incident does not cast doubt to the Prosecution case.
123. Notwithstanding, the defense’s alibi under scrutiny, it was not brought up at the earlier stages of trial, but months afterwards. This raises doubts as to the cogency of the alibi, given the governing principle of alibi as stated by Hon R. Nyakundi J in *Charles Kasena Chogo v Republic* [2019] KEHC 603 [KLR], provides that failure to disclose a defense of alibi at the earliest opportunity to enable the prosecution to investigate it as a serious omission.
124. In support of this right proposition, the court in *R v Sukha Singh S/o Wazer Singh & Others* {1939} 6 EACA 145 held as follows:
  - a. “If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”
125. In this case, the alibi in support of the defense case was introduced two years later, failing to meet the threshold of the law on credibility and reliability.
126. Sentencing is part of judicial process and hearing and determination of the matter by the Trial Court. Sentencing is discretion of the Trial Court that will look at the facts and circumstances of the offence in entirety so as to arrive at appropriate sentence. This position is as in *Court of Appeal Bernard Kimani Gacheru v Republic* [2002] eKLR; *Thomas Mwamba Wanyi v Republic* 2017 eKLR & Supreme Court case *Joshua Gichuki Mwangi v Republic* Petition No E018 of 2023 held that the mandatory minimum sentences prescribed under the *Sexual Offences Act* are lawful and/or Constitutional and therefore courts have no jurisdiction to impose lesser sentences.

### **Disposition**

1. It is to my finding that there was no evident bias or impartiality, given that it is a matter of reasonable apprehension of bias that must be sufficient enough to transfer the matter to a different judicial officer and conduct retrial.
2. In light of the foregoing, it is my conclusion that the offence of defilement was adequately proved by the prosecution to the required threshold.
3. I therefore find the accused guilty of the offence charged contrary to section 8[1] as read with section 8[2] of the *Sexual Offences Act* No. 3 of 2006.
4. The Appeal is dismissed conviction and sentence is upheld.

**JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN CRIMINAL DIVISION OF HIGH COURT**

**ON 10/7/2025.**

**M.W. MUIGAI**



**JUDGE**

