



**DMK v Republic (Criminal Appeal E025 of 2022)
[2024] KEHC 3663 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E025 OF 2022**

**MW MUIGAI, J
APRIL 11, 2024**

BETWEEN

DMK APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against conviction and sentence of 20 years in the case of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act 2006, decision of the Chief Magistrate’s Court at Mavoko Law Court dated 22nd February, 2022 by Hon B. Kasavuli)

JUDGMENT

Background

1. The accused person was in the trial court charged with the offense of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act 2006 and in the alternative committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act 2006.
2. The particulars as per the charge sheet were that the Appellant on the on 16th day of June 2016 in Athi River Sub-County within Machakos County, intentionally and unlawfully caused his genital organ (penis) to penetrate the female genital organ (vagina) of one RK .
3. The particulars of the alternative count were that the Appellant on the on 16th day of June 2016 in Athi River Sub-County within Machakos County, intentionally and unlawfully committed an indecent act by allowing his male genital organ (penis) to come into contact with female genital organ (vagina) of one RK .
4. The substance of the charges and every element were read to the Appellant in a language that understands and was asked whether he admits/denies.
5. The Appellant pleaded not guilty and the matter went to full trial.



Prosecution Case at the Trial Court

6. The prosecution case was anchored on the evidence of eight (8) witnesses.
7. PW1 was RK . She testified that on 5/6/2016 she was at home at 11:00P.m. with the kid to her step mother and that they were asleep in one room. PW1 slept on the seat in the sitting room. Testifying that the accused/Appellant went and found them asleep. She told the trial court her other siblings were sleeping on the floor at the sitting room. That the Accused/Appellant knocked the door. It was her testimony that her step mother called C opened the door. Appellant talked to her (C). PW1 heard him tell C to leave and he paid a motorcycle to take her away. Testifying that C boarded a motor cycle and left with her small child.
8. PW1 slept and the Appellant woke her and asked if she would give him. PW1 refused and he said she would give him his thing. PW1 refused and the Appellant told her that she would follow C. PW1 went to open the door. That the Appellant went and held her cloth on the back and pushed her back to the house. PW1 resisted and he pushed her telling him she wanted to sleep. Appellant followed her to the seat. He woke the children and told them to sleep on the bed and she was told to sleep on the mattress on the floor. PW1 had worn a full school dress, maroon in colour. Testifying that he pushed her skirt from below up. PW1 wanted to scream and he held her neck. According to PW1, children heard the scream. CEM the brother heard her scream and asked why I was screaming.
9. PW1 said that dad had strangled her. Testifying that he tried to remove her dress again and she refused. He did it over and over again. Finally, he pushed the dress to her below and also removed her panty. He removed his trouser and shirt and he remained with a vest. It was PW1's testimony that during all this episode the children heard the struggle and never said a thing. Appellant went on top of her and laid on her. He thrust his penis into her vagina. She felt pain. She screamed. He held her throat. That he held his thing by the use of other hand. PW1 just felt pain and she felt him ejaculate. She did not bleed. He went back. PW1 slept. He woke up again and defiled her again towards midnight. She told the Trial Court that her brothers used the blanket to cover their faces. That children woke up at midnight. Testifying that he defiled her twice and four times with the last between 4-5 a.m. she woke up and made tea. She packed food for them to go to school and that one child, J refused to go to school. He wanted his mother. They took breakfast PW1 went with J to his aunt. Appellant asked why they had gone there and told PW1 to return home.
10. PW1 refused and went to school. She told the trial court further that teacher asked CEM her problem. He gave all the information. Police were called and PW1 was taken to hospital in Kitengela. PW1 can read and she stated that the PRC MFI 1 has her name and that she could not recall going to any other hospital and that the document P3 MFI 1 has her name. She was 13 years old when she was defiled. PW1 identified the document that had her name MFI 3 (age assessment). Testifying that the Appellant is her dad and that her biological mum is in rural home. PW1 stated that the Appellant and PW 1's mum differed and he married another woman.
11. In cross-examination, PW1 testified that it was on a Sunday and the following day was Monday. Testifying that the Appellant asked where she had come from. She told him that she had come from C's sister and the Appellant told her to return home. Appellant gave PW1 the key and told her to go to the house. She refused. That J told his mum what the Appellant did to PW1. According to PW1 the Appellant used to drink that even on that day his eyes were red. And that PW1 was told to explain what happened and not to lie to court by C.
12. PW2 was Jeniffer. She testified that on 6/6/2016 she was at school at 9:00 a.m. Appellant's child called RK went to school. She used to go to school to take lunch to her brother CEM. She told her that her



- dad told her to pick her brother CEM and PW2 told her to wait. PW1 did not have shoes. She told PW2 that she left her shoes at home. PW2 told the trial court that the child was dirty, her legs and clothes were dirty. PW2 told her to go and call her brother CEM and told her to pass by with her brother. PW2 talked to CEM. Testifying that she asked why RK wanted him to go home and the complainant said her dad wanted the two of them to go to their biological mum.
13. PW2 said that she used to know the Accused/Appellant, he had a second wife and asked the complainant where her step mother was and she said her dad sent her away at night. According to PW2, the complainant appeared suspicious. PW2 told CEM to open up to her. It was PW2's testimony that the complainant had difficulty in walking. CEM told her that RK (his sister) was defiled. He said his dad slept with her as they slept alone. The complainant said her dad slept with her whole night.
 14. PW2 told her to wait and she did. She told PW1 to hide in a certain church and that she would provide lunch for her. PW2 testified that the complainant said her dad held her throat and raped her. PW1 was feeling pain in her groins. PW2 called community policing personnel. She called Mercy, Kimathi and Josephat and told them what she had heard and they interviewed the complainant who explained what had happened. Police were called the accused had come before the police came. He did not know that complainant had gone to school. He wanted to pay fees and that he wanted to see the child. Complainant was taken to police station. PW2 had known the Accused/Appellant for almost 3 years. They never differed as they engaged good relationship and used to pay fees well.
 15. In cross-examination, it was her testimony that the complainant wanted her brother CEM at 9:00 a.m. PW2 saw complainant coming at the gate i.e. 2 meters away. PW2 owns the school and also teach. At 9:00 a.m. she was facing outside. Complainant was wearing brown dress. She was limping. RK was not her student. According to PW2, the Complainant said the Accused sent her to the school. That complainant said the Accused/Appellant was in the house. Testifying that they were to board a motor vehicle and go to their mum's place. Testifying that it was not during visiting day. That RK used to bring lunch for her brother CEM. Complainant used to go with shoes but on that day she had no shoes. As per PW2 the child looked scared and limped not because she had no shoes but pain. PW2 did not call Accused/Plaintiff. PW1 had not showered. PW2 did not see blood but she saw some fluids associated with sexual intercourse. Testifying further that police went in the evening between 2-4 p.m. she told the trial court that other teachers were in school when police went and that one teacher is a witness in this case and that school is near police station. that RK's step mother knows each other but did not want to associated with this case. PW2 kept the child between 9-4p.m. PW2 did not touch her and that RK ate in school and was taken to the hospital.
 16. In re-examination, it was testified that the complainant said her dad raped her. Saying that her dad told her to open her legs and her dad put her thing into her vagina. PW2 heard report was that she had been raped.
 17. PW3 was Samson Kamwathi. He testified that he is a community policing official and that on 6/6/2016, he was called at 5:30 P.M. by a teacher her name is Jennifer (PW2) and found her colleague Mercy Mahinda inside and that he was told of a child who had gone to school at 9:00 a.m. her name is RK. She was a young child aged 12 years old. That PW3 said RK had gone to see her siblings and she looked suspicious PW2 told PW3 that the child's mood was not good and that the child cried. According to PW3, PW2 said her dad had gone drunk and held RK on throat and removed her panty. That her dad chased away her step mum before raping her. PW3 called OCS and they went to police station. that PW2 had called accused via a phone. PW3 saw the child walking. She was limping. Complaint had a pink uniform. She did not have shoes. Her dress was dirty. OCS sent the motor vehicle. They took the child to Athi River. They interrogated the child in presence of OCS. It was PW3's testimony that on 8th June,2016 at around 7:00p.m. PW3 saw someone using a phone. That



- the person referred to be defilement. This witness told him that he had been told of a lost child by a man called Bosire. PW3 remembered that it was the accused/Appellant she was referring to. PW3 told him to call Mr. Bosire and he did. They found Bosire in Kioko club and PW3 was shown the Accused/Appellant and they arrested him. Accused/Appellant was taken to police. Accused/Appellant had reported that his child had gotten lost.
18. In cross-examination, it was the testimony of PW3 that PW2 called him at 5:00p.m. He went to school immediately within 3 minutes. PW3 was not sure about the time. He found the teacher in the school, Mercy and RK. That the Complainant was looking scared. The teacher told PW3 that complainant was defiled by her dad. Child was interviewed by police. The child was wearing purple dress. PW3 did not examine the complainant. He saw child limping and that her walking style was not normal. According to PW3 the incident is said to have occurred in KMC. PW3 is a community policing officer of Athi River and that they do not have crime areas can reach. They act in good faith. PW3 talked to the complainant's step mother who said Accused/Plaintiff chased her that night incident occurred.
 19. PW4 was Mercy Mbula Chyenze. She testified that on 6/6/2016, she was at work. She was called by PW2, a teacher and went to the school. That in school PW2 told her of a child who had a problem. PW4 saw a child. The child had no shoes and was dirty. PW4 talked to the child. The child said that her biological mum was chased by her dad and that she used to live with her step mum who was chased previous night. According to PW4 the child could not walk well. OCS Athi River went with a car and took her away. PW4 testified that Complainant was taken to the Hospital. PW4 was summoned to go to court. The child used to live in [Particulars withheld] estate. He heard that the Accused/Appellant had been arrested.
 20. In cross-examination, it was the testimony of PW4 Jennifer called PW4 at 4:30 p.m. He saw the child. The complainant could not walk well. PW4 did not open the Complainant's private parts. That the Accused/Appellant's other children used to study in the same school but RK was at a different school. Testifying that the school is in his area of jurisdiction with child but the child lives out of the Jurisdiction which is less than 2 kilometers away. That PW2 told PW4 that the child's parents had a problem. He did not go to the hospital with the child. He handed the child to police.
 21. In re-examination, he testified that he is not the investigating officer of this case.
 22. PW5 was C. He testified that on 6/6/2016 at night at 11:00p.m accused/Appellant went home drunk. They used to leave in KMC. He told PW5 to leave the baby who was 6 weeks old. That the accused/Appellant came and brought a boda boda and paid the motorcycle. PW5 went to her sister's place at Kwa Mongeli. She slept there. at 8:00a.m Complainant went with her son (Josephat). Testifying that RK said she would go for the shops. J remained with PW5. Her last born called Maurine was in School. She came at 2p.m. she told PW5 she had been locked by a teacher. PW5 cleaned her and she slept. PW5 went to school and teacher John (PW2) asked PW5 what was the problem with RK (Complainant). PW5 saw complainant walking style. It was not normal. That RK told PW5 that accused held her and removed her panty and did what he used to do to her (PW1). PW5 went to the child. The child's dress had dirt, the dress had red spots. PW5 did not go to police station. the Accused/Appellant was in court. testifying that the accused/Appellant was PW5's husband for 6 years. That they used to live in harmony.
 23. In cross-examination, PW5 testified that she was chased on 5/6/2016 at 11:00p.m. They had not differed before and that they had been married for 6 years. The Accused/Appellant came and chased her. Accused/Appellant didn't fight. That he found PW5 sleep. PW5 used to operate a shop and that the Accused/Appellant went when shop had been closed. It was her testimony that they used to live with 5 children out of which her's we only two. PW5 told the trial court that she can confirm that RK



was asleep when the Accused arrived. That the Accused/Appellant chased PW5 by force. It was her first time to be chased by the Accused/Appellant. That the Accused/Appellant was drunk. Testifying that she did not tell RK to lie she must have heard when the Accused/Appellant paid the boda boda. There was commotion in the house and she must have woken up. PW5 did not fabricate this case so as to return her former husband. PW5 had no problem with RK as RK used to respect PW5. Complainant told PW5 that Accused/Appellant had sent complainant to take key to PW5 and that she did not realize that she had a problem in walking. That complainant returned to pick her shoes. PW5 was called to go to the school by Mwendu who was alone. She was not with the community policing people. That PW5 found community policing personnel at 2p.m. PW5 saw complainant private parts. She saw blood on her dress. PW5 left the matter with police. Testifying that she had stayed with RK for 2 weeks.

24. In re-examination, it was her testimony that Accused/Appellant had beaten her child called Mwendu who ran away and that she looked at RK's private parts.
25. PW6 was Geoffrey Wagure of Kajiado County. Testifying that he has a degree in health and management system. He has 11 years experience. On 6/6/2016, PW6 was brought a 13 years old child. PW6 examined her. She had school uniform, it was dirty and she claimed to have been defiled by her drunkard dad. According to PW6, her hymen had been broken, there was lacerations in her labia and was negative HIV. Testifying that there was no syphilis, her vagina swab had pus. PW6 signed PW3 on 9/6/2016 which he produced as exhibit 2
26. In cross-examination, it was the testimony of PW6 he works in Nairobi women. PW6 has 11 years experience and is employed by the government. PW6 saw the child on 9/6/2016. PW6 told the trial court that the child was with police officer. PW6 wanted to know if child had been defiled or not. PW6 cannot remember her walking style and that she was in school uniform that was dirty.
27. In re-examination, he testified that he has 11 years' experience and that he has served many people and that he cannot remember condition of the child.
28. PW7 was Dr. Karanja, he told trial court that he is a medical officer with 3 years experience. Testifying that it is for rape/defilement victims. Complainant was RK . PW7 saw her on 6/6/2016 at 8p.m. and that 5/6/2016 at 11:50p.m. PW7 told the trial court that she was defiled by her dad in Machakos that upon examination her vagina had laceration inside, hymen was broken and she wore school uniform that was dirty. That it had not blood nor was torn. According to PW7 there was infection in her urine. They admitted her. PW7 produced the PCR which he had signed EXH.1 and that she went back for checkup and they witnessed her age as 13 years. That the child was 41Kgs, 150cm height and had not repeated any class. PW7's colleague examined her to estimate the age via dental formula. Testifying further that the child had urinated well. PW7 produced the admission sheet, Signed form MFI 4a, discharge summary MFI 4b. and appointment care MFI 4c.
29. In cross-examination, it was testified by PW7 that he saw the child on 6/6/2016. He told the trial court that the child was with 2 police officers. Her uniform was dirty and that no sperm was found in her clothes. PW7 testified that he had seen many such cases. PW7 did not take the cloths of the complainant. She had been referred from Mavoko dispensary. According to PW7 the child was admitted for 3 nights. It was PW7's testimony that hymen was partly broken, anus nor affected and that the complainant reported that on 5th the Accused/Appellant defiled the complainant. That the Accused/Appellant pushed his finger into the child's private parts and then his manhood as confirmed by the findings. Testifying that the child could not tell if a condom was used or not and that no sperm was found and could not have been found. According to PW7 the incident had occurred before.
30. In re-examination, it was testified that the budge was for Nairobi Women Hospital and that the child hereby was defiled on 5/6/2016 at midnight and further that the complainant was cautious.



31. PW8 was No. 83 CPL Florence Ngomoli. She testified that she was previously AT Athi River Police Station and that she investigated this case. Testifying that on 6/6/2016 she was at the police station and that Members of community personnel one woman and one man came to the station with a girl known as RK . That they told her that the child had told the teacher that she was defiled by the father. The teacher called them to school and gave them the child. PW8 told the trial court that she called the child and interrogated her. She told PW8 that on the night of 5/6/2016 the father went home while drunk and chased the step mother and ordered the other children to sleep on the he shares with the step mother. Testifying that Accused/Appellant told RK to sleep on the bed normally used by the other children. It was lamented by PW8 that the girl used to sleep on a couch. Accused/Appellant removed her uniform and underpants, complainant tried to raise alarm but the father attempted to strangle her. The father removed his pair of trousers and pant, parted the child's legs as she lay down and defiled her. PW8 recorded the report in the OB. Testifying that she took the child to Athi River Health Center. They told them that they did not have a laboratory. They took her to Nairobi Women Hospital Kitengela where she was treated. And that she was admitted at the hospital for treatment. It was PW8's that on 8/6/2016 she received a call from an officer at the report office that the father of the child had gone to report that she was missing. PW8 told the officer to take an action against the reportee for the offence he had committed. PW8 took the child from Nairobi Women Hospital and the child identified the father as the perpetrator. That on 9/6/2016, RK was discharged from the hospital. Lamenting that the doctor did an age assessment because they did not share her birth certificate. A P3 form was filled. Stating that they also obtained a PRC Form and discharge summary, which PW8 produced P3 Form and PRC Form. PW8 interrogated the suspect and he said he was drunk and could not recall the events that occurred. PW8 recorded statement from witnesses. PW8 went to where they were living. It was a house cum shop.
32. In cross-examination, it was the testimony of PW8 that the people who accompanied the child went to the gender Officer. That members of Community personnel received a call from the teacher. The victim could not walk properly and that the child had injuries on the body. shows that she had no physical injuries. That the child had uniform, blue in color. It had no stains and the clothes were not torn. The doctor examined her private parts. Accused/Appellant had disagreed with the step mother of the child. Testifying that Accused/Appellant had frequent disagreements with the step mother and that members of Community personnel are witnesses in the case. PW8 visited the Accused/Appellant's house on 10/6/2016 and found neighbours. The house was locked as the Accused/Appellant had chased his family members. Accused/Appellant was staying with his second wife,two children and the victim. That the child witnessed the incident. He saw the Accused/Appellant on top of the victim herein. PW8 did not get into the house and did not find the victim's pant in the house. Incident was the night of 5/6/2016 and took the child to hospital on 6/6/2016. PW8 recorded that there was slight attempt of penile penetration. Testifying that the child was not examined at Athi River Health Center. Telling the trial court that the Accused/Appellant took himself to the police station on 8/6/2016 to report that the child was missing. According to PW8, there was no warrant out for the Accused/Appellant and she did not take the accused/Appellant for medical examination. PW8 did not investigate the Accused/Appellant's report of missing child because she was in their custody and PW8 arraigned Accused/Appellant in court on 10/6/2016. According to PW8 the Accused/Appellant was arrested the night of 8/6/2016 a Wednesday and was brought to court before expiry of 24 hours.

Trial Court Ruling on a Case To Answer

33. The trial court in its ruling dated 12/8/2021 found that the prosecution had proved a prima facie case to warrant the Accused/Appellant be put on his defence.



The Defence Case.

34. The accused person having placed on his defence, gave his defense without calling witnesses.
35. DW1 was DMK He told the trial court that on 2/6/2016 was on a Sunday that he went to work and passed by a construction site. Testifying that he left at 7:00 p.m. and arrived in the house at 9:00p.m. and that he found his child not in the house. DW1 asked her mother who told him his daughter had gone to her aunt Mangeli. According to DW1 he sent fare for her to bring his daughter. The mother went but did not come back for long. DW1 called her but she was offline. DW1 called a boda boda rider who told him that he had dropped her Kwa Mangeli. It was DW1's testimony that the following day he went to Mangeli and while on the way he met his daughter. That his daughter told him that she slept at her step aunt's place. DW1 gave her key to go home and called her step mother but phone was still off. DW1 went to work and returned home in the evening 6:00 p.m. He found his daughter in the house and his other two kids at the door. Step mother had not come back. DW1 told the trial court that he lives with six children. They told him the mother to their siblings had been taken from school at 3:00p.m. Testifying that the following day he went to school and asked about the children and he was told their mother picked them. DW1 went to chief and reported and he was told to wait if they could come. As per DW1 they did not come and on 8/6/2016 he went to police station and reported vide OB No. 45/ 8/6/2016. On 8th he was called and told RK his daughter had been found at Mangeli. DW1 went there and found two men and his wife. He did not find his daughter there and he was escorted to the police station and charged. DWI denied the case stating that he had lived alone with the children and he never defiled them. Testifying that his daughter made this claim thinking he would take her to Meru because she did not want to live with step-mother. The step-mother did not also want to live with her.
36. In cross-examination, it the testimony of DW1 that RK is his daughter aged 13 years then.
37. The Accused/Appellant in mitigation stated that he has a young family and children who rely on him and that he has also been remanded for 7 years. He prayed for non-custodial sentence.

The Trial Court Judgment

38. The trial court in its judgment dated and delivered on 22nd February,2022, convicted the Accused/Appellant of the offence of defilement contrary to section 8(1) as read with Section 8 (3) of the Sexual Offenses Act. the trial court arrived at the determination pursuant to Section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.

The Appeal

39. Dissatisfied with the judgment the Appellant vide the amended petition of Appeal filed in court on 17th October, 2023 in which he sought to have the conviction and sentence quashed be set aside. This came after he had sought leave to file this appeal out of time. Grounds of appeal are as follows that:
1. The learned Trial Magistrate erred in law by convicting the Appellant to serve 20 years imprisonment without observing that the ingredients of the offence of defilement was not proved beyond reasonable doubt and the Appellant herein has to suffer prejudice.
 2. The learned Trial Magistrate erred in the matter of law by failing to interpret the finding of a clinician stated on the PRC form the words "Attempted Defilement" this rendered a blow to the prosecution case.



3. The learned Trial Magistrate erred in law by failing to accord Appellant herein the benefit of doubt that were observed in the prosecution case as victims age was not proved.
 4. The learned Trial Magistrate court erred in point of law by relying on the evidence on record was contradictory. Inconsistence and intelligence and unreliable especially on issues of the identity.
 5. The learned trial magistrate erred in the matter of law and facts by failing to accord Appellant herein a right to fair trial guaranteed by Article 25 (c) of *the Constitution* of Kenya 2010 and failed to comply with Section 200 (3) of the CPC.
 6. The court below erred in points of law and facts by failing to exercise discretion in the present case thus Article 27 of Constitution was breached.
 7. The court below erred in points of law and facts by failing to conduct voire dire examination to the complainant.
40. The matter was canvassed by written submissions.

Submissions

Appellant's submissions

41. Vide written submissions filed on 17th October, 2023, the Appellant submitted on three ingredients as follows.
42. On penetration, it was submitted that on page 34 and 35 PW7, the clinician adduced his evidence that upon examination her vagina had lacerations inside hymen was broken. She was wearing school uniform that was dirty. It had no blood nor was it torn. There was infection in her urine.
43. Submitting that PW6 a doctor of 11 years experience stated in court under oath that complainant was negative HIV/ No syphilis and another medical officer with an experience of 3 years both alleges to have seen the victim on the same date 6/6/2016 and he stated that, "there was infection in her urine" i believe that the infection of urine is STI and syphilis is among STI infection.
44. It was the Appellant's case that given that the 11 years experienced Doctor confirmed on court under oath that she was HIV no syphilis, then the allegation of PW7 that there was infection in her urine and he has 3 years experience in work brings a lot of debris in his evidence on the issue of proof of penetration.
45. It was averred that this case is cooked up story to hoodwink the court and up to this point it is now settled decision that both PW1 and medical evidence failed to proof penetration in the present case. Contending that the mentioned two doctors saw the complainant on the same date and their findings are contradictory. To buttress the issue of penetration Appellant relied on the case of Athur Mshila Manga Vs Republic KCA No. 24 of 2014 at Mombasa (2016) eklr, and submitted that in the present case no discharge was observed, no injuries that were not on the victim as already discussed above.
46. As to the age of the alleged victim, the Appellant opined that he carefully perused the evidence of PW2 who stated that she operates a school of the alleged victim and he had not seen any evidence regarding the age of the alleged victim and no any letter that was adduced in court emerging from the said school to confirm PW1's age, that no certificate was tendered to prove the age of a victim and no even baptism card that was tendered to proof the age of the victim. Opining that the only evidence tendered to prove the age of the victim was the two doctors and they were not in agreement. Further that the Appellant



- told the court on his defence hearing that the child was 18 years old but due to the anomalies on the proceedings that had been typed as it was argued on page 47 and 55 ruling delivered by the trial court.
47. Submitting that age of the was not proved beyond reasonable doubt. Appellant placed his reliance on the case of Athur Mshila Manga Vs Republic (supra).
 48. As to identity of the assailant, it was submitted that the court below erred in matters of law and facts by failing to note that, identity of the alleged assailant was not proved beyond reasonable doubt as required by the law. Contending that PW1 was raped outside his compound as per her evidence when she slept out.
 49. It was the submission of the Appellant that the trial Magistrate court erred in points of law by failing to accord Appellant herein a right to fair trial when they failed to comply with Section 200 (3) of the C.P.C and call witnesses when each magistrate was succeeding another. To buttress the point on Section 200 (3) credence was placed on the cases of Richard Mule Vs Republic Nairobi Court of Appeal, Cr App No. 135 of 2004 Ndegwa Vs Republic (1985) eklr, Bob Ayub alias Edward Gabriel Mbwana Mandiga Vs Republic KCA Cr. App No. 106 of 2009. Paul Kithinji Vs Republic Miscellaneous Cr. Applications Nos. 445,448 and 452 of 2012
 50. The Appellant submitted and prayed that this Appeal be allowed in its totality.

Respondent's Submissions

51. The Respondent in its submissions dated and filed in court on 25th October,2022, submitted on the following grounds:
52. As to ground that the trial court erred in law and fact by failing to observe that the evidence procured by the prosecution did not have any probative value, it was the Respondent's case that cogent evidence to prove that indeed the Appellant was guilty as charged. PW1 properly identified the Appellant as the perpetrator of the heinous act. the victim testified that indeed the Appellant defiled her severally in their living room.
53. Contending that the evidence was well corroborated by PW6 who confirmed that indeed the victim's hymen was broken and lacerations noted on the labia. Contending that the evidence adduced by PW1 to PW9 was proper and met the threshold required by law.
54. On ground that the trial court failed to find that the essential ingredients of the offence were not established against the Appellant, it was contended that the essential ingredients of defilement were proved beyond reasonable doubt. The age of the minor was properly ascertained to be 13 years, penetration was sufficiently proved by PW6. Reliance was made on the case of George Opondo Olunga Vs Republic (2016) eklr to buttress its point on identification, penetration and age of the victim.
55. As regards the ground that the trial court erred in law and fact by failing to find that the prosecution's case was marred with contradictions and inconsistencies, it was averred that the prosecution proved its case beyond reasonable doubt. The direct evidence by the victim, which clearly implicated the Appellant, was well corroborated with medical evidence. No contradictions and inconsistencies were noted from the lower court record.
56. On the burden of proof against the Appellant was not well proved by the trial court, it was argued by the Appellant that the prosecution proved its case beyond reasonable doubt as required by the law.
57. The Respondent relied on section 8 (1) as read with Section 8 (3) of the Sexual Offences Act and the case of FOD Vs Republic (2014) eKLR to buttress the point of beyond reasonable doubt.



58. On penetration, it was the Respondent's submission that the main ingredient of defilement which is penetration was proved beyond reasonable doubt. Contending that it was evident from the P3 form, post Rape Care form and lab form that the victim was defiled. To buttress on penetration, respondents relied on the case of Charles Wamukova Vs Criminal Appeal No. 72 of 2013, submitting that the victim was ascertained by the age assessment produced as PEXH 4 a. the minor was aged 13 years.
59. Submitting that the conviction and sentence against the Appellant is sufficient and appropriate.

Determination/analysis

60. It is now well settled, this Court as 1st Appellate Court examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno-vs- Republic (1972) EA 32 & Pandya Vs. Republic (1975) EA 366.
61. The Court must itself also weigh conflicting evidence and draw its own conclusion Shantilal M. Ruwala-vs-R (1975) EA 57 which further states it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court 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 made the advantage of hearing and seeing the witnesses.
62. Section 8(1) of the *Sexual Offences Act* No 3 of 2006 provides as follows;
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) 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
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
63. The ingredients for the offence of defilement are summarized as follows;
1. Age of the victim (must be a minor),
 2. penetration and
 3. *Proper identification of the perpetrator.
64. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
- “... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.” (emphasis added).



65. In the case of Francis Omuroni vs Uganda, Court of Appeal Criminal Appeal No 2 of 2000, it was held thus;
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.
66. PW1 in her testimony stated that she was 13 years old when she was filed and PW6 produced MFI 3 (age assessment document), where he assessed the child’s age and confirmed PW1 was 13 year old child. This was not challenged in cross-examination or in Defense and no evidence to controvert the age assessment by PW6.
67. The accused person submitted that the Trial Magistrate erred and that the age of the alleged victim was not proved beyond reasonable doubt.
68. Having analyzed the evidence tendered I find that the age of the victim can accurately be estimated to 13 years old as stated by the victim herself and the medical doctor who examined her in order to assess her age and thus this ground was sufficiently proved. PW7 testified PW1 was assessed via dental formula to establish her age.
69. The second element is penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as;
- “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
70. PW1 testified that on 5/6/2016 she was at home with her siblings when the accused came and paid for a motorcycle for her step mother to leave. The accused then woke her up and said that she would give him his thing which she refused and she went to the door where the accused held her cloth on the back and pushed her back to the house. He told her to sleep on the mattress on the floor, he then pushed her skirt from below up she wanted to scream and he held her neck. He tried to remove her dress over and over again in which she resisted. He finally pushed her dress down and removed her panty. He removed his trouser and shirt and remained with vest. He then came on top and lied on her. He thrust his penis into her vagina and she felt pain and he felt him ejaculate. He woke up and defiled her again twice and four times lastly between 4-5 a.m
71. PW6 Dr Geoffrey Wagure testified that on 9/6/2016, a 13 year old was brought to him and he proceeded to examine her. Her hymen was broken, there were lacerations in her labia, her vaginal swab had a pus.
72. PW7 Dr Karanja testified that upon examination of PW1 her lacerations inside, her hymen was broken, there was infection in her urine and they admitted her. He produced PCRC form.
73. This Court finds that the evidence of PW1 was detailed as to the events of the fateful night as outlined above and in agreement with the finding by the Trial court that penetration had been proved. The doctor produced the PRC form in which upon examination of the victim he concluded that the hymen was broken, lacerations were noted. PW6 & PW7 confirmed from examination of PW1 her genitalia was consistent with recent sexual activity. The question of penetration was therefore proved.
74. The third element to be proved was identification. The complainant PW1, testified that the accused defiled her several times on that night of 5/6/2016. As was held in Charles O. Maitanyi v Republic 1988-1992 2KAR 75.



75. It is necessary to test the evidence of a single witness respecting to identification, and, absence of corroboration should be treated with great care.
76. In *Kariuki Njiru & 7 others v Republic Criminal Appeal No 6 of 2001*; the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.
77. Given the above facts; identification was by way of recognition and such evidence must be carefully examined to satisfy if the circumstances of identification were favorable and free from possibility of error before it can safely be made as a basis of conviction. See *Wamunga vs Republic (1989) KLR at 426*.
78. In this case the Appellant was positively identified by recognition by PW1. On the night of the ordeal, the Appellant was in the house as per PW1's evidence, other children specifically Muriuki was present heard the commotion and reported to PW2 the teacher the next day. I find no reason to doubt the identification of the Appellant as the perpetrator of defilement to PW1.
79. The Appellant raised the following grounds on appeal and submitted that he was not granted a fair hearing under Article 50 of CoK and was discriminated against contrary to Article 27 of CoK. The grounds include that the child PW1 was not subjected to voir dire examination.
80. In the case of *Patrick Kathurima –vs- Republic [2015] eKLR* the Court stated as follows;

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

Disposition

81. The accused also took issue with the fact that a voir dire test had not been done on the child whilst I don't underestimate the importance of voir dire test, the victim complainant testimony was consistent throughout the hearing and thus it was not fatal.
82. The Court of Appeal in the case of *Athumani Ali Mwinyi vs Republic Criminal Appeal No. 11 of 2015* stated thus:

“On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voire dire examination. The complainant's evidence was cogent, she was cross examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the Appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defense evidence especially the medical evidence which corroborated the fact of defilement.”



83. The Trial Court record confirms the Trial Court on 19/9/2016 asked the child PW1 and was answered as follows;

I am RK . I am 13 years old. I am in Class 6. I am a Christian -Methodist Church. I will tell the truth.

Court: She is intelligent and capable of taking oath.

This Court finds that voir dire examination was duly conducted by the Trial Court.

84. The Appellant raised the issue that Section 200(3) CPC was not complied with. I have gleaned through the Court Record and found that the trial was conducted before 3 Magistrates; Hon L. Kassan SPM; Hon. C. Oluoch SPM and Hon B Kasavuli. Each of the Trial Courts applied Section 200 CPC, the Accused person sought recall the witnesses.

85. On 27/6/2018 sought to recall of the Complainant. The Prosecution objected. The Trial Court Hon L. Kassan SPM read Ruling on 28/6/2018 and refused recall of PW1 who was a minor and had no phone contacts and could not be traced & PW5 and allowed recall of PW7 only. The Court heard 7 witnesses.

86. The Appellant filed an application dated 5/7/2018 seeking transfer of the case and accused the Trial court of bias and the Court refused. The Appellant sought to appeal the decision and was granted and proceedings were typed.

87. On 8/11/2018 Hon C. Oluoch took over the matter Section 200 CPC was applied. The accused person sought hearing de novo. The Prosecution vide Affidavit filed by Investigation Officer of the case, on 22/6/2018, mother & child moved from their residence to unknown destination.

88. By Ruling delivered on 30/11/2018, the recall of witnesses and hearing de novo was not granted. The Trial Court heard 2 witnesses and placed the Accused person on his defense.

89. The Hearing was taken over by Hon B. Kasavuli and Section 200(3) CPC applied and the Accused person gave his defense and judgment was delivered by the Trial Court the subject of the appeal.

90. From the above outline from the Trial Court record the Trial Courts appropriately applied Section 200 (3) CPC and the Prosecution objected to recall witnesses specifically PW1 a minor as they moved from place of residence.

91. The Court record discloses that the Accused person exercised his right of appeal in High Court Criminal Application 62 of 2019 and the application to recall and rehear witnesses under Section 200(3) CPC was dismissed on 30/1/2020.

92. The Appellant raised on appeal clinician stated on the PRC form the words "Attempted Defilement" and alleged this rendered a blow to the prosecution case.

93. The Court Record confirms PW6 examined PW1 and found she had lacerations in the labia and her hymen was broken and had pus in vaginal swab then filled in the P3 Form. PW7 examined PW1 and found similar findings and included infection of PW1's urine and filled the PCRC.

94. Comment on the PCRC, in part shows on the part of Genital Examination of the Survivor;

History, the physical examination are consistent of likely attempt of peno- vaginal penetration.



This what the Appellant attributes to being inconsistent with the charge of defilement. The PCRC is a detailed event, circumstance, physical and medical examination form based on report made. The PCRC includes in the same part of Genital examination of the survivor;

Physical injuries- No physical injuries

Other genitalia- laceration inferior of labia marjoram Vagina- crifice laceration at 6 oclock

Anus- no tears

95. All these findings cumulatively disclose commission of the offence of defilement as penetration in Section 2 of *Sexual Offences Act* is defined as;

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

96. This Court finds the charge as drawn and read to the Appellant who entered plea of not guilty was proved by overwhelming evidence on record.

DISPOSITION

1. Having considered the facts in this case, this Court agrees with the Trial Court in finding the accused guilty of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.
2. This appeal is therefore dismissed.

It is so ordered.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 11th APRIL, 2024. (VIRTUAL /PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In the presence/absence of:

DMK - the Appellant

Mr. Mwongera - for the Respondent

Geoffrey/patrick - Court Assistant(s)

