



REPUBLIC OF KENYA



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**Ngui v Republic (Criminal Appeal E035 of 2022)
[2024] KEHC 3237 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E035 OF 2022**

MW MUIGAI, J

APRIL 3, 2024

BETWEEN

DENNIS NGUI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the judgment by Hon. Martha Opanga (SRM) in Kangundo Senior Principal Magistrate's Court in Cr. S.O No. 24 of 2020 Delivered on 18th August, 2022)

JUDGMENT

Background

1. The Appellant herein Dennis Ngui was charged with an offence of Defilement contrary to Section 8(1) (B) of the [Sexual offences Act](#) No.3 of 2006.
2. The particulars of the offence being that on the 4th June, 2018 in Matungulu Sub-County Machakos County intentionally caused his penis to penetrate the vagina of RKM, a child aged 14 years.
3. In the Alternative Charge the Appellant herein was charged with the offence of committing an indecent Act with a child contrary to Section 11(1) of the [Sexual offences Act](#) No.3 of 2006.
4. The particulars of the offence being that on the 4th June, 2018 in Matungulu Sub-county Machakos County intentionally touched the vagina of RKM, a child aged 14 years with his penis.
5. Plea was taken on 11/06/2018 and the Appellant denied the charges and a Plea of Not Guilty entered on his behalf.
6. The Prosecution called a total of five (5) witnesses in support of its case while the Defence gave sworn testimony and called one witness.



Prosecution Case

7. PW1 No. RKM from Kyaume stated that she stopped going to school in class eight, she had not been to school that year and her mother told her to repeat class eight next year. She used to go to [Particulars Withheld] Primary school and lived with her mother. It was her testimony that she was 15 years old and she had a clinic card date which showed the date of birth as 20.4.2003. She said that in the evening of 4th June, 2018 in the company of her two friends namely C and J went to the [Particulars Withheld] bar. They found the Appellant (Dennis) in company of two other men (RM and M) drinking beer. They joined the 3 men. PW1 was taking soda while C and J were taking beer. Thereafter C went with M, J went with RM while PW1 went with Dennis Ngui (The Appellant). PW1 went into a lodging with Dennis where they had sex and went home the following morning. J and C gave her items they had been sent the previous day to take home. The Appellant gave her kshs.100/-. When she arrived home her mother asked her where she had been. She told her mother she had gone to Tala with C and J. Her mother beat her up. Thereafter the three girls were taken to the village elder called Freedom who took them to Tala Police Station where they stayed for two days. The girls informed the Elder what had happened the previous day. PW1 was taken to Kangundo Level Four hospital where the doctor examined her. PW1 stated that she did not know Dennis before but he was introduced to her. She identified the accused in court.
8. On cross – examination by Mr. Munguti for the Accused she averred that she met Dennis for the first time on that day. With regard to her statement, she said her aunt came when she was recording the statement. She said she did not know if they were related to Freedom or if the doctor concluded, what he wrote in part D. She said she was with CN and JM, J slept with Robert, C slept with M and she slept with Dennis. The room was on the upper floor and R took them home in a white car. She said she left Tala at 9.00pm.
9. In re examination she said that her mum is S, her Aunt is C and she was with J.
10. PW.2 SM mother to the PW1 told the Court that PW1's she gave birth to PW1 on 20/04/2003. She said that PW1 was in class eight the year before and fell ill thus was unable to do her exams. She stated that R (PW1) returned home at 9.00 p.m. and slept at home. She said that Freedom came to her house and took PW1 while she was at work. Freedom took PW1 to Tala. She said that the next day she went to Tala Post, she learnt that R had been with C and J. The two girls did not sleep at home. She said that C gave R food to take home. C's aunt came infuriated asking for C. The next day, the police asked her where she was when her child slept outside the home and she said R came home at 9.00pm and slept at home.
11. On cross – examination PW.2 told the court that PW.1's father was in Meru and that C had bad influence on her. PW1 had told her that on 4.6.2018 C had told her to go along with her to get food from her father. She told the court that she saw Dennis at the police post. She did not interrogate PW.1 and did not know about the doctor's findings.
12. In re - examination she said that she did not know what means R used to come home but she told her it was a bike.
13. Pw3 Freedom Musyoka the village elder stated that on 4/06/2018 he was called by the parents of three girls who were in primary and secondary school. He went to Ngonda and found two girls were arrested by their parents. The two girls (C and J) were taken to Tala police station and Pw1 was thereafter brought at the station. M, M and Dennis are said to have used the girls. The two girls said they had gone to [Particulars Withheld] club where Dennis was with R (Pw1). The other guys were with C and J who were found to be above 18 years hence their cases in Court ended. The police investigated the



case and arrested Dennis Ngui (the appellant). She said the girls were beaten but refused to disclose where they slept.

14. Upon cross examination Pw3 stated that the event took place on 5/06/2018 on Wednesday and she arrested them on Tuesday the next week. She did not know how long they stayed in the police post all he knew was that they were detained so that they can be taken to hospital. Pw.1 was taken to hospital for treatment. He is the one who handed over Pw1 to the police and she returned home at 9.00pm on the material day. She was taken home on a motor vehicle and not by Dennis. She said that [Particulars Withheld] is a storied building that has a bar on the ground floor. Pw.1 had told him that she was at [Particulars Withheld] Bar with Dennis and he later took her home on a motor vehicle.
15. There was no re-examination.
16. Pw.4 Dominic Mbindyo the Clinical Officer stated that he filled the P.3 form. He stated that Pw.1 came to the hospital on 7/06/2018 at 6.00pm following the history of defilement. She had been invited by a friend to [Particulars Withheld] Tala. She was in the company of ladies known to her. Pw4 stated that Pw 1 told him that one man took her to a lodging and the two slept together. Later they were taken to their homes. He said Pw1 was a student at [Particulars Withheld] Primary.
17. During the examination Pw.1 had taken a shower and answered calls of nature. Pw.4 observed that the vagina had a whitish discharge on the vagina and external oars, bruises at 12” and 6” O’clock, no bleeding. The hymen was torn long time ago. Pregnancy test, VDRL, Urine test and hepatitis were negative, urine test showed armophores crystals. He said the patient was given profilaxis exposure, postinor 2, Antibiotics and referred to post rape counselling. The age of the injury was two days.
18. PW4 said that the Appellant was brought for medical examination on 8/06/2018 for allegedly defiling a minor. He denied the allegations and stated that on Sunday 3.6.2018 he met M who us supposed to be a co accused for a phone repair deal. M was with M, three girls came and greeted them. Upon genital examination, PW4 found that he had no bruises or anything suspicious and all the tests done turned negative. He said that the injuries on the complainant 12” and 6” showed that there was penetration. He produced P3 form. Treatment notes, lab report for the complainant and the Appellat and treatment notes for the accused person.
19. On cross examination Pw.4 stated that the Appellant was examined by Ngoroi, he only filled in the P3 form relying on the patients history and treatment notes. The three men were not known to PW1 before the incident .Pw.1 presented different personalities during the examination including being calm, anxious etc. There were no struggle marks on any of the patient.
20. On re-examination Pw.4 stated that fresh tears 6 and 12 o’clock position indicated that there was a sexual act. He said there was n bleeding.
21. Pw.5 Pc. Moses Ngeno, the investigating officer stated that on the material date 4/06/2018 a case of defilement was reported at Tala Police post. He recorded the statement of the minor (Pw1) on 6/06/2018 and recorded his own statement on 10/06/2018. Pw.1 was later taken to hospital for examination and a P.3 Form filled which informed the decision to prefer charges and thereafter the accused was arrested. Pw.1 was 14 years at the time of offence and the child health clinic card indicates date of birth as April 20th 2003. The appellant was arrested on 6/06/2018. The Appellant was not known to Pw1 before. He knew the accused as he is a common figure at Tala being a business person Pw.1 had stated that she met the Appellant in the evening hence there was no need of identification parade.
22. On cross – examination Pw.5 stated that he was not the arresting officer and the accused was arrested on 6.6.2018. He said that after the offence, the complainant was in a position to identify the accused.



She pin pointed him to the police. In the last paragraph of her statement, she had said that they forced them to have sex. The minor said Dennis had sex with her. He said that an identification parade was not carried out. He said [Particulars Withheld] club is a storied building with three floors. According to his investigating diary, the victim said she used a motor cycle to get home registration No xxxx, he could not recall the other units. He said that a female colleague recorded the statement of the minor and she went home the same day at 20.30 hours. When she was asked where she was, she ran away. He said the room was on 2nd floor but he could not recall the room number. He said that the minor stayed at the police station for two days. He said the first entry was vide OB 27 of 6th June 2018 and an earlier report had been made about missing girls.

23. Upon re-examination, he stated that during investigations, the girl took them straight to the accused's shop in Tala.

Defence Hearing

24. Dw1 Dennis Ngui gave sworn testimony. He told the court that he repairs phones. He had a wife and three children. That on 4/06/2018 his friend RM called him and asked him to take his phone to EPI Centre at Tala stage for repair. He took the phone to R who was with M in a bar drinking and he gave him 1500 and urged him not to leave. R asked Dw1 to join them and thereafter he saw three ladies come. The three girls were chased by the bar attendant as they looked under age. M and M followed the girls. He saw his friend AM nearby and he told the accused that he wanted to leave. The girls came at about 8.00pm. He said he requested he drops him at his house at about 9.00am. He denied knowing R.
25. Later on he was arrested on 6th. M and M had also been arrested on Tuesday and he found them in the cells. Dw1 was taken to hospital after his arrest. He was charged and taken to hospital. He denied giving PW1 Kshs.100/-.
26. On cross –examination he stated that he left the club at 9.00 p.m. That he did not go to [Particulars Withheld] . He said that he had bathed twice and even changed clothes.
27. Dw.2 JM stated that she was 23 years old. Pw.1 was her friend. On 4/06/2018 she was not with Pw1. On Monday they were chased from school for lack of school fees at 9.00am and they went to Tala at 2.00pm. She took her friend C to get food and went to a club on top of Equity Bank. She said that at 8.00pm they argued debating who was to take food. They took all the food. She said C's Aunt asked PW1 where C was and she told her she has taken a friend to hospital. She went back to Tala with C and they went home using R's car. They went home at 7.00am. She said they were arrested, beaten and taken to the police post.
28. It was her testimony that she was given a phone to call R, M was also called and told to call his friends. Pw1 was arrested the next day. She said that Denis did not sleep with PW1. She said that they were six in the club and Denis was with a certain madam who was big and had hips.
29. On cross-examination she stated that after they were chased for school feed on 4.6.2018, the four of them; C, R, V and herself went to get food. She said they were taken by R using his car. He said they remained in the car as PW1 took food and they left her and went back to Tala [Particulars Withheld] . She said that they did not see PW1 until after two days.
30. It was her testimony that R and M dropped them and that they found Denis at [Particulars Withheld] at 10-11pm. She said she was R's girlfriend, C was M's girlfriend for two days. She said she could not tell if R left and met up with Dennis. She contended that Denis was at [Particulars Withheld] . She said she was in form two, R class and C form 2



31. Upon cross examination by the court, she said they drank all night until morning and Denis left with his girlfriend.

Judgment of the Trial Court

32. The Trial Court delivered its Judgment dated 17/08/2022 and found the appellant guilty of the offence of defilement and sentenced him to serve Ten (10) years imprisonment.

Appeal :

33. Aggrieved by the Judgment the appellant filed his amended Petition of appeal based on the following grounds;
 1. That the Learned Magistrate erred in law and fact when she convicted the appellant by relying on the evidence of the complainant who was not a credible witness.
 2. That the Learned Magistrate erred in law and fact when she convicted the appellant on consistent, contradictory and hearsay testimonies of the prosecution witnesses.
 3. That the Learned Magistrate erred in law and fact when she convicted the appellant despite the P.3 form showing that there was no evidence of defilement.
 4. That the Learned Magistrate erred in law and fact by relying on a P.3 Form that had been doctored after hearing to support the prosecution case.
 5. That the Learned Magistrate erred in law and fact by failing to consider and analyze the testimony Appellant's witnesses thus arrived at a conclusion contrary to the law and weight of evidence on record.
 6. That the Learned Magistrate erred in law and fact when she convicted the appellant only on the complainant's uncorroborated testimony despite coming to conclusion that the complainant was untruthful witness.
 7. That the Learned Magistrate erred in law and fact by misdirecting herself in her judgement after having edited the original witness statement of Pw4 by editing the typed proceedings and relying on the evidence of a P.3 form which was doctored after hearing.
 8. That the Learned Magistrate erred in law and fact by reaching a conclusion that the appellant was positively identified by the complainant despite weight of evidence on the contrary.
 9. That the Learned Magistrate erred in law and fact when she failed to take into account the Appellant's mitigation before sentence.
 10. That the Learned Magistrate erred in law by imposing on the appellant a sentence that was unduly harsh and excessive in the circumstances.
34. The Appeal was canvassed by way of written submissions.

Written Submissions

Appellant Submissions dated 19th June, 2023

35. The Appellant submitted on three issues. On the issue of whether while relying on the case of Kimani Ndungu vs Republic (1979) 1 KLR 282, Pw1(complainant) was a credible witnesses it is submitted that on 4/06/2018 Pw.1 in company of her two friends went to [Particulars Withheld] Bar where they



were joined by the Appellant and his two friends. Pw.4 the clinical officer testified that pw.1 went to the hospital on 7/06/2018 following a history of defilement. Pw.1 gave different versions of stories on how she got home that night which is an indicative factor that she was not being truthful.

36. Secondly, as to whether the testimonies given by the prosecution witnesses had material inconsistencies, contradictions and hearsay. It was submitted that the evidence of PW2 and PW3 were hearsay as they were not at the scene of the crime. Further that there were contradictions in their testimony as to whether minor slept at home or came back the following day. Similarly, Pw4 says that the complainant went to hospital at 6.00pm on 4/6/2022 and this same date is when the Appellant is accused of defiling the minor. It was submitted that the P3 form indicated that there was no evidence of defilement.

37. The Appellant took issue with the reputation of the minor and submitted that the minor was coerced to accuse the Appellant of the said offence. She was beaten before being taken to the police station where she was held incommunicado until she talks and were only released after writing statements. Reliance was placed on the case of GKS –v-Republic [2019] where the Court ruled as follows;

The inconsistencies in the evidence for the prosecution witnesses left doubt in the case that the appellant defiled the complainant.

Taking all the above into consideration, I am not satisfied that the conviction of the appellant was safe. The conviction is thereby quashed and the sentence set aside. The Appellant is set at liberty forthwith unless lawfully held.”

38. Lastly, as to whether the prosecution proved the offence of do warrant a conviction of the Appellant, It was submitted while relying on the case of Dominic Kibet vs Republic [2013] e KLR, George Opondo Olunga vs Republic [2016] e KLR, Mohammed Omar Mohamed vs Republic, Criminal Appeal 2 of 2020 and Patrick Kathurima vs Republic [2015] e KLR, Maitanyi vs R [1986] e KLR It was submitted that having found that the complainant was a minor, a voir dire before taking the victim evidence was necessary. Further, that penetration was not proven as the clinical report stated otherwise. As regards identification, it was submitted that no identification parade was ever conducted and it is not clear as to how the Appellant was identified by the minor.

39. It was contended that the evidence given by Pw1 was uncorroborated but despite that the Trial Court chose to believe most of it save for the penetration. Pw1 could not remember the room number or the floor of the building where she slept with the Appellant. It was submitted that the victim was not a virgin because the clinical officer observed her and found that the hymen had been torn a long time ago though she said she had never had intercourse before. It was submitted that in the instant case the prosecution did not prove the offence of defilement beyond reasonable doubt hence the conviction is not safe and urge the court to set the same aside.

Respondent's Submissions

40. On behalf of the Respondent it is submitted that the state concedes this appeal on the ground that the Trial Court failed to conduct a Voire dire examination before taking the victims evidence.

41. Section 19(1) of the *[oaths and Statutory Declarations Act](#)* has something to do with receiving evidence of a child in the following;-

Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be



received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.”

42. See also 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”.

43. Also in the case of Samuel Warui Karimi –vs- Republic [2016] eKLR where the Court quashed the conviction and sentence of an appellant as the Trial Court had failed to conduct a Voire dire examination. Reliance was also placed on the cases of John Maina Mariga vs Republic (2018) e KLR and Kibangeny Arap Korir vs Republic [1959] EA

44. It is finally submitted that this court vacates the conviction and the sentence imposed by the Trial Court and issue an order for retrial.

Determination

45. I have considered the Appeal, the Trial Court record and the submissions of parties on record.

46. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court stated:

“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. R., [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

47. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

“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 favour 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.”



48. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(3) of the *Sexual Offences Act*.

49. Section 8 (1) and (3) of the Act provide as follows;

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

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.

50. The elements of defilement are thus age of the victim (must be a minor), penetration and the proper identification of the perpetrator. This was stated in the case of *George Opondo Olunga vs. Republic* [2016] eKLR.

51. The first element of age was elucidated by 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.”

52. Further, in the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR it was held that:

... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

53. In this case, PW1 stated that she was 15 years old as at 24.10.2018 when she was testifying. According to the Child Clinic Card date, the victim was born on 20th April 2003. This was corroborated by the statement of PW2, the mother of the victim and PW5 statement. According to the charge sheet, the offence was committed on 4th of June 2018. This means that the accused was 15 years old at the time and thus a child. A child is defined as a person under the age of 18 years old by the Children’s Act. No 29 of 2002 under section 2.

54. Section 2 of the *Sexual offences Act* defines a child as “has the meaning assigned thereto in the *Children Act*”

55. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

56. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the



Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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.”

57. In the case of *DS v Republic* [2022] eKLR, the court stated that;

“Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.”

58. In this case, the victim said that she went to [Particulars Withheld] bar with C and J and in the evening they found Dennis Ngui in the company of two other men. It was her testimony that she went with Dennis Ngui and they had sex. It is noted that the victim became uncomfortable while saying this from the proceedings.

59. Medical evidence was produced by PW4 who was the clinical officer who wrote the P3 form. He said that the victim was examined on 7.6.2018 at 6pm. He said that the vagina had a whitish discharge on the vagina and external oars , bruises at 12” and 6” O’clock , no bleeding .The hymen was torn long time ago. Pregnancy test, VDRL, Urine test and hepatitis were negative, urine test showed armophored crystals. He said the patient was given profilaxis exposure, ponstinor 2, Antibiotics and refereed to post rape counselling. The age of the injury was two days. It was his opinion that there was penetration. The Appellant was also tested and the tests were negative. I find that indeed there was penetration.

60. The Appellant contends that the P3 form shows that there was no penetration and the date of the alleged offence was 4.06.2018 however a perusal of the P3 form does indicate that the injury sustained is “defilement” the date of the offence is 4.06.2018. This was corroborated by the evidence of PW1 who said that was the date of the offence.

61. The last ingredient is identification. The victim in this case spent some time with the Appellant before they proceeded to have sex in a room in the lodging. The Appellant has denied knowing the Victim however the evidence presented before this court and more especially the circumstantial evidence is very compelling.

62. Circumstantial evidence is defined by the Black’s Law Dictionary as’

Evidence directed to the attending circumstances; evidence which inferentially proves the principal fact by establishing a condition of surrounding and limiting circumstances, whose existence is a premise from which the existence of the principal fact may be concluded by necessary laws of reasoning.

63. The Appellant on 4.06.2018 was at [Particulars Withheld] where he met two of his friends. It was his testimony that three ladies came in and were chased for being under age and two of his friends, M and M followed them. He then left with his friend AM who was not called as a witness. DW2 confirmed that the Appellant was in the club and those were her friends. She confirmed that they found Dennis at [Particulars Withheld] and he left with his girlfriend but she did not specify who the girlfriend was.



64. As regards the issue of contradictions that have been raised by the Appellant, the way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of *Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6* where it was held that:

“with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case”.

65. Also, in the case of *Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi)* the Court of Appeal held that: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

66. The discrepancies highlighted by the Appellant have been noted but they do not go to the core of the offence before the court. This court has subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

Issues Raised on Appeal

Voir Dire Examination

67. The next issue is that of voir dire evidence, this court has on many occasions stated that voir dire examination is done for the benefit of the court that the child of tender age is intelligent enough and understands the meaning of oath the same is sworn in and tenders his/her evidence on oath. The position was confirmed by the Court of Appeal in the case of *Japheth Mwambire Mbitha v Republic* [2019] eKLR as follows:

(13) As regards the second issue, the appellant has contended that the evidence placed before the trial court was not only contradictory, but that no voir dire examination was ever conducted on the minors (PW 2 and PW 3). Voir dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See *Duhaime, Lloyd*. “VoiDire definition” *Duhaime’s Legal Dictionary*).

With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of voir dire was explained by this court in *Johnson Muiruri vs Republic* [1983] KLR 445 as follows:

1. “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall



not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

(14) In this case, a perusal of the record reveals that prior to receiving the respective testimonies of PW 2 and PW 3, the learned trial magistrate went on an enquiry of whether each of the witnesses understood the meaning of telling the truth and the consequences of lying. Having satisfied herself that the two minors understood the importance of telling the truth, the court went on to record their evidence. No objection was ever raised by the appellant regarding the voir dire examination or the subsequent admission of the minors' testimony. Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on each of the two witnesses; to which the two minors even indicated to the court that failure to tell the truth renders a liar ineligible to go to heaven.

(15) Having satisfied herself that the two minor witnesses understood the import of speaking the truth in court and the consequences of lying, the trial magistrate then admitted their evidence and from the record, we see no reason to interfere with that finding. The evidence of FO and PW 3 was admitted within the confines of the law on voir dire examination."

68. The question then is, was PW1 a child of tender years? I am guided by the observation in the case of *FMG v Republic* [2022] eKLR where the court stated that;

In *Maripett Loonkomok vs Republic* [2015] eKLR, the Court of Appeal restated that:

"Voire dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voire Dire definition" Duhaime's Legal Dictionary."



41. It is now trite that a child of tender years is one under the age of 14 years. In the Maripett Case (*supra*) it was held that:

“Section 19 of the [Oaths and Statutory Declarations Act](#) is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The [Sexual Offences Act](#) and the [Oaths and Statutory Declarations Act](#) are silent on this question. However way back in 1959 in the celebrated case of *Kibageny Arap Korir v R* (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years” is section 2 of the [Children Act](#) where it is defined to mean a child under the age of 10 years. This Court has recently in *Patrick Kathurima v R*, Criminal Appeal No.137 of 2014 and in *Samuel Warui Karimi v R* Criminal Appeal No.16 of 2014 stated categorically that the definition in the [Children Act](#) is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voir dire examination...”

42. Section 19 (1) of the Oaths and Statutory Declaration Act is the provision under which voir dire examinations are underpinned to determine the child’s understanding of the nature of an oath. The provision states:

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken



and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”

.....

44. Further in the In the Maripett Case (supra) the Court of Appeal held:

“It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;

“In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction”.

45. 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.”

46. It is evident from the record that the court did not conduct voire dire examination because it was of the view this was not a child of tender years. This was drawn from the description in the *Children Act* and which the Court of Appeal in the Maripett Case (supra) distinguished. It is however evident from the record that the child understood why she was in court, and gave her testimony cogently. She was cross examined by the accused and her testimony remained coherent and credible. What she told the court was supported by the medical evidence obtained from the physical examination of her body. Clearly there was no prejudice suffered at all by the Appellant.



The trial court which had the privilege to observe the demeanor of the complainant formed an opinion that she was telling the truth. This is one the cases where the Maripet Case above set out the exception. The trial court’s omission is not sufficient reason to nullify the proceeding.

69. In the instant case, the Trial Court proceedings of 24/10/2018 confirm that the Prosecutor informed the Trial Court that the witness was aged 15 years old. The Court noted and indicated that the witness be sworn. Clearly, the Witness/Complainant/Victim being below 18 years and in light of the highlighted authorities above it is debatable if she was one of tender years or not, no enquiry was made to confirm that she understood the meaning of being a truthful witness and/or the importance of testifying on oath.
70. Therefore, in the absence of voir dire examination being conducted during trial before PW1 testified although evidence of a single witness is sufficient by virtue of Section 124 of Evidence, the testimony of PW1 required/res corroboration in order to sustain a conviction.

In the case of DPP v Kilbourne 1973) 1 ALL ER 440; (1973) AC 720, Lord Reid asserted;

‘there is nothing technical in the idea of corroboration when in the ordinary affairs of life one is doubtful whether or not to believe a particular statement. One naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.’.....

“Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.”

71. The Trial Court observed in the judgment at Pg 17;
Therefore, in order to be safe and for benefit of doubt, I would not only rely on the evidence of PW 1 that there was penetration as the Court is not satisfied that the alleged victim is telling the truth and thus corroboration of her evidence is required.
PW4 who is a clinical Officer corroborated the evidence of PW1 that there was indeed penetration. He produced notes (Exh 3) and P3 Form (Exh 2) which showed that vaginal examination there was whitish discharge on the vagina and external genital of the Complainant. There were fresh bruises at 12” & 6 o’clock position of the vagina which showed there had been recent [sexual activity] The age of injuries was 2 days.
72. On appeal the P3 Form presented in the Trial Court was/is contested. The Appellant through Counsel submitted that the findings of the Clinical Officer also confirmed that the hymen of the Complainant had been torn a long time ago yet the Complainant stated that she had never had sex before. The Clinical Officer also noted there was no evidence of defilement when he examined the Complainant. He produced a P 3 Form to the Trial Court which read – There was no evidence of defilement but after the hearing , the same [P3Form] was doctored by rubbing out the word ‘no’ to read there is evidence of defilement.



73. This Court perused the Trial Court file specifically the P3Form produced as exhibit during Trial and copy of P3 Form annexed to the Application of Bail pending appeal lodged in the High Court. I find there was/is interference, defacing, scribbling and/or alteration in the Exhibit P3Form the word 'no' is cancelled ,scribbled on and defaced so that the Conclusion reads there was evidence of defilement. The annexed copy to the application to this Court reads;
- ‘there was no evidence of defilement’.
74. In light of the contested content of the P3 Form used to mislead the Trial Court through tampering of evidence, this Court cannot rely and uphold evidence whose credibility and veracity remains contested and doubtful as corroboration of PW1 evidence/testimony. The evidence is unsafe to legally sustain the conviction.
75. In addition, this Court finds the events culminating to defilement of PW1 by the Appellant disturbing, as PW1 testified 4th June, 2018 in the company of her two friends namely C and J went to the [Particulars Withheld] bar. They found the Appellant (Dennis) in company of two other men (RM and M) drinking beer. They joined the 3 men. PW1 was taking soda while C and J were taking beer. Thereafter C went with M, J went with RM while PW1 went with Dennis Ngui (The Appellant). PW1 went into a lodging with Dennis where they had sex and went home the following morning.
76. PW1 did not report the incident to anyone of any criminal offence committed to her. PW3 testified PW1 and other 2 girls were beaten by their mothers and they refused to say where they were the previous night. PW1 was taken to the Police station by PW3 and PW5 in further cross examination stated that the minor was detained there for 2 days as she was abit defensive and her evidence was not consistent.
77. From the circumstances surrounding the commission of the offence as indicated above, PW1 did not report any indecent assault/defilement until she was questioned on her whereabouts the previous night by her mother and was beaten up. PW 3 the Village elder on receiving information that the 3 girls were missing went to investigate and in the process took PW1 to the Police Station.(The other 2 girls were found to be consenting adults and made no complaints on their escapade the previous night at [Particulars Withheld] Bar with other 2 men who were with the Accused person.) The arrest and conduct of investigations culminating to prosecution of the Accused person by detaining PW1 at the station for 2 days strongly suggests coercion and duress to have PW1 admit a criminal offence was committed by the Accused person.
78. From the totality of the evidence on record, the Trial Court did not conduct voir dire examination nor record reasons for PW1 giving a sworn statement. The Trial Court in the judgment did not find PW1 a credible witness and therefore PW1’s evidence required corroboration. The only other direct evidence was medical evidence by PW4 Clinical Officer from Kangundo Level 4 Hospital who examined PW1and filled the P3 Form whose conclusion was/is tampered with and hence not conclusive or reliable and could not/cannot corroborate PW1’s evidence.
79. This Court cannot in light of the girls’ night out escapade on being caught and reprimanded PW1 was/ is forced to report and record statement of defilement against the Appellant, yet on her own volition she did not raise any issue/report any incident/wrongdoing on her until she was questioned on her previous night’s whereabouts and activity and was beaten up taken to the Police Station and detained. Any evidence from such circumstances, process and/or outcome which is not out of free will and consistent cannot legally sustain a conviction.



Disposition

1. The evidence is not credible and it is unsafe to uphold the conviction of defilement of PW1 by the Appellant.
2. The Appellant is hereby set free and conviction and sentence set aside and the appeal is upheld/succeeds.

It is so ordered.

JUDGMENT DELIVERED, DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 3/4/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence/absence of:

Dennis Ngui – Absent

Mr. Langalanga - for the Appellant: We got the notice today. My client is not in Court. I need time I get intouch with my client.

Mr. Mwongera- for the Respondent

Mr. Geoffrey/Patrick - Court Assistant(S)

Court: Further mention on 9/04/2024.

M.W.MUIGAI

JUDGE

