# Rono v Republic (Criminal Appeal E030 of 2021) [2023] KEHC 73 (KLR) (17 January 2023) (Judgment)

Neutral citation: [2023] KEHC 73 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CRIMINAL APPEAL E030 OF 2021**

**TM MATHEKA, J**

**JANUARY 17, 2023**

**BETWEEN**

**CALISTUS RONO ........................................................................ APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(Being an appeal from the Judgment, conviction and sentence by Hon. R.Yator, Senior Resident Magistrate delivered on 6th October, 2021 in Molo Chief Magistrate Sexual Offence No. 117 of 2018)***

## JUDGMENT

1. This is an appeal filed by Calistus Rono, (hereinafter "the appellant) who was on the 6th October 2021 sentenced to 20 years imprisonment for the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006, and in the alternative Indecent Act with a child, contrary to Section 11(1) of the same Act. The particulars were that on the 25th December, 2017 and 5th January 2018 in Kuresoi Sub County within Nakuru County he either intentionally caused his penis to penetrate the vagina of BC or intentionally touched with his penis the Vagina of BC, a child aged 15 years.

   He was aggrieved by the conviction and sentence, which he challenged vide the Petition of Appeal dated 15th October 2021 and Supplementary Grounds of Appeal dated 5th July, 2022 on the following grounds:

   1. That the learned magistrate erred in law and fact by denying the accused person the right to be represented by counsel during a crucial stage of the prosecution case.

   2. That the learned magistrate erred both in law and fact by according undue weight to evidence of the prosecution and by convicting the appellant on account of underwhelming evidence by the prosecution which did not prove the case against the Appellant beyond reasonable doubt.

3. That the learned magistrate erred both in law and fact by, denying the appellant the right to have DNA test conducted on the complainant's child as well as himself, which test if done would have proved beyond all doubt, the appellant's innocence.

4. That the learned magistrate erred both in law and in fact by harshly and unlawfully sentencing the appellant to the minimum sentence provided for under the law, which sentence does not in any event capture the mitigation adduced by the Appellant.

2. The appellant's prayer is that:-

    1. The Judgement of the Trial Court delivered on 6th October 2021 in Molo be set aside and the Appellant's Appeal be allowed.

    2. The conviction of the Appellant in Molo Chief Magistrate's Court S.O No. 117 of 2018 be quashed and the resultant sentence be set aside and the Appellant be set free.

3. The case for the prosecution and the defence were well summarized by the trial court;

> " Calistus Rono is charged with defilement contrary to section 8(1) (3) of the Sexual Offence Act No. 3 of 2006.
>
> The particulars are that on the 26th December 2017 and 5th January 2018 in Kuresoi Sub County within Nakuru County intentionally caused his penis to penetrate the vagina of BC a child aged 15 years.
>
> In the alternative charge, the accused is charged with indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
>
> The particulars are that on the 26th December 2017 and 5th January 2018 in Kuresoi Sub County within Nakuru County intentionally touched the vagina of BC a child aged 15 years with his penis.
>
> PW1 BC the complainant herein said she met the accused in 2018 and who became her boyfriend and that they had a relationship from 26th December 2017 when they had sex near [Particulars Withheld] bridge. That on 5th January 2018 she also met the accused and they had sex near the bridge at a nearby bush. That she had sex with him for three times.
>
> That she later fell sick and visited the hospital after two months where it was confirmed she was expectant and that it was in the month of March that she continued with school but stopped in second term due to pregnancy. That she later delivered on 1st September 2018 and sat for her KCPE in October. That after delivering her parents advised they report at Kamwaura Police Station where they were issued with P3 form and was examined at Ikumbi Health Center and P3 form was fully filled. She confirmed that she was born on the 17th July 2003.
>
> On cross examination by Mr. Simiyu she insisted that she had sex with the accused and who was father of her baby and that she conceived in December. She stated that she was not a virgin at the time she met the accused and that earlier she had another boyfriend who had ever had sex with her but insisted she met accused on 26th December 2017 who has sex with him.
>
> That she lastly had sex with the accused in the year 2018 though she does not recall exact date.

On reexamination she insists that she conceived in December 2017 after sex with the accused and not any other man.

PW2 ICS mother to the complainant said at unknown date in the year 2018 she discovered that PW1 was expectant and she discovered when it was almost 6 months pregnant. That on interrogating her she said Calistus was responsible. She said she used to know the accused as they did business together in the same town.

She later reported to the police and took minor to Ikumbi Health Center where P3 form was filled and that upon examination it was confirmed that indeed she was expectant. That at that time the child was a primary school student at [Particulars Withheld] Primary. That the school also wrote a letter on 28th October 2018 confirming she was expectant. That she was later called by the police confirming the accused had been arrested.

On cross examination by Mr Simiyu counsel for the accused she said the complainant was her 5th born child in the year 2002. That the complainant got pregnant and had since delivered and that she did not know if the accused was responsible and that when PW1 was asked about it she was not mentioning one person.

On re-examination she stated that when PW1 was asked who was responsible while at the police station she said it was Calistus.

PW3 Kiprotich Geoffrey clinical officer Ikumbi Health Center referred to the P3 and PRC form he filled on 20th September 2018 and that on date of examination the victim had already given birth to a 2 week old baby girl. That all body parts and tests were normal and had broken hymen. That the complainant said she took time to reveal the information. He then produced the P3 and PRC form as exhibit.

On cross examination he confirmed that he saw complainant after she had given birth and that she could have been seen by a different doctor before she gave birth. Though he personally saw her after giving birth.

PW4 PC Mathi the investigating officer herein stated that report was made on the 16th September 2018. That he took victim to the hospital and it was confirmed she has been pregnant and had since given birth.

That PW1 on interrogation said she had known the accused for some time and used to meet at [Particulars Withheld] Shopping Center before having sex near the bridge. That he visited the school [Particulars Withheld] where PW1 was confirmed to be a standard 8 pupil as per letter dated 23rd October 2018, P. Exhibit 1, that the complainant after months of having sex fell sick and went to a private clinic and found to be pregnant and later gave birth on 1st September 2018 that they reported to the police after giving birth. That accused later disappeared and resurfaced on 23rd October 2018 hence arrested. That he used to know accused and was identified by complainant's brother. He produced birth certificate.

On cross-examination he insisted that the girl had been sent to the market and arrived home late and that she said it was not the first time had sexual intercourse with the accused. That incident was reported on the 16th September 2018 which was the same day he issued P3 form that he did not carry out DNA test of the born baby to establish if the accused was the father and that the same was of no importance as they only needed to prove penetration. That he did not bother to calculate exact date of delivery of child or information of the girl.

On re-examination, he said the girl said the accused had defiled her twice and that in a defilement case all they needed to prove is penetration and not paternity hence did not conduct DNA test. That the complainant did identify the accused and there was no need for calculation of months of her expected delivery.

The accused gave unsworn evidence and did not call any witness. He stated that he had come from his grandmother's funeral on the 22nd October 2018 when police went and arrested him and following day informed of the allegation of defilement. That he suspected that there could be a grudge after he sacked the complainant's brother one Peter (deceased) who worked for him at the butchery and had threatened him that he will see what will happen.

That he never accompanied complainant to market and wondered why no passerby witnessed the alleged offence as it was a busy road and that complainant had not mentioned exact date, he took her to the bridge. He wondered why the child's mother did not interrogate her after arriving home around 8.00 p.m. – 9.00 p.m. He also wondered why offence was not reported immediately and that the date of delivery was not adding up to the date of alleged defilement saying if offence happened in late December, then the complainant should have given birth in late September and not on the 1st September 2018.

The accused who said he used to see the complainant around stated that her behavior was wanting as she behaved as an adult and had sexual relationship with other men and multiple boyfriends. That the fact that report to the police was delayed could be because she did not know who personally defiled her. He questioned why he was not subjected to DNA test."

4. The appeal was canvassed by way of written submissions, pursuant to the directions given herein on 12th October, 2022.

**Appellant's Submissions**

5. Mr. Bore Advocate for the Appellant submitted that the Appellant was unrepresented by counsel during crucial stages of the trial and the trial court did not inform him of this right as provided under Article 50(2) (g) and (h) of *the Constitution* thus his rights to fair trial was violated.

6. He argued that further the trial court was manifestly biased and discriminated against the Appellant. That this came to light on 2nd September, 2019 when the appellant's request to wait for his advocate who was on his way was declined by the court.

7. That once again on 30th October,2019, the trial court declined to place aside the matter to wait for the appellant's advocate who was before the High court in Nakuru on grounds that this was a children's matter which must be expedited.

8. He submitted that by purporting to put different weights between criminal matters involving children, and those involving adults the trial court clearly misapprehended and misconstrued the provisions of Article 50 of *the Constitution* which provides that all are equal before the law.

9. He submitted that consequently the hearing proceeded on 30th October, 2019 in the absence of the defence counsel and the appellant was unable to properly challenge the evidence of PW3 who was a clinical officer and whose evidence was ultimately used to convict him.

10. He placed reliance on the case of Francis Ochieng Osura vs Republic [2019] eKLR where the court nullified the entire trial proceedings on grounds that there was proof of derogation of the right under Article 50(2)(g) of *the Constitution*.

11. He also cited the case of Owuor vs Republic (Criminal Appeal 16 of 2019) [2022] KECA 18 (KLR) where the court while citing Lord Denning in Pett vs Greyhound Racing Association, (1968) 2 All E.R 545, at 549 stated: -

> " The value that legal representation adds to an accused defence in ensuring not only a vigorous but skilled participation in the criminal process cannot be gainsaid. Lord Denning in Pett v Greyhound Racing Association, (1968) 2 All E.R 545, at 549 stated: "It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

12. The counsel further relied on the case of South Africa in Fraser vs ABSA Bank Limited (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court said that an accused person is entitled to legal representation of his/her choice regardless of his or her financial situation.

13. The Counsel argued that In Kenya, the Supreme Court in Petition No. 5 of 2015 Republic vs Karisa Chengo & 2 Others [2017] eKLR while dealing with various aspects of the right to a fair hearing under Article 50 of *the Constitution* stated that right to a fair trial is a fundamental ingredient is to be enjoyed pursuant to the constitutional edict without more and that also the International Convention on Civil and Political Rights (ICCPR) recognizes right to legal representation under Article 14(3)(d).

14. The Counsel submitted that the Parliament enacted The *Legal Aid Act* No. 6 of 2016 to give effect to Articles 19(2), 48, 50(2) (g) and (h) of *the Constitution*. That the court under Section 43(1)(a) of the Act has a duty to promptly inform the accused of his/her right to legal representation.

15. In respect to the stage at which the accused person should be informed of his/her the right of representation, the counsel argued that article 50(2)(g) requires the accused to be informed of this right promptly. For this Preposition he relied on the case of Joseph Kiema Philip vs Republic [2019] eKLR where the court observed that this right should be informed at the earliest opportunity either at the first appearance before plea is taken, or at the commencement of the proceedings and Francis Ochieng Osura vs Republic (Supra) where the court emphasized that the accused must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether plea would be taken at that point in time or later.

16. He thus submitted that the denial of the appellant's right of representation amounted to grievous violation of his right to fair trial.

17. Counsel further argued that in a criminal case the burden of proof lies with the prosecution to prove the guilt of the accused persons beyond reasonable doubt. In order to discharge this onus, the prosecution must adduce evidence and present witnesses in court whose evidence must be consistent, credible, incontrovertible and without contradictions.

18. He argued the prosecution did not discharge the burden of proof. He submitted that the PW1 admitted to having had sex previously with another person and therefore was not a virgin and it was crucial therefore in determining the appellant's culpability to conduct a DNA test.

19. He argued that PW2 stated that the victim initially said that she did not know who defiled her when she interrogated her but later said that it was the Appellant. That on cross examination she further said

she did not know who was responsible for victim's pregnancy because when she was asked about it she was not mentioning one person.

20. He argued that from the above it was clear the appellant was not the perpetrator and if he was PW1 could not have been hesitant to disclose the same.

21. He submitted that PW3 who stated that the victim's hymen was broken without clarifying on it. He argued that PW4- produced the Victim's birth certificate which had not been marked for identification and without disclosing how he obtained it. He submitted that it was a travesty of justice for the trial court to suo moto mark it for identification and allow PW4 to produce it as an exhibit and that the court erred on relying on it and finding that the Victim was 15 years old at the time of the offence.

22. He submitted that it is unsafe to rely on the evidence of a witness who appears to be untruthful as it was held in Ndungu Kimanyi vs Republic [1979] KLR 283 and that it was thus wrong for the court to convict the Appellant on account of untruth, inconsistent, contradictory and unreliable evidence of PW1.

23. Counsel submitted that the court placed weight on the complainant's pregnancy yet refused the prosecution's request for a DNA test to determine the paternity of the child. That based on uncertain date of conception of the complainant's victim's child and her contradictory evidence it was imperative that a DNA test be conducted on PW1, Appellant and the minor for purposes of matching their DNA profiles. In this regard he placed reliance on Eric Kipkoech Kemei vs Republic [2020] eKLR, Abdisalan Burale Abdi vs Republic [2008] eKLR Bukenya vs Uganda [1972] EA 549 Gaileth Mubarak Elkana vs Republic [2013]eKLR cited with approval in Abdisalan Burale Supra & Davis Kipngetich Langat vs Republic [2017] eKLR.

24. On the age of the complainant he faulted the learned trial magistrate for allowing the investigation officer to produce the birth certificate of the complainant yet the same had not been marked by any other witness. That she did so despite the fact that the investigating officer did not reveal the source of the birth certificate.

25. On the sentence, counsel challenged that same as far as it was meted as a minimum sentence. That this was excessive, harsh and abuse of the court's discretion with respect to sentencing in light of existing precedents on mandatory minimum sentences. He submitted the trial court disregarded the appellant's mitigation and failed to call for the appellant's criminal records from the prosecution. He stated that the Appellant was a first time offender and thus a lenient sentence was merited.

26. In this regard, he placed reliance on Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, Petition No. 15 of 2015 as cited in Simon Kipkurui Kimori vs Republic [2019] eKLR in which the Supreme Court held that failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.

27. He further relied on Simon Kipkurui Kimori vs Republic [2019] eKLR in which the court while reiterating the view of the Supreme Court with regard to mandatory sentence held that: -

> " In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:
>
> Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."

28. He further placed reliance on S vs Malgas 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:

> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

29. He prayed that the appeal be allowed.

**Respondent's Submissions**

30. The respondent submitted that the prosecution had a duty to proof the three ingredients in a defilement case which are; the age of the victim; the act of penetration; and the identity of the perpetrator.

31. On the age of the victim, the respondent submitted that in Edwin Nyambogo Onsongo vs R (2016) eKLR the court of appeal stated that "the question of proof of age has finally been settled by recent decisions by this court to the effect that it can be proved by documents, evidence such as birth certificates, baptismal card or oral evidence of the parents or guardians or medical evidence among other credible evidence of proof".

32. The respondent submitted that the victim testified that she was 14 years in the year 2017, her mother testified that she was born in August 2002 making her 15 years in the year 2018 while the Investigating Officer testified and produced birth certificate as exhibit 5 indicating that the victim was born on 9th September, 2003 making her 14 years on the date of commission of the offence. The respondent admitted that there was minor contradiction on the date of birth of the victim which did not go to the gist of the case as they fell under section 8(3) of the *Sexual Offences Act* and as such this ingredient was proved beyond reasonable doubt.

33. On the act of penetration, the respondent referred to Section 2 of the *Sexual Offences Act* and submitted that in the instant case the P3 form produced showed that the complainant's hymen was broken and this was a sufficient proof of penetration.

34. On identification of the perpetrator, the Respondent submitted that PW1 knew the appellant well as he was her boyfriend and therefore the Appellant was positively identified.

35. As to whether the appellant's right to fair trial envisaged under Article 50 (2) (g) was contravened, the respondent submitted that the Appellant was well represented by Mr. Simiyu save on 30th October 2019 when the matter proceeded in his absence as he was not in Molo. That the said date was taken by consent and the court had discretion to allow or disallow an adjournment. The respondent submitted that despite the Appellant's advocate absence on the said date, no prejudice was suffered by the Appellant as he was able to follow the proceedings and even cross examine the witness.

36. On the court's to failure to call for DNA testing, the respondent submitted that the evidence of the complainant was clear with respect to her previous relationships. The respondent further submitted that it was pure common sense that a person who conceived either in December or January will give birth in August or September. That the evidence of the complainant had already been collaborated and there was no need of proving the parentage of the child as the same was not an ingredient in a defilement case.

37. The respondent prayed that this court upholds the conviction of the trial court and an appeal against conviction should fail.

38. On sentence, they left it to court to exercise its discretion.

39. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that: -

> " On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

40. The issues that arise for determination are: -

    a) Whether the Appellant's right to fair trial was infringed upon;

    b) Whether or not the Prosecution had proved its case beyond reasonable doubt;

    c) whether the sentence is harsh and excessive.

41. Article 50(2) of *the Constitution* provides safeguards of an Accused's Right to fair trial. Amongst the tenets of fair trial is the Right to choose, and be represented by an advocate and to be informed of this right promptly. Article 50(2)(h) of *the Constitution* of Kenya, 2010 stipulates as follows: -

> " (2) Every accused person has the right to a fair trial, which includes the right—
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

42. The Appellant contends that this specific right was violated at crucial stages of the trial.

43. The appellant specifically submitted that the trial court did not inform him of the aforesaid right thus violating his fundamental right to fair trial. This position cannot hold since a perusal of the record shows that the appellant was well represented by Mr. Simiyu Advocate during hearing save on 30th October, 2019. On this date, the prosecutor had one witness, the Record's officer and was ready to proceed with the hearing. The accused on his part stated "My advocate is held up in High Court". In rebuttal the prosecutor told the court the date was fixed by consent and the Record's officer came from Ikumbi Health Centre. The court concurred with the prosecution and declined the adjournment. The records officer testified and the appellant cross examined him. The appellant already had an advocate who failed to attend court. The court exercised its discretion as whether or not to allow the application for adjournment. It was upon the Appellant to disclose fully whether his Advocate was ready or not to proceed with the hearing but he did not. His advocate too did not send any other advocate to hold his brief and there is no evidence herein that he was before the High Court on that date.

44. That besides, while the sins of the advocate should not be visited on the client, the question would be whether the absence of counsel on this particular day resulted in substantive injustice. In my view the subsequent happenings in the same matter demonstrate that it did not. It is noteworthy is that when counsel returned he had the opportunity to request the recall of the witness who had testified in his absence for further cross examination. There is no record of this application. The conclusion one draws from this is that he was satisfied that the proceedings in his absence had not prejudiced his client's case.

45. The only caution here to the trial magistrate is not to apply the best interests of the child principle in a manner that results in the violation of another person's rights. While a child's case ought to be expedited it must not be expedited in a manner that may result in the violation of the other person's right. The exercise of discretion must bear that in mind.

46. On the allegation of bias against the learned trial magistrate, it is unfounded as the record shows that on 2nd September 2009 the matter was placed aside upon the appellant's request to 11.20 am. At 11.25 am his advocate attended court and was able to represent him as such there was no open bias as alleged by the appellant's counsel herein

47. As to whether the prosecution proved all the ingredients of defilement charge; the ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 being the age of the victim (must be a minor), that there must be penetration and proper identification of the perpetrator (see George Opondo Olunga vs. Republic [2016] eKLR). The court must also consider the circumstances of the offence.

48. Section 8(1) of the *Sexual Offences Act* provides as follows:

> "8. (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.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> (5) It is a defence to a charge under this section if -
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.
>
> (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
>
> (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children's Act.
>
> (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

49. It is paramount that the age of the Child in a sexual offence is proved beyond reasonable doubt. In the case of Kaingu Kasomo vs Republic, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

50. The complaint stated that she was 14 years old at the time she first had sexual intercourse with the Appellant. That is on 26th December, 2017. It was her testimony too that she lastly had sexual intercourse with the Appellant on unspecified date in the year 2018.

51. Her mother PW2 testified that the complaint was born on 17th August, 2002. She was therefore 15 years at the time of offence. PW4 produced a birth certificate showing that the victim was born on 3rd September 2003. So on 26th December,2017 when she first had sexual intercourse with the appellant she was 14 years old. The appellants counsel submitted that this birth certificate was not marked for identification and PW4 produced it without explaining how the said birth certificate came into his possession. That the court suo moto marked this birth certificate as PMF15 and allowed it to be produced as exhibit 5. This birth certificate was produced in presence of the Appellant's counsel and he did not object to its production at hearing stage. It is misplaced therefore for the counsel to challenge the production of the same herein when he had a chance to object to its production but chose not to.

52. Further while it is correct that the birth certificate was obtained in 2018 (it shows date of registration to be 16th March 2018) there is no evidence that the birth certificate was obtained fraudulently.

53. In addition, the P3 and the PRC form both indicate the year of birth to be 2003. The PRC says 17th August 2003, the Birth Certificate 9th September 2003. The complainant testified she was 14 years in 2017. The trial magistrate drew the conclusion from all the evidence before her that the complainant was 15 years old. I have reviewed that evidence and I am satisfied that that age is well supported by the evidence before court.

54. This position is well supported by Rule 4 of the Sexual Offences Rules of Court Rules which is explicit that;

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

55. The birth certificate was produced showing the complainant was 15 years at the time of the offence and in the circumstances therefore it is my view that the age of the complainant was adequately proven.

56. Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. Penetration can either be proved through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of a child and this is governed by section 124 of the *Evidence Act* Cap 80.

57. In this case the court was told that the complainant was defiled on 26th December, 2017 That thereafter she fell sick had stomach aches and did not recover and also on 5th January, 2018 she was defiled. This time she fell sick for two months. She went to hospital and was told she was pregnant. She delivered

on 1st September and it was then that the matter was reported to the police, a P3 was completed on 16th September 2018.

58. The pregnancy was relied upon as the evidence of penetration. The question here is whether there was evidence that it was the appellant who penetrated the complainant.

59. I must point out that penetration and pregnancy do not necessarily go hand in hand in a defilement or rape case. The act of penetration is independent of penetration because not every penetration will result in a pregnancy. But there are circumstances such as those of this case where penetration is pegged on the resultant pregnancy. That becomes the reason to determine the paternity of that child.

60. In this case it is clearly evident that the defilement was worked backwards from the date of the birth of the complainant's child. Before that child was born there had been no mention of the appellant in connection with the alleged defilement. Therefore there would have been the utmost necessity to conduct the DNA test to draw that conclusion as to whether the appellant had penetrated the complainant.

61. The record shows that in re-examination the complaint told the court that she conceived in 2017. That she had not had any sexual intercourse with any other person. She had also told the court that before she met the appellant she had another boyfriend. Immediately after her testimony the prosecutor in his wisdom had made this application: I pray that blood samples be taken from the accused and he victim and minor for DNA analysis. In response defence counsel Mr. Simiyu told the court he was going to consult his client and if he was agreeable, then he would undergo the same.

62. The prosecutor sought an adjournment for that purpose. That issue was never revisited.

63. This was the case for the prosecution. It was their duty to prove the charge and each ingredient of the offence beyond a reasonable doubt.

64. Section 33 of the *evidence Act* requires a court to take into consideration among other things evidence of surrounding circumstances of sexual offence.

> "Evidence of the surrounding circumstances ... of any sexual offence ...may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove-
>
> (a) whether a sexual offence is likely to have been committed..."

65. This provision is emboldened by Section 36 which states provides for evidence of medical or forensic nature:

> "(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

66. This was a case that was screaming for directions under Section 36 of the *evidence Act* taking into consideration the totality of the circumstances of the alleged offence: the same was not reported at the initial stage, the complainant was a sexually active minor, the connection between the appellant and the alleged defilement was the pregnancy as it is clear had it not been for the pregnancy the minor would

not have reported the sexual activity. In the circumstances I am of the view that the trial court made an error in failing to order for a DNA test.

67. When the issue of the DNA test was raised the investigating officer told the court 'in defilement cases we prove penetration and not parenthood hence I did not conduct DNA test'. Clearly this attitude is misplaced. There are defilement cases where a paternity DNA test may be necessary due to the circumstances of the case. An investigating officer ought to keep an open mind to enable him close all the loopholes. The prosecutor would not have requested for that test had he not thought it necessary for his case or the ends of justice. In any event the law allows the DNA test to gather evidence against an accused person in a sexual offence case.

68. Without the DNA test the case for the prosecution as to whether the appellant was the perpetrator remained a bit shaky. The law gives the trial court the discretion to make that order. Having not pronounced herself on the application the court could not proceed to explain itself in the judgment. The court ought to have made a determination on the prosecutions application for the test. As it is now it is the word of the complainant against that of the accused. They were not strangers.

69. The record shows that the complainant was the sole witness that the appellant is the person who defiled her. It is imperative to note that the complainant confirmed she had had sexual intercourse with another boyfriend she had before having a relationship with the Appellant. The complainant did not disclose it to the mother that the appellant was the one responsible. She testified that she did not tell anyone and she continued with the school at Banana Primary School and dropped from school in second term due to pregnancy. Her mother confirmed that she discovered the complainant was pregnant six months later. She testified that when she interrogated her the complainant told her she did not know who was responsible but later stated that it was the appellant. On cross examination the complainant's mother stated that when the complainant was asked about her pregnancy she was not mentioning one person.

70. This court has power on appeal to take additional evidence. It says so under Section 358 of the Criminal Procedure Code.

> " Power to take further evidence
>
> (1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court
>
> (2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.
>
> (3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.
>
> (4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court."

71. The offence the appellant is charged with was committed against a minor who appears to have been the victim of defilement by various men. It does not matter that she says she had sexual intercourse with them, what matters is that they were adults who ought to have known better. If the appellant was one of them, then the way to confirm this as required by sections 33 and Section 36 of the *Sexual Offences Act* is to obtain the DNA evidence the prosecution had earlier sought.

72. In the circumstances I direct that:

a. The matter Molo S O 117 of 2018 be returned to Molo Law Courts for the taking of DNA additional evidence. The Deputy Registrar Nakuru to ensure the file gets to the Court within 7 days hereof.

b. That the file be placed before the Chief Magistrate for action in accordance with Section 36 of the *Sexual Offences Act* not later than 7 days upon the receipt of the file.

c. That the Investigation officer to facilitate the taking of DNA samples from the complainant, the minor and the appellant within 30 days of the receipt of the file by the Chief Magistrate Molo.

d. The file be returned to Nakuru immediately upon the taking of the evidence of the Government Analyst for the final disposal of the appeal.

e. This order be served upon the Chief Magistrate Molo Law Courts, the Government Analyst and the OCS Kuresoi Police Station for compliance.

73. The appeal file be mentioned before the Deputy Registrar on 15th of March 2023 for progress.

74. Orders Accordingly.

**DATED, SIGNED AND DELIVERED THIS 17TH JANUARY, 2023.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

C/A Jeniffer

Mr.Bore: Advocate for appellant

Appellant: Present

For state: Ms. Murunga