



**Kiura v Director of Public Prosecution (Criminal Appeal 14 of 2021)
[2023] KEHC 1569 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 14 OF 2021
RK LIMO, J
FEBRUARY 16, 2023**

BETWEEN

SHADRACK KIURA APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

1. Shadrack Kiura, the Appellant herein, was charged with three Principal Counts of defilement Contrary to Section 8(3) of Sexual Offence Act No. 3 of 2006, with alternative Counts of committing indecent act with children Contrary to Section 11(1) of Sexual Offence Act. He also faced a 4th Count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006.

2. The offences outlined in the charge sheet presented were as follows: -

i. Count 1: Defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* and the particulars are captured as follows;

That the appellant on diverse dates between 10th May 2018 and 29th May 2018 at [Particulars Withheld] Primary School in Mutomo sub-county within Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of SMM a girl aged 14 years.

Alternative Count: committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* and the particulars are captured as follows:

That the appellant on diverse dates between 10th May 2018 and 29th May 2018 at [Particulars Withheld] Primary School in Mutomo sub-county within Kitui



County, intentionally and unlawfully touched the vagina of SMM a girl aged 14 years with his penis

- ii. Count II: Defilement contrary to Section 8(1) as read with section 8 (3) of the [Sexual Offences Act](#) and the particulars are captured as follows:

That the appellant on diverse dates in the month of May 2018 at [particulars withheld] Primary School in Mutomo sub-county within Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of SW a girl aged 14 years.

Alternative Count: committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) and the particulars are captured as follows:

That the appellant on diverse dates in the month of May 2018 at [Particulars Withheld] Primary School in Mutomo sub-county within Kitui County, intentionally and unlawfully touched the vagina of SW a girl aged 14 years with his penis.

- iii. Count III: Defilement contrary to Section 8(1) as read with section 8 (3) of the [Sexual Offences Act](#) and the particulars are captured as follows:

That the appellant on the 24th day of May 2018 between 1300-1500hrs at [Particulars Withheld] Primary School in Mutomo sub-county within Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of JMT a girl aged 16 years.

Alternative Count: committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) and the particulars are captured as follows:

That the appellant on the 24th day of May 2018 between 1300-1500hrs at [Particulars Withheld] Primary School in Mutomo sub-county within Kitui County, intentionally and unlawfully touched the vagina of JMT a girl aged 16 years with his penis

- iv. Count IV: Committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) and the particulars are as follows:-

That the appellant on the 26th day of May 2018 at [Particulars Withheld] Primary School in Mutomo sub-county within Kitui County intentionally and unlawfully touched the vagina of BM a girl aged 7 years with his fingers.

3. The Appellant denied all the counts but after trial, he was found guilty in Count IV and in the alternative count in Count II. He was convicted and sentenced to serve 10 years each count with both sentences to run concurrently.

The Appellant felt aggrieved.

4. The following is the evidence as tendered by witnesses during trial.
5. The first witness in respect to Count I and alternative count was SMM (PW1) aged 14 years at the time. She testified and denied being defiled or sexually assaulted by the Appellant. She testified that she was forced to write a statement implicating the appellant by one Mrs. Mwangi and Mrs. Kingoo. She



stated that she was taken to Mutomo Hospital for medical examination but she was adamant that she was not defiled by the Appellant.

6. WW (PW2) the Complainant in respect to Count II testified that she was aged 14 and recalled that on 8th May, 2018, the Appellant summoned her and told her to go and collect examination papers from the staff room adding that there were no teachers in that staffroom at the time. She stated that she obliged and went to collect the papers and took them to him. She testified that the appellant directed her to go to lab/computer room and undertake the examination there. The girl testified that she proceeded there alone and the Appellant followed her into the Computer Lab where he asked her to lie on a mattress that was used by the school watchman and was kept in that room. The child stated that the Appellant who was her teacher, asked her to place the paper on the table first before he grabbed her dress and removed it. The girl stated that the Appellant then directed her to remove her pant and when she resisted, the Appellant removed his long sleeved shirt and used it to cover her mouth and then he defiled her. She testified that on the same day they proceeded for sports day at [Particulars Withheld] Primary School and that while there, the Appellant sent one J to give her 20 shillings adding that J on her part was given 30 shillings.
7. PW2 further testified that on another date as they undertook a science examination during the day, the Appellant asked her, together with J, M and B to go to the Computer Lab to undertake examination there because the classroom was full. She stated that she sat at the front while J and B sat together while M sat on his own. She testified that while the exams the exams was going on, the Appellant went in quietly and took a watchman's coat and put it in front of her to prevent the others from seeing her because she faced them at the front. The girl stated that, the Appellant then inserted his fingers inside her dress and began cuddling her breasts and that as he did so, M looked at the Appellant who told him to concentrate on his work before walking out.
8. She testified that after a while, the Appellant went back and found M busy at the time and that the Appellant again began touching her breast attracting the attention of the other pupils. She added that when the appellant realized that he was being watched, he pretended to be showing her the answers to the questions she was tackling adding that, when the Appellant left the room, Blessing cautioned her not to share the answers given to her by the Appellant because they were wrong answers.
9. She further testified that on 21st May 2018 at about 9 AM, the Appellant called her from class and led her past class 3 and behind the dormitory and into a thicket and defiled her there three times in 3 different spots before asking her to go back to the classroom after giving her a tissue paper to wipe her genitalia.
10. She testified that he did not disclose to anyone what had happened to her but thereafter, she started experiencing stomachaches. She testified that she told one K1 what had happened and that K1 asked her to report the matter to the Head Teacher One Madam K2 and that she obliged. She testified that when she reported the incident, Madam K2 took her to the Mutomo Police Station where they reported the incident and that she was referred to Mutomo Sub-County Hospital where she was examined and treated. She testified that she was later taken to Kitui Hospital for age assessment where her age was assessed and found to be 14 years. She added that the dress she was wearing when the Appellant caressed her breasts, got torn and identified the torn dress in the trial court. She denied suggestion by the Appellant during cross-examination that she was being used to frame and fix the appellant insisting that what she testified about what happened to her adding that she was an orphan.
11. JMT (PW3) the Complainant in respect to the 3rd Count testified that on 24th May, 2018 which she recalled was a Thursday after lunch, the Appellant went to her class and called her out and asked her to follow him into the Computer Room where he asked her to look for revision papers inside the lab.



12. She testified that she declined the directive because she knew that no revision papers were at the Computer Room because what was in that Computer Lab were just computers.
13. She testified that the Appellant told her to go out and look for a cane behind the dormitory which she stated was next to a thicket and that as she looked for a cane, the Appellant followed her, caught her hand and led her inside the thicket where he defiled her on the ground.
14. She also testified that she went home on Friday without disclosing what had happened to her. She testified that she went back to school on Sunday where she got information that the Appellant was looking for her, adding that, she also heard that another girl namely BM had also been defiled which made her gather courage to go and report what happened to her to the School. She testified that the matron notified Mr. N and J and that she was later taken to Mutomo Health Centre where she was examined and treated.
15. BM (PW4), the Complainant in respect to the 4th Count, a girl aged 7 years stated that she was in Class II at [particulars withheld] Primary School. She testified on a date she could not remember while she was at the Kitchen the Appellant went there and asked her to go to the staffroom to get a ball she had sought and that while there, the Appellant placed her on his lap and inserted his fingers into her vagina after removing her pant to the knee level. She testified that she felt pain and that she then left the staffroom and went to play with other pupils.
16. The minor testified that she disclosed what had happened to her fellow pupils Reke, Nice and the School watchman. She testified that she was later taken to Mutomo Sub-County Hospital where she was examined and treated.
17. NK (PW5) testified that on 26th May 2018 on a Saturday, the Appellant went to her and asked her if she had seen a pupil named JMT (PW3). She stated that she told him that JMT was away. He asked the witness who was in the company of other pupils to go and fetch PW3 from her home but the witness declined and the appellant asked her to take his bag to the staffroom. The appellant followed her and while they got to the staffroom, he told her that he had a gift for her in the bag. He also gave her a sweet and when she looked inside the bag, she saw some clothes. She stated that he asked her to pick a file for him and as she did so, he tried to hold her but she managed to run away from the staff room. She testified that she went back to class and that the appellant sent for two of her classmates to call her. She added that, one of them told her that the appellant had harassed her as well while she was in the staff room. The witness also stated that on 29th May, 2018, JMT, (PW3) told her that the appellant had called her to the computer lab and asked to suck her breasts and when she refused he asked her to go and fetch a cane upon which he followed her to a bush and defiled her there. On cross examination, the witness told the court that BM, (PW4) had told her of what had transpired between her and the appellant which was the same day on Saturday, 26th May, 2018.
18. BM2 (PW6) told the court that the appellant asked her together with three of her classmates S, M and J to go and undertake their exams from the computer lab on 4th April, 2018. She stated that there was a parent's meeting at their school on the same date. That while there, she saw the appellant touching S's (PW2) breasts. She stated that the appellant had covered S's using a jacket that he picked from the lab. That when the appellant noticed that the students had seen him, he asked them what their problem was.
19. JK (PW8) stated that on 24/5/2018, she was in the Computer Lab undertaking an exam with her classmates M (PW8), S (PW2) and B (PW6) because their chairs had been taken by Parents Meeting earlier in the day. She stated that PW2 was seated alone at the back and that she saw the appellant touching her breasts. She also told the court of another instance, 24th May, 2018 when students were



attending sports at [particulars withheld] when the appellant gave her Kshs 50/- and instructed her to give Kshs 20/- to PW2 and give him back the change of Kshs 30/- which she did. On cross examination, the witness told the court that she did not tell the police about the computer lab incident as the same was not recorded in her statement. She however maintained on re-examination that the incident did occur. She also stated that she did not recall the date that the students went for sports at [particulars withheld].

20. MM (PW8) on his part testified and recalled that on 4th April, 2018, as they did their exams in the Computer Laboratory, and as the exams went on, he saw the Appellant caressing S's breasts adding that, he had gone to the Computer Lab with S, B, and J. He added that S sat at the opposite end and at her own desk while B and J sat on another side. She testified that the Appellant covered face and chest area using a jacket belonging to the watchman to conceal what he was doing but despite the attempt to conceal what he was doing to S, they saw adding that when B looked at them, the Appellant reprimanded her asking her what her problem was.
21. He testified that the Appellant then showed S some questions and shared with him answers to question Number 2 which he failed. He stated that S scored the highest in that examination.
22. JS (PW9) that on 6th May, 2018, the appellant asked her to accompany him to the office to fetch some exam papers and on reaching the office, the appellant had asked her whether she knew anything about sex to which she replied that she didn't. That the appellant also told her that he wanted to have sex with her. She stated that she that she walked out of the class and the appellant asked her to call another student who she referred to as SM (PW1). That she went to call SM and took her to the appellant who held SM by the hand and led her to a thicket. That SM later told the witness that the appellant had promised to give her Kshs 400/- and that SM was later given Kshs 200/- by the appellant. She stated that she did not tell anybody about the incident involving PW1.
23. MM (PW10), a child aged 13 years testified that on one Tuesday 6th May, 2018, while in Class One, SM (PW1) went and fetch her on class telling her the Appellant was calling her behind a water tank within their school. She stated that, she went and found the Appellant holding Kshs. 200 note which he handed over to her which offer she said she declined because she did not know the purpose of the offer. She stated that when she declined the Appellant got agitated and called her "kumbafu" and that he went back to class leaving SM (PW1) alone with the Appellant. She further added that she did not disclose to anyone at the time what had transpired and simply went back to her Class 7.
24. Rueben Muasya Mandu (PW11) the school watchman [Particulars withheld] Primary School, testified that he had worked in the said school for eight months. He testified that on 26th May, 2018, which was a Saturday, upon arrival a child named BM (PW4) went to where he was at the Kitchen and told him that on the same date, she had gone to the Appellant to borrow a ball to play with and that the Appellant had told her to go to the staffroom to pick it up and that she reported that as she picked the ball, the Appellant touched her private parts adding that one K1 found her in the staffroom being touched inappropriately. The witness also stated that the girl (BM) reported to him that the Appellant has asked her if she had seen a girl with strong thighs. The watchman told the trial court that he advised the minor to report the matter to the school matron adding that, he also spoke to one R and K1 to confirm the allegation made by BM (PW4) and according to him, the said girls confirmed that the incident took place.
25. He further identified a jacket brought to court during trial as his, adding that he used to leave it at the computer lab when he left duty in the morning adding that, his duty was from the evening to morning and that there was no watchman for the day.



26. Faith Kilele (PW12) the school matron testified that on 29th May, 2018, in the morning, a child named J (PW3) went to her and reported to that the Appellant had told her that her breasts were beautiful and had sought to suck them. She further testified that she also got a complaint from another child named BM (PW4) who told her that the Appellant had inserted his fingers into her vagina after she had gone to ask for a ball. She stated that she got those Complaints on a Saturday.
27. Dr. Martin Gullet Nyongesa (PW12) testified that he was a doctor working at Mutomo Sub-County Hospital and that on 12th June, 2018, he filled a P3 Form in respect to Susan Muthini (PW1). He testified that he examined the girl who appeared timid and that her vaginal examination was normal but with laceration and foul smelling discharge which the doctor found unusual for a girl her age. The doctor testified that they did not carry out further examination in the lab. He testified that the girl was treated and tendered treatment note book as P Ex1 and P3 Form as P Ex 2.
28. The doctor testified also tendered treatment notes in respect to BM (PW4) as P Ex 13 adding that the girl complained that fingers had been inserted into her vagina. He testified that the hymen was missing and the vaginal opening was about 3 Cm in diameter which he stated was approximately the size of an index finger which is about 2cm, He tendered P3 Form as P Ex 14.
29. K1 (PW14) testified that on 26/5/2018, the appellant went to the school and called the students to the assembly and that he picked out N (PW5) to take his bag to the staffroom. She testified that later, the appellant went to her class and sat next to her and asked her to take a file to the staffroom to which she obliged. She added that as she went, she saw BM, (PW4) who was in class two outside their class and that she asked the appellant for a ball. She saw BM, (PW4) going to pick the ball from the staff room with the appellant following her. The witness stated that she later went to the staff room to collect a dictionary and she saw the appellant sitting on the desk babysitting BM and that when the appellant saw her, he asked her what she was doing and she told him that she was looking for a dictionary. The witness stated that she went back to class and BM followed and told her that the appellant had inserted his fingers on her vagina. She stated that she reported the matter to the school watchman (PW11).
30. R (PW15) on her part, testified that on 28th May, 2018, she saw JMT (PW3) walking abnormally with her legs apart and when she asked her, she told her that the appellant had asked her to be 'friends'. That on 26th May, 2018, in the dormitory, BM (PW4) told her that the appellant had defiled her. During cross examination, the witness stated that JMT PW3 had told them that the appellant had defiled her on 24th May, 2018. The witness also stated that he was not sure whether JMT (PW3) was in their school in the first term or whether she reported back after the August holiday.
31. K2 (PW16) the Head Teacher testified [particulars Withheld] Primary School that on 28/05/2018. She got a report from the School Matron (PW12) that Beatrice (PW4) had been sexually assaulted by the Appellant whom he had reportedly inserted his fingers into the vagina of the said minor. She testified that she reported the incident to a Communication Officer who told her he was away in Nairobi and would come to review the report.
32. She testified that the following day on 29th May, 2018, a teacher named Justus Kilonzo reported to her that JMT(PW3) had also been defiled by the Appellant. She testified that she reported to P.E.O Mutomo who advised her to go to Teachers Service Commission (TSC) with Joyce to report and that JMT (PW3) recorded her statement before she was taken to Hospital for a medical examination.
33. The Head Teacher further testified that on 30th May, 2018, another child named S (PW2) went to her and reported to her that the Appellant had defiled her on 24th May, 2018 which was on a Thursday and that the girl reported to her that she had been defiled behind the dormitory on a thicket. She testified



that the girl showed her three spots in the thicket where she was defiled. She testified that she sent the girl to the Police to report accompanied by a teacher.

34. She further testified that the Teachers Service Commission Officers asked her to inquire if there were other girls in the school who had been defiled by the Appellant and that he assigned other teachers to carry out the task. She added that the Police went to her school and collected a coat belonging to the watchman and a mattress the watchman used adding that both items were used by the Appellant to defile the school girls. She denied any suggestions made to her in cross-examination that she was envious of good performances posted by the Appellant in the subjects he taught at the school.
35. Teresia Mbula (PW17) a Clinical Officer, at Kisasi Health Centre, testified that at the material time, she worked at Mutomo Sub-County Hospital and had worked as a Clinical Officer for 10 years. She testified that, while at Mutomo Sub-County Hospital, she saw the minors who were reported to have been defiled and named them as Joyce Thomas (PW3), Syombua Wanzia (PW2).
36. The Clinical Officer testified that PW3 complained to her of having been defiled by a person known to her on 24th May, 2018 and that she examined her 4 days after the incident and that her hymen was broken when she examined her adding that she had already bathed. She stated that on examination, she found no tears or bruises.

She tendered treatment notes in respect to JMT as P Ex 11(a) which note was in respect to the treatment she received on 29th May, 2018 and P Ex 11(b) in respect to the treatment she got on 8th June, 2018. She further tendered P3 Form as P Ex 12.

37. She also tendered treatment notes for Syombua Wanzia as P Ex 4 and P3 Form as P Ex 6.
38. PC Defence Mghoi (PW18) the investigating officer stated that on 29/5/2018 (PW16) while at Mutomo Police Station the Head Teacher (PW16) in company of PW3 reported that PW3 had been defiled by the appellant. He added that on 30th May, 2018, another girl S (PW2) was taken to the station by the Head Teacher (PW16) with the same allegation citing the appellant as the perpetrator. He testified that the Head teacher also went back to the station two days later with the similar report this time in respect to SM (PW1) and BM (PW4). That after the police took statements from the children, he took them to hospital and later visited the school where he drew a Sketch Map of the School (Pexh 16) and collected some exhibits including timetables for Class 6 and 8 for term II for subjects the appellant was teaching (Pexh 17 a & b), a jacket (Pexh 9) and a blue mattress (Pexh 10). On cross examination, the witness stated that PW1 told him that she had been defiled on a Friday, in a thicket behind the school adding that there was a big thicket behind the school dormitory.
39. When placed on his defence, the Appellant herein, Shadrack Muriithi Kiura (DW1) the appellant herein gave a sworn statement in is defence and denied defiling the complainants. With regards to Count I, denied molesting PW1 on 10/5/2018 and stated that he had been hospitalized at Mutomo Mission Hospital from 28/5/2018 to 30/5/2018 adding that, he proceeded on a 10-day leave after his hospitalization. According to him, Mrs. K2 (PW16), the school head teacher had forced PW1 to frame him for the offence. The appellant also denied the charges in relation to Count II and testified that S was not a student at [Particulars Withheld] Primary School. As for Count III, the appellant denied the charge and stated that PW3 was not a student at [Particulars Withheld] Primary School. He also stated that there were no class eight students at the school on 24/05/2018 as they had all gone for prize giving in Kitui adding that there was no way JMT (PW3) could have been in school on that particular day. He accused the school head teacher of paying JMT (PW3) to implicate him in the charge. The appellant also denied charges in respect to Count IV and denied defiling BM (PW4). He however admitted to being in the school compound for 20 minutes on 26/5/18 for his classes but stated that he was unwell on the particular day. He stated that he delegated his duties to one of the teachers and left at 10.30am



- with the school's chairman who was also at the school on that day. He denied entering the staffroom and also denied the allegation that BM (PW4) asked him for a ball. He also stated that BM(PW4) was a class two pupil at the time and that she could not have been in school on a Saturday as all lower classes up to class 3 went home on Fridays.
40. He also claimed that the sub-county ball game competitions were on 25/5/2018 and that all schools were closed as a result. He also cited evidence given by the Doctor (PW13) who stated that PW4 suffered a 3cm tear in her vagina which he insisted would have resulted to bleeding but that the child (PW4) did not bleed. He therefore blamed the school's head teacher for using PW4 to implicate him. The appellant also denied being in school on 4/4/18 when it was alleged that he touched PW2's breasts in the computer lab. He stated that he was away at the time supervising exams at [Particulars withheld] Primary School. He stated that B (PW6) was untruthful as she stated that she was in class 6 which the appellant intimated was in a different class from the class of S (PW2) as such the two could not have been in the computer lab doing exams together. He also claimed that he was away on 24/5/2018 coordinating exams at [Particulars Withheld] Primary School. He also accused J(PW8) of lying and stated that she was used by the school head teacher to frame him because his father operated a motor bike which belonged to the head teacher. He also took issue with the evidence of the school watchman (PW11) stating that the witness was lying as he got confused on the dates of the incidents reported. The appellant claimed that he had never seen the mattress that PW11 stated he slept on in the Computer Lab. He also claimed that the School Matron (PW 12) was lying in her testimony in court as she could not remember the dates of the incidents and also because she stated that she did not tell the police what BM (PW 4) reported to her. He also stated that the relationship between him and the school head teacher, (PW16) was strained because she was angry at him as parents congratulated him for improving the school's performance and starting various projects in the school.
 41. He also alleged that he declined advances by PW16 which did not please her. The appellant further faulted the manner in which the School Head Teacher (PW16) handled the defilement allegations. He faulted her for the incidents to the police without involving the parents of the Complainants apart from one.
 42. RMS (DW2), the father to SM (PW1) stated that her daughter was beaten badly and forced to admit that she was in a relationship with the appellant. He also stated that Muthini PW1 was forced to record and sign a statement with the police saying that she had been defiled by the appellant. The witness also stated that PW1 was taken to hospital where she was examined. He stated that he was angry and decided to change PW1 from [Particulars withheld] Primary School to another school.
 43. FSM PW1's (DW2) the mother to PW1 stated that she was summoned to the school and told by the head teacher that the appellant had beaten her daughter badly and asked her to go and report the same to the police. The witness stated that, her daughter (PW1) denied having been beaten by the appellant and refused to go to the police. The witness also stated that she was aware that there were some school games in the month of May, 2018 and that she had given her daughter some Kshs 200/-. She stated that her daughter told her that she had been beaten while at school and forced to say that the appellant had defiled her and given her the Kshs 200/-. She stated that the school head teacher told her that other children had been beaten and forced to admit to having been defiled by the appellant and that the witness was of little help to her. She stated that PW1 recorded her statement with the police in her absence.
 44. Kyalo Mwangangi (DW4), The PTA chairman at [Particulars Withheld] Primary School stated that he knew the appellant. He testified that when he joined the school in 2016, he uplifted the school's performances and initiated many projects in the school including planting of trees. He also stated that he heard about the defilement allegations in the school and called for a parent's meeting. He stated



that he asked the parents to investigate the matter and that reported to him that there was no truth in the allegations and that the head teacher in the school had beaten and forced the children to give false testimonies. The witness also stated that he asked the Head Teacher (PW16) about the allegations but she dismissed him and told him that it was none of his business.

45. The trial court evaluated the evidence tendered and found that the Prosecution's Case had failed to prove all the Counts save for the alternative charge in Count II and the Principal Count in Count IV respectively.

The Appellant was therefore, acquitted of all the other counts but convicted in the alternative count to Count II and Principal Count in Count IV. He was sentenced to serve 10 years in each count and both sentences were to run concurrently.

46. The Appellant felt aggrieved and filed this appeal and raised the following grounds namely: -

- i. The learned senior magistrate erred and misdirected himself in law and facts when he casually dismissed the Appellant's defence of frame up without considering its weight despite the fact that the appellant called watertight and credible evidence to establish the frame up done by the head teacher of Thome Primary School and her accomplices with a view of settling scores.
- ii. The learned senior magistrate erred and misdirected himself on the law and facts when he rules that the prosecution had adequately proved the two counts he convicted the appellant of when the evidence tendered created more doubts than truthfulness of the charges.
- iii. The learned senior magistrate erred and misdirected himself on the law and facts when he convicted the appellant on charges that had not been sufficiently established.
- iv. The learned senior magistrate erred and misdirected himself on the law and the facts when he applied selective bits of the evidence in convicting the appellant while disregarding the exonerating evidence that was overwhelmingly credible.
- v. The sentence meted against the appellant was grossly excessive in the circumstances of the case.

47. The appellant submits that there were contradictions pertaining to the 2nd complainant, (PW 2) as to when she joined the school. He submits that PW6, PW7 and PW8 testified that they were doing an exam with PW2 in April of 2018 while PW2 stated that it was in May of 2018. The Appellant further takes issue with the testimonies of PW6, PW7 and PW8 stating that they gave varying narratives about the sexual assault of Syombua (PW2) which occurred in the Computer Lab as they undertook an exam. He also faults that Trial Magistrate for convicting on the alternative charge on Count II and stating that the offence could not have occurred on 8/5/2018

48. The appellant faults the trial court's conviction on Count IV stating that the court relied on the testimonies of K1 (PW14) and R (PW15) who were both untruthful. The appellant submits that PW15 specifically could not have been in school on 26/5/2018.

49. The appellant also faults the evidence presented by Reuben Muasya (PW11) stating that his testimony included four different dates of when he allegedly received information from PW5's about defilement.

50. The State through the Office of the Director of Public Prosecution has conceded to this appeal citing that the testimonies of witnesses were full of discrepancies. The State contends that the testimonies



were contradictory adding that, the charge sheet in respect to Count III does not tally with the evidence tendered by the Complainant in that Count. The State/Respondent blames the school head for framing the Appellant to kick him out of Thome Primary School. It asks this Court to re-evaluate the evidence and determine this appeal.

51. This court has considered this appeal and the response made. The Respondent has conceded to this appeal but that notwithstanding, this court is obligated to determine it on merit.

52. The duty of this court being the first appellate is stated in the case of Okeno vs. Republic (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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 junction 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 1978) E.A. 424.”

53. The Appellant herein, was charged with three Counts, being defilement Contrary to Section 8(1) (3) and 3rd Count being defilement Contrary to Section 8(1) of the Sexual Offence Act. He was also charged with the offence of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offence Act.

54. In view of various Counts facing the Appellant, this court will consider each count separately so as to avoid getting jumbled up in view of the complexity of the case and evidence tendered during trial.

55. I will begin with the first three counts which are in respect to defilement. In cases of that nature, the following elements are crucial and must be established and proved to sustain a conviction. The same are: -

- i. Penetration
- ii. Age of the victim
- iii. Identification of the perpetrator

Count I

56. On this Count, the Prosecution presented two witnesses the Complainant (PW1) and the Doctor (PW13). The Complainant SMi (PW1) on her part, denied any suggestion of being defiled stating that she was not defiled and was instructed by the Head teacher Mrs. K2 and Mrs Mwange to report to the Police that she was defiled.

57. The Doctor (PW13) however, was of a different opinion because he told the trial court that when he carried out physical examination on PW1 he found lacerations on her vaginal wall as well as a foul smell which was suggestive of defilement. The doctor testified that when he examined her, she appeared timid, and no further explanation was forthcoming.



58. The defence called both parents of PW1 who testified as DW2 and DW3. The parents stated that their daughter (PW1) was forced to write a statement indicating that she had been defiled. It is apparent that though the parents were not persuaded that their daughter had been defiled, they made no comment about the doctor's finding. They however, testified that they had transferred their daughter to another school but gave no reasons for the transfer.
59. The trial court found that the Complainant's evidence together with the evidence tendered by her parents made the prosecution's case against the appellant in respect to Count I and the alternative Count weak and found that the evidence could not sustain a conviction.
60. This Court has evaluated the evidence in respect to Count I and though I find the doctors evidence and the evidence PW 9 (JS) a bit disturbing, I am unable to overturn the finding of the trial court in both the Principal and the alternative Count in Count I. This is because though the element of age and penetration were certainly established, the Complainant stated categorically that the Appellant did not defile her. That statement casts doubts about the charge and the benefit of the same must go to the Appellant.

Count II

61. The Prosecution's Case in respect to the Main Count in this instance, hinged on the evidence of the Complainant (SWW) (PW2) and the Medical Evidence of Dr. Martin Gullet Nyongesa (PW12).
62. The Complainant in respect to Count II gave a vivid and graphic details of various incidences of defilement and indecent assault by the Appellant.
63. The Complainant (PW2) stated that the 1st incident of defilement occurred on 8th May, 2018 when the Appellant sent her to take examination papers for him to the computer lab and while there, the Appellant followed her inside the Computer Lab alone. The girl stated that the appellant told her to lie on a mattress in the lab. This is how she narrated the incident.

“He grabbed my dress and removed it. He then asked me to remove my pant. I resisted..... he then removed my pant.he inserted his penis into my vagina.....”

The Complainant further stated that on another occasion, while she was doing some examination with other pupils in class when the Appellant asked her together with J, M and B to go to the Computer Room and while there as the said pupils did their exams, the Appellant went in quietly and in front where PW2 was seated alone facing the others. She stated;

“..... Mr. Kiura came quietly and took the watchman's coat.....he put the coat in front of me such that M, B and J could not see me..... he inserted his hands in my dress and started cuddling my breasts. When Mambo looked, he asked him to concentrate on his work. After that, he walked out.....”

It is apparently clear that the Appellant appeared rebuffed by a curious look from the boy.

64. The girl also stated that the Appellant undeterred went back a second time and found Mamba busy with his exams and that he began touching her breasts attracting the attention of Juliana and Blessings and when he realized he was being watched, he pretended to be giving answers to the Complainant.
65. The Complainant's (PW2) narrative regarding the indecent act was well corroborated by B (PW6), J (PW7) and M (PW8). All the children stated that they saw the Appellant cover the Complainant (PW2) with a coat and started caressing her breasts. So, as the Appellant thought he had concealed his despicable acts, he was mistaken because he was seen by the other pupils caressing the breasts of



- PW2. The Appellant at one stage scolded M (PW8) and told him to stop staring and concentrate on his work before leaving the computer room. That action of stopping what he was doing and walking out, in my view, spoke volumes about the guilt feeling by the Appellant who knew that what he was doing was wrong and awful.
66. The evidence by PW2, PW6, PW7 and PW8 on what transpired on the Computer Lab was so vivid and consistent that it is not possible for the 4 of them to give such a consistent account of what occurred if they were coached to fix or frame the appellant falsely.
67. The trial court, in respect to the indecent act evaluated the evidence well and arrived at the correct conclusion. The only anomaly I have detected is the fact that the charge sheet was improperly framed to reflect the offence as an alternative charge to the Principal Charge of defilement. The charge should have been drawn as a separate count rather than alternative count. But this court finds that the Appellant suffered no prejudice as a result of the minor omissions. The Appellant had pointed out this anomaly in his submissions which I find valid but the said omission was not fatal to the Prosecution's Case
68. The Court therefore, invokes the Provisions of Section 382 of Criminal Procedure Code to correct the anomaly in the Charge Sheet only to the extent that instead of a charge being an alternative count, the charge of indecent act with a child contrary to Section 11(1) of Sexual Offence Act stands as an independent Count. I find that the evidence adduced in respect to that Count was simply overwhelming. The Appellant contends that the 4 pupils gave different account on where the coat was placed but that in my view was insignificant. All the 4 children testified that the Appellant used the coat in the lab and the watchman (PW11) confirmed that he used to leave his coat at the computer lab during the day. That a coat was identified in Court and tendered in Evidence.
69. The Appellant has also pointed out that the Complainant (PW2) in the charge sheet is described as SWW while the proceedings at the trial captured her as SWW. This court has looked at the record and finds that the 2nd Complainant (PW2) was referred to as SWW and the Medical documents to wit treatment chit P Ex 5 and P3 Form as Ex 6 reflects PW2 as SWW. All the witnesses from [particulars withheld] Primary referred her as SWW and even in her evidence PW2 stated that the Appellant called her SWW. There is therefore, no doubt that the girl/victim who was sexually molested was one and the same girl SWW who testified as PW2.
70. The Appellant has submitted that PW2 joined [Particulars Withheld] Thome Primary School in 2nd term which is not denied or contested. The incidents of indecent acts and defilement took place in the month of May, as indicated in the charge sheet. There is therefore, no contradiction there.
71. I will now turn to the Principal Count in Count II which was defilement. As observed above, the Complainant SWW (PW2) stated that the Appellant defiled her on 2 occasions which was on 8th May, 2018 inside the Computer Lab and on 21st May 2018 at around 9am behind the dormitory in a thicket.
72. The girl testified that on the second Occasion, the Appellant defiled her three times in 3 different spots on the ground in the thicket. She testified that she at first resisted the Appellants advances. This is how she gave the narrative during trial;

“..... he asked me, “Syombua what are you doing to me? He got hold of me, and carried me on his back and took me to the thicket.....he defiled me on the ground. He took me to another spot still within the thicket and defiled me again. He took me further to another spot and defiled me further. After he was done he asked me to go to class. He



gave me a tissue paper and asked me to wipe on my genitalia.....he asked me to give back the tissue so that that he could dispose it off in the thicket.....”

73. The way the Complainant narrated what happened to her, was too vivid and graphic to have been made up as the Appellant contends.
74. The Complainant (PW2) further, stated that she did not mention to anyone what happened to her but after she started experiencing stomach pains, she told her friend named K1.
75. The evidence of PW2 was corroborated to some extent by the medical evidence tendered by Teresia Mbula (PW17), the Clinical Officer who examined her. The Clinical Officer testified that the Complainant (PW2) went to hospital for examination on 29th May, 2018, four days after the event on 24th May, 2018. The Medical Officer stated that the Complainant had bathed and found no bruises or lacerations on examination. The only significant finding by the Medical Officer was that the hymen was broken which led to Medical Officer conclude that there was defilement. The Medical Officer further added that the Complainant went back on 8th June, 2018 complaining of Stomach pains and when she was examined she found whitish discharge from her vagina. The Officer did not indicate if she referred to the Complainant for further tests to confirm if she had a Sexually Transmitted Disease and whether the Medical facility had any challenge but that in my view did not negate the prosecution’s case in respect to the main count of defilement.
76. The trial court in its evaluation found that there was no Medical evidence to support defilement notwithstanding the medical evidence tendered by PW17 who tendered treatment chit (P Ex 5) and P3 Form (P Ex 6). The trial court may have been misled by the information captured by P3 Form which indicated that the victim “had already taken bath so no evidence was detected”. The evidence contained in the P3 Form and the treatment chit however, clearly indicated that the hymen was broken. Besides that, the evidence of the Complainant (PW2) in respect to the pain she experienced in the aftermath of the ordeal was well corroborated by a Medical Officer (PW17) who stated that the Complainant went back to Mutomo Health Facility and complained of stomach pains and on checking, she noticed whitish discharge.
77. This Court finds that the investigation and the medical attention the Complainant received in general indicated a need for improvement in that regard but that does not in my view lessen the weight of the evidence tendered by the Prosecution against the Appellant in regard to the Principal Count in Count II.
78. The Appellant has cited what he calls contradictions and the state through the Office of the Director of Public Prosecution has termed them as discrepancies but I am not persuaded. The evidence given by PW2, PW16 and PW17 were consistent, cogent and credible. The evidence of the 3 witnesses, coupled with evidence of PW6, PW7 and PW8 established beyond doubt that the Appellant defiled the Complainant with respect to Count II and on another occasion he indecently assaulted her by fondling her breasts.
79. The Prosecution erred by failing to call an expert to tender age assessment and instead let the Investigation Officer (PW18) to tender the age assessment report. That was an omission because, the Investigation Officer was not an expert in that field of science and incompetent to tender evidence on age in light of clear provisions of Section 48 of the *Evidence Act*.
80. However, the omission by the Prosecution was not fatal because the element of age was captured clearly in the Medical documents properly tendered by PW17. The treatment chit (P Ex 5) and P 3 Form (P Ex 6) showed that the Complainant (PW2) was 14 years’ old which corroborated the evidence given by the minor herself. I am satisfied that despite the cited omission by the State, to call Medical evidence



to prove age, the element of age was proved to the required standard. The other medical evidence was properly tendered and noted above.

81. With the prove of penetration, age and identification of the perpetrator, the prosecution proved the 2nd Count of defilement to the required standard in Criminal Law.

Count III

82. The Principal Count in Count III was also defilement. The Complainant on this count JMT (PW3) said that the Appellant defiled her on 25th May, 2018 on a Thursday after lunch. She stated that the incident occurred on a thicket behind the dormitory and the narrative given is similar to what SWW (PW2) had said regarding what also happened to her. She said she was called to the Computer Lab and told to look for revision papers and when she declined, knowing that there were no revision papers, the Appellant pretended he was going to cane her and led her to a thicket allegedly to look for a cane but whilst there, he defiled her on the ground.
83. The girl stated that she never disclosed the incident to anybody and went home on Friday and when she came back on Sunday, her fellow pupils informed her that the Appellant was looking for her. She was also informed of an incident of indecent assault involving BM (PW4) and that is what prompted the girl to make her own report to the matron.
84. His testimony was corroborated by R (PW13) a Pupil in the same school who testified that on 28th May, 2018 at lunch time she saw Joyce (PW3) walking abnormally. According to her,
- “She was walking with her legs apart” and when she inquired, she told her that the Appellant had defiled her on 24th May, 2018.
85. Faith Kilele (PW12), the school matron, also corroborated the evidence of Joyce (PW3).
86. The Medical Evidence tendered by Teresia Mbula (PW17) in respect to PW3 is almost identical with that of PW2. According to the said Clinical Officer, JMT (PW3) had already taken bath and found no bruises or tears. She however, noted that her hymen was broken which was indicative of defilement. The only doubt created was the fact that the girl reportedly told the Medical Officer that the sexual encounter forced on her by the Appellant was not her first encounter as she had had a previous encounter. There was no clear evidence about whether the Appellant also had anything to do with the previous encounter. It is only on that basis that I concur with the trial court finding that the evidence tendered in respect to Count III were insufficient to render a conviction. I must however, add this Court found the evidence tendered deeply disturbing and with better investigation and proper job by the Prosecutor, the finding of this Court in respect to Count III would have certainly been different.

Count IV

87. The Prosecution in respect to this Count presented what I can say was the most watertight evidence in relation to the other Counts. The victim in this count was a 7 years old girl who was at Class 2 at the time. She testified that on a date she could not recall (this was a seven years old) she went to the Appellant to ask for a ball to play with and that the Appellant told her to go and get it at the staffroom and that as she went the Appellant followed her there and placed her on his lap facing her and started inserting his fingers in her vagina. This is how she narrated the incident;

“..... he sat on the table restrained me in the staffroom.....and placed me on his laps. I sat.....facing his abdomen.....we were both facing the same direction He inserted



his fingers into my vagina. He had removed my pant to the knee level..... I felt pain.....”

88. The torrid testimony of PW4 was clearly corroborated by FK (PW12) who testified that she was in Class 8 and recalled that the incident occurred on 26th May, 2018 in the morning. She stated that she was outside her Class (8) which was near the staffroom when she saw and heard BM (PW4) asking the Appellant to get her a ball and that she saw BM (PW4) going to the staffroom followed by the Appellant. She also shortly followed the duo because she states that she wanted to borrow a dictionary and this is how she described the scene;

“.....on reaching the staffroom, I saw Kiura (Appellant) sitting on the desk babysitting BMM.....did not enter the staffroom.....”

I turned back, Kiura followed me asking what I was looking for, I told him it was a dictionary. He asked me why? I told him.....I wanted to know the meaning of an amphibian.....”

89. This court has gone through the evidence of Dr. Martin Gullet Nyongesa (PW13). He tendered treatment note in respect to PW4 as P Ex 14. What is glaring is the findings made by the said doctor when he examined her. He stated that the hymen of the victim had been penetrated having an opening of 3 cm and that lacerations on the vaginal walls suggested that much force had been used to break her hymen. He further approximated that a human index finger measures about 2 Cm which I also find quite telling in light of the size of the opening on the vagina which the doctor stated measured about 3 Cm.
90. The trial court in view of the above evaluated the evidence well in respect to Count IV and considered the defence raised by the Appellant. The Appellant’s defence was that the Head Teacher was jealous of his good performance and wanted to fix him but surely even if that was the case, (and I must say there was no evidence to back up the accusations), the evidence by the minor (PW4) was well corroborated by Faith Kilele, Reuben Muasya Maundu (PW11), KK (PW14) and the doctor (PW13). There is no way all the above witnesses could gang up and come up with a narrative so complete and real unless it was the reality.
91. The Appellant in this appeal contends that there is no way a girl of that age feeling the pain she said she felt could have gone out with the ball and play after the ordeal but I am not persuaded. This was a minor aged 7 but very brave in my view because had she not been bold enough to tell others what had happened to her, perhaps, the other incidents of sexual assaults on innocent girls could have gone unreported. JMT (PW3) says she was defiled but initially never reported but when she went back to school and heard what had happened, to BM, (PW4) she gathered courage and reported to the Matron (PW12). The matron testified and confirmed that it was actually JMT (PW3) who went to her and told her that she had been defiled and that Beatrice too had been sexually molested. The same information was given by the school watchman (PW11).
92. I have looked at the evidence of Nice (PW5) and MM(PW10) and find that the evidence tendered by those two witnesses paints unmistakable acts of the Appellant. This was a pedophile and the trauma caused to those innocent minors was simply traumatic and sad.
93. The Appellant says that Dr. Martin Gullet Nyongesa (PW13) did not introduce himself when he tendered his evidence in Chief which could have been an oversight by both the trial court and the



Prosecutor (whom as I have said could have done a better job) but during cross-examination by the Appellant's Counsel, the doctor did introduce himself thus;

“I qualified as a doctor in the year 2016 from Kampala International University” That in my view, was sufficient to show that he was an expert in the field of medicine.

94. I also find the contention that the age of PW4 was not proved to be unsustainable because the P3 Form (P Ex14) is clear that the minor was 7 years old. It's now well settled that the element of age can be proved through either evidence other than age assessment report.

95. I am not persuaded by the Appellant's contention that the victim's hymen was broken when she was playing. The medical evidence tendered by PW13 and the evidence of the minor was well corroborated by PW14 and PW15 is simply overwhelming. The Prosecution's case was proved beyond reasonable doubt and his conviction based on the evidence tendered was safe. The conviction in respect to Count IV is therefore, sustained.

The long and short of this is that this appeal fails. In light of the findings of this court in respect to Count II, this court reverses the finding of the trial court that the Appellant was guilty of alternative Count of indecent assault contrary to Section 11 (1) of Sexual Offence Act and in its place, under Section 354 of the Criminal Procedure Code, I find that the Appellant is guilty of the Principal Count of defilement contrary to Section 8(1) as read with Section 8(3) of Sexual Offence Act and he is convicted accordingly and sentenced to serve 20 years imprisonment.

In respect to 2nd Count of indecent act with a child, this court reverses the finding that the conviction was in respect to alternative count and in its place conviction is now based on a second count because, the defilement and the indecent act took place on different occasions. I find that the varying dates on the indecent act given by PW6 and (4/4/2018) and J (PW7) were insignificant as the children may have forgotten the actual dates of the incidents given the passage of time. In the 2nd Count, the Appellant is convicted of indecent act with a child contrary to Section 11(1) of Sexual Offence Act and the sentence of 10 years meted out by the trial court is upheld. Both sentences in Count (1) (20 years) and Count II (10 years) to run consecutively because the offences were committed in two separate occasions. In respect to Count IV, this Court upholds the conviction but the sentence is enhanced owing to aggravating circumstances. This was a person in a position of authority, respected and trusted by pupils but turned and betrayed that trust by preying on them and taking advantage of their innocence and naivety. He ought to serve a severe sentence to deter others of similar intentions who are in similar position in order to protect young children in school. His sentence is enhanced to 15 years in jail. The sentences in Count II and IV shall run consecutively as the offences were committed separately on diverse dates against different victims. In total, the Appellant will serve 45 years in jail. He has 14 days Right of Appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF FEBRUARY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

