



**Kiprop v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 13570 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL APPEAL E022 OF 2023
JRA WANANDA, J
NOVEMBER 6, 2024**

BETWEEN

BENARD KIPCHOGE KIPROP APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction and sentence of the Appellant in Iten Senior Principal Magistrates Court Case No. E025 of 2021.
2. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 29/05/2020, at Keiyo Sub County within Elgeyo Marakwet County, the accused intentionally caused his penis to penetrate the vagina of JC., a child aged 9 years. The Appellant was charged with the alternative count of committing an indecent act with the same child contrary to Section 11(1) of the *Sexual Offences Act*.
3. The Appellant pleaded not guilty to the charge and the case proceeded to full trial in which the prosecution called 6 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. On his part, the Appellant called 2 witnesses and gave sworn evidence. By the Judgement delivered on 07/12/2023, he was convicted of the main charge and sentenced to 70 years' imprisonment.
4. Dissatisfied with the decision, the Appellant, through the firm of Messrs Jepchirchir & Co. Advocates, on 30/01/2024 instituted this appeal against both the conviction and sentence. The following grounds were cited:
 - i. That the learned Magistrate erred both in law and fact by failing to observe that one of the ingredients establishing the offence of defilement i.e. penetration was not proved by the prosecution beyond reasonable doubt as required by law.



- ii. That the learned trial Magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt yet evidence on record did not support such a finding.
- iii. That the learned Magistrate erred in law and fact in failing to appreciate that there was no compliance by the prosecution with the provisions of law in regards to positive identification which was a crucial procedure in positively and accurately identifying the Appellant.
- iv. That the learned Magistrate erred in law and fact in failing to appreciate that there was no compliance with the provisions of section 36(1) of the *Sexual Offences Act* as no medical test was conducted by the prosecution to ascertain whether or not the appellant committed the present offence.
- v. That the learned Magistrate erred in law and in fact in failing to consider the impact of the prosecution's failure to call key witnesses, the complainant's mother and aunt.
- vi. That the learned Magistrate failed to consider the Appellant's fundamental constitutional right to fair hearing as stipulated under Article 50 of *the Constitution*.
- vii. That the learned Magistrate erred in law and fact in failing to consider the fundamental constitutional right of the Appellant to have an Advocate assigned to the Appellant if substantial injustice would otherwise result, and to be informed of this right promptly.
- viii. That the learned Magistrate erred in law and in fact in disregarding and rejecting the Appellant's alibi evidence.
- ix. That the learned Magistrate erred in both matters of law and fact by imposing a harsh, punitive, unfair, unjust and excessive sentence of 70 years an equivalent of life imprisonment upon the Appellant without taking into consideration the Appellant's mitigation.

Prosecution evidence before the trial Court

5. PW1 was the complainant. The Court conducted a voire dire examination and was satisfied that the minor understood the nature of the oath thus allowing her to give a sworn statement. She testified that she was 11 years old (at the time of testifying), a class 6 pupil and that she knew the Appellant. She stated that on 29/05/2021 at about 11 pm, she was asleep at home in the kitchen, that the door had no locks and that they used to block it only using bricks. She testified that the Appellant came in and she felt him do "tabia mbaya" (bad manners) to her, that she screamed and her 2 sisters who were next to her woke up upon which the Appellant ran off and that she saw him due to the moonlight. She testified that the Appellant had earlier on that day come to their home to take alcohol and that he was wearing the same shoes and shirt which she recognised him through, that the shirt had patterns and that he wore a black trouser. She testified further that when the Appellant ran off, she followed him outside with her sisters and that he ran and entered his house. She added that on the next day, together with her sisters, they went to confront the Appellant in his house but they did not find him and that his wife informed them that they were not living together. PW2 stated that she then went to school and informed her teachers, Madam C and Mr. S about the incident who took her to hospital where she was treated and thereafter, they reported the matter to Biretwo Police Station where she was issued with a P3 form. She then produced her birth certificate indicating that she was born on 02/11/2011.
6. PW2 was LCK, also a minor, a sister to the complainant. She, too, was taken through a voire dire examination upon which the Court determined that she understood the nature of an oath and allowed her to give sworn evidence. She testified that she was 15 years old, and that she knew the Appellant as his wife was a neighbour. She testified that on the night of 29/5/2021 at around 11 pm, she was



- asleep in the kitchen with her sisters, that the door had no lock, that at some point, she felt cold and realized that her dress had been pushed up and then she heard the complainant sister screaming, that she thought that the complainant was dreaming but then she screamed again, that she woke up and saw the Appellant run out of the house towards his house, and that they identified him by his clothes as there was moonlight outside. She testified that she ran to wake her mother up, that on the next day they went to the Appellant's home to confront him but his wife informed them that the Appellant was not around and that he used to sleep on the sofa. PW2 testified that she then went to school and told Mr. S about the incident, that they then went to the hospital, then to the Police station and then to Tambach hospital from where they were sent to Iten Teaching and Referral Hospital where they were examined.
7. PW3 was Mr. S, the complainant's school teacher. He testified that the complainant was a pupil in class 5 and was aged 10 years old. He stated that on 29/05/2021, he had finished his classes when PW2 informed him that the complainant had been defiled the previous night, that they went to the office and discussed the issue, and that the children's guardian (one E) and the Chief were called to school. He added that they then went to the police station and recorded statements. During cross-examination, he stated that the complainant informed them that the Appellant is the one who had defiled her.
 8. PW4 was KTK, another teacher at the complainant's school. He testified that he did not know the accused but that on 3/05/2021 at about 11 pm, the complainant was brought by PW3 with a report of having been filed by one Bernard Kiprop. He stated that he called the complainant's guardian and also the Chief and asked them to take her to hospital.
 9. PW5 was the Investigating Officer, Corporal Mercy Kiprop who was attached to Chepsigot Police Post. She stated that a defilement report was made at the station on 2/06/2021 upon which she recorded witness statements and issued a P3 form. She also stated that she accompanied the complainant to hospital and also visited the crime scene. It was her further testimony that the Appellant disappeared and was only arrested in October 2021 upon which he was charged. During cross-examination, she stated that she was not aware that the Appellant had gone to work and not "disappeared". She also stated that it is the complainant who identified the Appellant.
 10. PW6 was Peter Kiptoo, a clinical officer at Chebyemit Sub County Hospital who testified that the complainant was brought with a history of defilement on 02/06/2021. He testified that on examination, no physical injuries were noted, that regarding the external genitalia, the hymen was broken but there was no presence of discharge, that lab tests revealed epithelial cells on high vaginal swab, but there was no spermatozoa and there were a few pus cells. He then produced the P3 form as an exhibit.
 11. Upon a request by the Prosecution, P5 (the investigating officer) was recalled to produce the complainant's birth certificate which she did. She then testified that the complainant was born on 2/11/2011.
 12. At the close of the prosecution case, the trial Magistrate found that a case to answer had been established against the Appellant and placed him on his defence.

Defence evidence

13. The Appellant testified as DW1. In a somewhat incomprehensible testimony, he stated that the complainant's mother's cows had grazed on his farm, that she had come to pay him and report the matter and that he was later arrested and charged with defilement. In cross-examination, he stated that he knew the complainant's mother but did not know the complainant.



14. DW2 was Noela Komen. She stated that the Appellant was her husband, and that he was at home at 7.00 pm. She stated that neighbours alleged that the Appellant had defiled a child. In cross-examination, she stated that she could not remember the date.
15. As aforesaid, by the Judgement delivered on 07/12/2023, the Appellant was convicted and sentenced to 70 years' imprisonment.

Hearing of the Appeal

16. The Appeal was canvassed by way of written submission. Pursuant thereto, the Appellant's Counsel filed her Submissions on 13/06/2024 while the Respondent, through Prosecution Counsel Calvin Kirui, had filed earlier on 04/06/2024.

Appellant's Submissions

17. Counsel for the Appellant submitted that the burden of proof lies with the prosecution to establish the charges against the Accused person beyond reasonable doubt and that the Accused person is not obligated to prove his innocence even if the defence may not be convincing. She cited the case of *Woolmington v DPP*, which, she submitted, is a foundational case highlighting the presumption of innocence. She submitted that the learned trial Magistrate erred in holding that the prosecution had proved its case yet evidence on the charge of defilement typically requires the prosecution to establish 3 key elements, as outlined under Section 8(1) of the *Sexual Offences Act* No. 3 of 2006, namely, age of the victim, penetration and proper identification of the perpetrator. She cited the case of *George Opondo Olunga vs. Republic* [2016] eKLR.
18. In respect to "penetration", Counsel submitted that the burden of proving the explicit act of penetration rests with the prosecution, that the phrase used by the complainant to describe the act of penetration, namely "tabia mbaya", is too ambiguous to be interpreted as referring specifically to penile penetration. She submitted that the expression 'tabia mbaya' has garnered the status of a technical term, akin to the term 'defilement', in sexual offences but that it is incumbent upon the prosecution to furnish evidence elucidating the nature of this "tabia mbaya" within the specific context of each case, that simply asserting that "tabia mbaya" occurred is analogous to merely stating that defilement occurred and that the components of this "tabia mbaya" can only be substantiated through evidence.
19. She added that the complainant never testified that the Appellant removed her clothes, removed his clothes, parted her legs and inserted his genital organ in her vagina at any one time and that she only said that he did "tabia mbaya" which is a euphemism. Counsel further challenged the credibility and sufficiency of the witness testimony, particularly that of the complainant, the complainant's sister and the Clinical Officer. She contended that the trial Court relied on the testimony of the Clinical Officer who only relied on history to determine the existence of the overt act, that his testimony did not conclusively establish and/or prove the overt act of penetration, if any, and by what means and by whom and at what time the hymen was allegedly broken and that there are other things that can break the hymen. She cited *Busia High Court Criminal Appeal No. 65 of 2016* in which, she submitted, the Court cautioned against strong reliance on evidence of a broken hymen as proof of penetration without other corroborating evidence.
20. In respect to the issue of "positive identification", Counsel submitted that as in any criminal offence, positive identification plays a pivotal role in connecting individuals to offences, and that as such, it must undergo rigorous examination to avoid miscarriage of justice. She cited the case of *Kariuki Njiru & 7 others vs Republic, Criminal Appeal no. 6 of 2001*, in which, she submitted, the Court emphasized that evidence regarding identification should only be accepted and acted upon if it is



deemed positive and free from the possibility of error. She urged that this underscores the gravity of ensuring the reliability and accuracy of identification evidence before it can be relied upon, that distinction is made between “recognition” and “identification”, with “recognition” often considered more reliable, especially when it involves familiar individuals rather than strangers but that even in cases of “recognition”, caution is advised, as mistakes can still occur. Counsel contended that in this case, the incident occurred during the night, at approximately 11 pm, that the complainant and her sister claim to have witnessed the Appellant fleeing the scene after committing “tabia mbaya”, that the crucial aspect of the complainant’s testimony is that they recognized the Appellant based on their earlier encounter that day at the complainant’s home, that specifically, they claim to have recognized the Appellant by his shoes and shirt, and not his face or any other physical description.

21. She submitted that an identification parade would have been important in this case considering the conditions under which the incident occurred, at night time, that given the potential impact of night-time conditions on visibility and witness’s ability to accurately perceive and remember details, an identification parade would have provided a controlled environment to assess the reliability of the identification and that by presenting the Appellant alongside individuals who resemble them, an identification parade offers a means to mitigate the risk of misidentification and ensure a fair and objective evaluation of the witness’s testimony. She urged further that the failure of the trial Court to direct an identification parade indeed was a prejudice to the right of the Appellant to a fair trial.
22. Regarding the ground of “contradictions, discrepancies and inconsistencies”, Counsel argued that the prosecution’s case was riddled with material contradictions, discrepancies and inconsistencies that went to the core root of the matter as they concerned material facts relating. She submitted that the case was marred by conflicting dates of the incident, that the charge sheet claims the incident occurred on 29/05/2020 as testified by the first school teacher, whereas the complainant and her sister asserted that it happened on 29/05/2021, that while the second school teacher testified that the complainant reported the incident to him on 3/05/2021, the complainant testified that it was on 31/05/2021, her sister testified that it was on 30/05/2021, and the first school teacher testified that it was on 29/05/2020. She also pointed out discrepancies concerning the date when the complainant sought medical attention, namely, that the complainant stated that she was examined on the next day, 30/05/2021, while the first school teacher’s testimony indicated that the complainant visited the hospital on 1/06/2021.
23. She also submitted that the clinical officer indicated that he works at Chebiemit Sub County Hospital, however, it was the evidence of the complainant and her sister that the complainant went to Iten Referral Hospital for treatment, that this contradiction can also be seen on the face of the P3 Form which is dated 2/06/2021 contradicting the earlier testimony of the complainant, her sister and the first school teacher. She also cited the discrepancy between the complainant’s statement and that of a prosecution witness named M, who is the complainant’s mother, that according to M, the complainant and her sister had informed her that a stranger had assaulted the sister by touching her thighs inappropriately and then moved on to another person, that however, in her statement, the sister claimed ignorance about what caused her dress to be lifted and informed her mother that the assailant was a stranger, whereas in her statement, she asserts recognition of the assailant. Counsel also argued that if indeed there was defilement, then there would have likely been blood on the clothing as a result, that however, the prosecution did not present any clothing and that the medical examination did not reveal any signs of blood, bruises, or spermatozoa in the vagina. She also reiterated that the medical examination failed to determine the timing of the hymen’s rupture, which would have indicated whether it was recent (fresh) or old, thereby assisting in establishing the timeline of the incident.



24. Counsel also submitted that there was no compliance with the provisions of Section 36(1) of the *Sexual Offences Act* as no medical test was conducted on the Appellant. She submitted that there were no other tests, such as DNA or vaginal swab, conducted to conclusively determine the perpetrator, and criticized the trial Court for relying on assumptions or inferences in the absence of clear evidence linking the Appellant to the offence, that Regulation 5(1) of the Sexual Offences (Medical Treatment) Regulations, 2012 requires necessary and sufficient evidence to convict, and that the Appellant was not medically examined. She added that one crucial aspect that cannot be overlooked is the reliance of the trial Court on circumstantial evidence to convict the Appellant, that circumstantial evidence, while admissible and sometimes compelling, must be approached with caution, especially when fundamental rights and liberties are at stake, and that in this case, where the charge of defilement carries severe consequences, it was incumbent upon the trial Court to ensure that all avenues of establishing guilt or innocence were thoroughly explored. According to her, it was important for medical examination to have been conducted on the Appellant since the P3 Form indicated that no spermatozoa was noted, that the test would have proved that any act of penetration could have been caused by a male organ, and since the medical officer, apart from noting the absence of spermatozoa, also stated that there was no other evidence after examining the complainant.
25. Another ground argued by Counsel is that the trial Court failed to consider the impact of the prosecution's failure to call key witnesses, namely, the complainant's mother and aunt. She argued that while the prosecution has some leeway in determining which witnesses to call, it must exercise this discretion judiciously, ensuring that all essential witnesses are presented to enable the Court arrive at a just decision and that failure to do so may undermine the credibility of the case and potentially result in adverse inferences. She cited the Court of Appeal case of *Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005* and also the East African Court of Appeal case of *Bukenya & Others vs Uganda* [1972] E.A 549 and submitted that in this case, the prosecution omitted to summon the mother, who was present at the scene of the incident and who was awakened by the complainant after the alleged defilement and would have had a clear view of the circumstances, potentially providing crucial details on whether the complainant had indeed been defiled, including the date, location, and timing of the incident and that the aunt, on the other hand, would also have been a critical witness as she is the one who allegedly escorted the complainant to the hospital as per the testimony of the complainant's sister.
26. Counsel further argued that the learned Magistrate erred in failing to consider the fundamental constitutional right of the Appellant to have an Advocate assigned to him if substantial injustice would otherwise result, and to be informed of this right promptly. She cited Article 50(2)(g) of *the Constitution* which provides that an accused person has a right to choose an Advocate of his own choice to represent him in the matter, and imposes a duty on the trial Court to inform the accused person of that right. He cited the case of *Jared Onguti Nyantika vs. Republic* [2019] eKLR, the case of *Daniel Mpayo Ngiyaya vs. Republic* [2018] eKLR and also the case of *Karisa Chengo, Jefferson Kalama Kengha, Kitsao Charo Ngāti vs Republic* [2015] eKLR.
27. Another ground argued is that the learned Magistrate erred in disregarding and rejecting the Appellant's alibi defence. She submitted that the Appellant's alibi evidence that on the material day, he was at home with his wife, and not at the scene of crime, was disregarded and rejected by the trial Court yet it was corroborated by his wife and who confirmed that the Appellant was at home from 7 pm. She urged that it was the prosecution's responsibility to prove the Appellant's presence at the scene on the night in question, that however, the prosecution failed to meet this burden, that the trial Court neglected to properly evaluate and give weight to the defence before dismissing it and that the same was summarily disregarded as the trial Court seemed to have already concluded the existence of



defilement without thoroughly analyzing the evidence. She contended that the trial Magistrate drew certain conclusions suggesting the presence of elements of the offence without taking into account the entirety of the evidence, and that during the trial, the Appellant asserted that he was falsely accused of serious charges stemming from a disagreement with the complainant's mother regarding trespassing cows onto his land and crop damage.

28. Counsel also argued that the learned Magistrate erred by imposing a harsh, punitive, unfair, unjust and excessive sentence of 70 years, an equivalent of life imprisonment, without taking into consideration the Appellant's mitigation. She cited the case of *Bernard Kimani Gacheru vs. Republic, Criminal Appeal No. 188 of 2000*, and also the case of *Karioko Muruatetu & Another v Republic* [2017] eKLR (Petition 15 & 16 of 2015 (Consolidated)) wherein, she submitted, it was stated that a trial Court must take into consideration the mitigation from the accused person. She submitted that the Appellant having a small family and old parents who solely depend on him and also the fact that he had no previous criminal record are mitigating factors that are crucial for ensuring a fair trial and just resolution, and that the trial court's failure to consider the Appellant's mitigation violated his right to a fair trial, as these factors can significantly influence sentencing.

Respondent's Submissions

29. On behalf of the State, Prosecution Counsel Calvin Kirui appreciated that the prosecution is under a duty to establish or prove all the elements of the offence of "defilement" beyond reasonable doubt and that the duty or burden of proof does not shift to an accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses. Regarding the ingredients of the offence of "defilement", namely, identification or recognition of the offender, penetration, and the age of the victim, he cited the case of *George Opondo Olunga v Republic* [2016] eKLR, and submitted that all were all proved.
30. In respect to "identification" of the perpetrator, he submitted that in this case, "identification" was by way of "recognition", that the complainant was 9 years old at the time of the incident and hence capable of having a proper recollection of the incident, that she recognized the Appellant from his shoes and shirt as even ran after him outside. According to Counsel, this evidence was corroborated by PW2 who is the complainant's sister and who was present at the scene.
31. Regarding "penetration", Counsel cited the definition given under Section 2 of the *Sexual Offences Act*, namely, "the partial or complete insertion of the genital organs of a person into the genital organs of another person". He submitted that the complainant testified that the Appellant did "tabia mbaya" to her, that she screamed, that on the following day, she was taken to hospital. Counsel submitted further that the complainant was examined by PW6 who found that her hymen was broken and presence of epithelial cells and pus cells, that these findings were filled into the P3 form which was produced in Court as exhibit and that PW6 concluded that "penetration" into the complainant's vagina had occurred. He cited Section 124 of the *Evidence Act* on the issue of "corroboration" and contended that the complainant's evidence on the fact of her being defiled was corroborated by that of the medical officer (PW6). He therefore submitted that there was evidence proved beyond reasonable doubt that there was defilement as contemplated by the Act.
32. Regarding "age" of the victim, Counsel submitted that the Investigating Officer (PW5) produced the complainant's certificate of birth which indicated that the complainant was born on 2/11/2011 and the incident having happened on 29/05/2020, it means that the complaint was 9 years old as at the time thereof. He observed that the Appellant did not challenge this evidence and that no contrary evidence was produced and that as such, the age of the complainant was proved.



33. Counsel submitted that the Appellant chose to adduce sworn evidence which was a mere denial of the incident, which denial was untrustworthy and that the trial Court rightfully held that the prosecution had discharged its burden to prove all the ingredients of the offence beyond any reasonable doubt.
34. In response to the other matters raised in this Appeal, Counsel submitted that the prosecution witnesses and evidence were all consistent, that PW1 was candid and specific and even included the colours and drawing patterns of the clothes that the Appellant wore at the time of the incident, that none of this evidence was challenged, whether during cross-examination or defence hearing, that there was therefore no doubt or contradiction raised and that therefore, the evidence was credible and reliable. Regarding medical evidence, he submitted that it is tacit law that it is not mandatory to subject an accused person to medical tests to prove sexual offences. He cited the case of *MJO v Republic* [2021] eKLR and also the case of *Fappyton Mutuku Nguv v R* (2014) eKLR.
35. On the allegation that the prosecution failed to call other crucial witnesses, namely, the complainant's mother and aunt, he submitted that the complainant's mother was not present at the scene since the complainant was asleep with her siblings while their mother was in another house. He submitted, that in any event, it is the discretion of the prosecution to decide which witnesses to call. He cited Section 143 of the *Evidence Act* and the Court of Appeal case of *Julius Kalewa Mutunga v Republic*.
36. On the issue of the right to a fair hearing and right to representation, Counsel submitted that the right to representation is not absolute. He cited the case of *Owiti v Republic* (Criminal Appeal E054 of 2022) [2023] KEHC 21977 (KIR) (23) August 2023) (Judgment). He added that in any event, the Appellant, throughout the trial did not manifest any reason why injustice would ensue, that he cross-examined all the prosecution witnesses and defended himself in a manner that he saw fit and even called a witness. According to Counsel therefore, the principles of fair hearing were adhered to.
37. In respect to the allegation that the trial Court failed to consider the Appellant's defence of alibi, Counsel submitted that the trial Court found the Appellant's defence to be a made-up story, and untrustworthy as the complainant had no reason to frame him. He added that the trial Court considered the offence, mitigation by the Appellant and submissions by the prosecution and exercised its discretion judiciously and in accordance with the law.

Determination

38. As a first Appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See *Okeno vs. Republic* [1972] E.A 32).
39. The issues for determination are evidently the following:
 - a. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
 - b. Whether the sentence of 70 years imprisonment was proper.
40. Regarding whether the offence was proved beyond reasonable doubt, the Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which provide as follows:

" 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



8(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.”

41. From the foregoing, it is agreed that for the charge of defilement to stand, the Prosecution must prove 3 ingredients, namely, the “age” of the victim (must be a minor), “penetration” and proper “identification” of the perpetrator (see *George Opondo Olunga vs. Republic* [2016] eKLR
42. Although proof of the “age” of the victim has not been challenged in this Appeal, there is no harm in analyzing the same nevertheless.
43. The importance of proving “age” was reiterated in the Court of Appeal case of *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010, in which the following was stated:

“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.”
44. In respect to the manner of proving “age”, in the case of *Francis Omuroni v Uganda Court of Appeal*; Criminal Appeal No. 2 of 2000, the following was stated:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense
45. In this case, the age of the victim was proved by production of the certificate of birth. The same indicated that the victim was born on 02/11/2011 and the incident having been alleged to have happened on 29/05/2020, it means that the victim was 9 years old at the time thereof. Age was therefore properly proved.
46. In respect to “penetration”, Section 2 of the *Sexual Offences Act* defines the act as follows:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
47. In cases of defilement, “penetration” is proved either 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*.
48. Additionally, since this case, being a sexual offence, is one where conviction may be based on the evidence of a single witness, the provisions of Section 124 of the *Evidence Act* provide guidance. The Section provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim



and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

49. In this case, the victim simply stated that the Appellant did to her “tabia mbaya”. The prosecution does not seem to have probed further or made any attempt to get more information on what the term “tabia mbaya” (bad manners) really entailed from the complainant’s point of view. The victim’s testimony did not all give any indication whether she was penetrated or even whether her clothes were removed. Under these circumstances, interpretation of the term “tabia mbaya” remained unclear since unless clearly differentiated or well explained, even groping a person without even undressing her and/or penetrating, would, in ordinary language, still amount to “bad manners”.
50. Under the above circumstances, the possible “saviour” for the prosecution would be the medical evidence. In this case however, the medical evidence was itself not very helpful. Although the medical officer found that there was no hymen and concluded that there was penetration, he made no effort to give the estimated timeframe or age of such penetration. One cannot therefore tell whether the penetration was fresh, thus recent, or old. According to the P3 Report, the incident took place on 29/05/2021 and the examination was conducted on 1st June 2021, about 2-3 days later. The medical officer ought to have therefore indicated whether the estimated period of healing was consistent with such 3 days’ timeframe. This information was important because the medical officer found no spermatozoa or bruises or blood in or on the victim’s genitalia or on her clothes.
51. The medical officer appears to have made his conclusion simply on the basis of the fact that the hymen was missing. The failure by the medical doctor to give the estimated timeframe when penetration occurred means that the Appellant cannot be conclusively directly linked to the missing hymen which, again, the medical officer did not give an estimate of when it was broken. It cannot be ruled out that the hymen could have been broken on a much earlier date, either by reason of a sexual act or through any other of the various other acknowledged reasons. This is because breaking of the hymen can also be caused by other acts such as riding, cycling, gymnastics, use of tampons or menstrual cups, a gynaecologist conducting a pelvic exam or any other act of insertion of a foreign object into the female genitalia. In my view, there being no information demonstrating how recent the alleged “penetration” occurred, the medical evidence presented fell far short of the threshold required in cases of this nature.
52. I am also curious about the description given by the complainant and PW2 on how the incident occurred. It has been stated that the 2 girls plus a third sister were all sleeping in the same kitchen. It is unlikely that a sexual assault of the nature alleged herein would occur instantaneously. I say so because the assailant would have had to undress the victim, lie on top of her, physical position her, forcefully subdue her and finally penetrate her. This process would be reasonably expected have taken some time and would also involve some level of resistance, struggle and fightback from the victim, no matter how young, before penetration would have been eventually achieved. This process would have inevitably delayed penetration. The complainant stated that she was sleeping next to her 2 sisters. It is however not disclosed whether the 3 were sharing one bed or mattress or beddings. Be that as it may be, considering what I have stated above, it is unlikely that the assailant would have successfully gone all the way up to penetration without the 2 sisters sleeping next to the complainant noticing any commotion. This is even more unclear since the prosecution did not during the complainant’s evidence-in-chief elicit from the complainant information on how much time the assault lasted. Coupled with the fact that, as aforesaid, the complainant never specifically mentioned any “penetration” or even that she was undressed, I find that in this case, “penetration” was not proved beyond reasonable doubt. Although there could have been preparation or intention or an attempt to commit the act of defilement, the prosecution failed to establish that indeed the assailant was successful in achieving that intention. For this reason, I find that the complainant’s testimony was not corroborated.



53. With the above finding, I see no reason to belabour the other grounds of appeal raised. However, even on “identification”, I am not convinced that the same was proved beyond reasonable doubt. “Identification” of an accused person in these kinds of cases is crucial. In connection thereto, the Court of Appeal in the case of Kariuki Njiru & 7 others vs Republic, [2001] eKLR restated the following principle:
- “Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”
54. It is also true that “recognition” is regarded as more reliable than identification of a stranger. However, caution must always be taken where a witness is purporting to recognise someone that they know since even in such cases mistakes may sometimes be made. (see R vs. Turnbull & Others [1976] 3 ALL ER 549).
55. In this case, it is not denied that the Appellant was well known to both the complainant and PW2 as he was a neighbour. According to the complainant, she recognized the Appellant from his clothing as she had seen him earlier in the day wearing the same attire. It is to be recalled however that the incident is alleged to have occurred around 11.00 pm at night. While the complainant and PW2 allege that they recognized the Appellant as a result of the moonlight, their evidence-in-chief did not divulge more. My assumption is therefore that there was no other form of lighting inside the room. The moonlight recognition could therefore only have been meant to indicate that the two recognized the Appellant afterwards when they ran after him outside the house as they alleged. The evidence-in-chief did not cover such crucial questions as; what was the intensity of the moonlight and was the surroundings therefore sufficiently illuminated to ensure positive identification? Did the moonlight also illuminate the inside of the house? how far were the complainant and PW2 from the assailant while running after him? How far and for how long did they run after him and whether therefore they had sufficient time and/or opportunity to positively identify the Appellant.
56. Although they claim that the Appellant ran and entered his house, the evidence-in-chief did not divulge how far the Appellant’s house was from the complainants’ house thus denying the Court crucial material to enable it gauge whether, for instance, the narrative that they (3 young girls) chased and ran after an adult man in the middle of the night was indeed plausible.
57. I also note that the complainant stated that when the Appellant ran away outside, they followed him and that he ran and entered his house and that on the next day when they went to confront him, they did not find him but that his wife told them that the Appellant does not live with her. This answer therefore raises doubts on whether the Appellant could have really ran into that same house. The issue is even made murkier by the fact that on her part, PW2 gave a contradictory answer on what the Appellant’s wife stated. This is because according to her, when they went to the Appellant’s house on the next day with the complainant, the wife told them that the Appellant used to sleep on the sofa. These are two contradictory reports of what the Appellant’s wife is alleged to have stated yet the report was given by two witnesses who were both in the same meeting. Since the wife was called as a defence witness, I would have expected the prosecution to have strenuously interrogated her on this aspect during cross-examination. This however did not happen and the issue was therefore left unaddressed.



58. On the allegation that the prosecution failed to call key witnesses, Section 143 of the *Evidence Act* provides as follows;
- “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
59. The discretion to call witnesses therefore rests on the prosecution. In *Julius Kalewa Mutunga v Republic* [2006] eKLR, the Court of Appeal held that:
- “..... As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
60. It follows that the prosecution’s discretion to call the witnesses it deems fit to prove its case rests entirely on the prosecution and therefore, the Court cannot interfere with the same. The Appellant has not shown that the prosecution was influenced by some oblique motive in calling the witnesses it chose to call. I would therefore not hold that fact against the prosecution.
61. I am however curious that although PW2 testified that on the same night she ran to wake their mother up to report to her the incident, there is absolutely no mention of the mother’s reaction or any further mention of her throughout the prosecution case. The omission to call the mother as one of the witnesses, inasmuch as it may not have been very significant, has the potential of raising adverse inferences. The evidence is silent on what action the mother took, if any, upon hearing that her daughter had been defiled. It is also strange that the children opted in the morning, in school, on their own to instead report the incident to their teachers who then called the children’s undisclosed guardian (not even the mother) and the Chief who are the people who then reported the matter to the police and also took the complainant to school. The alleged guardian was also not called as a witness and the mother does not feature at all in the prosecution’s entire evidence. Even the medical examination seems to have been conducted in the absence of the mother. Granted, the evidence was that the mother used to sleep in a separate house within the compound and would not have therefore offered any eye-witness account. However, considering the shaky state of the evidence presented as set out above, I believe it was important for the prosecution to have disclosed a little bit more about the mother’s participation (or lack thereof) in the aftermath of the incident. For instance, being their mother and the first person to whom the incident was reported, after it had just allegedly freshly occurred, it would have been helpful to know what the children told her about the incident and whether they named the assailant. It would have also been important to know whether she inspected the complainant’s genitalia and if so, what she found and also whether she confronted the Appellant immediately, when matters were fresh and if so, what the Appellant’s response was.
62. The Appellant’s Counsel is also right in pointing out that there were substantial contradictions and inconsistencies among the witnesses regarding the dates when the incident is alleged to have been reported to the teachers and also when the medical examination was conducted. While such contradictions may not be so significant, where the evidence of “penetration” and “identification” is shaky as herein, it becomes a point of concern as it may give rise to an inference of a cover-up or “manufacturing” of evidence even where such is not the case and where such inconsistencies may as well be genuine and honest due to the long passage of time leading to understandable blurring of memories. I am therefore constrained to find that the evidence of “identification” was not watertight.



63. In respect to the Appellant’s allegation that he was not assigned an Advocate or that he was not informed of his right to hire an Advocate to represent him, I find that ground to be a flimsy one. This is because I note from the records of the proceedings of 26/01/2022 that on that date, even before any witness had testified, the trial was adjourned because both the prosecution and the defence was ready. The Appellant is indicated to have stated as follows:

“Accused: My advocate hasn’t arrived. I can be given a date.”

64. It is therefore evident that at all material times, the Appellant was fully aware of his entitlement to legal representation and in acknowledgment thereof, he had even instructed an Advocate to represent him. In any event, in Kenya, provision of an Advocate to an accused person at the expense of the State is only mandatory in capital offences in which death is a possible sentence, which defilement is not. I therefore agree with Prosecution Counsel Mr. Kirui that such right to representation is not absolute (see the Supreme Court decision in *Petition No 5 of 2015, Republic -vs- Karisa Chengo & 2 Others* [2017] eKLR and also the Court of Appeal case of *David Njoroge Macharia v Republic* [2001] eKLR).

65. In any event, I have not observed any injustice or prejudice caused to the Appellant since he cross-examined the prosecution witnesses and conducted his defence well. He also called 1 witness of his own.

66. Nevertheless, in view of my earlier findings that the prosecution failed to prove its case beyond reasonable doubt, this finding on the issue of the right to legal representation is not sufficient to resist this Appeal.

67. Having found that the prosecution did not prove the case beyond reasonable doubt, I hold that the Appellant’s conviction was unsafe and cannot therefore stand.

Final Orders

68. The upshot of the foregoing is that I make the following orders:
- i. This Appeal is allowed.
 - ii. The conviction of the Appellant by the trial Court in Iten Senior Principal Magistrates Court Case No. E025 of 2021 is hereby quashed and the sentence imposed therein set aside.
 - iii. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024.

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Ayuma for the State

Appellant present virtually from Naivasha Maximum Prison

Ms. Jepchirchir for Appellant

Court Assistant: Brian Kimathi

