REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. EO20 OF 2020

JOSHUA KIARIE NJUGUNA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon C. C. Oluoch- CM

in the Chief Principal Magistrates Court at Mavoko delivered on the 14th

day of December, 2020 in Criminal Case (S.O) No 19 of 2020)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JOSHUA KIARIE NJUGUNA.....ACCUSED

JUDGEMENT

Introduction

1. The appellant, **Joshua Kiarie Njuguna**, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the ***Sexual Offences Act***, Act No. 3 of 2006. The particulars of the charge were that on the 8th day of May 2020 at [particulars withheld] Township in Athi River sub-county within Machakos county intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of SN a child aged three years.

2. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the ***Sexual Offences Act*** No. 3 of 2006. The particulars of the offence were that on the 8th day of May 2020 at [particulars withheld] Township in Athi River sub-county within Machakos county did unlawful act which caused contact of his hands with the vagina of SN a child aged three years.

3. Upon conviction, the appellant was sentenced to serve Twenty (20) years imprisonment.

4. The prosecution called 5 witness in support of its case.

5. After carrying out *voir dire* examination of PW2, the Court concluded that she was possessed of sufficient intelligence despite her tender age and that she understood the difference between truth and falsehood and concluded that she may be affirmed.

6. Upon being affirmed, PW2 testified that she used to go and watch cartoons in the house of the appellant whom she referred to as uncle Shema. According to her, the appellant, who was staying near them, put a "*dudu*" in her private parts after which he wiped her using a piece of paper. After that the appellant told her to go home. Upon going home, she disclosed the incident to her auntie who took her to Hospital where the doctor examined her. PW2 insisted that she did not go to any other house that day. She however stated that she did not cry when

the appellant inserted his *dudu* in her. She explained that on that day she had a pair of trousers which the appellant removed and also removed his trousers. PW2 stated that she disclosed the incident to her mother and M and insisted that there was no other uncle Shema staying with them.

7. Upon being questioned by the Court, PW2 stated that she did not tell her mother, PW1, anything when she went home and that there were other people like uncle Shema at the plot though on that day she only went to uncle Shema's house.

8. PW1, **WWB**, PW2's mother testified PW2 was born on 28th April, 2017 and was aged three years old and identified the age assessment card. In her evidence, the Appellant, her neighbour who was living alone, was fond of PW2 and that PW2 used to go to his house to watch TV as her set had developed technical problems. It was her evidence that the Appellant used to buy PW2 *mandazis* and bananas after work and she had a cordial relationship with the appellant having been neighbours for one year and one month.

9. On 8th May, 2020, PW2, the Complainant, returned from her the appellant's house and when she sought to bathe her, the Complainant informed her that she was feeling pain in her private parts. Upon being asked what the problem was, the Complainant explained that the appellant, who was known to PW1 as **Uncle Shema**, had removed her trousers, removed his and inserted his *dudu* in her private part. After that, the appellant wiped her using a piece of paper. Upon examining the Complainant's private parts, PW1 found that she was wet and dirty and the Complainant informed her that the Appellant had urinated on her thighs and that the Appellant's *dudu* had injury and was bleeding.

10. Since it was late at night, PW1 was advised by her cousin who was present from going to report the incident to the police due to the curfew. It was PW2's evidence that they were 5 tenants in the plot, the others being men and they were all known to the Complainant by names. According to her, it was only the Appellant that the Complainant used to refer to as Uncle Shema.

11. The following day, 9th May, 2020, PW1 took the Complainant to Saitoti Hospital, Kitengela and narrated to the doctor what the Complainant had told her. Upon examination, she as informed that spermatozoa was seen and upon interrogation by the doctor, the Complainant repeated what she had told PW2. From the Hospital, PW1 reported the incident to Mlolongo Police Station where the Complainant narrated the same incident. Upon inquiries, it was discovered that the Appellant was not present and PW2 was advised to report his presence once he was seen around. On 10th May, 2020, upon seeing the Appellant, she reported the same to the police.

12. In cross-examination, she stated that she recorded in her statement that the Complainant returned at 9pm. She however denied that she saw the Complainant passing the other three houses and stated that the Complainant was not crying when she entered the house. Though she saw blood stains, the same was not dripping but the Complainant was wet. She however admitted that in her statement she did not record that she saw blood. According to her, the discharge was watery but almost colourless and the Complainant did not have a pant but had a dotted pair of trousers with a pink top and a jacket. It was her evidence that the trousers were not blood stained and had no discharge. She disclosed that she did not take her clothes to the Hospital or to the Police Station. In her evidence, she took the Complainant to Saitoti Hospital in Kitengela because that was her usual treatment facility where the Complainant had recently been admitted. When she saw the Appellant, she did not talk to him for fear that he might escape. She however denied that she trumped up charges against the Appellant.

13. PW3, **Lemuta Saila Sanvia**, a clinical officer at Kitengela Subcounty Hospital testified that on 9th May, 2020 in the afternoon, the Complainant, accompanied by PW1 went to the facility with the complaint of lower abdominal pains, itchiness and pain while passing urine arising from a reported sexual assault or attempted assault on the Complainant by a neighbour. According to PW3, the Complainant was playing though the mother was worried.

14. Upon examination, PW3 found the Complainant to be in fair general condition and had mild bruises on the right side of the *labia minora* and her hymen was not intact. There was mild blood stain on HVS stick though there was no vaginal bleeding and discharge. Other tests revealed the presence of bacteria and there were pus cells indicative of urinary tract infection. Further, epithelial cells and spermatozoa were seen. In her conclusion, the Complainant had been defiled as the child could not have spermatozoa and her hymen ought to have been intact and she ought not to have had an infection. She exhibited the PRC Form and Lab Request Form.

15. In her testimony though the Complainant did not seem to have any complaint of pain, she seemed to be experiencing discomfort during HVS. She however noted no discharge despite the report by the mother that she had a discharge. According to her, loss of hymen by a child of three years leads to bleeding. However, from the presence of spermatozoa, she concluded there was penile penetration. In her evidence, bruises can be caused by a lot of things including injuries where the victim may bleed profusely depending on the extent of penetration. In her evidence, there was mild penetration. According to her, semen cannot be found outside and it was inside the vagina. In her evidence, sometimes sperms travel when they get a smooth surface. She however stated that the clothes the Complainant had during the incident were taken to her and the Complainant had not taken shower though her clothes had been changed. She however explained that it was not possible for her to connect the spermatozoa with anyone.

16. PW4, **Dr Namu**, the Facility in Charge of Athi River Health Centre, testified that on 3rd May, 2020, the Complainant, who was alleged to have been defiled, was taken to the facility for age assessment by her mother. Upon examination, he found the Complainant to be 3 years old.

17. PW6, **PC Maryanne Miako**, stationed at Mlolongo Police Station testified that the matter was reported at the Station on the morning of 9th May, 2020. Upon being summoned by the OCS, she found the Complainant with her mother, PW1 and was briefed about the case. By then the Complainant had been treated and had PRC form which was handed over to her. After interrogating the mother, they arranged on how to apprehend the Appellant and based on the information from PW1, she, accompanied by another police officer arrested the Appellant and took him to the Station. She sent the Complainant for age assessment which was done. Though she started the process of DNA sampling it was found that the samples were not preserved. She exhibited the age assessment report.

18. During her investigations, she found that there were other neighbours but they were not present during the incident and the Complainant insisted that she was with "Uncle" alone.

19. Upon being placed on his defence, the Appellant testified that on 8th May, 2020, he woke up at 6am and went to work where he was till evening. In the evening he met his work mate known as Maasai and they decided to proceed to his house in order for him to hand over the money that owed the said Maasai for downloading some movies. When they reached the gate to the plot where the Appellant was staying, they found it locked but the Appellant had the key. By then it was raining and they also found the Complainant sitting outside the gate. When the Appellant inquired from the Complainant where her mother was, the Complainant responded that she did not know her whereabouts and they entered the compound with the Complainant and found that her mother was not present. They then proceeded with the Complainant to the Appellant's house. By then it was around 5.30pm. Due to the fact that it was raining heavily and the Appellant had no umbrella, the said Maasai was unable to leave immediately and they stayed together in the Appellant's house watching movies. At around 6.30am, the Complainant's mother, accompanied by another lady she was living with, called the child from the Appellant's house and the Complainant never returned to his house. Because it was time for worship, the said Maasai, being a Muslim, left though it was raining and the Appellant escorted him to the gate and returned to his house where he prepared food and slept by 8.30am.

20. The following day he was on night shift and after doing shopping he went to work at 11pm by which time the Complainant's house was locked. The following morning at 7am he left his place of work and boarded a vehicle together with the said Maasai and another person since the said Maasai was staying in the neighbouring plot. When he was buying tea, he was arrested and taken to Mlolongo Police Station where he was remanded and later he was arraigned in court.

21. According to the Appellant, there were four residential plots while the other plots were business premises. According to him, the Complainant used to go to his house during the day but would also visit the other houses. It was his evidence that he did not have a close relationship with the Complainant's mother though the mother would send the Complainant to borrow certain items from his house. He however clarified that he had no grudge with the mother despite the fact that at one time, the mother sent the Complainant to borrow his gas cooker but he declined. Despite that there was no argument or altercation as a consequence.

22. According to the Appellant, the Complainant used to refer to other people as "Uncle".

23. DW2, **Kamwea Kimonyi**, the Appellants' workmate testified that on 8th May, 2020, he was at work together with the Appellant during the day shift. After work, he accompanied the Appellant to the latter's house since the Appellant owed him some money. Both of them left their place of work at about 4.15pm and arrived at the Appellant's place at about 5pm. Upon their arrival they found the Complainant at the gate which was locked and upon inquiring the whereabouts of her mother, the Complainant responded to the Appellant that she did not know.

24. After watching the video for some time, the Complainant's mother knocked the door and asked for the child. According to DW2, the Appellant escorted him to the gate and he left. By then it was around 6.30pm. The following day they worked with the Appellant on night shift and left the following morning. However, later that day, he did not see the Appellant and when he visited the Appellant's house the following morning he found it locked and the Appellant was unavailable on phone. Eventually when he got him, the Appellant explained to him what had transpired and he went to see him at the Police Station.

25. In his evidence, DW2 stated that he could not tell what happened after he left the Appellant's house at 6.30pm.

26. In her judgement, the learned trial magistrate found that the age of the Complainant was not contested and based on the evidence on record, the Complainant was aged about three years. As regards penetration, the learned trial magistrate found that based on the evidence of PW1 the Complainant and the PRC Form, there was penile penetration of the Complainant's vagina. As regards the identity of the perpetrator, she found that it was confirmed by the Appellant that he knew the Complainant's family prior to the incident as they were neighbours and that the Complainant used to visit his house and had been to his house on the material day. She therefore believed the Complainant's evidence on identification as there was no cause for her to falsify evidence against the Appellant when there was no grudge between them. She therefore proceeded to convict the Appellant and sentenced him to serve 20years imprisonment.

27. In this appeal the Appellant has condensed his grounds as follows:

> ***A. THAT the Learned Magistrate erred in law and in fact by failing to note that the prosecution failed to prove its case beyond reasonable doubt.***
>
> ***B. THAT the fundamental right to fair trial was violated by the Court to the prejudice of the appellant.***
>
> ***C. THAT the sentence imposed by the Court is harsh, oppressive and manifestly excessive.***

28. It was submitted on behalf of the Appellant that the evidence tendered at the lower Court was insufficient to sustain a conviction on the sexual offence charge of defilement due to the following reasons. An issue was taken with the finding of the trial court that the minor in question (PW2) was possessed with sufficient intelligence and further that she also understood the difference between truth and falsehood. This was based on the provisions of Section 19(1) of the ***Oaths and Declarations Act***.

29. The appellant faulted the ruling by the learned Magistrate as the child was of extreme tender age to be adjudged of sufficient intelligence and knew the implications of telling the truth and false. This was based on the response to the second question questions put to her which according to the typed record is indicated as follows:

> ***Q: Where do you live?***
>
> ***A: Aunty W and Mama Y***

30. It was submitted that contrary to what is expected of a child possessed of sufficient intelligence and can be truthfully as was adjudged by the court, the Child demonstrated that not only didn't she know the location of the child but equally mentioned **"Mama Y"** a person or something else totally foreign and unknown to the parties in the proceedings. In this regard the Appellant relied on the Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR** and contended that a *voir dire* examination is supposed to determine the competency of a minor on the basis of accurate response of the questions posed. It's only then that the minor can be adjudged to be of sufficient intelligence and is in a position to understand what is truthful and what amounts to lies. In this case it was submitted that the learned magistrate erred in making a finding that the minor was of sufficient intelligence and this Court was urged to vacate that finding as well as that of her entire testimony.

31. It was further submitted that the evidence tendered by the prosecution was full of inconsistency and failed to meet the beyond reasonable doubt threshold to sustain a conviction. Specifically, the Appellant took issue with the evidence from PW1 and PW2 as giving a different account of facts which led to the conviction of the appellant. The Appellant, in particular pointed to the evidence of PW2 wherein in examination in chief she stated that she reported the incident to her mother PW1 yet, when PW2 was Cross examined, she denied of ever telling her mother such information in relation to the defilement by stating categorically. According to the Appellant, PW1 lied when she testified in Court that the child her told her that "***Uncle Shema had inserted his DUDU in Hers"*** yet the minor said no such thing hence. In support of this submissions, the Appellant relied on the holding of the Court of Appeal in case of **Phillip Nzaka Watu vs. R (2016) e KLR**.

32. It was further submitted that the conduct of the mother also raises doubts as to the involvement of the appellant in the defilement case. This was due to the failure by the mother to confront the appellant who was a close neighbour and someone well acquainted with both the mother and the child; to report the same immediately to the police for purposes of apprehending the appellant until after two days; to seek the help of the neighbours in reporting the matter or taking the child to the hospital; to immediately take the child to the hospital having noticed the blood stains on her 3 year old child having been defiled by a 25 year old citing curfew as a reason not to go to the hospital. According to the Appellant, the existence of curfew does not lock out any person in seeking emergency health treatment neither does it preclude a person from reporting a crime to the police.

33. It was submitted that it shocks human conscious that a mother to a three year old child who is faced with primary evidence of defilement would opt not to immediately seek medical attention knowing very well that the injuries inflicted could result to the death of the minor. Apart from taking issue with the conduct of the mother of the Complainant, the Appellant also took issue with the manner in which the investigations were conducted the change the clothes worn on that material day and the failure by the investigating officer **PW5 (MM)** to ask for the victim's clothes.

34. According to the Appellant the fact that the defilement incident was alleged to have happened on Friday on 8th May, 2020 yet the appellant was arrested on Sunday 11th May, 2020 at his home was proof enough that he was a stranger to all this accusations of defilement. As regards the standard of proof, the Appellant relied on the case of **Republic v Ismail Hussein Ibrahim (Criminal Case No. 4 of 2016)** which adopted the Nigerian Supreme Court decision in **Bakare Versus State 1985 2NWLR** and submitted that the inconsistency of the testimonies witnessed from PW1 and PW2 are lacking in credibility, high degree of cogency consistent with a high degree of probability and out rightly falls short of the legal required threshold of beyond reasonable doubt as the law requires in criminal trial and impeaches the probative value of the witnesses as to the identity of the appellant having been involved to the incident. And it is on such reason that the appellant implores the Court to vacate his conviction and sentence.

35. As regards the derogation of the Appellant's right to fair trial it was submitted based on Articles 50 and 25(c) of the Constitution as read with the decision of the High Court sitting in Nyeri in the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR,** that the learned magistrate in pinning the defilement on the appellant misdirected himself that PW2 in cross examination gave the names of the neighbors who reside in the same neighbourhood in reaching the conclusion that ***"her evidence of identification was therefore watertight and credible"*** **when** the proceedings fail to disclose that anywhere during the examination in chief nor the cross examination. According to the Appellant, it is on this erroneous finding that the Learned Magistrate erred in convicting him as PW2 never identified the appellant from his neighbours as alluded to by the trial court magistrate.

36. It was also submitted that the Learned magistrate erred in law and in fact by not considering the appellant evidence in convicting him. The appellant is of the view that his evidence together with that of DW2 was cogent, consistent and unimpeachable and if it had been considered then the learned magistrate would have exonerated him from the charged crime. According to him, it was the mother of the child (PW1) who went for the minor at around 6:30pm in the presence of DW1 which evidence was well corroborated by DW2 who was present and the Appellant denied that the child went back to his residence. Flowing from the given evidence by the defence, the prosecution ought to have broaden its investigation for purposes or realigning the timelines to fit in the set of facts instead of dismissing the appellants evidence in entirety on the basis of the minor's identification which was not even contentious before the trial court.

37. It was further contended based on the decision of the Supreme Court in **Francis Karioko Muruatetu & Anor vs. Republic**, **[2017] eKLR** and **Evans Wanjala Wanyonyi vs. Republic [2019] eKLR** that the sentence meted out on the appellant is harsh, oppressive and manifestly excessive.

38. Based on the foregoing, this Court was urged to vacate the conviction and sentence by the trial court and set the appellant at liberty.

39. On behalf of the Respondent, it was submitted that PW1 in her testimony stated that the minor was born on 28th April, 2017 and the offence took place on 8th May, 2020 when she was three (3) years of age. This was supported by the evidence of age assessment of the complainant which was estimated to be the age of three years less or plus two months.

40. As regards penetration, reliance was placed on Section 2 of the ***Sexual Offences Act*** and the evidence of PW2 (complainant) as well as that of PW3, the clinical officer, who noted that the minor had mild bruises on the right side of the labia minora and her hymen was absent. There was mild blood stain on HVS stick while laboratory test revealed the presence of tercocytes (bacteria) and pus cells indicating urinary tract infection. He also noted that there were epithelial cells and spermatozoa cells seen and concluded that the minor had been defiled.

41. As to whether penetration was occasioned by the accused, it was submitted that PW2 testified that the appellant was a person known to her as she used to go and watch TV (cartoons) and he was a neighbour. She added that there was no other Uncle Shema staying in the neighbourhood, therefore there was no possibility of mistake in identification. It was submitted that in his defence, the Appellant also confirmed that he knew the complainant's family prior to the incident and they were neighbours. He did not contest that the child was at his house on the material day. Therefore, in all occasions, it is safe to conclude that the appellant was identified by recognition.

42. Regarding *voir dire* examination, it was submitted that this was done before she testified in court and Section 19(1) of the ***Oaths and Statutory Declarations Act*** and Section 125 (1) of the ***Evidence Act***, were relied upon.

43. According to the Respondent, though the above cited statutes are silent on the definition of who is a child of tender years, the provisions of the law *voir dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus, under the ***Evidence Act***, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. As for the question of who is a child of tender years, reliance was placed on Section 2 of the ***Children's Act*** which defines a child of tender years to mean ***"a child under the age of 10 years"***. However, court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to *voir dire* examination and reliance was placed on the case of **Kibangeny Arap Korir vs. Republic, [1959] EA 92**. In this case it was submitted that the minor was aged 3years and the trial court conducted *voir dire* and noted that the minor possessed sufficient intelligence, despite her tender age, and she understood the difference between truth and falsehood. Therefore, her evidence was affirmed.

44. Regarding contradictions, it was submitted that the learned trial Magistrate rightfully relied on the proviso under Section 124 of the ***Evidence Act*** when she stated that: "*I do not find any reason to discredit the evidence of the child on identification. she had no cause to falsely single out the accused person as the person who defiled her*." It was submitted that the minor inconsistencies by the rest of prosecution witnesses are not fatal to the testimony of the complainant.

45. It was therefore submitted that the prosecution proved all the ingredients of the offence beyond any reasonable doubt as the defence of the appellant was hopeless denial and could not dispel the overwhelming evidence tendered by the prosecution. He was placed at the scene and he also confirmed being at the scene of the crime. It was therefore submitted that the conviction was safe and that this appeal does not raise any basis to disturb the conviction. It was prayed that the conviction be upheld and sentence confirmed.

Determination

46. I have considered the grounds of appeal, the submissions made by the parties and evidence on record as I am duty bound to do. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

47. The prosecution's case in summary was that on 8th May, 2020, the Complainant, a minor aged 3 years, went to the Appellant's house to watch TV. While there, the Appellant removed her clothes, removed his and inserted his genital organs into the genital organs of the Complaint. In the process, the Appellant sustained injuries in his genital organs and bled. After the incident, he told the Complainant to go home. The Complainant arrived home at 9.30pm and her mother, PW1, while in the process of bathing her, was informed by the complainant that she was feeling pain and that the Appellant had inserted his male genital organ (dudu) into hers. PW1 also noticed that the Complainant was wet and dirty. According to the Complainant, after being defiled by the Appellant, the Appellant wiped her using a piece of paper. Due to the prevailing curfew, PW1 did not report the incident until the following morning after she had taken the Complainant for treatment. Upon examination, it was confirmed that the Complainant had been defiled.

48. On his part, the Appellant testified that on the material day, he, in the company of his workmate, DW2, found the Complainant at the gate where she was being rained on and they took her into his house. Later PW1 went and took her away. While he admitted knowing the Complainant he denied defiling the Complainant.

49. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

50. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

51. As regards the age of the complainant, in this case, it is not contested that the Complainant was three years. This is supported both by the oral evidence of PW1 and the age assessment report. Accordingly, the prosecution proved the age of the Complainant beyond any reasonable doubt.

52. The next issue is whether the Complainant was penetrated and if so who penetrated her. Section 2 of the ***Sexual Offences Act*** provides that:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

53. This was explained in the case of **George Owiti Raya vs. Republic [2013] eKLR** where it was held:-

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."**

54. In the case of **Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR** the court held that;

> **''As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.''**

55. In this case the Complainant's evidence was that she had gone to watch TV in the Appellant's house. She explained that on that day she had a pair of trousers which the appellant removed and also removed his trousers. The Appellant then put a "*dudu*" in her private parts after which he wiped her using a piece of paper. After that the appellant told her to go home. Upon going home, she disclosed the incident to her mother, PW1 who took her to Hospital where the doctor examined her. According to PW1, the Complainant informed her that she was feeling pain in her private parts. Upon examining the Complainant's private parts, PW1 found that she was wet and dirty. When the Complainant was examined by PW3, **Lemuta Saila Sanvia**, a clinical officer at Kitengela Subcounty Hospital, it was found that the Complainant had mild bruises on the right side of the *labia minora* and her hymen was not intact. There was mild blood stain on HVS stick though there was no vaginal bleeding and discharge. Other tests revealed the presence of bacteria and there were pus cells indicative of urinary tract infection. Further, epithelial cells and spermatozoa were seen. It was concluded that the Complainant had been defiled as the child could not have spermatozoa and her hymen ought to have been intact and she ought not to have had an infection. In **Dominic Kibet Mwareng vs. Republic [2013] eKLR** it was held that:

> **"The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence."**

56. In this case the Complainant's evidence was that the Appellant inserted his genital organ (*dudu*) into her genital organ. According to what she told her mother, PW1, the Appellant urinated in her. That there was penetration of her genital organ was proved by PW3, **Lemuta Saila Sanvia**, who exhibited the PRC Form and Lab Request Form.

57. From the evidence on record, there is no doubt that there was penetration of the Complainant's genital organ with the male genital organ of another person. The presence of spermatozoa was evidence of what was applied in the penetration.

58. As regards the identity of the Appellant, there is no doubt that the Appellant was well known to both the Complainant and her mother. This was admitted by the Appellant himself who stated that the Complainant used to go to his house. Therefore, there could not have been mistaken identity.

59. The question is however, whether it was the Appellant who defiled the Complainant. That the Complainant was in the Appellant's house at least till 6.30pm is not in doubt. However, according to the Appellant, the Complainant left when her mother returned and called her. The

Appellant called DW2 as his witness. However, DW2's testimony was to the effect that when the mother of the child knocked the door and asked for the child, he asked the Appellant for the umbrella and the Appellant escorted him to the gate. He did not know what happened thereafter. Accordingly, DW2's evidence could not completely exonerate the Appellant from the incident.

60. The trial court believed the evidence of the Complainant as being truthful. In that case, the Court was entitled to make a finding even in the absence of corroboration. It is however contended that from the voir dire examination, the evidence of the Complainant ought not to have been believed. This was due to the Complainant's response when asked where she was living. Whereas the typed proceedings reflect the answer as *"Aunty W and Mama Y"*, it is clear that the typed proceedings are incorrect. According to the handwritten proceedings, the answer to that question was *"I don't know the name"*. It was in answer to who she lived with that she answered *"Aunty W and Mama Y"*. It is therefore clear that the submissions on *voir dire* examination, to the extent that it was based on incorrect proceedings, cannot be sustained.

61. Specifically, the Appellant took issue with the evidence from PW1 and PW2 as giving a different account of facts which led to the conviction of the appellant. The Appellant, in particular pointed to the evidence of PW2 wherein in examination in chief she stated that she reported the incident to her mother PW1 yet, PW2 when cross examined, denied of ever telling her mother such information in relation to the defilement. According to the Appellant, PW1 lied when she testified in Court that the child her told her that "***Uncle Shema had inserted his dudu in Hers*****"** yet the minor said no such thing hence. In support of this submissions, the Appellant relied on the holding of the Court of Appeal in case of **Phillip Nzaka Watu vs. R (2016) e KLR**.

62. As regards the conduct of the conduct of the mother, PW1 clearly explained the circumstances under which she failed to report the incident that night. While another person might have reacted differently, I am unable to say that the conduct of PW1 was so unreasonable as to render her evidence unbelievable. In any case, even if one disbelieves her evidence there was sufficient evidence from the Complainant and the medical evidence on the basis of which penetration could be found. As for the perpetrator, the Complainant's evidence on who defiled her was clear and cogent and was not shaken. In this case there was no evidence of bad blood between the Appellant and the Complainant or her mother. While there was an allusion to the denial by the Appellant to assist PW1 with a gas cooker, the Appellant admitted that that action did not lead to bad blood between them. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan and Sachdeva, JJ** held that:

> **"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?"**

63. Regarding inconsistency in the evidence of PW1 and PW2, whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

64. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

> **"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."**

65. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

> **"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."**

66. In the case of **Njuki vs. Rep 2002 1 KLR 77**, the court said the following in respect of discrepancies in the evidence of witnesses:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."**

67. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

> **"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in**

evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

68. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> **"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."**

69. In **Erick Onyango Ondeng' vs. Republic [2014] eKLR**, the Court of Appeal held that:

> **"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

70. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

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

71. In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

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

72. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (**Nyakisia v. R**. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal).

73. In this case, I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

74. As regards the sentence, the principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12** where it was held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'**

75. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> **"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

76. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue

as follows:-

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors".**

77. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". **(R - v- Shershowsky (1912) CCA 28TLR 263)** while in the case of **Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

> **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

78. In this case, reliance was placed on the holding of the Supreme Court in **Francis Karioko Muruatetu & Anor vs. Republic**, **[2017] eKLR.** However, on 6th day of July, 2021, the Supreme Court issued directions in the same matter (for purposes of clarity I will refer to the directions as ***Muruatetu 2***) in which it clarified inter alia as follows:

> **(i) The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;**
>
> **(ii) The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;**
>
> **(iii) All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.**
>
> **(iv) Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.**
>
> **(v) In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.**
>
> **(vi) An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.**
>
> **(vii) …….**
>
> **(viii) Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on resentencing.**
>
> **(ix) These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.**

79. Based on the said directions, the sentence imposed of 20 years imposed on the Appellant where the law provides for upto life imprisonment cannot be said to have been excessive in the circumstances. The appellant took advantage of the trust that the Complainant had in him as "Uncle Shema" and the absence of her mother for his own selfish gratification.

80. As was appreciated in **Tito Kariuki Ngugi vs. Republic [2008] eKLR**:

> **"The Appellant…caused her trauma which she will have to live with for the rest of her life."**

81. This Court does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

> **"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."**

See also **Omari vs. Ali [1987] KLR 616.**

82. Therefore, taking into account the circumstances of this case I find no merit in this appeal which I hereby dismiss in its entirety. From the record, however, the Appellant was arrested on 10th May, 2020 and it was not until 19th May, 2020 that he was released on bail. Pursuant to section 333(2) of the ***Criminal Procedure Code***, that period is to be taken into account in computing his sentence.

83. Judgement accordingly.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Kaya for the Appellant

Mr Ngetich for the Respondent

CA Martha