REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 17 OF 2020

KELVIN JUMA MUNGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence

of the Principal Magistrates Court at Kaloleni by Hon L. N.

Wasige (PM) delivered on 4th May, 2020 in SO No. 31 of 2018)

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mugambi advocate for the appellant

J U D G M E N T

The appellant was charged and convicted of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act and sentenced to ten (10) years imprisonment. The appellant was aggrieved with the conviction and sentence passed by the trial Court and filed an appeal through the firm of **Mugambi & Co. Advocates** on grounds that:

(1). That the Learned trial Magistrate erred in Law and in fact in failing to find that there was absolutely no evidence to support the charge of defilement. The Magistrate's findings were mere conjecture.

(2). That the Learned trial Magistrate erred in Law and in fact in finding that the appellant committed the offence yet there was no cogent evidence to support that finding the Magistrate relied on extremely weak and uncorroborated evidence of the witnesses.

(3). That the Learned trial Magistrate misdirected herself by believing the evidence of the complainant (PW3), the Clinical Officer and (PW6) yet their evidence was contradictory and inconsistent. The prosecution evidence was full of gaps, incoherent and thus not capable of sustaining a conviction.

(4). That the Learned trial Magistrate erred in Law and fact in failing to appreciate that the complainant (PW3) as evident from her evidence was not a witness of truth and that her evidence ought to be disregarded.

(5). That the Learned trial Magistrate erred in Law and fact in failing to find out that there existed material and fundamental contradictions in the contents of the P3 Form, medical documents vis-à-vis the evidence of physical observation by the witnesses on the nature and extent of injuries purportedly occasioned to the complainant.

(6). That the Learned trial Magistrate misdirected herself in failing to find that the evidence on record, taken into totality, did not satisfy the ingredients on the offence of defilement.

(7). That the Learned trial Magistrate erred in Law and fact in failing to find that the prosecution's case was wanting by dint of poor investigations. The Learned trial Magistrate erred in failing to find that there was no independent and/or material evidence to support or corroborate (PW3)'s evidence and the prosecution's case in general.

(8). That the Learned trial Magistrate erred in Law and fact in convicting the appellant without regard to the circumstances surrounding the manner in which the offence was allegedly committed. The prosecution's case and the charge sheet are full of uncertainties.

(9). That the Learned trial Magistrate erred in Law and fact in failing to consider and analyze the appellant's testimony in defence. The Magistrate in total contradiction of the Law casually ignored the appellant's defence thus occasioning a serious miscarriage of justice.

(10). That the Learned trial Magistrate in passing sentence failed to consider the appellant's mitigation hence passed an extremely harsh and excessive sentence in the circumstances.

(11). That the Learned trial Magistrate failed to call for a pre-sentence report and was quick to pass a sentence not being alive to the circumstances surrounding the case hence causing a miscarriage of justice.

Background

The litigation history to this case is that on diverse dates between 24.4.2018 and 17.8.2018 at unknown time at [particulars withheld] village, Mtwapa Location, the appellant intentionally and unlawfully committed an act of penetration using his genitals into the female genitals of the victim identified as **RK**, aged seventeen (17) years. The burden of proof vested with the prosecution discharged it by calling the following witnesses.

(PW1) – L.N. – testified and identified herself as a social worker involved on children matters more specifically the girl child. According to **(PW1)**, the complainant to this offence **(PW3), RK** happened to be one such girl child the organization sponsors to undergo a health screening every year. On the material day of 17.10.2018, he complainant **(PW3)** underwent a routine screening which revealed that she was pregnant about 1 ½ months. This result necessitated her organization to involve the family members to **(PW3)** so as to ascertain the circumstances under which she might have impregnated. Thereafter, on interrogation **(PW1)** told the trial Court that the complainant **(PW3)** named the appellant as the one responsible for the pregnancy. The matter was then to be reported to Kaloleni Police Station for further action to indict the appellant. That is how the appellant got arrested and charged with the offence of defilement. Further, the Court received evidence from **(PW2) – J.C.,** identified as one of the close relative to the complainant. His role in the case was to work closely with **(PW1)** organization to ensure justice has been done with regard to the crime of defilement committed against **(PW3).**

When it was the turn of the complainant **(PW3)** to the best of her recollection, she told the trial Court that on or about the year 2016 they started an intimate relationship with the appellant. As part of the agreement, the relationship was to ripen into a marriage. According to **(PW3),** on the 24.4.2018 the appellant sent her fare to look for means to travel to his homestead. That request was voluntary acted upon by the complainant which she travelled to the appellant's home where he stays with his parents. In **(PW3)** testimony that visit culminated in the appellant having carnal knowledge, it was followed later with another one on 20.7.2018. During the second visit **(PW3)** confirmed to the Court that she stayed on for two days before going back home. These incidents resulted in the pregnancy which became a subject of investigations by **(PW1)** organization. The complainant carried the pregnancy to a full term and did give birth on 19.4.2019 but unfortunately the child passed away soon thereafter. In support of the medical examination carried out in the hospital, **(PW3)** was able to identify the P3 form, treatment notes and laboratory request form as exhibits.

The other witness summoned by the prosecution was **(PW4) NK,** a village elder within the local area where the offence was committed. All that **(PW4)** told the Court was in regard to the report made on the pregnancy of **(PW3)** and giving birth he advised that being a still birth, the child be buried immediately.

It was also the evidence of **(PW5) – PC. Winnie Murei**, a police detective attached to Kaloleni Police station. In her testimony **(PW5)** gave the chronology of events she was involved in immediately the complaint on defilement of **(PW3)** was brought to her attention. According to **(PW5),** it emerged that the complainant had been in a relationship with the appellant since the year 2016. It was therefore appropriate to have the complainant examined by a medical officer to confirm certain issues in connection with the offence. As part of the investigations, **(PW5)** told the Court that **(PW3)** was escorted to Mariakani Sub-County Hospital.

The clinical officer- **Barington Charo** on his part testified that **(PW3)** was taken to the hospital with a history of having been defiled by a known male person. At the time, **(PW6)** told the Court that a medical examination conducted upon the complainant revealed a ruptured hymen, discharge from the genitals, and a positive pregnancy test. In support of his oral testimony **(PW6)** produced documentary evidence of a P3, outpatient booklet and laboratory form request as exhibits. That formed the basis upon which the appellant was placed on his defence.

The appellant on his part denied the charges including any knowledge of the complainant in the first place to warrant him to be involved in committing the crime against her in the first place. Both counsels addressed the Court by way of written submissions which this Court has taken the liberty to consider in the ensuing Judgment.

Appellant's Submissions

Ms. Mugambi, counsel for the appellant contended that the Learned trial Magistrate did not fully address the issue of proof of beyond reasonable doubt of each ingredient to the offence. Learned counsel first attack was on the age of the complainant which was neither proved as required by the Law. For instance, Learned counsel argued and submitted there was no age-assessment report or any credible evidence to support the median age of seventeen (17) years used by the prosecution to frame the charge against the appellant. That the use of a copy of an immunization card cannot be used as cogent evidence to establish the age of the complainant. Learned counsel on this ingredient cited the principles in the case of **Abdi Saran Abdi v R CR Appeal No. 82 of 2008, Hadson Ali Mwachongo v R {2016} eKLR, Alfayo Gombe Okello v R CR Appeal No. 203 of 2009** To that extent Learned counsel submitted that proof of age remained a matter of conjecture. Learned counsel further submitted that the prosecution failed to proof penetration. She banked her submissions on the aspects of lack of spermatozoa and the DNA profile to prove that the appellant indeed was the one responsible for the pregnancy. It was Learned counsel

contention that the complainant's character placed her in the class of witnesses who cannot be trusted and as such any weight given to her testimony is a misdirection. Learned counsel further took issue with the Learned trial Magistrate not giving reasons in her Judgment why she found the complainant to be a credible and truthful witness. On this element Learned counsel submitted and invited the Court to be guided by the principles in **Ndungu Kimanyi v R {1979} KLR 282, Omuroni v r {2002} 2 EA 508.** Learned counsel relying on these authorities submitted that the complainant cannot be taken to be a truthful witness.

Learned counsel also delved into the evidence given by **(PW1), (PW3)** and **(PW6)** which she submitted was full of gaps, inconsistencies and contradictions to support the facts on occurrence of the offence. To buttress this argument, Learned counsel cited and relied on the principles in **John Cardon Wagner v R & 2 others {2011} eKLR, Hamisi Bakari & Another v R {1987} eKLR**.

On sentence, Learned counsel submitted that, the sentence imposed by the Learned trial Magistrate occasioned prejudice and a miscarriage of justice in view of the fact that no recognition, or pre-sentence report was called for and considered before the final verdict. Learned counsel on the applicability of the discretion of the Court, she placed reliance on the legal propositions in **Dismas Wafula Kilwake v R {2018} eKLR, S v Toms 1990 (2) SA 802 (A) at 806 (h)-807 (b) and Francis K. Muruatetu v R {2017} eKLR, AOO & 6 others v Attorney General & Another {2017} eKLR.**

Having extensively canvassed the four areas of Law above, Learned counsel concluded that the appeal by the appellant ought to be allowed by setting aside the conviction and sentence.

The Respondent's Submission

Mr. Mwangi, the prosecution counsel argued and submitted that from the re-appraisal of the evidence from the six witnesses, there is no doubt as to culpability of the appellant. Relying on the spectrum of the principles in **Charles Wamukoya Karani v R, CR Appeal No. 23 of 2013, Fappyton Mutuku Ngui v R {2014} eKLR, Nehemiah Kiplangat Ngeno v R {2018} eKLR** all the critical elements of the offence of defilement were in existence against the appellant. Learned prosecution counsel contended that the appeal as framed lacks merit and substance, hence it's for dismissal. With Learned counsel's submissions it's now the duty of this Court to determine the appeal. The substantive appeal thus focuses on these issues raised by the appellant.

Resolution of the Appeal

It is perhaps apposite to begin my analysis by examining the very cases which developed the principles for the first appeals Court jurisdiction. **See Okeno v R {1972} EA 32, Soki v R {2004} 2 KLR, Kimeu v R {2002} 1KLR 756**. It is the duty of this Court to reconsider, re-evaluate the evidence and draw independent conclusions. However, this Court has to give due allowance to the advantages enjoyed by the trial Court of seeing and hearing the witnesses. For that reason, the first appellate Court should not interfere with the findings of the trial Court which were based on the credibility of witnesses, unless, no reasonable tribunal could make such findings or it was shown that the findings of the trial Court are erroneous in Law. The appeal against the decision of the trial Court is on the issue whether the prosecution indeed proved the case against the appellant beyond reasonable doubt. On appeal better part of the arguments was centered on non-proof of the elements of penetration and age of the complainant. As these elements do overlap, I find it convenient to deal with the issues together on whether the contentions by the appellant should be left to stand.

In the first instance, for the prosecution to secure a conviction against the appellant, evidence adduced has to stand that the complainant was penetrated into her genitals by the appellant. The prosecution evidence therefore has to manifest either partial or complete insertion of the penis of the appellant into the vagina of the complainant. This is what the legislature envisage under the definition as provided in Section 2 of the Sexual Offences Act. It is also trite that a fact in issue can be proved by evidence of a single witness. See the principles in **Maitanyi v R {1986} KLR 198**. The primer of this authority is that a conviction can be safely based on the testimony of the victim as a single witness, provided the Court finds her to be truthful and reliable. This is what the Court in **Livingstone v Uganda SCCA No. 19 of 2006** stated as follows:

> ***"What matters is the quality and not the quantity of evidence."***

In **Francis Mugendi v R CR Appeal No. 345 of 2008** the Court held interalia that:

> ***"The proviso to Section 124 of the Evidence Act states that where in a criminal case, involving a sexual offence, the only evidence is that of the alleged victim of the offence, 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."***

The criteria of what elements constitutes the truth are not defined in the statute, but is left to the Courts to interpret and make inferences to demonstrate that the witness evidence is worthy of believe. Secondly, the evidence given by that witness taken at its highest or lowest is such that it has an important bearing and influence on the outcome of the case. Thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible. These requirements appreciated above by this Court are for once which one can respectively be referred to as the criteria of relevance and credibility in a criminal trial to discharge the burden of proof beyond reasonable doubt.

To start with the prosecution has the duty to adduce evidence to satisfy all the elements more precisely that of penetration. This is the highest burden imposed by the Constitution as the accused is presumed innocent until the contrary is proved. (**See Article 50 (2) (a) of the Constitution.)** In the present case, the prosecution evidence on penetration was based primarily on that testimony of **(PW3).** She gave a detailed description of existence of an intimate relationship with the appellant dating way back in 2016. From the evidence of **(PW3),** apparently there was no sexual intercourse until the two identifiable occasions referred as the 24.4.2018 and 20.7.2018. it is interesting to observe that no credible explanation was given by the complainant why they practiced celibacy for the initial two years namely 2016 and

2017 but decided to break the fast for sexual intercourse in the year 2018.

If one juxtaposes the above testimony of the complainant alongside that of the clinical officer, **(PW6)** on rupture of the hymen, which had no assessment of time and age when it was broken, the trial Court ought to have been cautious with the cogency and credibility of the complainant testimony on this ingredient. It is a fact that the complainant was not ready to disclose the man responsible for the pregnancy as reflected in her testimony. Reading between the lines of **(PW1),** and **(PW3)** evidence, it's as if she was being coerced to involuntarily name the person to be held culpable. I note that in normal circumstances at the outset she would specifically and confidently point to the appellant as the man engaged to her for some time with a promise to marry her at an opportune time. That for a courtship stated to have lasted more than two (2) years. There is a general believe that her guardians/parents would come to know it directly or indirectly. That seemed not to be apparently the case here. There is no underlying interest to withhold the identity of the person who impregnated her unless, there was serious doubt on her part against such assertion. In making observations as to the truthfulness and credibility of witnesses, it was appropriate for the trial Court to succinctly state which elements of her evidence which sets her apart as a truthful witness. One may ask why did the complainant, not report the incident to the parents/guardians, the school administration or the police on the alleged sexual relationship with the appellant way back in 2016. From the narration of **(PW3)** testimony the latter incident of 2018 came to be known by virtue of routine screening normally carried out by an organization in which **(PW1)** is one of the social workers. It is quite apparent that the complainant was in no mood to divulge information that the appellant had any sexual act with her on the two diverse dates specified in her evidence. The complainant had not specifically stated that she did not have sexual intercourse in 2016 and 2017 to express the appellant intentional and unlawful acts of the crime. By failing to patch up the gaps during this period and only reached out to the material dates in 2018 compromised the integrity of her testimony.

The vexed question in this appeal is whether this 17 year old can be trusted for the evidence to pass the threshold of beyond reasonable doubt. From the record and submissions by Learned counsel, I believe that this was one case the evidence on the DNA profile could have assisted the Learned trial Magistrate in reaching the finding on the issue of penetration. The provoking statements from the foregoing is that the complainant having acknowledged that sexual intercourse took place at the appellant's house on the 24.4.2018 and 20.7.2018 respectively. The appreciation of the DNA evidence was necessary to determine with precision a link in the chain on the sex act and the pregnancy as a produce of that criminal act by the appellant. Her evidence could have tallied circumstantially with that of the medical evidence on DNA analysis.

In the language of the clinical officer, there were no signs of lacerations or bruises to the vaginal labia or majora. The broken hymen or signs when that rupture occurred was beyond the realm of the clinical officer. What was responsive was the fact of a positive pregnancy test, on this case the prosecution failed to call a vital witness and material to proof the element of penetration beyond reasonable doubt.

I have also taken issue with the complainant failure to report the incident as it happened on the two occasions cited in her testimony. There is therefore even a doubt whether the complainant and the appellant really know each other very well. So if this Court impeaches the character of the complainant and the credibility of her testimony there could be no evidence to stand that there was some penetration into her genitals by the appellant. The broad overarching principle is on the nature of the investigations conducted by **(PW5)** of Kaloleni Police Station. As the trial Court retained its discretion to act in the interest of justice, the prosecution failure to visit the scene of the crime and the decision not to initiate recording of witness statements from the family members to the appellant goes to the very heart of this matter. As quoted by the complainant in her evidence the appellant perpetrated the commission of the crime since 2016. In a similar vein on the two important dates, sexual intercourse took place at the appellant's house. It follows, therefore certain crucial evidence was left out by the prosecution to squarely place the appellant at the scene of the crime. If I was the trial Court I will be extremely reluctant to exercise any latitude pertaining to the certainty of the complainant's credibility and the possibility of her truthfulness of the matter at hand.

In a single identifying witness to prove existence or non-existence of a fact in issue as provided for under Section 107 (1) of the Evidence Act, the trial Court should always bear in mind that its overriding constitutional limit and objective is to promote, dispense and achieve justice between the parties as well as uphold public confidence in the even handed observance of the rule of Law. This objective entirely calls upon the Courts to cautiously scrutinize the demeanor of witnesses which serves as a significant yardstick to ensure the integrity of the fact finding process.

> ***In my Judgment, it's expected that the inquiry should encompass, the tone of the voice, in which a witness statement is made, the hesitation or readiness with which his or her answers are given, the look of the witness, his or her carriage, his or her evidence of surprise, his or her gesture, his or her zeal, his or her bearing, his or her expression, his or her yawns, the use of his or her eyes, his or her furtive or meaning glances, or his or her shrugs, the pitch of his or her voice, his or her self-possession or embarrassment, his or her air of candor or seeming levity (emphasis mine)*** **(See Blacks Law Dictionary 430 6th Edition 1990).**

In the instant case, taking into consideration the evidence of **(PW3),** I find no nexus of the sense of impressions made by the Learned trial Magistrate and her final statement phased out as follows:

> ***"I have warned myself of the danger of convicting the accused based on the evidence of (PW3) as it was not corroborated. Nevertheless, this Court is mindful of the proviso of Section 124 of the Evidence Act, that a Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the Court believes the victim and records the reasons for such belief. I am satisfied that (PW3) indeed told the truth. Furthermore, her evidence was not shaken in cross-examination by the accused."***

As much as I agree principally with the Learned trial Magistrate, it's inevitable to simply bear in mind that at times liars will convince the Court on their truthfulness, while honest witnesses nervously fail to convince in the pursuit of obtaining the best evidence to prove facts in issue. The discretion of the Court therefore must nuanced with some guides why a particular witness was believed in relation to the one not believed in the finality of the decision. Suggesting that the evidence of the witness was never shaken on cross-examination may not yield the best conclusion on demeanor and credibility.

Ultimately, I am not persuaded that the Learned trial Magistrate spelt out in detail, the indicia upon which she believed the complainant as

against the others to place more weight on her evidence. I therefore find the current approach of many trial Courts expressing their views that I have warned myself in relying upon single identifying witness to convict the accused without cogent reasons of that believe unsatisfactory.

The question which must play in the mind of the Court's is whether the accused deserves to be punished and whether there is qualitative evidence presented by the prosecution for that person to be punished to serve society's interests. All these aspects of the analysis lead me to conclude that the Learned trial Magistrate finding on penetration to be problematic, and unsustainable to support the prosecution case.

Likewise, on the age of the complainant, its crystal clear that the prosecution produced a copy of the child clinical card capturing her age as seventeen (17) years old. The appellant's counsel build her case against admission of this evidence to support appellant's appeal. On review of the evidence, Learned counsel for the appellant would be stating the obvious that the quality of evidence adduced in any case will have a material if not a critical bearing on its outcome. For this reason, the Evidence Act under Section 65 as read in conjunction with Section 67 and 68 of the Act has developed rules and exceptions for the admission of secondary evidence at the trial. The copy of a clinic card as documentary evidence to proof the age of the complainant remains inadmissible without a proper basis being laid down by the prosecution. Not infrequently, secondary evidence may be introduced at the trial but such evidence must qualify as an exception under the provisions of **Section 68 of the Evidence Act. Section 66 of the Evidence Act** provides interalia, that:

> ***"secondary evidence includes certified copies given under the provisions contained in the Act made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies, copies made from or compared with the original counterparts of documents as against the parties who did not execute them, oral accounts of the contents of documents given by some person who has himself seen it."***

For the hearing below, the Learned trial Magistrate overlooked the provisions of Section 66 and 68 of the Evidence Act when she admitted a copy of the clinic immunization card for purposes of proving the age of the complainant. Under this scheme of legal arrangement, the age of the complainant remained in the realm of unknown. It is apparent from the statutory framework set out in the cited Sections the prosecution strictly failed to satisfy the set criteria. The prosecution case therefore has no legs to stand on for the indictment of defilement against the appellant. What the prosecution did was to ask the appellant to answer suspicious things in which a *primafacie case* never existed to demand an answer in rebuttal.

It is apparent from the foregoing that the above analysis which focuses from the nature of the proceedings giving rise to the Judgment appealed against falls short in meeting the criteria of evidence proving the charge beyond reasonable doubt. First and foremost, notably it is the testimony of the complainant who allegedly testified that she has been having an intimate relationship with the appellant but only premises the sexual act on the two instances in the year 2018. In my view, by that testimony she put a character into issue for the Court to consider all material evidence before arriving at the final decision on the appellant's guilt or the appropriate sanction to impose.

In addition, I note that the point in time at which the prosecution formally brings charges against an appellant, thereby initiating the criminal litigation process, is a matter that is essentially within the prosecution's discretion. This means that the prosecution has the opportunity to ensure that the evidence it has gathered with the assistance of the police is in a satisfactory state before it mounts charges against the appellant. This furnishes yet another reason for recognizing that an appellant may not have as full an opportunity to deliberate on his litigation strategy and gather the evidence he wishes to put before the trial Judge. It is therefore at least in part to ensure greater parity between the prosecution and the defence that more leniency is afforded to appellant for any doubt to be resolved in his or her favor.

Peculiarly, it should not be forgotten the jurisprudence surrounding the Sexual Offences Act is very problematic in the sense that it assumes that children aged between 16 and 17 years have no capacity to make certain autonomous decision effecting their sexuality. The rhetoric on this issue from several quarters is yet to locate some unifying principle upon which the country legislated equal protection clauses for minors aged between the late median of sixteen (16), and seventeen (17) with those below fifteen (15) year capping. As a vehicle for expanding the cluster of defilement offences it's too broad and it strains the plain meaning of a child in the language of a criminal process. Having the requisite capacity to be held responsible for offending behavior recognizes that a child has attained the emotional, mental and intellectual maturity to be held responsible for his or her actions. The question which begs for an answer is whether in the flattened world by technology a child can live up to the moral and psychological components of criminal responsibility by virtue of her or his individual discernment and understanding to account for anti-social behavior. It is true the phrase best interest of the child enshrined in our Article 53 (2) of the Constitution and Section 4 of the Childrens Act principally refers to children who have not attained the age of eighteen (18) years.

Notwithstanding that approach chosen by the Republic of Kenya, the main concern is the capacity in the protection of minor victims of sex crimes and the child capacity to contribute to that process. In fact, in our inner cities and rural villages of all the factors that have been empirically certified that contribute to delinquency behavior of children under eighteen (18) years is the inadequacy of parenting, Parents who are incompetent, abusive, negligent or rejecting, failing to maintain adequate supervision over their children.

I consider the problem of defilement in our country essentially a problem of lack of moral-social ethos in the families. Therefore, the criminal justice system with all its resources to detect, prosecute and sanction offenders who defile children of tender years and those below eighteen (18) years, simply cannot solve the problem. As one of the actors in the justice system, Courts can only pick up the pieces. It is appropriate that at this juncture to tie up the different threads of evidence by the complainant which heighten the importance of a complainant who carries herself in a manner to persuade the offender that he is an adult of sound mind capable of making decisions on her sexuality. It is clear that in the act of defilement between two consensual minors is the boy child who suffers the brunt of Criminal Law. This requires the Court to look retrospectively and prospectively at the likelihood that the child a victim of the offence may have deceived the accused that she was over the age of eighteen (18) years. In this regard, the accused responsibly believed the victim to be of maturity age to the extent that they can take reasonable steps to engage in a relationship.

Thus, in view of the nature of the proceedings in question, the criterion of availability of the provisions under Section 8 (5) & (6) of the Sexual Offences Act, ought to have been construed in favor of the appellant. It is most likely that the appellant might not have been aware of defences in Criminal Law that afforded him an escape from criminal responsibility. Principally, such defences properly raised form a basis that a suspect before is considered excusable or justified.

While it is true that ignorance of the Law is no defence but here is an appellant facing a serious offence without the right to counsel. Under Article 50 (2) (g) & (h) of the Kenyan Constitution an accused person enjoys the right to have the assistance of counsel for his or her defence. Right to have assistance of counsel could reasonably interpreted in any of the three ways:

(a). The accused has a constitutionally guaranteed option to employ counsel.

(b). The accused has constitutionally guaranteed option to have counsel assigned if he cannot afford to employ one.

(c). The constitution requires that counsel be employed or assigned whether or not desired by the accused.

I take it that compliance with this constitutionally mandate is an essential jurisdictional prerequisite of a trial Court. While factors of cost and manpower dictate some limitation be placed upon the obligation of the state to assign counsel to the appellant there should be elasticity to cater for the poor and those with little knowledge on Court processes and procedure.

A fair trial under Article 50 of the Constitution is never guaranteed to the great mass of defendants who frequent our Courts to answer one crime or another unless this fundamental right to legal representation is realized. It is in this context **Lord Denning** in his decision in **Pett v Greyhound Racing Association {1968} 2 ALL ER 545**. Had this to say:

"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favor or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine, or cross-examine witnesses. We see it every day. A Magistrate says to a man, you can ask any question, you like whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him, and who better than a lawyer who has been trained for the task."

Despite the judiciary efforts to intervene for self- represented accused persons, I must recognize that the criminal justice continuum constitutes a complex and elaborate structure upon which such an offender would find it difficult to navigate through its landscape. It is not surprising therefore to find on appeal appellants who went through a trial which they never understood its components. Whatever, the reason or justification for Courts to proceed with the trial where substantial injustice would be occasioned without legal representation adequate provision should be made for indigent accused persons.

Having completed my review of the grounds of appeal and their applicability to the evidence on record, the criteria applied by the Learned trial Magistrate relating to events subsequent to conviction and sentence failed the threshold test of a case proven beyond reasonable doubt. In this case, the gist of the prosecution case wholly dependent upon admissibility of evidence of the complainant who explained in greater detail her relationship spanning a period under review with effect from 2016 but focused to the trial Court was on the acts of defilement which occurred on diverse dates between 24.4.2018 and 20.7.2018. She failed to lead evidence that showed, her personality from a perspective that she abstained and protected her virginity until the material dates in question. There was an aspect of non-disclosure of minimum evidence of a decisive character to the case.

In my opinion there existed a range of admissible evidence from the complainant which failed to clarify certain details which compromised the probative value and credibility of her testimony. As pointed out identification evidence was purely based on this single identifying witness of the complainant. The application of this criteria will inevitably be considered unreliable in view of the fact that this was a relationship which had taken place since 2016. In view of the position taken to impugn the single identifying witness, there was every reason for this long acquaintance to be corroborated by some other independent evidence.

The fairness of the trial process was lost when it routinely accepted the complainant testimony as basic truth ignoring exceptional nature of the case to incorporate evidence from the scene of the crime. That omission affected the result to which the Learned Magistrate secured Judgment in favor of the prosecution. In light of Section 65, 66 and 68 of the Evidence Act an error was committed by the Learned trial Magistrate to admit the immunization card as documentary evidence to proof the age of the complainant.

One last notable area of Law in which the trial Court failed to adopt a nuanced approach is to the applicability of Article 50 (2) (G) (H) of the Constitution on the right to legal representation. It follows therefore the question of Law raised in the present appeal that there was no evidence to support the conviction of the appellant succeeds. In the result, I allow the appeal, quash the conviction, set aside the sentence and direct that the appellant be set free unless otherwise lawfully held.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 AND DISPATCHED VIA EMAIL ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mugambi for the Appellant

2. Mr. Mwangi for the state

3. The Appellant