



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. E037 OF 2021**

**ELIAS M'MWERE MAINGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTION**

*(Being an appeal from the original conviction and sentence of the Senior Resident Magistrate's Court*

*at Nkubu in Criminal Case No. 32 of 2019 delivered on 20<sup>th</sup> January 2021*

*by Hon. E. M. Ayuka, SRM)*

**JUDGMENT**

1. Elias M'Mwere Maingi, the Appellant was charged with the offence of 'Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act' with the alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences' in Nkubu Criminal Case No. 32 of 2019.

2. The particulars of offence for the offence of Defilement were as follows: -

*'On the 19<sup>th</sup> day of September 2019, at Lower Kiringa Sub-location in Imenti South Sub-county within Meru County, intentionally and unlawfully caused his penis to penetrate into the vagina of PK a child aged 14 years.'*

3. The particulars of offence for the offence of Committing and Indecent Act with a Child were as follows: -

*'On the 19<sup>th</sup> day of September 2019, at Lower Kiringa Sub-location in Imenti South Sub-county within Meru County, he intentionally and unlawfully touched the vagina of PK, a child aged 14 years with his penis.'*

4. He pleaded not guilty to both charges and the matter proceeded to full trial. By Judgement delivered on 20<sup>th</sup> January 2021 by Hon E. M. Ayuka SRM, he was convicted for the offence of Defilement and was sentenced to 15 years imprisonment.

***The Appeal***

5. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal. He initially filed grounds of appeal but in his submissions made amended supplementary grounds of appeal. He raises the following grounds of appeal: -

***i) That the learned trial magistrate erred in matters of law and fact by failing to note that the complainant's evidence tendered did not support the charges preferred to the Appellant.***

***ii) That the learned trial magistrate erred in both matters of law and fact by sentencing the Appellant to serve 15 years imprisonment without noting that the evidence of broken hymen is not a sufficient prove of defilement.***

***iii) That the learned trial magistrate erred in law and fact by failing to note that there was gross contradiction in the evidence tendered by PW3, the clinical officer and the treatment note MFI (2) Pex 2.***

***iv) That the learned trial magistrate erred in both law and fact by failing to note that the investigation was shoddy.***

### ***Appellant's Submissions***

6. The appeal was canvassed by way of written submissions. The Appellant filed written submissions on 29<sup>th</sup> July 2021. He urges that the evidence tendered did not support the charge because section 8 (1) as read with section 8 (3) talks about children who are upright psychologically but the evidence tendered confirms that when she was subjected to a mental status examination, the complainant was found to be mentally challenged and unfit to testify and that the trial court thus exempted her from testifying.

7. He urges that the charges ought to have been amended. He urges that the evidence tendered supported Section 146 of the Penal Code which states that "Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years." He thus urges that the charge was defective and it is trite law that were the evidence tendered doesn't support the evidence the accused person should be acquitted.

8. He urges that PW3, the clinical officer testified that upon examining her hymen, it was observed that it was broken, the valve was reddish in color and there was no discharge. He urges that this evidence contradicts with the treatment notes filed as Pex 2 as MFI (2) states that there was a "whitish discharge on the vulva." He urges that there cannot two different findings observed from a single person at a go.

9. He urges that a hymen may be perforated in several instances other than by defilement and the clinician did not testify whether the hymen was freshly broken or not. He cites *P. K. W. vs Republic* (2012) eKLR and *Republic vs Jacob Mutege* HCCRA No. E002 of 2020. He urges that even parents with ill motives can fix a person to the extent of inserting fingers into the child's vagina for it to redden and use this as evidence to implicate the accused in order to settle their own score.

10. He urges that he is an old man 76 years of age and at a risk of succumbing to Covid-19 due to the congestion in prison. He urges that this coupled with his defence of the matter being a frame up against him, is reason to allow his appeal.

### ***Prosecution's Submissions***

11. The Prosecution filed submissions dated 15<sup>th</sup> September 2021. They cite *Charles Wamukoya Karani vs Republic* and *Kyalo Kioko vs Republic* (2016) eKLR, for the ingredients of defilement which they urge include the age of the complainant, proof of penetration and positive identification of the assailant. They urge that the age of the complainant was proven to be 14 years as per the complainant's health card (Pexb4) and the evidence of her mother. They cite the case of *Richard Wahome Chege vs Republic* (2014) eKLR wherein the case of *Jon Gardon Wagner vs Republic* (2010) eKLR for the proposition that the age of the complainant in defilement cases is determined by medical evidence or other evidence.

12. With respect to penetration, they urge that the Prosecution made an application to have PW1, the complainant's mother testify on behalf of the complainant who was said to be mentally challenged. They cite Article 50 (7) of the Constitution which provides that a Court may allow an intermediary to assist a complainant or an accused person to communicate with the Court in the interests of justice. They also cite Section 31 of the Sexual Offences Act for the definition of a vulnerable witness and that Section 31 (4) (b) provides for protection of vulnerable witnesses including by way of directing that the witness shall give evidence through an intermediary. They cite the case of *M M vs Republic* (2014) eKLR for the procedure of conducting proceedings through an intermediary and they urge that PW1 was indeed permitted by the trial Court to testify on behalf of the complainant who was mentally challenged.

13. They urge that PW1 testified that on the material day, she left the complainant with her aunt EG and that when she returned home, EG told her that the complainant had gone missing. That this prompted PW1 to report the matter to the assistant chief, PW2 and together they went to the Appellant's house and found him **red handed** with the complainant in his house. That the Appellant attempted to block them at the door of his house but PW1 and PW2 were able to gain access and they had a torch which they used to flash around the house and they found the complainant on the Appellant's bed. That PW1 notice that she did not have her panties on and that she had been intoxicated by alcohol by the Appellant because she smelt of the same and she was drunk. Citing the case of *P M M vs Republic* (2014) eKLR, they urge that in sexual offences, the evidence from one witness, even a minor would be sufficient to sustain a conviction as long as the Court is satisfied with the veracity of the testimony of the complainant. They further cite Section 124 of the Evidence Act.

14. They urge that in addition, the trial Court found PW1's evidence to be truthful and consistent with respect to the events of the material day. That PW1's evidence was supported by the medical evidence of PW3 who stated that upon examination of the complainant, he observed that her hymen was broken and the valve was reddish in colour, both of which are indicators of penetrative sexual intercourse.

15. They urge that the complainant was a child who was mentally incapacitated and therefore, could not consent to sexual intercourse. They further urge that the complainant was intoxicated by the Appellant with alcohol and that she was incapable of appreciating the nature of the unlawful and intentional act as per Section 43 of the Sexual Offences Act.

16. On identification of the assailant, they urge that the same was positive as PW1 and PW2 went to the Appellant's house and they found the complainant who had gone missing earlier on in the day. That PW1 and PW2 knew the Appellant very well and they knew his residence, meaning they were neighbours. That PW1 stated that she had known the Appellant since she was young and that PW2, the assistant chief stated that PW1, the complainant and herself hail from the same village and that she knew the Appellant very well because he was of great help to her as he was a village elder when she had been newly employed as an assistant chief. They urge that, therefore, the identification of the Appellant was by way of recognition.

17. They urge that the Appellant's defence of alibi was an afterthought as it was never raised when he was cross-examining the Prosecution witnesses.

18. They urge that the sentence meted out against the Appellant was very lenient taking into consideration that Section 8 (3) of the Sexual Offences Act provides for a term of not less than 20 years yet he was only sentenced to 15 years. They urge that the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic*, Petition No. 15 & 16 (Consolidated) of 2015 clarified that the decision did not apply to all other cases but only to murder cases.

#### **Evidence adduced at trial Court**

19. This being a first appeal, this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings, of course bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See *Okeno v Republic (1972) EA 32*. The Court hereby reproduces the evidence adduced at the trial Court: -

#### **Prosecution's Case**

##### **PW1**

20. PW1 testified on behalf of the complainant who was exempted from testifying due to her mental disability. She testified as follows: -

***"I am TN. I stay at [Particulars Withheld]. Am a farmer. On 19/9/2019 I left the complainant PK at home. She does not go to school she stays at home. She is mentally challenged. Complainant is aged 15 years. She was born on 2005. I don't remember the date. I have the Birth Certificate. I left the complainant at home and went to the farm. I left her with her aunt EG. I went back at 5pm. EG told me that the complainant had gone missing. That the said EG went to the accused's house and heard the complainant therein. We reported to the area Assistant Chief that the accused had locked up the complainant in his house. With the assistant chief we went to the accused's house. We found the accused and the complainant asleep in the bed. The accused woke up and asked who we are. I entered and took the complainant. I realized that the complainant had been given alcohol and she was drunk. Assistant chief told me to take the complainant to hospital. I slept because it was night. On the next day, I went to Ntharene police post and I was issued with a P3 form. I escorted the complainant to Kanyakine S/C hospital where she was treated and issued drugs. P3 form for the complainant identified by the witness- PMFI -X1 Treatment card - PMF1-20 P.NO. 8814. (2) Lab request form for complainant dated 20/9/2019, O/P 8814. PMFI-3 (a&b) child health card for the complainant - date of birth 17/1/2005 PMFL-4. I know the accused he is a neighbor back home. His home is not far from mine. I have known the accused since I was young. Apart from me, Madam Assistant chief and many other people caught the accused in bed with the complainant."***

#### **Cross examination**

***"The assistant chief told me to seek medication for the complainant before taking action against you. You were arrested after a report to the police and treatment of the complainant. CG was passing by when she heard the complainant in your house. I am not related to the area chief."***

##### **PW2**

21. PW2 testified as follows: -

***"I am Rosaline Kathure Murungi. I stay at lower Kiringa S/loc. Am senior assistant chief of the area. On 19/9/2019 I was called by one G, who is an aunt to the complainant. She told me that the complainant had gone missing. She stated that she had heard the child in the accused's house. The house is very close to the road. The PW1 came running to me. She was crying. She reported that the complainant had been found in the accused's house. I accompanied her to the accused's house. I called out while at the door. The door was not locked. I called out the accused. He came out quickly to the door step. He held the two frames of the door. It was at night. I flashed a torch. We heard the complainant in the house. I pushed/struggled with the accused and we gained entry into the house. I pushed him out. PW1 entered the house. I flashed the torch and the complainant's mother removed the child from the bed. A commotion arose and people came. I calmed them down. We left with the child to hospital. The complainant had no pants on. The accused told PW1 to collect the pants from the house. I know the accused. We hail from the same area. The accused is not related to the complainant but we all hail from the same village. I and the accused have no grudge. He in fact was of great help to me as a village elder when I was newly employed."***

#### **Cross examination**

***"I could not arrest you at the moment. I wanted us to take the child to hospital fast. A mob had gathered. I am the one who calmed them down. I did not see any alcohol at the house. There was a process between reporting the case at the police station, treatment P3 form and mental assessment on the complainant. I have never had a case with you. I have no grudge with you."***

##### **PW3**

22. PW3 testified as follows: -

***"I am Moses Bayenia a Clinical Officer at Kanyakine s/c hospital. I have been a clinical officer for over 8 years now. I graduated from KMTc Eldoret. I have the medical documents in respect of the complainant. I have the p3 form for the complainant then aged 14 years old. I filed it upon 23/9/2019. She had a history of being found in bed with a man known to her mother. That she had been reported to have been missing for a while. On examining her hymen was broken, the valve was***

reddish in color, and there was no discharge, V.D.R.L test, pregnancy test, Hvs, test urinalysis. HIV test were all conducted. She was issued drugs as appropriate. V.D.R.L-VE. HVS showed numerous fat cells. Pregnancy tests- ve. Urinalysis No spermatozoa seen. Presence of broken hymen and reddish valva is indication of penetrative sexual intercourse. I also have the complainant's treatment notes dated 20/9/2019. O/P No-8814. I also have the lab report form dated 20/9/2019. I wish to produce the documents in evidence."

#### Cross examination

"I do not know if it was you who was found in the bed with the complainant. There's no record to show that you were subjected to medical examination. You were not presented to the hospital for any medication or examination."

#### PW4

23. PW4 testified as follows: -

"I am No. 224802 Sergeant S.Hassan of Ntharene police post. I am the investigating officer. Immediately the case was investigated by CPL Simon Terotich who is now on transfer to Busia. I took over the case after the transfer of the investigating officer. I had worked with him for one year. I perused the file and I am conversant with the case. On 30/9/2019 while at the police post the assistant chief Igokine and assistant chief Kiringa S/loc. Mrs. Rosalinda brought in the accused on allegations of defilement and the victim was mentally challenged. We received the accused and re-arrested him and referred the victim to Kanyakine s/c hospital. We later on charged the accused before court. The offence was committed on 19/9/2019. In Kiringa sub location. The child was accompanied to the police post by her mother and two chiefs. The victim's child health card was availed to us by the parents/her mother. I have the card. Victim was born on the 31/1/2005. It bears the name PK. Child health card-P.EXb.4."

#### Cross examination

"You were not arrested on the material day. You were arrested later on. I do not know your home. The investigating officer visited the scene in the course of his investigations. I don't know if you were at home when the offence took place. The accused was arrested and presented to the police post by the Assistant Chief's. The area assistant chief and mother to the victim implicated you in the offence. There are witnesses who caught the accused in the act and Medical Examination revealed that she was defiled."

#### Defence Case

#### DW1

24. DW1 testified as follows: -

"I am Elias M. Mwere Maingi. I stay at Kirimba. I am a farmer. I wish to state that the case is a frame up by G who is a witness. She had seen my money. She wanted me to give her the money. I had collected a stipend for many people at Nkubu. She also had collected money on behalf of her mother. She then sought me to lend her Ksh. 10,000 and I declined. The next day, G came to my home with her sister called M. She still asked for the money. I declined. She insisted I give her the money so that she works on my farm. She then insisted that she would stay with me. G did not attend court. She was not a witness. She demanded for money to withdraw the case. The complainant's mother is sister to G. They demanded for money to withdraw the case. M and G did not record witness statement nor called as witnesses. It is G who had the child. She was seen by Fidensio Kinoru going towards my home with the child at about 7:00 p.m. I was not at home. I was at my brother's home, where I stayed up to 9:30 p.m. I went to Kinyaru's home up to 10pm while I charged the phone. That's when I went home. The next day I went to fence. I met one Mwiti who asked me how I was at home yet they had heard I had been arrested with a child in bed. He said it is the assistant chief who told him that. I did not commit the offence."

#### Cross examination

"It was towards end of August 2019 when G came to demand for money from me. She was with her sister. I know the complainant we are neighbors but not too close. G is not mother to the complainant. Her mother did not ask for any money from me. I had gone to my brother's home on a Thursday 19/9/2019. I arrived there at 7:00 p.m. I met my brother at home."

#### DW2

25. DW2 testified as follows: -

"I am Fidensio Kinyuru. I stay at Kiringa. The accused is a neighbor at home. On 19/9/2019, the accused called me. He had distributed his land but his children were disgruntled. We went to have a sitting and talk. I saw G with the complainant. We went to the accused's brother's house. We stayed there up to 9:00 p.m. I and the accused went to my home where the accused charged his phone. He left at about 10:00 p.m and went home."

#### Cross examination

**“I went to the accused's home at 7:00 p.m I had not been with accused prior to that time. I saw G with the complainant. She is an Aunt to the complainant. She is K. I know her. They are of the same family with the accused. They are also neighbors. The child is of mental disability. I did not see the complainant's mother on that day. I saw G at about 7:00 p.m with the child. I did not talk to them. I do not know any grudge between accused and G.”**

DW3

26. DW3 testified as follows: -

**“I am Dominic Gikunda. I stay at Kanyakine. I know the accused. He is my uncle, a brother to my father. I wish to state that on the 19/9/2019 I was at home. The accused came to our home which is about 500 metres away from his home. He stayed at our home up to around 9:00 p.m. DW2 was also present. At about 9:00 p.m the two left. They went to DW2's home. After about 2-3 days I heard that the accused had been found defiling the child/complainant. Accused was arrested and charged in court.”**

**Cross examination**

**“It was on the 19/9/2019. It was a Thursday. I had not been with the accused throughout the day.”**

**Issues for Determination**

27. From the Petition of Appeal and the parties' submissions, the two issue arising for determination are as follows: -

- i) Whether the charge sheet was defective.**
- ii) Whether the Prosecution proved their case beyond reasonable doubt.**
- iii) Whether there is reason to disturb the sentence meted out by the trial Court.**

**Determination**

**i) Whether the charge sheet was defective.**

28. The Appellant urges that the evidence tendered did not support the charge because Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act addresses children who are mentally stable and/or normal whilst the victim child in the charge was found to be mentally challenged. He urges that the charges ought to have been amended to read Section 146 of the Penal Code which provides for defilement of idiots or imbeciles. According to the Appellant, the charge was defective and he should thus be acquitted. The Prosecution did not submit on this aspect of the appeal.

29. In criminal law, it is a cardinal principal that an accused person should only be charged with an offence which is known in law. This is embodied in the maxim '**Nullum crimen sine lege**' otherwise known as the legality principle. It serves to ensure that a person is only found guilty of a crime in respect of acts which constituted a crime at the time of their commission. The principle has found standing in both international and national law. Article 15 (1) of the International Covenant on Civil and Political Rights provides as follows: -

**No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.**

Article 50 2) of the Constitution of Kenya provides for the right to a fair trial which includes the right: -

- n) not to be convicted for an act or omission that at the time it was committed or omitted was not-**
- i) an offence in Kenya; or**
- ii) a crime under international law;**

30. The contention that the charge sheet is defective is based on the premise that the evidence adduced revealed that the victim was mentally challenged and yet he was charged under Section 8 (1) and 8 (3) which relates to victims who are mentally stable.

31. The Court has confirmed from the particulars of offence of the charge sheet that the charge addressed defilement in its ordinary sense without mentioning that the victim child was mentally challenged. The Court observes that the mental status of the child was brought to the attention of the trial Court for the first time on 10<sup>th</sup> August 2020, when the Prosecution availed a doctor's report confirming that the child was mentally challenged, thus not fit to testify.

32. To this Court's mind, therefore, the child's mental status only came out as an issue in the course of the proceedings by virtue of the Prosecution's indication of her mental status and their subsequent application for her exemption from testifying. The charge, therefore, did

not address the child's mental status at the time of the offence.

33. The Court however observes that Section 8 (1) and 8 (3) of the Sexual Offences Act does not specify whether the child victim with respect to the charges thereon is one who is mentally upright or one who is mentally challenged. This Court finds that the generality of these provisions allow for the charge to be brought against an accused who is alleged to have committed the offence on a child who is mentally upright as well as a child who is mentally challenged.

34. The Court is aware of Section 7 of the Sexual Offences Act which makes reference to a person with disabilities as follows: -

**7. Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities.**

***A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.***

35. This Court finds that the definitive part of the above section is the commission of an offence ***within the view of*** another being a family member, child or person with mental disabilities. It is therefore possible to charge an accused person under both Section 7 and Section 8 as difference counts within the same charge if the case is one where the accused committed rape or defilement within the view of another person. In such a case, there would be 2 complainants for each of the counts. One would be the victim who was raped and/or defiled the other would be the person who was subjected to the sight of the rape and/or defilement.

36. I respectfully agree with the finding of Nyamweya J in the case of ***Patrick Mwanzia v Republic, Criminal Appeal No. 112 of 2014*** [2017] eKLR where she held as follows: -

***“Lastly, this Court would like to observe and comment that the Appellant had earlier on in my view been correctly charged with defilement under Section 8 (1) and 8 (3) of the Sexual Offences Act, before the charges was amended to read defilement of a child with mental disabilities under section 7 of the Sexual Offences Act. Section 8 is the applicable section when a child is defiled, whether or not the child has a mental disability, and such a disability only becomes a relevant factor during sentencing as it is an aggravating factor in the defilement.***

***In addition, Section 7 of the Sexual Offences Act is commonly used as the section for charging persons who defile children with mental disability which is in my view wrong, as the ingredients of the offence created by section 7 as shown in the foregoing do not include defilement of children, and therefore also fails to capture the different age categories of children and sentences provided for by section 8. To this extent there is no offence known as defilement of a child with mental disabilities created by section 7.***

37. This Court thus finds that the charges against the Appellant were properly brought under Section 8 (1) and Section 8 (3) of the Sexual Offences Act. The Court has taken note of the Appellant's submission that the charge ought to have been brought under Section 146 of the Penal Code. The said Section provides as follows: -

**146. Defilement of idiots or imbeciles**

***Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.***

38. Taking an idiot or imbecile to be the same as a person who is mentally challenged, this appears to be the most appropriate provision which directly infers defilement of a child who is mentally challenged. The Court has however already found that Section 8 of the Sexual Offences Act includes defilement charges for both mentally upright and mentally challenged children. This Court thus finds that the charges were properly drafted and the Appellant was charged with an offence which is known in law. The charge sheet was, therefore, not defective.

***ii) Whether the Prosecution proved their case beyond reasonable doubt.***

39. In a charge for defilement, the Prosecution is required to prove the age of the complainant, the act of penetration and the linkage of the act to the accused person.

***Age of the Complainant***

40. With respect to the age of the complainant, this was not contested. The Prosecution produced medical evidence being a P3 form and health card indicating that the child was 14 years old at the time of the offence. A person of 14 years is a child within the meaning of a child both under the Sexual Offences Act and the Children's Act.

***Identification***

41. On the matter of identification of the Appellant, this Court observes that PW1 testified that she went to the Appellant's house, accompanied by PW2 where they found the complainant in bed with the Appellant. PW2 confirmed that they went to the Appellant's house and got the complainant therein. PW2 testified to have flashed a torch as they entered the house. From the evidence on record, the Appellant

and PW1, who testified on behalf of the complainant and who lives with the complainant are neighbours. Further, the Appellant is said to be a village elder whom PW2, the Assistant Chief described as having been very resourceful to her when she was newly employed.

42. The Appellant was, therefore, someone well known to both PW1 and PW2 and they could thus not have been mistaken as to his identity. This was evidence of recognition, dependent upon the personal knowledge of the assailant, which this court has previously held to be more reliable and weighty than that of identification of a stranger. See *Anjononi & Others v Republic*, (1976-80) 1 KLR 1566, 1568. This Court is, therefore, satisfied that the identification of the Appellant as the assailant was positive.

### **Penetration**

43. On the matter of penetration, this Court observes that both PW1 and PW2 confirmed that they found the child in the Appellant's bed. Although the Prosecution submits that the Appellant was caught red handed in the act, the Court observes that neither PW1 nor PW2 confirmed to have found the Appellant having sexual intercourse with the complainant. It is one thing to find the complainant in the bed and it is another thing to find the complainant being defiled on the bed, although the former is of probative value as well. PW1's and PW2's oral testimony was however not the only evidence adduced. There was also medical evidence by the clinical officer, PW3 who testified that from the examination done, a conclusion was made that there was repeated defilement by reason of the broken hymen and reddish valva. These observations were highly indicative of sexual penetration.

44. The Appellant urges that the evidence of PW3 contradicts what is on the treatment notes in that the latter includes a finding of a whitish discharge which the former does not include. The Court observes that indeed, the P3 form does not include a finding of a whitish discharge but the treatment notes include this finding. This Court, however, considers that the observation of a broken hymen and reddish valva is consistent in all the medical evidence. These two findings are what indicates penetration and for this reason, the contradiction on whether or not there was a whitish discharge is not enough to cast doubt on the Prosecution's case.

45. The Court further considers that when PW1 and PW2 went to the Appellant's home, their attempt to get into the Appellant's house was met with resistance from the Appellant. PW2 testified as follows: -

***"...The PW1 came running to me. She was crying. She reported that the complainant had been found in the accused's house. I accompanied her to the accused's house. I called out while at the door. The door was not locked. I called out the accused. He came out quickly to the door step. He held the two frames of the door. It was at night. I flashed a torch. We heard the complainant in the house. I pushed/struggled with the accused and we gained entry into the house. I pushed him out. PW1 entered the house. I flashed the torch and the complainant's mother removed the child from the bed..."***

46. The above reveals that there was some resistance by the Appellant to grant PW1 and PW2 access to this house. This adds weight to the Prosecution's case as the resistance is highly indicative of guilt. Furthermore, PW2 testified that the complainant was found without her underpants and that the Appellant told PW1 to collect the complainant's pants from the house.

47. The Appellant has urged that a broken hymen is not proof of defilement. While this is true, the Court finds that the presence of the reddish valva in addition to the other circumstantial evidence in the matter is strong enough to prove the charge of defilement against the Appellant.

### **Appellant's Defence**

48. The Appellant raised a defence of the case being a frame against him by a lady namely G who wanted to extort money out of him. He further claims that GFPW1 blackmailed him in order to get money from him with a promise to withdraw the case. The Appellant however failed to substantiate his allegations.

49. The rest of the Appellant's defence constituted an *alibi* wherein he claims that he was at his brother's home and later at his nephew's home on the material night. He called his said brother (DW2) and (DW1) as his witnesses.

50. This Court has considered his defence and finds that a weighing of the same against the Prosecution's medical evidence and the evidence of PW1 and PW2 is strong enough and raises no doubt as to the Appellant's guilt.

51. In criminal trials, the Court is allowed to weigh the evidence in support of an accused person's defence against the evidence of the Prosecution. I respectfully agree with the finding of Madan, Miller & Potter JJA in *Wang'ombe vs The Republic* (1980) KLR 149, where they held as follows: -

***"The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy's evidence.***

***To weight one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers..."***

52. Although the above was discussed within the context of an alibi defence, the same reasoning applies irrespective of the nature of the defence.

53. Further, the Court considers that the Appellant did not raise the issue of *alibi* or framing during cross-examination and raised the same during defence hearing for the first time. This Court thus finds that the Appellant's defence was an afterthought.

54. This Court thus finds that all the elements necessary for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act were proven beyond reasonable doubt against the Appellant.

### **Conclusion**

55. The complainant, a young and mentally challenged girl of 14 years was found in the Appellant's house, on his bed on the evening of 19<sup>th</sup> September 2019. PW1, the complainant's mother and PW2, the assistant chief of the area are the ones who located the child and confronted the Appellant in his own house. Their attempts to enter the Appellant's house were met with resistance and the Court takes this fact to add weight to his guilt. There was medical evidence to confirm that the child was observed to have a broken hymen and a reddish vulva upon examination. The Appellant was also well known to both PW1 and PW2 as they all reside in the same village and he was also said to be a village elder in the area. The Appellant's identification as the assailant was therefore positive.]

56. The Court rejects the Appellant's defence of the case being a frame up, for lack of evidence to support the same and further, for the reason that it was not raised during cross-examination earlier on. The Court also rejects his defence of *alibi* for the reason that he did not raise it during cross-examination. The Court finds his defences to be an afterthought. Going by the principle in **Wang'ombe vs The Republic** (1980) KLR 149, the Court finds that a weighing of the evidence adduced by the Prosecution and the Defence as a whole establishes all the elements of the offence of defilement beyond reasonable doubt, and the charge of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act against the Appellant was indeed proven.

57. The Court rejects the Appellant's contention that the charge sheet was defective. The Court finds that the provisions of Section 8 of the Sexual Offences Act do not distinguish whether the charges therein are restricted to cases of children who are mentally stable or upright or whether they extend to children who are mentally challenged. This Court finds that Section 8 of the Sexual Offences Act applies to both instances i.e where the child was mentally upright and when the child was mentally challenged at the time of the offence. This Court adds that the mental status of the child would, primarily, be a factor to consider at the point of sentencing and when considering an application for the child to be exempted from testifying and thus, be allowed to testify through an intermediary.

58. As to sentencing, the Appellant did not expressly raise this as an issue in his Petition of Appeal. Nonetheless, the Court observes that the trial Court sentenced him to 15 years imprisonment which in this Court's view is lenient going by the fact that the penalty section for the offence provides for a minimum of 20 years. The Court also considers that there was an aggravating factor, in that the complainant was mentally challenged at the time of the offence. As there was no cross-appeal on the sentence by the Prosecution, the Court will not disturb the finding on sentence.

### **ORDERS**

59. Accordingly, the Court makes the following orders: -

***i) The Appellant's Appeal is declined and the finding of the lower Court is upheld.***

*Order accordingly*

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF NOVEMBER 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**Elias M'Mwera Maingi, the Appellant in person.**

**Ms Nandwa, Prosecution Counsel for the Respondent.**