



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. E076 OF 2021**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. E077 OF 2021**

**AND**

**CRIMINAL APPEAL NO. E078 OF 2021**

**ONESMUS KARITHI KABERI.....1<sup>ST</sup> APPELLANT**

**TIMOTHY MURITHI MITHIKA.....2<sup>ND</sup> APPELLANT**

**DUNCAN MWIRIGI KIRIMI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTION**

***(Being an appeal from the original conviction and sentence of the***

***Principal Magistrate's Court at Tigania in Criminal Case No. 16***

***of 2020 delivered on 7<sup>th</sup> April 2021 by Hon. G. Sogomo, PM)***

**JUDGMENT**

1. The Appellants were jointly charged with the offence of 'Gang Defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006' with the alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences No. 3 of 2006' in Tigania Criminal Case No. 16 of 2020.

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

*'On the 24<sup>th</sup> day of March 2020, at [Particulars Withheld] Market in Tigania Central Sub-County within Meru County, in association and in turns intentionally caused your penis to penetrate the vagina of NKK a child aged 15 years.'*

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

*'On the 24<sup>th</sup> day of March 2020, at [Particulars Withheld]Market in Tigania Central Sub-County within Meru County, in association and in turns intentionally touched the vagina of NKK, a child aged 15 years with their penis.'*

4. All the 3 Appellants pleaded not guilty to both charges and the matter proceeded for trial. By Judgement delivered on 7<sup>th</sup> April 2021 by Hon G. Sogomo PM, they were convicted for the offence of Gang Defilement and were sentenced to 15 years imprisonment each.

***The Appeal***

5. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, they have preferred the instant appeal. In their respective Petitions of Appeal all dated 14<sup>th</sup> April 2021, they raise the following grounds of appeal: -

***i) That the learned principal magistrate erred in law and in fact in convicting the Appellants when the case against them was not proved beyond reasonable doubt.***

***ii) That the learned principal magistrate erred in law and in fact in failing to take into account the contradictions and inconsistencies of the prosecution evidence hence arrived at a wrong conclusion.***

***iii) That the learned principal magistrate erred in law in not properly analyzing the evidence of each witness by name and only said 'The Court was told' and not by who.***

***iv) That the learned principal magistrate erred in law and in fact in laying conviction on very weak circumstantial evidence of a single witness and never properly addressed himself to the provisions of Section 124 of the Evidence Act.***

***v) That the learned principal magistrate failed to analyze the Appellants' defence and just rubbished it as 'nothing but futile red herring.'***

***vi) That the learned principal magistrate shifted the burden of proof to the Appellant.***

***vii) That the sentence is harsh and excessive.***

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

6. The appeal was canvassed by way of written submissions. The Appellants filed written submissions dated 20<sup>th</sup> September 2021. They urge that the charge was not proved beyond reasonable doubt. That the complainant stated that she was sexually assaulted by three men and the accused herein. That in her evidence in chief, she stated that she was forced to have sexual intercourse but on cross-examination by the defence counsel she said that she was pregnant out of another sexual encounter on 1<sup>st</sup> March 2020. They urge that this creates doubt as to the occurrence of the said offence. They urge that the Clinical Officer PW2, agreed that according to the PCR form, the sex was consensual. That the Clinical officer (PW2) admitted that there were no garments presented to them, no lab test was conducted and even other tests conducted did not reveal any spermatozoa.

7. They urge that the evidence of PW3, the complainant's mother, cannot be relied upon to convict as it is obviously biased. They urge that the evidence of PW3 and PW4 is merely hearsay evidence. They urge that the evidence of PW5 is of no probative value as it only indicates that the officer went to the homes of the 3 accused and did not find the complainant in any of the homes.

8. They urge that the conviction was based on the evidence of a minor witness PW1 as all the other evidence is hearsay and very weak circumstantial evidence. They thus urge that the case was not proved beyond reasonable doubt.

9. They urge that there are clear contradictions and inconsistencies in the Prosecution's evidence. That PW1 states that she was forced to have sex with the appellants while PW2 the clinical officer admits it was consensual. That the PCR form also indicates that it was by consent and there was no struggle as PW1 wanted the Court to believe.

10. They urge that at page 2 of the judgment, the trial Court merely indicated that the Court was told or informed, without mentioning the particular names of witnesses. They urge that the trial magistrate did not address himself to Section 124 of the Evidence Act and that the evidence of PW1 was not corroborated by material evidence in support thereof implicating the Appellants. They cite the case of *David Ochieng Aketch vs- Republic*, Siaya H.C. CR. Appeal No. 30 of 2015 (2015) eKLR. They finally urge that the sentence imposed on them is excessive.

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

11. The Prosecution filed submissions dated 15<sup>th</sup> September 2021. They start by highlighting the provisions of Section 10 of the Sexual Offences Act. They urge that the Prosecution proved its case against the Appellant beyond reasonable doubt. They cite the cases of *Francis Matonda Ogeto v Republic* [2019] eKLR and *George Opondo Olunga v Republic* [2016] eKLR, for the ingredients of the offence of gang defilement.

12. They urge that the age of PW1, the victim was proven as PW1 testified that she was 15 years at the time of the offence. That PW2 also mentioned that PW1 was 15 years old. That this fact was corroborated by the P3 form which was produced as Pexb2 together with the birth certificate produced as Pexb4 which indicated the age of PW1 as being that of 15 years at the time of examination. They cite *Hadson Ali Mwachongo vs Republic* [2016] eKLR for the importance of proving the age of a victim of defilement under the Sexual Offences Act. They further cite *Joseph Kiet Seet vs Republic* 2014 eKLR and *Francis Omuroni vs Uganda*, Court of Appeal Criminal Appeal No. 2 of 2002.

13. They urge that penetration was proven by the evidence of PW1, PW2 and PW4. That PW1 testified that on 24<sup>th</sup> March 2020 she was taking shelter from the rain under the canopy of a building at her local market when her school mate, the 3<sup>rd</sup> Appellant joined in and after a brief chit chat the other two Appellants joined them. That PW1 further stated that the three men went to the side about 16 meters away and began canvassing in hushed tones. That PW1 further stated that the 3 Appellants attacked the complainant gagging, blind folding and tying her hands up with pieces of cloth before carrying her to a backroom of the building where they stripped and had sex with her in turns on top of a bed. That PW1 further stated that at around midnight the assailants threw her out of the room. They urge that the trial Court found the testimony of PW1 to be truthful and honest within the proviso of section 124 of the Evidence Act. They cite *J.W.A. vs Republic* [2014] eKLR and *Mohamed vs Republic* [2006] 2 KLR 138.

14. They urge that in addition to the above, the evidence of PW1 was corroborated by that of PW4 who testified that having received information of her whereabouts, he tracked her down to the home of her classmate and that on their return home she had revealed to him her tribulations in the hands of the Appellants.

15. They urge that the evidence of the clinician PW2, supports the testimony of PW1 and PW4 whereby he stated that PW1 was not calm when he examined her. That as per the P3 form, he noted that her hymen was torn and she had bruises on the clitoris, labia minora and majora and posterior touchette. That he produced the P3 form as Pexb2 together with PCR form marked as Pexb3. That in cross examination however, the clinician did state that the complainant did indeed have consensual sex on 1<sup>st</sup> March 2020. That he also confirmed that the bruises he observed on the complainant were fresh and could not have occurred on 1<sup>st</sup> March 2020.

16. They urge that the identity of the perpetrators by PW1 was by recognition as PW1, during her testimony recognized the Appellants and also did also mention their names when testifying. The cite *Anjonini and Others vs Republic* [1989] KLR for the proposition that evidence by recognition is more satisfactory than that of identification.

17. They urge that the Prosecution proved its case against the Appellant beyond reasonable doubt.

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

18. 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**

19. PW1 was taken through a voir dire and found competent to testify. She testified as follows: -

*“On 24<sup>th</sup> March 2020 at 6.00 p.m, I left home headed to the salon at Mulango Trading Centre to collect my clothes. I found that my sister SK had already collected the clothes and I began returning home just before 7.00 p.m. It was raining heavily and I took shelter outside a building at Mulango Market and that is when Dancun Mwirigi showed up and demanded to know what I was doing at night. I asked Dancun to give me his cell phone so that I call my neighbours Onesmus Karithi with a view of seeking help from the latter. Dancun refused to give me the cellphone but he himself found the latter's cellphone number in his phone. I remained with Duncan outside the building and after 10 minutes Onesmus Karithi and Timothy Murithi arrived and joined us. The 3 men went to the side about 16 metres away and began canvassing for about 30 minutes in husked tones. The 3 men then returned and grabbed me whereafter they gagged, blindfolded and bound my arms with 3 pieces of cloth. I was unable to scream because of the gag. The trio hoisted me and took me inside one of the back rooms of the building we were standing outside. The 3 then had forced sex with me. I did not see the sequence of the assault because I was blind folded at the time. The assailants had removed my trouser and under pant before assaulting me sexually on top of a bed in the building back room. The episode took a long time because the 3 men threw me out of the building at around midnight. By then they had unbound me and removed my blind folds. I went to the home of Doreen Mwendu about 100 metres away to seek refuge. I slept there but I did not tell Doreen what had happened to me. In the morning I went to the home of Doris Kangai at Ankarnia. She is my school mate. I spent 3 days at Doris's home and on 27<sup>th</sup> March 2020 my cousin Kaigera came to fetch me. He is the one who took me home. I did not tell him what had happened to me. Upon arrival home Kaigera my sister S and brother NM took me to Mulango Police post because a missing person report had been made earlier in regard to my absence at home. At the police post I informed a policeman called Ndegwa what had happened and that is when I was taken to Mikinduri dispensary where I was examined. Treatment notes were then compiled alongside a P3 form and PRC form. I have my birth certificate in Court. There were no lights where I stood outside the building. However all the assailants were familiar to me. Dancun was my schoolmate while Onesmus is my friend. Timothy is someone I did not know until the day in question. Timothy, Onesmus and Dancun are the ones seated there (pointing at 1<sup>st</sup> Accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused respectively.”*

### **Cross examination**

*“I got to the salon at 6.30 pm. It started raining at the time I was returning home and it was dark by then. It is true that my statement speaks of 2 hours when Dancun showed up. The incident occurred before the curfew was in existence but police were chasing people out of town. The 2<sup>nd</sup> accused is the one I intended to call using the cellphone for the 3<sup>rd</sup> accused. I was raped in the same building that I had sought shelter from the rain. I struggled to free myself in vain. The 1<sup>st</sup> accused was the caretaker of the rental tenements whose roof I had sheltered under. I do not know who had made the missing person report at the police post. The area I was gagged and blindfolded was dark. Doreen asked me what had happened but I told her that I would inform her the following morning which I did not do. I did not tell Doreen what had happened because the assailants had threatened me as they threw me out of the house. Doris resides about a kilometre from Doreen's home. My home is not far from Mulango market. I was afraid of returning home because was afraid of my parents. I am not under any threat at the moment. I did not have the idea of reporting the incident to the local police when the incident happened. I told the doctor that I was attacked at night but I did not mention the time. It is true that as at the time of my medical examination I was pregnant.*

*It is true that I revealed to the medic that I had had a consensual sexual intercourse on 1<sup>st</sup> March 2020. It is the 2<sup>nd</sup> accused that I had had sex with. The 2<sup>nd</sup> accused is the one who impregnated me. The 2<sup>nd</sup> accused was my boyfriend and that is why I failed to report him for defilement. I told the medic who examined me that I struggled during the sexual assault. It is not true that I wanted to extort money from the accused with this case.”*

PW2

20. PW2 testified as follows: -

*“My name is Absalom Wambua a clinician in charge of Mikinduri sub county hospital. I have a P3 form for NK aged 15 years old who was seen at our facility on 28<sup>th</sup> March 2020 with a history of being sexually assaulted on 24<sup>th</sup> March 2020 by known persons at around 10.00 p.m. The patient claimed that the perpetrators were 3 in number. She was not calm when I examined her. Her hymen was torn and she had bruises on the clitoris, labia minora and majora and posterior fouchette. The PRC form was completed and a lab test revealed positive pregnancy test. The patient was not placed on any drugs. I opined that there were features of the defilement when I filled the P3 form, PRC form and treatment notes which are before court.”*

*Cross examination*

*“I filled the P3 form but the PRC form was filled by my colleague Jonah Muteria who works under me. I relied on the PRC form and treatment notes in compiling the P3 form. The PRC form shows that the complainant had consensual sex on 1<sup>st</sup> March 2020. The PRC form depicts the complainants demeanor as calm. However as at the time of my examining the complainant with a view of filling the P3 form she was not calm. The complainant had a sexual history prior to the incident complained of. The bruises I observed on the complainant were fresh and could not have occurred on 1<sup>st</sup> March 2020. Consensual sex would ordinarily not yield bruises. The PRC form depicted that the victim consented to have sex and that no struggle was reported. No garments were presented to us during examination of the victim. The lab test conducted did not reveal any spermatozoa. The test was done on 28<sup>th</sup> March 2020 4 days after the complained of incident. The pregnancy was not resultant from the complaint of the incident. It is a different clinician, Ruth Wangari who works under me who compiled the treatment notes.”*

*Re examination*

*“From the history I took in the P3 form, the victim had been sexually assaulted by 3 individuals known to her.”*

PW3

21. PW3 testified as follows: -

*“My name is SKM a resident of [Particulars Withheld] village and I am a retired education officer. On 24<sup>th</sup> March 2020 I recall that my daughter NK left my home to collect her clothes at a friend's shop around 6.00 p.m. N never returned home and I made inquiries as to her whereabouts in vain. I decided to go to Mulango police post to report the case of missing person. On the third day of her absence I got wind that N had been sighted in company of Timothy Murithi, Onesmus Karithi and Duncan Mwirigi at 8.00 pm on the day she had gone missing. I sent my other daughter to the police post to update them of the development. Before my other daughter returned from the post the local MCA called to tell me that my daughter was at Karithi Kaberia's home. I passed this information to the police who went to Karithi's home. They did not find N there. Eventually on 27<sup>th</sup> March 2020 N was found in her friend Doris Kangai's home about 1 1/2 Kilometres away. N narrated that she had met Dancun and that they were joined by Timothy and Onesmus who had blind folded and taken her to a room where she was sexually molested by the boys. I spoke to the OCS Mulika to inform him that N had returned. Timothy, Onesmus and Dancun who had been arrested were released by the OCS upon my prompting. N was taken to Mikinduri Sub county hospital where she was examined and it was confirmed that she had been sexually assaulted. I then recorded my statement. Timothy, Onesmus and Dancun are seated there (pointing at 1<sup>st</sup> accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused respectively). I know them quite well being my village mates. I even taught their respective parents. My daughter N is 15 years old and in form 1 at [Particulars Withheld] Mixed Day Secondary School.”*

*Cross examination*

*“Mulango Market is about a kilometre away from my home and that is where N was going to collect her clothes. I began getting anxious at about 6.20 pm when N failed to return home. I went to the market the same evening and found the shop that N had gone to closed. I was accompanied by my daughter SK and son TK when I made my report in addition to my other son MK. I am not aware as to whether N had complained of lack of freedom at my home as reported by M at the police post. I did not go to the police post on 27<sup>th</sup> March 2020 when my daughter showed up at home because I was traumatized. I sent my other daughter and sons who are both grownups. N was taken to hospital on 28<sup>th</sup> March 2020 and not 29<sup>th</sup> March 2020 as shown in my statement. The latter date is an oversight. The local MCA informed me that his own daughter had said that N was at the home of the 2<sup>nd</sup> accused. I learnt from the medical report that N was pregnant as at the time of examination. N informed me that the 2<sup>nd</sup> accused was the one responsible for the pregnancy.”*

PW4

22. PW4 testified as follows: -

*“My name is FKM a resident of [Particulars Withheld] village and I am a clerical officer at the Assistant County Commissioner, Tigania East Division. On 28<sup>th</sup> March 2020 I recall that I was at Kunatu at around 11.00 am when SK who is my uncle called me via cell phone to inform me that his daughter NK had been missing for 4 days since 24<sup>th</sup> March 2020. S told me that the girl had been sighted at the home of Kabula and he requested me to go there and pick her. I proceeded to Kabula's home and found N*

together with the old man and her class mate who is also Kabulas daughter. I picked N and as we walked to her home she explained that she had fled from home because she had spent the night of 24<sup>th</sup> March 2020 with Dancun Mwirigi, Onesmus Karithi and Timothy Murithi at a lodging in Mulango and that the boys had sexually molested her. N told me that she was scared of her parents and also her assailants who had warned her not to reveal the incident to anyone threatening harm to her. When we got to S' home he referred me to the local police post where I left N. A report of her disappearance had been made earlier. I later recorded a statement over the matter. I got to know the assailants in the course of this case and they are seated there (pointing at accused). They were unknown to me prior to this case.”

**Cross examination**

“I do not know why S asked me to go to the police post instead of the doing so. Kaibula's home is 2 kilometres from Mulango area and less than a kilometre from the home of S. I am not aware of whether the complainant had reported the incident to anyone.”

PW5

23. PW5 testified as follows: -

“My name is No. 97068471 SGT Charles Nkarichia of Giithu police post and formerly of Mulango Police post. On 25<sup>th</sup> March 2020 I received a report from one M and MK to the effect that their sister NK had gone missing. I booked the report in our occurrence book at Mulika police post at about 1.30 pm the same day. On 26<sup>th</sup> March 2020 M and his brother TK returned to report that the girl was suspected to be in Dancun Mwirigi's house. We all proceeded to Dancun's home within Mulango area at around 9.00 am that day and we found him but failed to find N. Dancun told us that he had left N with Onesmus Karithi in Mulango area. We proceeded to Onesmus home also at Mulango area. We found Onesmus at the home but N was nowhere to be seen. Karithi told us that he had left N the previous evening with Timothy who is a caretaker of a lodging in Mulango area. Together with Dancun and Onesmus we proceeded to Timothy Murithi's lodging. We found Timothy but N was nowhere to be found. We then took Dancun Onesmus and Timothy to Mulango Police Post and locked them up in charge of missing person. On the same day at 11.00 am the inmates were transferred to Mulika police station for further investigation. The suspects Timothy Dancun and Onesmus are seated there (pointing at 1<sup>st</sup> accused, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused respectively. They were unknown to me prior to their arrest.”

**Cross examination**

“The investigation diary was compiled by PC Mercy Ndugu who is the investigating officer and not myself. I am not aware as to whether the complainant had lamented lack of freedom at her father's home. We found each of the accused at their respective homes but not the complainant.”

PW6

24. PW6 testified as follows: -

“My name is No 2018043697 PC Peter Murithi of Mulango Police Post. On 24<sup>th</sup> March 2020 I was at the post when MK and his brother K arrived in the morning hours to report that their younger sister NK had gone missing. I booked the report of missing person on 1330 hours on the same day. On 26<sup>th</sup> March 2020 the 2 brothers and their father SK arrived to provide further information that N had been found with Onesmus Karithi on the previous night at Mulango market. Together with another officer and led by M we proceeded to Onesmus house and found him there at 6.00 am. N was absent. Onesmus confirmed that he had been with N at the market and revealed that he had left N with Dancun Mwirigi. We proceeded to Dancun's home led by Onesmus and we found him there minus N. Dancun revealed that he had left N with a lodge attendant at Mulango market one Timothy Murithi. The 2<sup>nd</sup> suspect led us to the lodge and we found Timothy in a room who said that he had left N with Onesmus and Dancun. I arrested the 3 suspects and led them to Mulika Police Station where I handed them over for further investigation. Timothy, Onesmus and Dancun are seated there (pointing at 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused respectively). They were all unknown to me prior to their arrest.”

**Cross examination**

“It is PC Mercy Ndung'u Wariga who received the first report. I never located N on any date.”

PW7

25. PW7 testified as follows: -

“My name is No 2579917 PC Mercy Ndung'u of Mulango police post. On 25<sup>th</sup> March 2020 at 1330 hours one MK made a report that his younger sister NK had gone missing on the same date since 7.00a.m. On 27<sup>th</sup> March 2020 at 1500hours N was presented to me by M the latter who said that she had been found at Kaganene area by her cousin FK. N looked frightened and her father SK requested that I take her for medical checkup owing to her disappearance for 3 days. On 28<sup>th</sup> March 2020 I escorted N to Mikinduri sub county hospital for medical examination and on 30<sup>th</sup> March 2020 I collected the report which indicated that N

had been defiled and was in fact pregnant. N revealed that on 24<sup>th</sup> March 2020 at around 2200 hrs she was within Mulango market where she met 3 people well known to her Onesmus Karithi, Dancun Mwirigi and Timothy Murithi who had blind folded her and took her to an apartment where

Timothy served as caretaker. N revealed that the 3 men had raped her in turns that night before throwing her out of the building at midnight with a warning that she should not say a word of the incident. N had decided not to return home that night fearing for the wrath of her father. I had the suspects all arrested and Timothy, Onesmus and Dancun are all before court (pointing at 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused) respectively. They were unknown to me prior to the incident. The medical records including the P3 form and N's birth certificate are before court."

#### Cross examination

"I was the one who booked the first report of 24<sup>th</sup> March 2020. It is true that N had complained that her family were denying her freedom to do what she wanted and had even threatened to run away from home. After receiving the first report I informed the OCS Mulika police station before embarking on a search for N within the local market. N was looking frightened when presented to me."

#### Defence Case

##### DW1

26. DW1 testified as follows: -

"My name is Timothy Murithi Mithika a resident of Mulango and I am a shop keeper. On 24<sup>th</sup> March 2020 at around 6.00 pm I met NK in company of a youth one Kamangiri. N borrowed my cellphone to call a friend and I told her that it did not have airtime. We then parted ways. On that day I did not see my coaccused. On 26<sup>th</sup> March 2020 police accosted and accused me of killing N and hiding her body. Police arrested and took me to Mulika police post where they assaulted me. On 27<sup>th</sup> March 2020 I was released on a police bond and was to report again on 31<sup>st</sup> March 2020 the police saying that N had been found. When I reported at Mulika police post on 31<sup>st</sup> March 2020 I was told to come with my parents on 3<sup>rd</sup> April 2020 to resolve the issue of the police assaulting me. On 3<sup>rd</sup> April 2020 my co accused and I were put in the police cells after we failed to agree on the issue of the police assaulting me. N's father, has approached me through her mother to act as a state witness but I refused. It is not true that I molested N on 24<sup>th</sup> March 2020."

#### Cross examination

"It is true that I recorded a statement with police upon my arrest and it is the one before court. It is true that in my statement with police I have indicated the day of my arrest as 27<sup>th</sup> March 2020. I met N at Mulango area."

#### Reexamination

"It is 26<sup>th</sup> March 2020 that I was arrested and not 27<sup>th</sup> March 2020."

##### DW2

27. DW2 testified as follows: -

"I My name is Onesmus Karithi Kaberia a resident of Mulango are and I am a petty trader. On 24<sup>th</sup> March 2020 I was at Kithanga area of Mulango with my father Kaberia Joseph planting trees the whole day and at 4.00 pm we returned home. After taking a shower I left for Mulango trading center where I met one Koome at his place. I stayed with Koome at his place. I stayed with Koome for a short while before purchasing airtime and leaving for home. I never met any of my co accused or the complainants. On 26<sup>th</sup> March 2020 I was awoken by the police at home and arrested. The police demanded that I take them to the home of Dancun Karithi which I did. Dancun was arrested and we were both taken to Mulango police post and joined a short while later by Timothy Murithi. The police accused my co accused and I of having been found with the complainant which was untrue. We were released on 27<sup>th</sup> March 2020 at around 2.00 pm after the complainant was found and directed to report back with our respective parents on 4<sup>th</sup> April 2020. On the latter date we were re-arrested and charged before court. I have a statement which I recorded with police. It is not true that I am the complainant's boyfriend or that I have impregnated her. I was a pupil at Mukono Primary school where the complainant also sat her final primary examination and that is how I got to know her. I am not in contact with the complainant and I do not know whether she has given birth."

#### Cross examination

"It is true that I have not indicated in my statement that I was planting trees with my father. I do not intend to call my father as a witness. It is true that both co accused are persons well known to me. I am not the one who took police to the home of the 1<sup>st</sup> accused. I now reside at my sister's place in Isiolo having relocated from Mulango. I do not know whether the complainant has given birth to my child. It is not true that I had sex with the complainant and shared her with my co accused."

### **Reexamination**

**“Prior to her seating KCPE examination at my school N was unknown to me.”**

DW3

28. DW3 testified as follows: -

**“My name is Dancun Mwirigi a resident of Mulango. I am currently unemployed but formerly a shop attendant. On 24<sup>th</sup> March, 2020 I was leaving Mithika's shop at around 8.00 pm and it was raining. I stopped at Asibi's storied building to shelter from the rain and a short while later my former schoolmate NK showed up and borrowed my cellphone. I gave her my cellphone and since I did not have airtime she installed her own sim card and called someone. After she finished the call she returned my cell phone and left. On 26<sup>th</sup> March 2020 police showed up at my home accompanied by the 2<sup>nd</sup> accused demanding to know the whereabouts of N. The police took the 2<sup>nd</sup> accused and I to Mulango police post and savagely beat us. We were transferred to Mutika police post and given a second beating. On 27<sup>th</sup> March 2020 we were released from custody since N had been found. We were instructed to report back at Mulika police post on 31<sup>st</sup> March 2020 and 4<sup>th</sup> April 2020 with our respective parents to resolve a case of an alleged defilement against N. I never did anything to N other than lend her my cellphone. I ask the court to receive my statement with the police.”**

### **Cross examination**

**“I did not meet anyone else other than N at the storied building where I was sheltering from the rain. It is true that there was a samosa vendor nearby when I met N. It is not true that I spent considerable time with N and that we were joined by my co accused. It is true that my co accused and I are good friends but I was not with them at the time. I only met the 1<sup>st</sup> accused earlier that morning. It is true that the 2<sup>nd</sup> accused was N's girl friend at the time. I do not know the person N called after borrowing my cellphone.”**

### **Re-examination**

**“I knew that N was the 2<sup>nd</sup> accused girlfriend after the latter revealed that to me.”**

### **Issues for Determination**

29. From the Petition of Appeal and the parties' submissions, the two issues arise for determination as follows: -

- i) Whether the Prosecution proved their case beyond reasonable doubt.**
- ii) Whether the sentence meted out by the trial Court was harsh and excessive.**

### **Determination**

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

30. The offence of gang defilement is provided for under Section 10 of the Sexual Offences Act as follows: -

#### **10. Gang Rape**

**Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.**

31. In a charge for gang defilement, therefore, the Prosecution is required to prove that the offence of defilement was committed in association with another or others. It is instructive that where a person did not do the actual act of penetration within the meaning of defilement but was in the company of others who did the actual penetration, he too will be liable for the offence. The definitive parts of the section are found in the terms ***'in association with another or others, or any person who, with common intention, is in the company of another who commits the offence.'***

32. In addition to establishing the ingredients for the offence of defilement, the Court is thus required to establish whether the accused persons were in association of one another or had common intention to commit the offence.

### **Age of the Complainant**

33. The age of the complainant is not contested. The Prosecution produced her birth certificate indicating that she was born on 21<sup>st</sup> February 2005. This means that at the time of the offence, on 24<sup>th</sup> March 2020, she was 15 years old. A person of 15 years is a child within the

meaning of a child both under the Sexual Offences Act and the Children's Act.

### **Identification**

34. On the matter of identification of the Appellants, this Court observes that PW1 testified that she had gone to the salon on the material day to pick some clothes but found that her sister had already picked them. That upon her return, it started raining and she took shelter in a certain building when the 3<sup>rd</sup> Appellant, Dancun Mwirigi showed up. She testified to have asked the 3<sup>rd</sup> Appellant to assist her with his phone, to allow her to make a phone call to the 1<sup>st</sup> Appellant, Onesmus Karithi Kaberi. That the 3<sup>rd</sup> Appellant did not give her his phone but he instead called the 1<sup>st</sup> Appellant himself who showed up with the 2<sup>nd</sup> Appellant. From her evidence, it is clear that this was a circle of acquaintances as this is the only explanation as to how the 3<sup>rd</sup> Appellant would have the phone number of the 1<sup>st</sup> Appellant. It is also clear that when the 3<sup>rd</sup> Appellant showed up where the complainant was, he begun interrogating her, asking her what she was doing at night at that place, and this is indicative of persons who had prior interaction. The complainant described the 3<sup>rd</sup> Appellant, Duncan as her schoolmate and the 1<sup>st</sup> Appellant Onesmus as her friend. The Court also considers that the complainant referred to the 1<sup>st</sup> Appellant not only as her friend but also as her former boyfriend. Although the 1<sup>st</sup> Appellant denied having been her former boyfriend, the Court takes this alleged relationship to be indicative of previous contact between the two.

35. This Court is thus convinced that the complainant's identification, at least of the 1<sup>st</sup> and 3<sup>rd</sup> Appellants was out of her own personal knowledge and she could thus not have been mistaken as to their 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.**

36. With respect to the 2<sup>nd</sup> Appellant, the Court observes that he came with the 1<sup>st</sup> Appellant to the scene. The complainant testified as to how the three went to discuss how they would execute their plan for about 30 minutes and that she could see them do that. This was before she was blindfolded and defiled. The Court, therefore, considers that there was ample time for the complainant to recognize the 2<sup>nd</sup> Appellant. In addition, in his defence, the Appellant did not deny being in scene. This Court is therefore satisfied that the identification of the Appellants as the assailants was positive.

### **Penetration**

37. On the matter of penetration, this Court observes that PW1 testified that on the material night, the Appellants jointly grabbed her, gagged, blindfolded her and bound her arms with 3 pieces of cloth. That they then took her inside one of the rooms at the back of the building they were standing outside and had 'forced sex' with her. She testified that they removed her trouser and under pants and then assaulted her on top of a bed in the room. She testified that she struggled to free herself in vain and that the episode took a long time because the 3 men threw her out of the building at around midnight.

38. The Appellant used the term 'forced sex' to describe the act which was done to her. This Court takes this to mean defilement, by virtue of the medical evidence and her age. PW2 tendered medical evidence which confirmed that upon examination, a conclusion of defilement was made. He testified as follows: -

***“She was not calm when I examined her. Her hymen was torn and she had bruises on the clitoris, labia minora and majora and posterior fouchette.”***

39. The Appellants have also urged that there was no spermatozoa seen on the Appellant during examination. To this end, this Court appreciates that the absence of spermatozoa is attributed to the length of time it took for the complainant to be examined following the defilement incident. She is said to have gone for examination on 28<sup>th</sup> March 2020, which was 4 days after the incident happened. This Court does not therefore find that the absence of spermatozoa is enough to conclude that there was no defilement.

### **Complainant's Pregnancy**

40. The Court has taken note of the Appellants' argument that because the complainant tested positive for pregnancy, this creates doubt on the Prosecution's case against them. This Court, however, finds that an explanation was given as to how the complainant became pregnant. The complainant herself explained and this was confirmed by PW2 that she conceived out of an earlier sexual encounter with the 2<sup>nd</sup> accused on 1<sup>st</sup> March 2020. PW2 testified as follows: -

***“The complainant had a sexual history prior to the incident complained of. The bruises I observed on the complainant were fresh and could not have occurred on 1<sup>st</sup> March 2020. Consensual sex would ordinarily not yield bruises. The PRC form depicted that the victim consented to have sex and that no struggle was reported. No garments were presented to us during examination of the victim. The lab test conducted did not reveal any spermatozoa. The test was done on 28<sup>th</sup> March 2020 4 days after the complained of incident. The pregnancy was not resultant from the complainant of incident.”***

41. The Court also considers that the fact that she was pregnant is not per se a factor to determine whether there was defilement. To put it differently, the test for defilement is not pregnancy but rather proof of sexual penetration on a minor.

### **Purported Consent**

42. The Appellants have urged that PW2 testified that the complainant had consensual sex. The Court observes that this is a misrepresentation of the facts because PW2 clearly testified that the ordeal complained of was not consensual and if it were consensual, then

there would be no bruises. The other consideration for delinking the bruises observed from the alleged *consensual* sex of 1<sup>st</sup> March 2020 is that the bruises were fresh and could not have been almost a month old. The *consensual* sex being referred to is said to have happened on 1<sup>st</sup> March 2020 and not 24<sup>th</sup> March 2020, the date when the offence the Appellants were charged with happened.

43. The Court has italicized the term *consensual* above because the term *consent* as used by the Appellants and within the context of their arguments is not a legal technical term as understood under the Sexual Offence Act. The Appellants used the term as an attempt to show that the complainant, a minor of 15 years at the time acquiesced to the sexual act. To this end, this Court considers that under the Sexual Offence Act, person(s) under the age of 18 years do not have the capacity to consent to sex. This is the essence of the offence of defilement which acknowledges the 'limitations' of minors with respect to rationalizing sexual acts.

44. The definition of intention and unlawful act under Section 43 of the Sexual Offences Act is as follows: -

**43. Intentional and Unlawful Act**

***An act is intentional and unlawful if it is committed-***

***(a) In any coercive circumstance;***

***(b) Under false pretenses or by fraudulent means***

***(c) In respect of a person who is incapable of appreciating the nature of an act which causes the offence.***

45. Section 43 (4) goes ahead to give the instances when an act may be committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence. It provides as follows: -

***4. The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act: -***

***(a) Asleep***

***(b) Unconscious***

***(c) In an altered state of consciousness***

***(d) Under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected***

***(e) Mentally impaired***

***(f) A child***

46. The complainant therefore, a child of 15 years, was unable to appreciate the nature of the act of sexual penetration and was thus unable to consent to the same.

47. Even if it were proved that she acquiesced to the act, this would not be a defence because a wrong, especially a criminal wrong, does not become right because the victim innocently contributed to it. Even assuming that the complainant had the capacity to consent to sex, the fact that she previously gave consent does not mean that the consent previously given would apply to every subsequent attempt to have sex with her. The Court does not, therefore, agree with the Appellants that the complainant consented to the sex.

***Events following the incident***

48. The Court has also considered the events which followed the incident. The complainant testified that after the Appellant threw her out at about midnight, she went to the home of Doreen Mwendu about 100 metres away to seek refuge and that she slept there but did not tell Doreen what had happened to her. She testified that on the next day, she went to the home of Doris Kangai at Ankarnia, her schoolmate and spent 3 days at Doris's home until 27<sup>th</sup> March 2020 when her cousin K came to fetch her and that she did not tell her cousin what had happened to her. Her evidence was corroborated by that of her father, PW3 who confirmed that the complainant was found in the home of Doris Kangai.

49. While she was away, a missing person was made by her family and upon her return home, she was accompanied by her sister S and brother NM to Mulango Police Post to clear the missing person report. She testified that it is at the police post where she, for the first time, disclosed what had happened to her. She identified the name of the police officer to whom she disclosed to her ordeal as Ndung'u. The said PC Ndung'u testified as PW7, and she confirmed that when the complainant was brought to her, she appeared frightened. She testified how the complainant revealed to her the events of the night of 24<sup>th</sup> March 2020 when she was defiled. PC Ndung'u also confirmed that the complainant complained of lack of freedom at home.

50. The above facts reveal a case of a teenager who had gone through a traumatizing ordeal and wanted to escape her reality. This explains why she moved from one friend's house to the other, seeking solace but unable to explain what had happened. She appears to have been

struggling to come into terms with her defilement experience and was not only too disillusioned to accept it, but also frightened to tell anyone what had happened. She testified that the Appellants had threatened her not to tell anyone what had happened.

### **Association**

51. To prove the charge of gang defilement the Prosecution is required to prove that the penetration happened in the association of one or more persons. In addition to the evidence of identification, this Court observes that once the missing report was made, the police who had gotten wind of the Appellants whereabouts went to look for her.

52. According to PW5 and PW6, they first went to the 1<sup>st</sup> Appellant who confirmed that they had been together on the material night, but said that he had left the complainant with the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant. He further testified that when they went to confront the 2<sup>nd</sup> Appellant, he similarly admitted that they had been together the previous night but he had left the complainant with the 3<sup>rd</sup> Appellant. When the 3<sup>rd</sup> Appellant was confronted, he similarly admitted that they were together on the material night, but he said that he had left the complainant with the 1<sup>st</sup> and 2<sup>nd</sup> Appellant.

53. PW5 testified as follows: -

***“We all proceeded to Dancun’s home within Mulango area at around 9.00 am that day and we found him but failed to find N. Dancun told us that he had left N with Onesmus Karithi in Mulango area. We proceeded to Onesmus home also at Mulango area. We found Onesmus at the home but N was nowhere to be seen. Karithi told us that he had left N the previous evening with Timothy who is a caretaker of a lodging in Mulango area. Together with Dancun and Onesmus we proceeded to Timothy Murithi’s lodging. We found Timothy but N was nowhere to be found.*”**

54. PW6 testified as follows: -

***“Onesmus confirmed that he had been with N to the market and revealed that he had left N with Dancun Mwirigi. We proceeded to Dancun’s home led by Onesmus and we found him there minus N. Dancun revealed that he had left N with a lodge attendant at Mulango market one Timothy Murithi. The 2<sup>nd</sup> suspect led us to the lodge and we found Timothy in a room who said that he had left N with Onesmus and Dancun.”***

55. The above depicts a series of blame games among and between the Appellants. They were all trying to shift the blame to the other. It is however clear that they all admitted to having been with the complainant on the night of 24<sup>th</sup> March 2020. As the complainant who was the only eye witness in the matter was blindfolded when the sexual acts were being done on her, this Court is unable to know who amongst the three did actual penetration or whether all the three of them penetrated her.

56. The test for gang defilement, however, is not dependent on who did the actual penetration. Once it is proven that any of the accused persons were in the company or in the association of the other(s) who did the penetration, then all who were in that association are liable for gang defilement. This Court finds that the 3 Appellants were in the association of each other when the offence was committed.

57. This Court thus finds that the offence of gang defilement contrary to Section 10 of the Sexual Offences Act was proven beyond reasonable doubt against all the three Appellants.

### **Appellants’ Defence**

#### **1<sup>st</sup> Appellant’s Defence**

58. In his defence, the 1<sup>st</sup> Appellant denied the charges and raise a defence of *alibi*. He claims to have been with his father all day working on their tree plantation and that in the evening, he went to see a friend called Koome and returned home. He however did not call either his father or his said friend Koome as witnesses to support his *alibi*. In addition, during cross-examination, he admitted to not having indicated that he had been planting trees in his statement.

59. The Court also considers that it was during defence hearing that the *alibi* was raised for the first time. Although this is not a ground for disregarding an accused person’s defence, the Court considers that an *alibi* defence must be raised at the earliest opportunity. This requirement was discussed by the Court of Appeal in ***Athuman Salim Athuman v Republic***, Criminal Appeal No. 44 of 105 [2016] eKLR where **Makhandia, Ouko (as he then was) & M’Inoti JJA held as follows: -**

***“The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:***

***“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”***

(See also *R. V. AHMED BIN ABDUL HAFID* (1934) 1 EACA 76 and *WANG'OMBE V. REPUBLIC* [1976-80] 1 KLR 1683).

The Supreme Court of Uganda, in *FESTO ANDROA ASENUA V. UGANDA*, CR. APP NO 1 OF 1998 made a similar observation when it stated:

**“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”**

60. Further, the although the Court did not have a chance to examine his demeanour, this Court finds that there is reasonable doubt as to the 1<sup>st</sup> Appellants credibility as a witness. To this end, the Court observes that despite the 1<sup>st</sup> Appellant denying to have been the complainant's former boyfriend, his co-accused, the 2<sup>nd</sup> Appellant testified otherwise as follows: -

**“I knew that N was the 2<sup>nd</sup> accused girlfriend after the latter revealed that to me.”**

61. The above reveals that the 1<sup>st</sup> Appellant was not a truthful witness.

### **2<sup>nd</sup> Appellant's Defence**

62. The 2<sup>nd</sup> Appellant testified that on the material date, he met the complainant who asked for his cellphone and he gave it to her to use and after she had used it, she returned it to her and he then left.

### **3<sup>rd</sup> Appellant's Defence**

63. In his defence, the 3<sup>rd</sup> Appellant denied having committed the offence. He however admitted to have met N on the material night but that he was not able to offer the help N had requested for and he left her there. He claims that he had been approached by the complainant's mother to be a state witness but he refused. The Court, however, considers that this question was not put to the complainant or her father during cross-examination and was thus an afterthought.

64. This Court considers that save for the 1<sup>st</sup> Appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants admit to have made contact with the complainant on the material night and this places them at the scene of crime. This Court finds their defences to be afterthoughts and when weighed against the Prosecution's evidence, reveals that they are guilty.

65. 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 all the 3 Appellants.

### **Whether the sentence meted out by the trial Court was harsh and excessive.**

66. The leading authority on the question of interfering with sentence is that of *Wanjema v Republic, Criminal Appeal No. 204 of 1970* (1971) EA 493, 494, where Trevelyan J held as follows: -

**“An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”**

67. The penalty section for the offence of gang defilement under Section 10 of the Sexual Offences Act is a **term of not less than fifteen years but which may be enhanced to imprisonment for life.**

68. On the other hand, Section 8 (3) of the Sexual Offences Act which provides for the offence of defilement for a person between the ages of twelve and fifteen provides for a penalty of imprisonment for a term of **not less than twenty years.**

69. The complainant herein was 15 years and this Court considers that if the Appellants had been charged individually under Section 8 (3) of the Sexual Offences Act, they would have been liable for a term of imprisonment of a minimum term of 20 years. This Court, therefore, finds that the Appellants got a lenient sentence.

70. The Court considers that the circumstances under which the offence took place are aggravating, and a custodial sentence would best serve to give effect to the principles of sentencing which include deterrence and denunciation. The Court finds no reason to disturb the sentence meted out by the trial Court.

### **Conclusion**

71. On 24<sup>th</sup> March 2020, the complainant, a 15 year old girl had left home to collect clothes at a shop in the market area. While on her way

back, the rains begun and she took shelter outside a building in the area. She was then met by the 2<sup>nd</sup> Appellant whom she knew well as he was a classmate. She asked him for his phone to make a phone call to the 1<sup>st</sup> Appellant, whom she described as her former boyfriend. She testified that the 2<sup>nd</sup> Appellant called the 1<sup>st</sup> Appellant himself and a few minutes later, the 1<sup>st</sup> Appellant showed up together with the 3<sup>rd</sup> Appellant. The three then began to converse for about 30 minutes, which conversation, as it turned out, was a plan on how they would assault the complainant.

72. The 3<sup>rd</sup> Appellant, who was a caretaker in the building where the complainant had taken shelter offered a room therein which they used to assault her. The complainant testified how the 3<sup>rd</sup> blindfolded her, took her to one of the rooms at the back of the building and they defiled her up to about midnight when they threw her out.

73. The complainant's identification of her assailants was positive because the 1<sup>st</sup> Appellant was her former boyfriend, and the 2<sup>nd</sup> Appellant was a classmate. These two were people well known to her and she could not have been mistaken as to their identity. Although it was during the ordeal that she met the 3<sup>rd</sup> Appellant for the first time, the Court considers that she had an opportunity to see the 3<sup>rd</sup> Appellant when he showed up together with the 1<sup>st</sup> Appellant to the scene. This was before she was blindfolded and she could thus see him well. The Court has also considered that in his defence, the 3<sup>rd</sup> Appellant admitted to have met the complainant and this places him at the scene of crime. The Court also considers that his co-accused implicated him when the police were searching for the complainant while attending to the missing person report.

74. The Court further considers that there was medical evidence to confirm that upon her examination on 28<sup>th</sup> March 2020, the complainant was observed to have had a torn hymen and bruises on the clitoris, labia minora and majora and posterior fouchette. The Court rejects the Appellant's assertion that the fact that the complainant was pregnant creates doubt on the Prosecution's case, because there was evidence to confirm that her pregnancy was as a result of an earlier sexual encounter that happened on 1<sup>st</sup> March 2020. The Court also rejects the Appellant's assertion that the complainant consented to the act because Section 43 of the Sexual Offences Act rules out the possibility of a child of 15 years having the capacity to consent to sex.

75. As to sentencing, the Court does not see any reason to disturb the sentence meted out by the trial Court and finds that the 15 years imprisonment was in fact lenient which would have been enhanced save for the fact that there is no cross-appeal seeking for its enhancement. In finding so, the Court considers the far reaching consequences of the ordeal on the complainant. The Court considers that among the people who defiled the complainant was a former boyfriend for whom she was pregnant. Although the 1<sup>st</sup> Appellant denied having been the complainant's former boyfriend, the testimony of his own friend and co-accused, the 2<sup>nd</sup> Appellant proved otherwise. It would be, undeniably hard, for any teenage girl who thought she had found in love to be defiled by the very person she considered her lover. Even more tragic is a case of gang defilement.

76. The Court also considers that the complainant was met with this ordeal at a most tragic and fragile time, when she was yet to come into terms with the fact that she was pregnant, at the tender age of 15. The Court considers that until the time of examination by PW2, her own biological father was not aware of her pregnancy. The complainant, who happened to reveal to PW7 that she felt constricted at home was scared to disclose to her parents her defilement ordeal, let alone her pregnancy. She testified that after the incident, she was afraid to go back home because of her parents. This explains why the first person she disclosed to the defilement incident was a police officer, one whom she had probably never met before.

77. The complainant's case is an unfortunate one, of a troubled teenager, who was trying to cope with her transition into adulthood while still under her parents' care and control. In the course of this struggle, she fell into the hands of her assailants, who were disguised as friends and schoolmates. The complainant went through great physical, psychological and emotional trauma. The Court considers that the Appellant's punishment was not commensurate to the adverse effects that the events of the material night caused the complainant. Had there been an appeal by the Prosecution seeking an enhancement, the Court would not have hesitated to enhance the sentence.

## **ORDERS**

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

***i) The Appeal on conviction is declined and the finding of the lower Court on conviction is upheld.***

***ii) The Appeal on sentence is declined and the finding of the lower Court on Sentence is upheld.***

*Order accordingly*

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

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**M/S Ayub K. Anampiu & Co. Advocates for the Appellants**

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