REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 20 OF 2019

FELIX MUASYA MWANILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C. A. Ocharo- SPM dated 13th February, 2019 in Machakos CM's Court Criminal Case No. 21 of 2015)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

FELIX MUASYA MWANILU.....ACCUSED

JUDGEMENT

1. The appellant, **Felix Muasya Mwanilu**, was charged in the Machakos CM's Court Criminal Case No. 21 of 2015 with the offence of defilement contrary to 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006*** the particulars being that on the 26th day of August, 2015 in Machakos District within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **JMD**, a child aged 11 years. He faced the alternative charge of indecent act with a child contrary to section 11(1) of the same Act the particulars being that on the same day at the same place the appellant intentionally and unlawfully touched the vaginal of the said **JMD** with his penis.

2. After hearing the evidence, the learned trial magistrate found the appellant guilty in the said main count and convicted him accordingly. He proceeded to sentence the appellant to life imprisonment.

3. In support of its case, the prosecution called 6 witnesses. The prosecution's case in summary was that on 26th August, 2015 at about 12.00pm, PW3, the complainant, the complainant's grandmother's househelp, sent the complainant, PW2, to the shop. However, PW2 stated that she was told by one **N**, a girl older than her, to accompany her to the road. The said **N** then told the complainant to return home and on her way back home, the complainant met the appellant. According to her this was about 4.00 pm and it was still bright. The appellant then told her not to disclose what he would do to her threatening to kill her if she did so. The appellant then took her to a bushy place and told her to remove her clothes and proceeded to remove her trousers after which he removed his clothes as well. According to the complainant, the appellant then did bad manners to her. She saw his penis and asked the complainant if he could insert his penis inside the complainant and the complaint declined. According to the complainant, the appellant did nothing after. It was her evidence that the person who inserted his penis slightly into her vagina then told her to dress up and go home. The complainant then went home and reported the matter to her aunt, PW1, who called her mother and relayed the said information to her. According to PW2, PW1 examined her and said she had seen blood. The complainant also saw blood on her clothes. After that she was taken to the Hospital. The complainant testified that she knew the appellant very well by appearance as she used to see him pass by their home.

4. When recalled the complainant stated that the appellant touched her vaginal with his penis and identified the clothes she was wearing that day.

5. PW3's evidence, when the complainant took too long to return from the shop she decided to follow her and found her still on the way to

the shop. PW3 however noticed that the complainant was walking abnormally. At 4.00pm she called PW1 and asked her to look at the way the complainant was walking but PW1 said she did not notice anything. Upon enquiring from the complainant what was wrong the complainant initially declined to disclose the same but when PW3 took her into the room and raised her dress, she noticed blood stains at which point the complainant disclosed that someone had caught her and put his penis inside her. According to PW3, the complainant disclosed to her that the said person had come to see her aunt T and based on the information from the complainant's grandfather, they discovered that the person was called **Muasya** but they were unable to get the said **Muasya**. The complainant was then taken to Machakos Level 5 Hospital by PW1 at later at 7.00pm the appellant, a neighbour, was arrested. In cross-examination, PW3 denied the existence of a grudge between her and the appellant since she was not a member of the complainant's family.

6. According to PW1, the complainant's aunt, on 26th August, 2015, she was at home where she had gone to greet her family when PW3, one of the family's workers, told her to examine the complainant. When she took a closer look she noticed that the complainant was walking as if she was in pain. On enquiring from the complainant what the problem was, the complainant informed her that she had pain in her vagina. When PW1 raised her dress, she saw blood spots and sperm like discharge. The complainant informed her that she had been defiled by a person know to her since the said person used to visit their home and that even the previous day he had gone to see her grandfather. The complainant did not know the person's name, PW3 knew him. They then took the complainant to the hospital. According to PW1, the appellant was well known to her being a neighbour and there was no grudge between them. She denied knowledge of the existence of any boundary dispute between her family and that of the appellant or any threats made by the complainant's family against the appellant.

7. On the material day, PW4, the complainant's mother was attending her aunt's funeral when she received a call from PW1 asking her to meet her at Machakos Hospital because, her daughter, the complainant, a girl aged 12 years, had been defiled by a neighbour, the appellant. PW4 went to the Hospital when she found her daughter and noticed that the complainant had pain in her private parts and was unable to walk well. She also had bloodstains on her body and had dirty pants. They were advised to report the matter to the police which they did. The complainant disclosed that she could recognise the perpetrator if she saw him. Later the appellant, a neighbour, was taken to the station by members of the community policing and when the complainant saw him, she became afraid and started crying saying that it was the appellant who had defiled her. PW4 then took the complainant's blood stained clothes to the police and took the complainant to the hospital for treatment.

8. PW5, a medical doctor from Machakos Hospital, examined the complainant 8 days after the alleged offence after the complainant had been treated. According to him, the appellant's external genitalia was tender, her hymen was broken and there were yellowish foul smelling vaginal discharge. He also produced the PRC form filled by **Dr Mbatha** with whom he worked for three years and he was conversant with his handwriting. The said report tallied with the P3 form. He also produced the age assessment report by **Dr Kamolo** with whom he worked for 2 and ½ years which assessed the age of the complainant as 8 years. The PRC form was however produced by PW7.

9. PW6 was the investigating officer. Based on her investigations, she preferred the charges against the appellant.

10. Upon being placed on his defence, the appellant in his unsworn statement stated that there was a boundary dispute between his family and that of the complainant and at a funeral of members of the complainant's family threatened that there would be deaths in the appellant's home. According to him, the charges were trumped as the complainant's family warned him that they would look for ways to finish him and subsequently, he was charged with the offence which he did not commit.

Determination

11. I have considered the evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

12. In this appeal, the appellant contends that his rights were violated since he was never arraigned in court within the prescribed period in Article 49 of the Constitution. However, in **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** it was held that:

> **"It is true that there is a delay of at least 4 days from the constitutionally-mandated 24-hours. However, while our previous jurisprudence on the issue was that the trial would be a nullity if the accused was detained beyond the time stipulated in the Constitution, this rigid rule has given way to a more flexible standard. In *Julius Kamau Mbugua v Republic [2010] eKLR* the Court of Appeal established the flexible rule that a violation of the constitutional provisions stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal - because one can be adequately compensated by way of monetary damages. *David Njuguna Wairimu v Republic (2010) eKLR* is in accord. Our law as it stands now, I believe, is that the Court will scrutinize the conduct of the State to determine if it acted flagrantly to frustrate the rights of fair trial of the accused person. Courts will not excuse a deliberate attempt to delay the presentment of an accused person to the Court with the conscious intention of suppressing his rights or prejudicing his ability to defend himself. Hence, where there is a long delay, the Prosecution has an affirmative duty to offer an explanation for the delay. Where such an explanation is not forthcoming, the Court is entitled to infer that there was a deliberate attempt to frustrate the accused person's right to free trial. However, this does not appear to be the case here. While I do not condone the violation of the Appellant's constitutional rights in light of the above, the violation of the Appellant's right to be produced in court within 24 hours will not automatically result in his acquittal. He is, however, at liberty to seek civil remedies for the violation of his constitutional rights."**

13. In **Francis Muthee Mwangi vs. Republic [2016] eKLR** the Court expressed itself as hereunder:

> **"As Justice Mutungi stated in the case of *Ann Njogu & 5 others V Republic*, whose sentiments I share:-**
>
> > ***'…the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute***

thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants…'

There is a litany of authorities in relation to the right of an accused person to be brought to court within a prescribed period of time. In the case of *Albanus Mwasia Mutua vs Republic* the court of appeal held that the appellant's constitutional rights guaranteed under *section 72 (3)* of the constitution had been grossly violated because he was taken before the trial magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay. The court made the following pertinent remarks:

'At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.'

It is worth noting however that an accused person is not automatically entitled to an acquittal where the prosecution has not been given a chance to offer an explanation for failing to bring him to court on time. In the case of *Eliud Njeru Nyaga vs Republic* stated

'While we would reiterate the position that under the fair trail provisions of the constitution, an accused person must be brought to court within twenty four hours for non capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in automatic acquittal.'

In the case of *Paul Mwangi Murungu v/s Republic* the court of appeal observed:-

'We do not accept the proposition that the burden is upon an accused person to complain to a Magistrate or a Judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under section 72 (3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court as the ultimate enforcer of the provisions of the constitution must raise the issue.'

All the above cases point to the need for courts to strictly observe the fair trial provisions in our constitution. The law of the land has to be obeyed particularly by those entrusted to enforce it. The police should be in the forefront of obeying the law and enforcing it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable.

Even though the delay herein has not been explained, I note that the appellant was arraigned in court on the third day and considering the nature of the offence before the court and the evidence adduced, I hold the view that it would not be fair to exonerate the appellant on account of the aforesaid delay only."

14. In this case the appellant did not raise the issue before the trial court. He has not disclosed the prejudice he suffered as a result of the said delay so as to enable the court determine the effect if any of the said delay. While this Court deprecates the failure to arraign suspects in court within the constitutionally prescribed time limits, each case must be determined on its own facts and at the end of the day, the court must determine the effect if any of the delay in arraigning the suspect in court. Where the delay is long and there is no explanation coming from the prosecution and where the issue is raised at the earliest possible opportunity, the court will invariably find that the delay in doing so was a deliberate attempt to frustrate the accused person's right to free trial. In this case I do not have sufficient material on the basis of which I can make such a determination at this stage of the proceedings.

15. The appellant also complained that he was not heard on the production by PW5 of the age assessment report and the PRC form. From the record, it is clear that the application to allow PW5 to produce both reports was allowed without the appellant being heard on the same. In my view the failure to hear the appellant before the said witness was allowed to produce the said documents was clearly a misdirection on the part of the learned trial magistrate. Accordingly, I will not consider PW5's evidence as relates to the said documents. However, his P3 form and the evidence of PW7, **Peter Wanyama**, are properly on record.

16. The other complainant raised by the appellant was that there were inconsistencies and contradictions in the prosecution evidence. It is true that there were contradictions between the complainant's evidence and that of PW3 regarding whether the complainant was sent by PW3 to the shop or whether she accompanied someone else to the road. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of **David Ojeabuo vs. Federal Republic of Nigeria {2014} LPELR-22555(CA),** where the court (**Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA)** stated as follows:-

"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision. The issue for determination is not how the complainant found herself in the circumstances that gave rise to the case but whether or not the complainant was defiled by the appellant. Rape and sexual assault for that matter may be a traumatising experience for the victim and minor inconsistencies which are not material to the determination of the case ought not to lead to the decision being reversed.

28. The appellant also complained that the record of the trial court only indicated the presence of the court clerk and not the interpreter. While it is true that the record does not indicate who the interpreter was, a holistic reading of the proceedings reveals that the appellant fully participated in the proceedings. The mere fact that the record does not indicate the existence of the interpreter in these circumstances where there was full participation of the appellant ought not to nullify the proceedings. As was held in **Fappyton Mutuku Ngui vs. Republic [2012] eKLR**:

"I have said elsewhere that the answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:

> ***…. no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***

The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

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

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

> ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years.***

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

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

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

blood or affinity.

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

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

31. It was contended that there was no evidence tendered to prove the age of the complainant. Whereas this court has found that the report of the age assessment ought not to be considered in light of the apparent violation of the appellant's rights in the process leading to its admission, this court has a duty to look at the record and find out if apart from that evidence, there was evidence proving the age of the complainant. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence."**

32. Closer home in the case of **Kaingu Elias Kasomo vs. Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010** stated as follows:

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

33. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."**

34. However, in **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

35. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact, according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich vs. Republic** - Criminal Appeal No. 89 of 2016.

36. In this case the complainant's mother testified that she was 12 years old. The complainant was in standard 1 at the time of her testimony. In my view from the admissible evidence placed before the court, the correct legal provision ought to have been section 8(3) of the ***Sexual Offences Act***.

37. Regarding penetration, taking the evidence of the complainant in its totality together with the medical evidence, it is clear that there was penetration of the complainant's genital organ. Section 2 of the ***Sexual Offences Act*** provides that:

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

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

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

39. Regarding the identity of the appellant, the appellant was a neighbour and so was well known to the complainant and her family. However, the appellant in his evidence stated that there was an existing boundary dispute between the two families and hence the charges against him were trumped up. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan** and **Sachdeva, JJ** held that:

> **"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?"…The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful…There are spiteful people about."**

40. In this case however, the person who first noticed the unusual manner in which the complainant was walking was PW3 who was not related to the complainant's family and therefore had no reason to fix the appellant. In this case the appellant did not answer to the facts of the charge and once that defence collapses, there is nothing remaining to weaken an otherwise strong case against the appellant. On my part I have reconsidered the evidence on record and it is my view that save for the section under which the appellant was charged as regards the admissible evidence, I hold that the case against the appellant was water tight. I have also considered his defence which I find wanting and amounts to a mere denial. As was held by the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR**:

> ***'With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: "I find that the defence of the 5th accused is not true." We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: "The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances." We agree with this confirmation.'***

41. As regards the sentence, the appellant's action was heinous. In this case, the appellant took advantage of the tender age of the complainant for his own selfish gratification. In **D W M vs. Republic [2016] eKLR** where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

42. In **Tito Kariuki Ngugi vs. Republic [2008] eKLR** the court held that:

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

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

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

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

44. In the premises I allow the appeal in respect of the sentence, set aside the life sentence meted against him and substitute therefor imprisonment for 15 years. The appellant was arrested on 27th August, 2015 and was released on bond on 27th October, 2015 till 15th November, 2018 when his surety was released and his bond cancelled. Accordingly, in computing his sentence, the period between 27th August, 2015 to 27th October, 2018 and the period after 15th November, 2018 shall be taken into account as provided under section 333(2) of the ***Criminal Procedure Code***.

45. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 17th January, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr Kimani for Miss Mogoi for the Respondent

CA Geoffrey