REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 62 OF 2019

JULIUS KAMITU ALEX.....APPELLANT

-VERSUS-

REPUBLIC (THROUGH) ODPP.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon E. Michieka- PM

in the Senior Principal Magistrates Court at Mavoko

delivered on the 25th day of March, 2019

in Criminal Case (S.O) No 21 of 2014)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JULIUS KAMITU ALEX.....ACCUSED

JUDGEMENT

Introduction

1. The appellant, **Julius Kamitu Alex**, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the ***Sexual Offences Act***, Act No. 3 of 2006. Particulars were that on the 7th day of June, 2014 at [particulars withheld] Township in Athi River District within Machakos, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of **AK** a child aged 6 years.

2. 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 caused his male genital organ (penis) to come into contact with the female organ (vagina) of **AK** a child aged 6 years. He pleaded not guilty to the offence.

The Prosecution's Case

3. In support of its case the prosecution called 10 witnesses. After *voir dire* examination, the complainant was sworn and testified as PW1. According to her, she was 6 years old. She remembered when she was playing with her brother in her mother's bed. She confirmed that she knew the accused whom she met in his house where she had gone with her mother though she was not aware why they went there. It was her evidence that she was playing with the appellant's phone in her mother's bedroom when the appellant touched her using his fingers though he did not remove the Complainant's clothes. The appellant however removed her clothes that is trousers, stockings and pants and put his *chip chip* which he removed from his trouser in her. According to the Complainant she did not feel the pain and the appellant did not remove

his clothes.

4. When the Complainant told him to stop, he did so and the Complainant put on her clothes and informed her mother what had happened. It was her evidence that the incident took place in the morning during the time when they had closed school. According to her during the incident they were upstairs while her brothers were downstairs. When she went downstairs, leaving the appellant upstairs, she found her aunt called **M** but did not divulge to her what had happened. Neither did she tell her brother. Although she felt pain, she did not cry. After that the appellant left for work. It was her evidence that the incident took place when her mother was at work. She could not tell why the appellant was in her mother's bedroom though it was normal for him to be there. The Complainant stated that her mother had informed her that the appellant was called Julius and she knew him before the incident since he used to go to their house and would sleep with her mother on her bed. However, this was the first time such an incident occurred. When the appellant came downstairs, he informed the Complaisant that he would but for her chocolate and lollipop.

5. When the Complainant informed her Aunty about the incident, the said Aunty disclosed the same to another Aunty and the neighbours. When she was asked who did that to her she replied "daddy". After that she was taken to Nairobi Women's Hospital by her Aunty where she was examined and treated before she went back home. Since her mother retried at night when she was already asleep, she informed her of what had happened the following day. The Complainant confirmed that the person who put his *chip chip* in her private parts was the appellant.

6. In cross-examination, the Complainant stated that she used to call the appellant "Daddy "whenever he went to their house. She said that she used to sleep in her room but in the morning when she went to her mother's room she found "daddy" lying on bed though he was not asleep and she started playing games with his phone. According to her the appellant removed her clothes after which he removed his trouser and his panty. It was her evidence that she did not cry though she felt pain and informed her brother, A so, who in turn relayed the information to her Aunty who was washing clothes downstairs. After she confirmed to the Aunty that she was feeling pain in her vagina she was taken to Hospital. She stated that once, she accompanied by her mother and A spent the night at the appellant's place. It was her evidence that it was her mother who told her to say that the appellant put his *chip chip* in her though she insisted that it was true that is what the appellant did.

7. PW2, **FAM**, the Complainant's mother testified that the Complainant was 6years old. On 7th June, 2014 at a round 7am, she was in her house. The previous day, she had sent the appellant to take her car to the garage and the appellant returned drunk and informed her that they should attend her uncle's funeral together on condition that they would be back at 12pm. PW2 however refused because they had a team building activity and PW2 proceeded to Mwingi alone leaving the appellant in her bedroom alone while her children were still asleep in their separate bedrooms. Her housegirl was however preparing breakfast.

8. According to PW2, she was engaged to the appellant and the children used to go and say good morning. According to PW2, she did not quarrel with the appellant and to the contrary the appellant gave her Kshs 8,000/= after which she left for Kenyatta University Mortuary. During the funeral, she switched off her mobile phone but switched it on when she was on her way back at 7pm and talked to the appellant normally. She however saw many missed calls from her neighbours. One of them informed her to return to Nairobi, Kitengela Nairobi Women's Hospital. When she talked to the Complainant, the Complainant told her that she had a headache and stomach-ache but when she talked to the appellant, he told her that he would go and check on the Complainant. She eventually got home at almost midnight and met her housegirl with the drugs which the Complainant had been given and upon doing so realised that they were ARVs. It was then that a neighbour informed her that the person she had left behind had raped her daughter. When she went to check on the Complainant, she found her asleep and upon examining her found that she was like a person who had just delivered with a tear on the vaginal region extending to her anal opening. The Complainant, who was in pain, narrated to her what had taken place saying that daddy had poked her stomach. The and upon inquiring from the housegirl, the latter informed her that she had been given Kshs 1,000/- by the appellant to buy soda in the canteen and left her son playing games. The next day, in the company of two police officers they traced the appellant a Supermarket where he was arrested after PW2 identified him after which they proceeded to Mlolongo Police Station. Upon asking the appellant what happened to the Complainant, the appellant told her that he did not go to the house to check on what had happened to the Complainant. According to PW2 there was no grudge between her and the appellant and that that morning the appellant went drunk and left in a hurry.

9. In cross-examination, PW2 stated that she had a formal engagement with the appellant for almost a year, a relationship which was known by her friends and relatives. According to her she used to spend time at the appellant's house with her children and vice versa. According to her, it was the appellant who used to deal with the vehicle when it had a breakdown and on 6th June, 201 was the one with the car. On that day, he went at 4am in the morning and they spent time together before the appellant left after the appellant told her that he had a team building that material day hence the reason he did not accompany her to the funeral. She however left the appellant in her bedroom sleeping and they agreed that she would pick him from Gymnasium Club in Buruburu on her way back.

10. According to PW2, when she got a puncture, she talked to the appellant normally and it was then that she received a call from her neighbour informing her that her daughter was unwell and that she should go home urgently and check on her and she told the appellant to go and check on her. She was unaware of where her neighbour was when she received the call. It was her evidence that she got her house girl from the bureau but had never had any problem with her. She however found an empty soda bottle in the kitchen which her housegirl informed her was the one which had the soda she was sent to buy by the appellant.

11. According to PW2, they did their things together with the appellant and she had given the appellant Kshs 10,000/- to go to the garage and the appellant told her that Kshs 8,000/- was in the car and she left him with Kshs 1,000/-. She also stated that she was under pressure from the appellant's parents and gave his relative Kshs 20,000/- as a result of the demand. According to her the appellant also had a daughter with a lady called **M**, whom she loved and had no issue with the appellant because of the daughter. She however denied that she forced the appellant to marry her and that she had gone to the appellant's place to request him to marry her. While she admitted that the appellant's mother did not like her, she stated that she had never been confronted by the appellant's mother about their relationship. She however believed that the dislike might have arisen from the fact that she had other children from a previous relationship. She however admitted that she had a problem with the appellant's cousin as she suspected that they had a relationship. According to PW2, the bedsheets had whitish stuff which she washed and kept.

12. In re-examination she admitted that when she met the appellant she knew that he had a past and severally accompanied him to court when he sued for maintenance. While the appellant's parents knew her, his mother did not like her from the onset. She however disclosed that she had left the appellant in her house on several occasions.

13. PW3, **RCK**, a neighbour received a call on 7th April, 2014 while at Nairobi Hospital vising her mother, from her house help that the Complainant had been defiled by her father and they were unable to get through to her mother. In the company of other neighbours, they proceeded to home after relaying information to PW2's housegirl not to shower the Complainant. When they arrived, they found the Complainant in pain crying with blood stained clothes and she informed them that daddy "*alinidunga hapa chini*". She reported the matter to Mlolongo Police Station though a report had already been made. In the company of a female police officer, her house help and that of PW2, they rushed the Complainant to Nairobi Women's Hospital, Kitengela in the same clothes, white stockings and a pair of shorts on top of the stockings. According to her, the Complainant stated that she was assaulted with a finger by her father, Julius. Her legs were opened and there was a fresh tearing between her anus and her vagina and the doctor took the pants and the socks. They called PW2 who arrived past 10pm since her phone was off. According to PW3, the said Julius was not someone familiar to her and she had never met him before the date she went to record her statement and was identified to her by PW2 as the appellant.

14. In cross-examination she reiterated that the Complainant explained to the doctor that the appellant had used his finger to injure her. It was her evidence that she had a cordial relationship with PW2 and that their children played together. It was PW2's househelp who called hers and she got home at about 3pm and proceeded to PW2's house and saw the Complainant who had blood stained pant and stockings though the blood was not dry. According to PW1, she had been defiled in PW2'd bedroom. The tear between her vagina and her anus was deep and the Complainant was in pain. It was her evidence that she had no relationship with PW2's house help and only met her on the material dy.

15. PW4, **NA**, a neighbour, on 7th June, 2014 met PW3 who relayed to her the information she had received from her house help. Together with one **Mama M**, they proceeded to PW2's house in a taxi where they found the Complainant, her brother and the house help who told them that she had been informed by the Complainant that daddy *amemdunga*. When they saw the Complainant they found that she was not happy and she confirmed the same information. They then proceeded to Mlolongo Police Station. According to her, the Complainant had short slippers and a top which were clean though she did not talk much to the Compliant as she was scared. After that they proceed to Nairobi Women's Hospital where the Complaisant was examined. It was however her evidence that she did not notice anything on the Complainant and only heard the results from the doctor. Who said that the Complainant had a tear in her private parts. She however did not know the person who the Complainant referred to as daddy but only came to know him when she went to record her statement after she was pointed out by the Complainant.

16. PW5, **FA**, a neighbour was on 7th June, 2014 at home when her neighbours' house helps went asking for someone with a vehicle to take a child to hospital. They informed him to pick the Complainant from PW2's house and take her to the Hospital. When he insisted on knowing what had happened they explained to him that the Complainant had been defiled. He told them that he would instead report the matter to Mlolongo Police Station so that he could be given a female police officer as the Complaisant would be scared. He accordingly did so and by the time a female police officer arrived, some neighbours had arrived with the Complainant.

17. After *voir dire* examination, PW6, the Complainant's brother aged 10 years, testified that on 7th June, 2014 he was in her mother's bedroom when he saw the Complainant playing games on a phone in the presence of the appellant. The appellant then went to work and the Complainant went to the sitting room and started crying. She was then taken to the Hospital by PW3 and PW4 and he was left alone. He was however unaware why the complainant was taken to the Hospital. It was his evidence that he was in someone's house till the return of PW4 at night. According to him, he never saw anything unusual and did not know why the Complainant was crying. According to him, the appellant had come to visit them and he took his phone and went to work. According to him they were watching TV when the complainant started crying. It was his evidence that the appellant slept in his mother's bedroom. He admitted that it was the Complainant who was playing games a lot and with him he only played once.

18. In cross-examination, she stated that when the Complainant refused him to play, he went downstairs after playing only once. He confirmed that his mother had gone for a funeral and the Complainant started crying while seated in the sitting room and he did not know why she was crying.

19. PW7, **Dr Mwende Ndibo**, based at Athi River health Centre, examined the Complainant on 20th August, 2014. According to him the Complainant who was aged 6 years and had a perennial tear with a 1st degree freshly torn hymen. She had tenderness in the vagina on mild touch and her underwear were blood stained. At the anal area, she had a small laceration which he marked as 1st degree injury. In his evidence there was forceful entry and whatever was used to cause the injury was big. By the time of his examination, the complainant had already been treated at Nairobi Women's Hospital where the PRC form was filled. He produced the P3 form as exhibit.

20. In cross-examination PW7 stated that he examined the Complainant on 20th August, 2014 about 2½ months after the offence by which time there was a scar at the perennial area about 3cm. According to him the PRC form was filed by a doctor from Nairobi Women's Hospital. He admitted that the words in the PRC form were also in his P3 report though after three months it cannot be freshly torn but there was no hymen. He however admitted having seen shorts and blood stains on the Complaint's pants. There were however no marks of violence such as scratch marks on her vaginal area. According to him perennial tears occurs when a woman gives birth. Upon examination using his index singer, there was no restriction of entry and the tear was old. He admitted that there were no fresh stains on her clothes.

21. PW8, **Christine Kiteshua**, a clinical officer based at Nairobi Women's Hospital testified on behalf of **Dr Njenga**, her colleague testified that the Complainant was examined on 7th June, 2014. According to him the Complainant was born on 4th February, 2008 and the date of assault was noted as 7th June, 2014. According to the report the Complainant complained that the appellant, her mother's friend inserted his fingers in her. Upon examination, the Complainant had no physical injuries but had a 1st degree tear extending from clitoris to the anal hole. By the time of the examination she had not changed clothes which were bloodstained and had whitish discharge. Though the Complainant had not showered, she had gone for a short call. Her hymen was torn and her vagina was tender on examination. Though she had epithelial cells in her urine, there was no spermatozoa thought there were numerous pulses. He proceeded to produce the PRC form as exhibit.

22. In cross-examination, PW8 stated that a finger cannot penetrate and cause a tear up to the vaginal area. In her opinion the whitish discharge may be spermatozoa or discharged from the complainant.

23. In re-examination, she stated that the doctor concluded that the Complainant must have been defiled and that it is not a must that spermatozoa has to be present in defilement cases.

24. PW9, **Cpl Elizabeth Mbithi**, the Investigation officer was at Mlolongo Police Station on 7th June, 2014 when the report of the incident was made. They took her to Nairobi Women's Hospital where she was examined. According to her there were blood stains on the Complainant's pant and a slight cut on her private parts. After the PRC form was filled in they returned to the Police Station. After the mother went the following day, the appellant who was her friend was arrested at Taj Mall Embakasi. She produced the birth certificate which indicated that the Complainant was born on 4th February, 2008 and her clothes.

25. PW9 confirmed that the incident had been reported by PW5 in the absence of the child. According to her, blood samples were taken from the accused too but no blood stains were seen on the shorts.

26. PW1, **Dr Daniel Njenga**, based at Nairobi Women's Hospital examined the Complainant and filled the PRC form. He confirmed that the hymen was actually torn and the Complainant had a 1st degree perennial tear. According to him he cancelled the word "torn" because in cases of minors it is supposed to read torn and not intact.

Defence Case

27. Upon being placed on his defence, the appellant in his sworn testimony stated that he was 33 years old banker and knew PW2 whom he met between March and end of April, 2014 before the incident happened, courtesy of her friends, **Kimeu** and **M** with whom PW2 used to drink. According to the appellant he was married with a daughter aged 5 years and 8 months. According to him after meeting they exchanged contacts with PW2 who most of the time was in the company of her other friends. On 6th July, 2014 they met over a drink and PW2 had an outburst with **M** who disclosed to the appellant that PW2 had kids with different fathers. As a result, the two were kicked out and they left with **Kimeu** and **M**. According to the appellant, PW2 and **M** were cousins and PW2 was trying to hide the fact that she had children. After that the appellant left for his house. On 7th June, 2014, **Kimeu** called him requesting him to accompany him to PW2's place to take her motor vehicle which **Kimeu** had. The appellant accompanied him and they got there at about 8.00 am, a Sunday and they were ushered in by a lady. According to the appellant they found PW2 leaving and after breakfast, PW2 offered to drop them at Buruburu as he had a team building. According to the appellant he saw PW2's two children, a boy and a girl who referred to both himself and **Kimeu** as "Daddy" and PW2 informed them that normally refer to all men that way. After PW2 dropped him at Buruburu she left. According to the appellant he never defiled the Complainant and the Complainant never went to his place. He denied that he had any relationship with her and insisted that the only time she called him "Daddy" was when she was addressing him and **Kimeu**. He stated that he was arrested when he was doing his shopping at Tumaini Shopping Centre. It was his evidence that he did not call PW2 on 7th June 2014 as her phone was off. According to the appellant PW2 had been stalking him and was violent after taking alcohol.

28. In cross-examination the appellant stated that he met PW2 10-15 times in a club at Hornbill. Though they were friends, they never got intimate and when he realised that she was married he held back despite PW2's advancement to him. In his evidence that was the source of their problems. It was his evidence that PW2 was known to date younger people than her. He however denied that the children played with his phone on the day they met. It was his evidence that the children lied in their testimony since he left with PW2 at around 8.30.

29. The appellant called **MMM**, who testified S dw2. According to him, they had grown together with the appellant and they had lived together for 5 years. He also knew PW2 as the appellant's friend. On 6th June 2014 the appellant went to work and his friend came for him and they left and he returned at 10 pm alone. In the morning his friend, **Pascal Kimeu**, came for him and they left at about 8am though they never told him where they were going. That day he was not with the appellant till evening when he returned. It was his evidence that PW2 was putting pressure on him to marry her though he advised the appellant against rushing into marriage. On 8th June, 2014, DW2 travelled to Tala and he returned after 4 days. When there the appellant informed him that he had been arrested.

30. In cross-examination, DW2 stated that he stopped living with the Appellant in 2015. He confirmed that the appellant was in a relationship with PW2 for 4 months in 2014 and the appellant disclosed to him that PW2 had two children. On Saturday morning when **Pascal Kimeu** picked up the appellant he was asleep and he did not know where they went but he retried at 10am. After that he was called he did not know what transpired.

31. In re-examination he confirmed that the appellant informed him about his life with PW2 and that they were lovers and he saw them together for about 4 months.

32. The appellant also called **AM**, who testified that he was a medical officer with 2 years practice. In his evidence he faulted the PRC form which was filed in by PW10 stating that whereas it was indicated that there was no vaginal tear there was marked tenderness on slight touch. According to him, it was not good practice when filling in PRC to have cancellations. It was his evidence that the form was haphazardly filled in though he could not question the author.

33. In cross examination, he stated that his issue was not with the use of the word "torn" but with the inconsistencies in the PRC form.

34. In his judgement, the learned trial magistrate found that the prosecution proved its case beyond reasonable doubt and convicted the appellant. He proceeded to sentence the appellant to 21 years imprisonment.

Grounds of Appeal

35. In this appeal the appellant relies on the following grounds:

1) The trial court erred in law and fact by convicting and sentencing the Appellant when there was no evidence to support the charge.

2) The trial court erred in law and fact by convicting and sentencing the Appellant on inconsistent, doubtful and contradictory evidence.

3) The trial court erred in law and fact by convicting and sentencing the Appellant by relying on the evidence of the Prosecution witnesses and disregarding the defence tendered by the Appellant together with his witnesses.

4) The trial Court erred in law and fact by convicting and sentencing the Appellant on a charge which was not supported by the particulars of offence and the evidence of PW1 and other witnesses.

5) The trial court erred in law and fact by holding that the prosecution had proved its case against the Appellant beyond reasonable doubt when even crucial witnesses had not been called to testify by prosecution.

6) The trial court erred in law and fact by convicting and sentencing the Appellant on defective charges which were not supported by the particulars of offence.

7) The trial court erred in law and fact by convicting and sentencing the Appellant by disregarding the submissions of the Appellant.

8) The trial court erred in law and fact by in convicting and sentencing the Appellant on Defective Charge Sheet

9) The trial court erred in law and fact by considering extraneous factors and evidence which was not tendered during trial in convicting and sentencing the Appellant.

10) The trial court erred in law and fact by convicting and sentencing the Appellant by drawing and using analogies not provided in Evidence Act, Penal Code and Criminal Procedure Code.

11) The trial court erred in law and fact by convicting and sentencing the Appellant when key ingredients of the offence were not proved by evidence tendered

12) The trial court erred in law and fact by convicting and sentencing the Appellant based on documents which had not been produced as exhibits.

13) The trial court erred in law and fact by rejecting the Defence tendered by the Appellant while convicting and sentencing him.

14) The Trial Court erred in law and fact by convicting and sentencing the Appellant to serve an excessive sentence at the circumstances.

Appellant's Submissions

36. It is submitted on behalf of the appellant that from the particulars, it was alleged that the Appellant used his penis to penetrate the vagina of the alleged victim. However, PW1 testified that "*he put his chip chip in me*" while PW3 testified that "*PW1 said amedungwa with a finger*" and that "*PW1 said to doctor that accused used his finger to injure her*". In addition PW8, the doctor who first came into contact with the alleged victim testified that "*PW1 complained that accused inserted his fingers in her*". From the proceedings, the trial Court indicates that it could not hear what PW1 was saying thus she requested her to write on a per. Curiously, the said paper was not put as part of the record by the trial Court thus remains at large. The Appellant was also never given a copy of the same to know what had been written on it. Further, the trial court did not indicate the procedure it used to have PW1 write, which language did she use and was her handwriting legible? Nevertheless, the trial Court indicated that PW1 wrote as follows at page 6 line 13 "***he did not remove his clothes".***

37. It was submitted that to corroborate the evidence by the victim that the Appellant did not remove his clothes and she wasn't defiled by the Appellant, PW4 testified that the complainant's clothes were clean. She had stated that upon examining the Complainant, she did not see anything. On cross-examination, PW4 confirmed that the clothes worn by the complainant had no blood. Further, PW5 stated that the Complainant did not have blood stains on her clothing. This again was further corroborated by PW9 in his testimony. According to the Appellant, it is clear that these charges were framed by PW2 to fix the Appellant in a bid to settle personal scores. PW1 admitted that her mother couched her on what to say in Court.

38. From the proceedings and as per evidence of PW1, 3 and 8 the contradictory evidence point to use of a finger and not a penis. While the trial court acknowledged that the evidence had gaps and clear contradictions, the Court went ahead to give erroneous analogies which were not supported by law and evidence. For instance, the Court stated that the girl was a virgin and could was not likely to see the thing that penetrated her because the finger was most probably holding the penis. This analogy was erroneous because the trial Court had noted during hearing that the child was very firm and she stated a finger and not a penis. Needless to add, there is no evidence of the alleged posture of sex used which the minor could not be able to see what allegedly penetrated her. The Court used personal and extraneous prejudices in a judicial trial which was erroneous at the circumstances. In support of this submissions the Appellant relied on the case of **Shaban Mutua Kiptui vs. Republic [2017] eKLR**, and the case of **Charles Kibe Mwangi vs. Republic [2015] eKLR**.

39. According to the Appellant, the PRC form with its alterations could not be relied on to corroborate the evidence of penetration since its authenticity failed completely and was more of an afterthought by PW10. The Appellant noted that the Complainant stated that she did not feel pain yet the prosecution doctor testified that the tear was extensive, secondary to the one for giving birth. To the Appellant, an independent finding by a medical doctor (DW3) confirmed that the above anomalies were so central to the prove of penetration by the accused such that they could not be wished away or ignored. It was further noted that whereas the PRC Form was filled on the 7th June 2014 (the same day of alleged offence), the P3 Form which was filled on 20th June 2014 states that on the date of filing the P3, the hymen tear was fresh meaning that on the 20th June 2014, the Doctor found the complainant herein having a fresh hymen tear. To him, the contradictions between the PRC Form and the P3 together with the alteration on the PRC Forms was not conclusively explained by the prosecution witnesses.

40. In the Appellant's submissions, throughout the proceedings, the evidence of the prosecution witnesses lacked veracity. For instance, PW8 testified that on examination on the material day, the victim had developed pus, the same day of the alleged defilement, since the minor was taken to hospital a few hours after the alleged occurrence of the incident. The prosecution witnesses did not explain how epithelial cells and pus formed the same day and were detected on the urine samples upon conduct of further forensic examination. In this regard the Appellant relied on the case of **Republic vs. Francis Muniu Kariuki [2017] eKLR**.

41. It was noted that though DNA samples of the complainant and the Appellant herein were taken and sent to government chemist for profiling as indicated by the P3 form and confirmed by PW9 confirmed, neither the said report was produced nor did a witness from government chemist appear to testify yet the report was a crucial piece of evidence and the government Chemist was a crucial witness. Interestingly, when the alleged officer appeared in Court on the 27th May 2015, she declined to testify and no reasons were given by prosecution. An adjournment was granted to prosecution. On the next hearing date, the prosecution closed its case and did not offer any explanation for it. The only logical conclusion is that had the prosecution called the said witness, the evidence and results could have exonerated the Appellant.

42. There is then the issue of the House Girl who is said to have been with the Complaint on the fateful day. Despite all evidence pointing to her as the reporter of the alleged offence and the first person the Complainant is said to have reported to, she was never called as a witness. According to the Appellant, it is the househelp who could have testified on whether the appellant was in the house that fateful day; whether PW2 had left the house as alleged and switched her phone the whole day; what time the Appellant left the house as alleged; whether the complainant reported to her of the alleged defilement and what time; whether she reported to PW3 and 4 as alleged; whether she saw the alleged injuries on PW1 that fateful day; where she was when PW1 was allegedly being defiled noting that she was the immediate caregiver in the absence of the mother; and where the Complainant's brother was at the time of the alleged offence. Accordingly, it was submitted that this was a clear scheme by the prosecution to manufacture evidence and at the same time curtail the truth by failing to call witnesses who would have exonerated the Appellant. The only logical conclusion is that had they been called to testify, they would be adverse to prosecution case and could have exonerated the Appellant and reliance was placed on the case of **Said Awadhi Mubarak vs. Republic [2014] eKLR.**

43. It was contended that it was a crucial piece of evidence because it is now established that hymen can even be broken by a doctor while examining an alleged victim and he relied on the case of **Kavoo Kimonyi vs. Republic [2018] eKLR.**

44. It was further submitted that the evidence was marred by very many inconsistencies which displaces the credibility of the various prosecution witnesses severing injuring the ability of the same to prove the case beyond reasonable doubt. For instance, PW1 testified in chief that she was playing with her brother Andrew. However, on cross examination, she was categorical that she was not playing with him. She further testified that the accused person did not remove her clothes but on further testimony, she indicated her clothes were removed. In addition to the above, its again not clear by the prosecution as to where the alleged incident took place whether in the Appellant's house or in PW2's house. Thirdly, how was the minor dressed on the material day? PW1 stated in chief that "*the accused person removed my trousers, stockings and my panty"* but on cross examination, she stated "*I was wearing a short, stocking, panty, sweater and t-shirt…"* Fourthly, the minor at one time claims to not have cried or felt pain after the alleged ordeal and in fact did not tell the persons whom she came across on the first instance only to contradict herself later on. She testified as follows; "*he put his chip chip in me…I did not feel pain*…" she then went ahead to contradict herself by stating thus, "*I went down stairs and found aunty called M down stairs…I did not tell her what happened…I also did not tell my brother…*". Immediately, she further changed her testimony to state, "*I told aunty who told another aunty and my neighbours."* PW6 on the other hand testified that PW1 immediately came to the sitting room where they were and started crying.

45. It was submitted that the contradictory evidence was extremely insufficient to support the charges and the appellant cited the case of **Kavoo Kimonyi vs. Republic [2018] eKLR**.

46. The Appellant also took issue with the fact that whereas the evidence of PW2 was that the accused was in her house, PW4 on the other hand, testified that the house girl told her that the Complainant came from outside raising the issue where the complainant was defiled: in the house or outside the house. It was noted that whereas both the complainant and PW6 referred the accused by his name **Julius** when testifying, from the PRC form, the victim told the doctor that she did not know the assailant. PW1 however admitted in Court that she had been coached by her mother, PW2, to incriminate the Appellant. In this regard the Appellant relied on the Court of Appeal decision in the case of **John Mutua Munyoki vs. Republic [2017] eKLR** and the case of **Paul Kanja Gitari vs. Republic [2016] eKLR**.

47. It was therefore submitted that the evidence of the prosecution witnesses was extremely doubtful and could not support the charges. PW6 testified at page 24 that he was at the bedroom playing phone games with the complainant. From his evidence, he was inside the alleged scene of crime and at no particular time did he testify seeing the appellant commit the offence. He actually informed court that the complainant started crying long after the appellant had gone. To be precise, he testified that they were watching TV.

48. The Appellant therefore submitted that the case against the appellant was not proved as required and his Defence was as well credible. The trial court had an obligation to re-evaluate the defence case in light of all contentions that have been raised and arrive at its own conclusion but sadly it did not because had it done so, it would probably come to different conclusion on the matter.

49. This Court was therefore urged to allow the appeal, quash the conviction and set aside the sentence.

Respondent's Submissions

50. On behalf of the Respondent the appeal was opposed.

51. It was submitted that the main issues for determination in this Appeal, is whether the prosecution proved the age of the victim, whether penetration was proved and whether the penetration was caused by the Appellant.

52. On the issue of age, it was submitted that PW2 the mother of PW1 testified that PW1 was six years old. Her evidence was corroborated by PW1's birth certificate that was produced by PW9 as exhibit in this matter. The birth certificate indicated that PW1 was born on 4th February, 2008 and as such 6 years at the time of the commission of the offence. In view of the foregoing, the prosecution proved the age of PW1 beyond any reasonable doubt.

53. On the issue of penetration, the Respondent submitted that PW1 testified that she was playing with the Appellant's phone in PW2's bedroom when the Appellant removed her clothes then removed his and inserted his *chip chip* into her. She felt pain but she did not cry or scream. By *chip chip*, PW1 explained that it was the thing the Appellant used to pee that he inserted into her.

54. From the evidence of PW2, PW3 and PW9, when they examined PW1, they were able to observe a physical injury on her private parts. It was their evidence that PW1 had a tear on a vaginal region that extended to the anus. The evidence of PW1 that she was penetrated and the evidence on what PW2, PW3 and PW9 observed on PW1 was corroborated by the evidence of PW7 and PW10 being the two doctors who attended to PW1 after the incident.

55. It was the testimony of PW10 who saw PW1 immediately after the commission of the offence that when he examined PW1, her hymen was torn and she had a 1st degree perennial tear and that such a tear occurs to women when giving birth.

56. Though there were cancellations on the PRC form, PW10 was able to explain them out and maintained that PW1 had a torn hymen clearly demonstrating that PW1 had been penetrated.

57. The evidence of PW7 in respect of the P3 form she filled for PW1 and which was also based on the PRC form, she testified that PW1 had complained that the Appellant had inserted his finger in her. From the medical examination, PW1 had a torn hymen and the anal had a normal tear. The vagina was tender on examination. It was PW7's evidence that there was evidence of forced entry and that whatever that was used to cause the injury was big.

58. It was the testimony of PW8 that PW1 said that a finger was inserted into her vagina but PW8 explained that a finger cannot penetrate and cause a tear up to the vagina area.

59. From the foregoing, it was submitted that the prosecution was able to prove the element of penetration through the evidence of PW1 (the victim) and her evidence on penetration was corroborated by medical evidence that proved beyond any reasonable doubt that PW1 was penetrated and there was physical evidence of the same.

60. On the issue on whether it was the Appellant who caused the penetration, it was submitted that the Appellant was known to PW1 and her family. PW1 had visited the house of the Appellant in the company of PW2 and PW6 and the Appellant used to visit their house too and could sleep in PW2's bedroom.

61. PW2 testified that she was engaged to the Appellant and the Appellant would visit her house and even spend nights there. It was the testimony of PW2 that on the material day, the Appellant brought her the car since she was to attend a burial. The Appellant was drunk and since he had a teambuilding event, he did not travel with her to attend the burial so she left him sleeping and headed to Mwingi.

62. It was the testimony of PW1 and PW2 that when they woke up, they went to PW2's bedroom and played with the Appellant's phone and since PW1 was playing more, PW6 left her in the bedroom and he went to the sitting room. It was also the evidence of PW6 that the Appellant was known to him and that they had visited his house and he used to visit their house too.

63. From the foregoing, it was the Respondent's submission that the identification of the Appellant was by recognition and as such, they could not have been any mistake as to his identity. Further, it was the testimony of PW1 that the Appellant defiled her during the morning during broad day light. The fact that it was during the day, means that she was able to see the Appellant clearly as the person who defiled her and not any other.

64. From the evidence of PW1 and PW6, it was clear that the only man present in their house in the morning of the commission of the offence was the Appellant and there is not any other evidence to suggest the contrary.

65. PW1 stated without any doubt that the person who defiled her was the Appellant. In view the testimony of PW1, PW2 and PW6, it was submittted the Appellant was positively identified as the person who committed the offence and there was no mistake as to his identity.

66. In his defence, the Appellant denied the fact that he was in a love relationship with PW2 a testimony that was false considering his own witness (DW2) who was his friend and someone he lived with confirmed that indeed the two were in a romantic relationship.

67. Though DW2 testified that the Appellant and his friend left their place on the material day at 8:00am, DW2 explained that he was not

with the Appellant during the day hence he could not testify as to what the Appellant did on the material day or where he went to after he left the house.

68. While admitting that there were a few contradictions in the evidence herein among them being whether PW1's clothes were blood stained or not, the extent of the injury she suffered and whether the Appellant used his finger of penis, it was contended that they do not go to the root of the offence. It was submitted that the only contradiction that goes to the root of the offence was whether the Appellant used a finger or penis to penetrate PW1. While appreciating that PW1 told PW3, PW4 and even the doctor who attended to her that the Appellant inserted/touched her with a finger, during her testimony in court, she testified that the Appellant had put his *chip chip* in her, she explained that he put the thing he uses to pee clearly demonstrating that it was a penis that was used and not a finger. Further, PW8 testified that in view of the degree of the injury that PW1 suffered, it was not possible that the same was caused by a finger and that something big must have caused the injury.

69. PW1 testified in court that PW2 told her to go and tell the court what happened to her. She also, testified that although PW2 told her to say that the Appellant had put his *chip chip* in her, she did emphasize that the Appellant did so hence it cannot be said that she was told to implicate the Appellant or coached on what to say.

70. The Appellant's defence was a mere denial that did not create doubt in the prosecution's evidence that he defiled PW1.

71. It was submitted that the prosecution's evidence was direct, clear and without any doubt whatsoever that the Appellants committed the offence charged with. To the Respondent, the trial Court duly analysed the evidence led by the Prosecution and Defence and was satisfied that it led to the irresistible conclusion that the Appellants did commit the offence hence convicted the Appellant. The decision of the Court was well reasoned and supported by evidence.

72. In view of the foregoing, the Respondent urged this Court to uphold the conviction of the Lower Court and confirm the sentence considering the age of the PW1.

Determination

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

74. The prosecution's case in summary was that on 7th June, 2014, the Appellant went to PW2's house drunk. Though he wanted to accompany PW2 to a funeral in Mwingi, it was on condition that they would return at 12pm since he had a teambuilding function. Accordingly, it was agreed that PW2 would proceed to the said funeral alone and PW2 left the Appellant in her bedroom alone, which was not unusual since the Appellant was her fiancée. That the Appellant and PW2 were in a relationship was confirmed by DW2, a close friend of the Appellant. After PW2 left, PW1, the complainant herein, PW2's daughter went to her mother's bedroom and started playing with the Appellant's phone. Together with her was her brother, PW6, they started playing games with the Appellant's phone. According to the two they knew the appellant since they had even visited the appellant in his house. They in fact referred to the appellant as "daddy" and this was admitted by the appellant. According to PW1, it was the mother, PW2, who told her that the Appellant was called Julius and they should refer to him as "daddy".

75. After some time PW6 became unhappy with the fact that the Complainant was playing more games that him and he left. According to the Complainant, the Appellant then removed her clothes and inserted what she called *chip chip* into her genital organ (vagina). What she meant by *chip chip* was not clear but it would seem that the learned trial magistrate made her write something on a piece of paper which unfortunately was not made part of the record though the learned trial magistrate stated that what the Complainant wrote was: "He put his *chip chip* in me." She however stated that the Appellant put his *chip chip* on her by the thing he used to pee. It would seem that it was this sentence that the prosecution deemed to clarify that the Appellant inserted his penis into the Complainant's vagina. However, the Complainant's evidence as to whether the Appellant removed his trousers was inconsistent and in her statement to the other witnesses, she was categorical that the Appellant inserted his fingers into her vagina.

76. That said, the Complainant, from the evidence of PW2, PW7 and PW10, sustained serious injuries in her vagina. She reported the incident to PW2's housegirl who got in touch with PW3's househelp who in turn got in touch with PW3. All along the efforts to get hold of PW2 were unsuccessful since PW2 had switched off her phone. The two househelps also sought help from PW5 who was of the view that it was prudent to get a female police officer handle the situation instead and he proceeded to seek help from Mlolongo Police Station.

77. In the meantime, PW3 returned from where she was and accompanied by PW4 proceeded to PW2's house where they found the Complainant crying and in pain. It would seem that PW4 got scared and did not take keen interest in the Complainant but PW3 took note of the details. The two then reported the matter to the Police Station where in the company of PW9, they proceeded to Athi River Medical Centre where the Complainant was attended to by PW7. By the time PW2 switched back her phone on, she found several missed calls from her neighbours and it was at that time that she got the information that the Complainant was injured though the details were not disclosed to her. According to her, she called the Appellant who promised to check on the Complainant but did not do so. By the time she returned home it was going to midnight and upon examining the Complainant she realised that the Complainant had sustained serious injuries in her genital organs which to her were similar to those sustained by a person who had delivered.

78. The following day she reported at the Police Station and with the help of the police she traced the Appellant at a Supermarket where the Appellant was arrested and eventually charged.

79. That the Appellant was present at PW2's house that morning is not denied. However, the Appellant stated that he was in the company of

a friend, **Kimeu**, and they were dropped together by PW2 after the said **Kimeu** dropped PW2's vehicle. He admitted that that was the first time he met the Complainant and PW6 and that they referred to him and **Kimeu** as "daddy" a term which PW2 explained to them that the two children used to refer to all male persons.

80. 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.***

81. 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."**

82. As regards the age of the complainant, in **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

> **"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."**

83. The importance of establishing the complainant's age in defilement cases cannot be over-emphasised. 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."**

84. 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."**

85. 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 MA 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."

86. However, in the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** 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..."

87. In the case of **Richard Wahome Chege –vs.- Republic Criminal Appeal No 61 of 2014**, the Court of Appeal sitting in Nyeri while considering the question of proof of age of the victim held as follows:

"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself"

88. 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.

89. What the Court frowns upon is mere averments of age without any documents in support thereof. In this case, PW2 the mother of PW1 testified that PW1 was six years old. This evidence was corroborated by PW1's birth certificate that was produced by PW9 as exhibit in this matter and which indicated that PW1 was born on 4th February, 2008. Therefore, the Complainant was aged 6 years at the time of the commission of the offence. In view of the foregoing, the learned trial magistrate's finding as regards the Complainant's age was based on sound and solid evidence and cannot be faulted. The prosecution proved the age of PW1 beyond any reasonable doubt.

90. As regards the identity of the Appellant as the assailant, in this case the Appellant's case was that he was not in close relationship with PW2. From his evidence, his case was that it was PW2 who in the habit of chasing after younger men was stalking him and not the other way round. He created an impression of someone whose contact with PW2 was only through PW2's friends. However, this impression was disproved by the evidence of DW2, his own witness who testified that the Appellant and PW2 were lovers and had been together for 4 months. According to PW1, the Appellant used to spend the night in her mother, PW2's bedroom and they had as a family visited the Appellant's house. She knew the Appellant as "daddy" and that she referred to her as such was confirmed by the Appellant himself. This visit was confirmed by PW6 who stated that in the company of his mother and the Complainant they went to the Appellant's house in Tala. That the Appellant knew PW2's family was confirmed by DW2 who testified that the Appellant told him that he could not marry someone with two children.

91. The totality of the foregoing is that the Appellant was well known by and to the Complainant very well. On the day of the incident he was admittedly in PW2's house and had some interaction with the Complainant during which the Complainant referred to him as "daddy". Accordingly, there was no mistaken identity.

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

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

93. 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."

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

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

95. In this case the Complainant's case in her evidence in Chief was as follows:

"I was playing games with the accused's phone when he touched me using his fingers. He did not remove his clothes. I was with the accused in my mother's bedroom. We went to accused's place on Friday. I went back on Sunday. He touched me when I had my clothes on. He then removed my clothes. The accused person removed my trousers, stockings and my panty. We were in my mother's bed. He then put his chip chip on me by the thing he used to pee… I did not feel pain. He removed my clothes. He did not remove his clothes. He removed from his trouser (child points). I told him to stop and he stopped. I wore my clothes."

96. Had this been the only evidence, maybe one could infer that there was penetration of the Complainant's genital organ with the genital organ of the Appellant. However, the statement that the Complainant gave, according to PW3 and PW8 was that she was injured by the Appellant using his fingers. While PW8 was of the opinion that a finger cannot penetrate and cause a tear up to the vaginal area, that remained just that: an opinion. In **Dominic Kibet Mwareng vs. Republic [2013] eKLR** it was held that:

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

97. The bulk of the Complainant's evidence was that she was injured by the fingers of the Appellant. It was suggested that she might have meant that what she saw were the fingers and therefore the fingers might have been used by the Appellant when inserting his penis. That however would be speculation and conjecture. The law is clear that for the purposes of defilement, penetration must be by the accused's male genital organs. It was therefore held in **Charles Kibe Mwangi vs. Republic [2015] eKLR** as follows;

"6. However, the definition of "penetration" under section 2(1) of the Act poses a serious challenge. That definition is – "penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person" According to this definition therefore, to constitute the offence of sexual assault the penetration must be by genital organs of a person into the genital organs of another person. Fingers are not genital organs.

7…Suffice it to say, for this present case, that because of the definition of penetration under section 2(1) of the Act, the particulars of the charge did not disclose the offence charged. The charge was thus incurably defective, and I so hold. The conviction cannot be upheld."

98. Similarly, in the case of **Shaban Mutua Kiptui vs. Republic [2017] eKLR**, the High Court expressed itself as follows:-

"22. Not once during cross-examination did PW1 mention Shaban inserting his penis into her vagina, but she twice said that he inserted his finger into her vagina and she screamed and ran home. Pw2 evidence of penetration could be consistent with insertion of finger only, without insertion of the penis. Curiously, the eye witnesses the complainant pw1 and pw3- never said what part of his body that the accused wiped with the paper. The charges were that he inserted his finger and his penis into the girl's vagina but the girl and the witness did not say whether the accused had wiped his finger, his penis or both. The record on the evidence of the two witnesses merely said " he wiped himself" with a whitepaper.

23. Pw1 did not say whether it was finger or the penis that she was referring to when she said in reexamination that "he wiped himself with a paper and threw it to the dustbin". Pw3 alleges to have "found Shaban zipping his trouser and had a white paper which he used to wipe himself'. She does not say that she saw Shaban wiping himself or what part of his anatomy he wiped. It may have been only the finer that he wiped, as an open zip does not conclusively denote penetration, the act may have been interrupted when upon insertion of the finger the child screamed and ran at home.

24. Although a Court would be entitled under section 180 of the Criminal Procedure Code to convict for attempt even though accused was not charged with attempted defilement, I do not find sufficient evidence with necessary corroboration to a support a finding of attempt. Section 180 of the CPC provides-

180. Persons charged with any offence may be convicted of attempt when a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.

25. that there was no spermatozoa in the PW2's examination report may also support, although not conclusively, a finding of lack of sexual penetration or penetration in the technical sense of the word within the meaning of section 2 of the Sexual Offences Act.

26. I find that the statement of the complainant in her evidence in chief that he then inserted his *dudu* (penis) in my private parts was not corroborated by any other evidence, and it would be unlawful to convict on uncorroborated evidence of a child of tender age received in accordance with section 19 of the Oaths and Statutory Act because as prescribed in section 124 of the Evidence Act" the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

99. Therefore, where there is doubt arising from substantial inconsistency as regards the proof of one of the ingredients of defilement, the benefit ought to go to the accused. It was contended that from the medical evidence, a whitish substance was seen in the Complainant's vagina. However, according to PW8, the whitish discharge may be spermatozoa or discharged from the complainant. In other words, she could not rule out the possibility of the whitish substance being substance from the Complainant. As regards the fact that the Complainant had had a perennial tear with a 1st degree freshly torn hymen, in the case of **Kavoo Kimonyi vs. Republic [2018] eKLR** the Court of Appeal expressed itself as hereunder;

"in P. K.W VS REPUBLIC [2012] eKLR on the issue of the proper view that courts ought to take on the fact of a broken hymen, without more.

"15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

100. That being the position, it cannot be ruled out that insertion of the fingers in the genital organs may well tear the hymen.

101. The Appellant took issue with the failure to call PW2's house girl and the Government Chemist. It is true that an officer from the Government Chemist could have shed some light as to whether the sample submitted to them had any connection with the Appellant. Similarly, may be PW2's house girl could have given some evidence, assuming she had it, that would have discounted the Appellant's version. I agree that the holding in the case of **Paul Kanja Gitari vs. Republic [2016] eKLR** restates the general legal position when the court of appeal expressed states that:

"the state of the evidence tendered with all of its inconsistencies means that the appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that there is not number of witnesses required for the proof of a fact. See Section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See BUKENYA & OTHERS VS> UGANDA [1972]EA 549. Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere."

102. However, that decision states that such inference is only to be made where the prosecution calls evidence that is barely adequate. As regards the failure to call the alleged vital witnesses, section 143 of the ***Evidence Act*** provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

103. I am guided by the case of **Mwangi vs. R [1984] KLR 595** where this Court stated:

"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

104. The prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter vs. Republic [2007] 1EA135** the court was categorical that:-

"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

105. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. T*his is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see.* Keter v Republic **[2007] 1 EA 135). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses."

106. I reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR** that:

"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two

boys."

107. In this case, there is no evidence that PW2's housegirl saw the Appellant when he was coming in or leaving. The only evidence is that at one point he sent her to go to the canteen and buy soda. It cannot therefore be said that her evidence would have tilted the case one way or the other.

108. With regard to the evidence of the Government Analyst I agree that there was no proper explanation why he never testified. At least the prosecution ought to have tendered him to the Appellant's advocate to decide whether or not to call him as their witness. In **David Kariuki Mutura vs. Republic [2005] eKLR** it was held that:

> **"These witnesses were not called to testify. In the case of GEORGE NGOSHE JUMA & ANOR VS ATTORNEY GENERAL, MISC. CRIMINAL APPLICATION NO. 345 OF 2001, The Constitutional Court held that the prosecution has a duty to bring before Court all the evidence gathered to ensure that justice is done. The prosecution cannot be allowed to suppress evidence in their possession even if it is in favour of the accused. Unfortunately this what seems to have happened in the instant case. The investigating officer was selective in the evidence he wanted adduced before Court. There was evidence recorded from witnesses that was in favour of the Appellant. This evidence was suppressed for no apparent reason. I think in this regard the Appellant's complain that the Learned trial Magistrate erred in disregarding the fact that the prosecution had deliberately suppressed the evidence of the eye witnesses to the accident despite having taken statements from them has some justification. I think that in those circumstances, the trial Magistrate ought to have drawn the necessary inference that the evidence that would have been adduced by the said witnesses would have been unfavorable to the prosecution case."**

109. In **Gabriel Kimuhu Kariuki vs. Republic [2003] eKLR** the court opined as follows:

> **"... It is my holding therefore that although the prosecutor in this case in hand had a discretion to decide which material witnesses to call or not to call he had an obligation to call the three witnesses hereinabove mentioned. But if he did not do so, he should have made them available to the appellant to call them if he so chose to do. On the other hand, the trial magistrate had a duty to impress upon the prosecution of such a duty and call the witnesses itself if the prosecution failed to do so. And finally, in this case, it cannot be arguable that the prosecution need not have called the mentioned witnesses because it had called adequate witnesses. In fact, without calling the said witnesses, the prosecution barely had any adequate evidence on the record upon which it could prove its case. Failure to call them therefore was motivated by a greater negative reason like the fact that if he called them, their evidence would tend to be adverse to the prosecution case. I accordingly have to hold that the prosecution failed to call the witnesses mentioned above because their evidence would possibly exonerate the appellant."**

110. In **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal opined as follows:

> **"It is, to say the least, surprising that the prosecution chose not to call the watchman or offer him for cross examination. The trial magistrate did not consider the evidence about the watchman. That was a further misdirection. The trial court would have been entitled to presume that the evidence which the watchman would have given, which was not produced, would, if produced, be unfavourable to the prosecution who withheld it: R V Urberle (1938) EACA 58."**

111. In light of the foregoing, I agree that adverse inference ought to have been made against the prosecution's failure to call the Government Analyst or at the very least to tender him for cross-examination. The rationale for disclosure of material collected by the prosecution in the course of investigation was explained in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, where the Court of Appeal held that:

> **"The prosecution, at the beginning of his trial, supplied the defence with all the relevant material upon which they intended to rely. That was perfectly right because that material was gathered by the police using the resources provided by tax-payers among whom is the appellant. That material is not the personal property of the police and the police are under a legal duty to gather it on behalf of the public. Of course, no busy-body would be entitled to demand to see that material, unless there be some very good reason for such a demand. But the appellant was a party directly involved in the affair and as public property directly affecting him, he was entitled to. The police were under a legal duty to pass that material to the Attorney General and the Attorney General, who is, in all criminal cases, the prosecuting authority was bound to disclose it to the appellant before his trial and throughout the trial. If the Attorney General received any new information during the trial the Attorney General was bound by law to disclose it. This is because the duty of a prosecutor, acting on behalf of the Republic is not to secure a conviction at all costs but to be a minister of justice, i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any public prosecutor who sees his or her duty as being to secure convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence, whether it supports his or her case or whether it weakens it and supports the case for the accused."**

112. However, the evidence of the Government analyst could only connect the Appellant with the offence of defilement or otherwise. In light of the finding I am about to make in this appeal, it makes no difference whether he testified or not.

113. It is true that there were inconsistencies in the evidence of some of the witnesses called by the prosecution. In this regard the appellants relied on **Onubugu vs. State 119741 9 S.C.1 Kem vs. State (1985)1 NWLR** where the court was of the opinion that**:-**

> **"Where prosecution witnesses have given conflicting version of material facts in issue, the trial judge by whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it."**

114. 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."**

115. 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.**

116. 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."**

117. 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*."**

118. 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."**

119. 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."**

120. 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."**

121. 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."

122. 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."

123. 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."

124. 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).

125. In this case the learned trial magistrate dealt with the said contradictions and reconciled them. 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.

126. Having subjected the evidence to a fresh scrutiny, it is my finding and I hold that the prosecution failed to prove penetration as defiled under section 2 of the ***Sexual Offences Act***. In the premises, the offence of defilement was not proved to the required standards.

127. In this case however, the appellant faced the alternative charge of indecent act. Section 2 of the ***Sexual Offences Act*** provides *inter alia* as follows:

"indecent act" means an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) exposure or display of any pornographic material to any person against his or her will;

128. Section 11(1) of the ***Sexual Offences Act*** provides that:

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

129. Therefore, for the purposes of that alternative charge, it does not matter whether in doing so, the appellant used his male genital organ or any part of his body as long as he touched the genital organs of the Complainant which was the testimony of the Complainant. The Appellant was well known to the Complainant. He was in a close relationship with PW2. Though he alleged that the charges were fabricated against him, most of the witnesses who testified did not even know him. The offence was committed in the absence of PW2 against whom he levelled the accusation of grudge. While the burden of proof was not on him, in light of the damning evidence against him, he could have rebutted the same by for example calling **Kimeu** whom he alleged was with him and with whom he was dropped by PW2. The evidence of PW7, PW8 and PW10 supported the evidence of PW1 that she was seriously injured in her genital organs. The trial court believed PW1 as a truthful witness and the mere fact that she was told to say in court what she had narrated to PW2 does not mean that she was coached. She was steadfast in saying that what she was saying was what happened. That coming from a 6 year old girl is clearly credible and I have no reason to disagree with the learned trial magistrate.

130. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. From the evidence adduced it is my view that the evidence disclosed the commission of the offence of indecent act. Though that was not the main offence with which the appellant was charged, indecent act is a cognate offence to the offence of defilement. Section 179 of the ***Criminal Procedure Code*** provides that:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of

the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

131. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged…As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171* and *WACHIRA S/O NJENGA V. REGINA (1954) EA 398*). *Spry, J*. explained the essence of the first consideration as follows in *ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294,* while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

"*Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.***"**

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial." [Underlining mine].

132. The Court proceeded:

"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500).* In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."

133. Accordingly, I hereby set aside the appellant's conviction of the offence of defilement and substitute therefor the conviction of the offence of indecent act.

134. As regards the sentence, in this case, the appellant took advantage of the trust that the Complainant had in him as her "daddy" the absence of his lover, PW2 and the tender age of the complainant for his own selfish gratification. He deliberately waited when the opportunity presented itself when PW6 was out of site and after having facilitated PW2's housegirl to be out of the way to inflict heinous and monstrous injuries on an innocent soul.

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

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

136. 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.**

137. However, the appellant was treated as a first offender. In **Charo Ngumbao Gugudu vs. Republic [2011] eKLR**, the Court of Appeal held that:

> **"It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was *"completely mentally disabled"*."**

138. I will repeat what the Court said in the case of **Gedion Kenga Maita vs. Republic Criminal Appeal No. 35 of 1997 (unreported).** There, the Court stated:

> **'…We are not saying that a court has no power to impose a sentence of life: a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was committed, the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature.'**

139. 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."**

140. Though the relevant section prescribes a *prima facie* sentence of not less than 10 years, it is now an acknowledged jurisprudence in this jurisdiction that that prescription does not bind the Court since the discretion of the court in imposing the sentence cannot be taken away. While there is nothing illegal about imposing such sentence in appropriate cases, the court's hands are not tied by that prescription.

141. Therefore, taking into account the circumstances of this case I allow the appeal in so far as the conviction and sentence imposed on the appellant in respect of the offence of defilement is concerned, substitute therefor a conviction of the offence of indecent act and sentence the appellant to serve 8 years' imprisonment. That period will include the period between 4th June, 2019 and 16th December, 2019 when he was in custody.

142. Judgement accordingly.

Read, signed and delivered in open Court at Machakos this

21st day of July, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Nthiwa for the Appellant

Mr Ngetich for the Respondent

CA Geoffrey