REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 79 OF 2015

STEPHEN KIKUMU MUTISYA...................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos

Chief Magistrate's Court (Hon. C.K Kisiangani, RM),

in Criminal Case No. 594 of 2013 and judgement

delivered on 23.2.2015)

REPUBLIC...PROSECUTOR

VERSUS

STEPHEN KIKUMU MUTISYA.....................................ACCUSED

JUDGEMENT

1. The appellant, **Stephen Kikumu Mutisya**, was charged before the Machakos CM's Court in Criminal Case No. 594 of 2013 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant, on the 14th day of June, 2013 at [Particulars Withheld] Village, Kyua Location within Machakos County, unlawfully and intentionally caused his penis to penetrate the vagina of **MP**, a child aged 13 years. Alternatively, he was charged with the offence of indecent act contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he unlawfully and indecently touched the private part (vagina) of MP using his penis, a child aged 13 years.

2. Upon being found guilty, the appellant was convicted of the offence of defilement and was sentenced to 20 years in prison. Being dissatisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1) The learned trial magistrate erred in matters of law and fact by unlawfully shifting the burden of proof to the appellant.**
>
> **2) The learned magistrate failed to consider that the prosecution did not discharge all the elements of the offence.**
>
> **3) The evidence of identification/recognition was not proved.**
>
> **4) The vital witness(es) were inadvertently not called to adduce evidence.**
>
> **5) The prosecution's case was not proved beyond reasonable doubt as required in criminal law.**

6) The learned trial magistrate failed to evaluate and analyse the entire record and improperly rejected the unchallenged defence of the appellant thereby shifting the burden of proof.

3. The hearing of the case commenced on 19th July, 2013. However, following the transfer of the initial trial magistrate, the hearing commenced de novo after the prosecution had closed its case on 19th May, 2014.

4. In support of the prosecution's case the prosecution called 7 witnesses.

5. After *voir dire* examination, Pw1, MP, testified that she was 14 years old and at the time of her testimony she was not going to school as she was still under treatment as she was suffering from fits. It was her testimony that she knew the appellant though she did not know his home.

6. On 14th June 2013, the complainant testified, that she was fetching firewood when she was suddenly accosted by the appellant who got hold of her, tied her with a sweater and told her that if she did not scream he would give her some money. The appellant then lay on her and pushed her clothes up. Although the complainant struggled and tried to scream, she however became unconscious. When she regained her consciousness, she found her clothes having blood. She then reported the matter to her mother who called people and the appellant was arrested. It was her testimony that one Baba Caro who saw the appellant following her when she went to fetch the firewood. The complainant identified the clothes she was wearing on the said date which she said had blood.

7. After the said incident the complainant reported the matter to the police and she was issued with a p3 form. She was then taken to the hospital immediately. She identified both the p3 form and the age assessment report. According to her she was defiled though she did not know what the appellant did since she was in a shock and passed out due to her illness. She was therefore unaware of where the blood came from.

8. PW2, **AMN**, the complainant's cousin testified that he knew the appellant who used to work for the complainant's father's cousin. On 14th June, 2013, at 6.10 am, PW2 was grazing cattle, when he saw the complainant's grandmother who was also grazing cattle on one side of the road where the appellant was similarly grazing cattle. PW2 was however on the opposite side of the road. At around 11 am, PW2 saw the appellant behind the stock while the complainant's grandmother was in front of the cattle. However, since the place was hilly, PW2 did not see anything else. Both the complainant's grandmother and the appellant then took the cattle to the river. On his way home PW2 received information that something had happened to the complainant and when he arrived home where there was a dowry payment function he saw the complainant crying and upon being asked what the matter was, she said that the appellant had defiled her in the farm.

9. PW3, **MP**, testified that on 14th June, 2013, he was at his Uncle's place when at 11am, his nieces informed him that the complainant was in the house crying but did not disclose to him the reasons why she was doing so. Since the complainant was suffering from fits, he went to check on what the problem was and the complainant, who was bleeding, informed him that she had been defiled at the farm where she was grazing with her grandmother by a man who works in Kanaa's home. PW3 then called the grandmother who took a bike to Katangi Police Post while PW3 remained with the complainant till the police arrived. In the meantime, the Appellant was arrested by those who were attending the meeting and was taken to the said police post and PW3 was told to take the complainant to Machakos Hospital where they arrived at 8pm and the complainant was examined and treated. At Masii Police Station, they were furnished with a P3 form. According to PW3, the complainant informed him of what happened.

10. In cross-examination PW3 stated that he did not now the appellant before that day and denied that he asked the appellant for money.

11. PW4, **NM**, the complainant's grandmother testified that on 14th June, 2013, at around 9.00 am she was grazing cattle with the complainant together with an employee of Kanaa in a hilly farm. Since the goats had crossed to the other side of the hill, PW4 left the complainant behind after telling her to fetch firewood and then go back to the house. According to her, the distance where she was from where she had left the complainant was a bit far and the appellant was on the hill while the complainant was fetching firewood but they were near each other and there was a river nearby. It was her evidence that she took some time when she went for the goats. When she returned, she called the complainant who was not crying. She then left her behind and went back. By that time the appellant was still grazing near there. She later found the complainant at home. It was her evidence that since she was far she could not hear the complainant cry.

12. On the application of the prosecution, PW4's evidence was marked as an exhibit.

13. PW5, **James Kilonzo**, a clinical officer based at Masii health Centre testified that she examined the complainant who was taken to the facility in torn, blood stained clothes. According to PW5, the complainant had a history of having been defiled, when she was tied with a sweater and the appellant inserted his penis without a condom. It was his testimony that the complainant was in general medical condition and had no injuries on the neck, head, abdomen and legs. There were however tears on her labia though there were no tears on her vagina. Similarly, there was no vaginal discharge and her external part of the vagina was normal and there was no bleeding. It was stated that the complainant was given post defilement care and a pregnancy test done. PW3 accordingly produced the P3 Form as an exhibit.

14. In cross-examination, PW5 stated that he examined the complainant after she had been treated at Machakos Level 5 after which the P3 form was filled at Masii based on the medical notes.

15. PW6, PC Wilson Maingi, was on 14th June, 2013 at 3pm at Katangi Patrol Base when he received a report that a crime had been committed at [Particulars Withheld] Village in Syokisinga where the complainant had been defiled. Accompanied by his colleague he went there where they found the complainant and the appellant who had already been arrested by the public. He was informed by the complainant that she was fetching firewood when she was asked by her grandmother to help her in herding the goats. However, when the said grandmother went to get the goats, the complainant was defiled by the appellant who blindfolded her with a sweater that was tied to her head. It was her evidence that the age assessment placed the complainant's age at 15 years. PW6 then proceeded to produce the clothes, P3 Form

and Age assessment report as exhibits.

16. At the close of the prosecution's case, the appellant was placed on his defence and he opted to give a sworn testimony.

17. According to the appellant, he was working as a *shamba* boy for one Kamandia where he had worked for one and half months from 10th April 2013 to 14th June 2013. On 14th June 2013, he woke up and went to the *shamba* and ploughed till 9 am after which he went home and took the cattle for grazing far from his place of work. He testified that he found one woman called N and her granddaughter whose name he could not recall who were also grazing while the said N's hair was being done by the said granddaughter. According to her, the said grandmother asked her to wait for her while her hair was being made which he did. After that was done, the said grandmother then told him to help her in placing the firewood on her granddaughter's head which he did. He then opened the gate and they took the cattle to drink and returned the cattle home.

18. However, at around 2.30 pm he was picked up by police officers who took him to Katangi Station. The following day he was asked if he knew the complainant and he admitted that he was with them in the forest where they were three people. He however denied that he defiled her.

19. According to his evidence on 5th May, 2013 he met the complainant's mother who requested him to lend her 700/= for worms but since he only had 500/= he lent her the same after being promised that the same would be repaid in a week. However, the week passed without the same being repaid and the complainant's mother was not being straightforward with him. Instead, the complainant's mother invited him on 26th May, 2013 to go and sleep with him but he did not go. On 27th May, 2013 while he was going to work, he saw the complainant's mother at her gate and she called him and inquired why he did not go to her home and he told her that he was scared and instead asked for his money. The complainant's mother however told him that she would repay if he acceded to her request at which point the appellant threatened to disclose the mater to her husband. At that point the complainant's mother threatened to destroy him and after that he was arrested on 14 th June, 2013.

20. In cross-examination he said that by the time he and the complainant's grandmother took the cattle to drink, the complainant had already gone home. He stated that they were many men who were grazing.

21. In this appeal it is submitted by the appellant that from the evidence it came out that the complainant's assailant never saw the appellant coming and that he tied the complainant, sending her into a shock. This, coupled with the terrain, it was submitted could not rule out the possibility of the assailant being someone other than the appellant. It was therefore submitted that there was no proper identification of the perpetrator hence the prosecution failed to discharge its burden. The appellant also urged the court to reject the complainant's evidence which in his view lacked coherence.

22. The appellant submitted that though the prosecution could have proved its case beyond reasonable doubt by way of DNA report, the failure to do so renders the prosecution's evidence disapprobative and lacking in weight.

23. It was further submitted that since the author of the age assessment report who testified in the initial trial was not called when the hearing started de novo, the said report should be rejected. Without the said report, it was submitted that it is difficult to determine the exact age of the victim which could only have been proved by the production of the birth certificate.

24. The appellant submitted that in light of the discrepancies and contradictions between the initial trial and the subsequent one, the court should find that the case was choreographed by the prosecution side having realised that their case had collapsed.

25. It was submitted that the omission to call the complainant's grandfather ought to be taken against the prosecution case since he was the one to whom the immediate report was made.

26. It was submitted that by finding that the accused's defence had not created any doubt in the prosecution's case, the learned trial magistrate shifted the burden onto the appellant.

27. On behalf of the Respondent, it was submitted that there was opportunity by the complainant to see the appellant because after the defilement, the appellant had a conversation with the complainant when he told her not to report him. It was submitted that from the evidence, the appellant was with the complainant on the material day and that they were left together by PW4. The complainant's evidence was consistent that she was defiled by the appellant and the offence took place during the day. Since it was admitted by the appellant that he was with the complainant, this places him at the scene of crime.

28. As regards the defence by the appellant, it was submitted that the issues raised were an afterthought since they were not brought up in cross-examination and further, PW3 was called after PW1 had disclosed to others that she had been defiled. It was therefore submitted that the appellant's defence was a mere denial and that the learned trial magistrate's judgement was well reasoned and was supported by evidence.

Determination

29. I have considered the foregoing. Before dealing with the issues raised in this appeal, from the submissions made by both the appellant and the respondent, it is important to deal with the effect of the evidence adduced in the earlier proceedings before an order is made that the hearing starts de novo. **Mativo, J** in **Kenya Anti-Corruption Commission vs. Michael K. Gituto [2015] eKLR** while dealing with *de novo* hearing cited the case of **Kajubo vs. The State** and expressed himself as hereunder:

“Starting the case *de-novo* entails re-calling all the witnesses. "The Latin Maxim "*De Novo*" connotes a *'New', Fresh", a 'beginning', a 'start' etc.* In the words of the authors of *Black's Law Dictionary,*[2] *De Novo* trial or hearing means trying a matter a new, the same as if it had not been heard before and as if no decision had been previously rendered...new hearing or a hearing for the second time, contemplating an entire trial in same manner in which the matter was originally heard and a review of previous hearing. On hearing *'de novo'* court hears matter as court of original and not appellate jurisdiction. That a trial *de novo* could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter, or rather, in a more general sense, the parties are at liberty, once more to reframe their case and restructure it as each may deem it appropriate. The consequence of a retrial order or a *de novo* (a *Venire De Novo*), is an order that the whole case should be retried or tried a new as if no trial whatsoever has been had in the first instance.”

30. Similarly, in **Catherine Wanjiku Kagua vs. Chinga Tea Factory & Another [2016] eKLR** the same Judge expressed himself as hereunder:

“Trial *De novo* refers to a new trial on the entire case conducted as if there had been no trial in the first instance. *De novo* is a Latin expression meaning *"anew," "from the beginning," "afresh." De novo* is a Latin phrase for *“anew”* which means starting over.[1] *The Black Law Dictionary* defines a de novo trial thus:-

"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the instance."

The dictum of Ibrahim Tanko Muhammed, J.S.C in the Nigerian case of *Babatunde v Pan Atlantic Shipping and Transport Service[3]* is also apposite and is quoted verbatim thus:-

"The Latin maxim “De Novo” connotes a “New” “fresh” a “beginning” a “start” etc. In the words of the authors of Black Law dictionary, De novo trial or hearing means trying a matter anew, the same as if it had not been heard before and as if no decision had been previously rendered … new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. On hearing “de novo” court hears matter as court of original and not appellate jurisdiction… that a trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter or rather, in a more general sense the parties are at liberty, once more to reframe their cases and restructure it as each may deem it appropriate."

From the above definition, for a matter to be tried *de novo* would mean considering the matter *anew,* as if it had never been heard. The foregoing makes it clear that a *de novo* trial should examine the evidence before it afresh. Obviously since a retrial has been ordered and the case is to be heard *de novo*, the plaintiff must reprove his case as if there has been no earlier trial. It is crystal clear from the above authorities that the plaintiff must prove his/her case afresh though previous evidence in an abortive trial is admissible as long as the ends of justice are met. There is nothing one can add to the above explanation. The fact is very clear that a *de novo* trial must be started from the beginning as if a trial had never taken place and the matter decided on its merits. It is also clear that the expression *“new trial” trial de novo, ‘retrial’, ‘fresh hearing’, ‘trial a second time* all have the same meaning. Thus, it is my considered opinion that the appellant cannot rely on the earlier evidence but he must adduce fresh evidence and since the issue of liability was resolved I the test case, the only issue the appellant will have to adduce evidence is on the issue of assessment of quantum of damages.”

31. **Lesiit, J** on her part in **Julius M’mario M’mauta vs. Republic [2011] eKLR** found that:

“It is clear from the record of proceedings that after the order to have the case heard *de novo*, no prosecution witness was called. The term *de novo* means that the case was to begin afresh from the beginning. *Black’s Law Dictionary, Eight Edition* defines trial *de novo* thus:-

“A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance.”

After the learned trial magistrate declared that the case was to be heard *de novo,* it meant that the prosecution was to begin its case from the beginning. Since no evidence was called by the prosecution after the order for hearing *de novo* was made, the prosecution could not have established a *prima face* case on whose basis the appellant was called to answer the charge. The learned trial magistrate misdirected himself for finding a *prima facie* case was established without calling of any evidence. The learned trial magistrate also misdirected himself when he entered a conviction as the only evidence before him was that by the appellant. The appellant could not have adduced evidence against him. Infact, his defence was that he deemed the charge in the circumstances the entire trial was botched. The conviction entered against the appellant was unsafe and cannot be allowed to stand.”

32. The effect of an order for hearing *de novo* was explained by the Court of Appeal in **Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992** where that Court expressed itself as hereunder:

“Where the Court of Appeal has set aside a Judgement and ordered a fresh hearing de *novo* by a different Judge, the Judge has to apply his own mind to the matter and decide for himself what would be a fair and reasonable compensation but should not just reproduce the Judgement which had been set aside and increase it by a small sum to take account of inflation as to do so is impermissible and the Judgement not being his, is a nullity.”

33. From the foregoing decisions it is clear that once an order for hearing de novo is made the hearing must start afresh. Whereas pursuant to

the decision of the Court of Appeal in **David Mutune Nzongo vs. Republic [2014] eKLR** the failure to plead afresh is not fatal to such proceedings, it is clear that the evidence adduced in the earlier trial has no place in the judgement arising from the proceedings undertaken pursuant to an order for de novo hearing. Where therefore an accused person requests that a de novo trial starts pursuant to section 200 of the Criminal Procedure Code and that request is granted, the accused takes the risk that the prosecution will have another bite at the cherry and may reframe its case and restructure it as it may deem it appropriate. Where therefore the evidence adduced at the hearing de novo is inconsistent with the evidence adduced in the nullified proceedings, no party can fall back on the same with a view to impeaching the credibility of the witnesses.

34. That said, this is a first appellate court, as expected, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and draw its my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

35. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

36. 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.***

37. 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."**

38. In the case of **Kaingu Elias Kasomo vs. Republic** 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."**

39. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where the Court stated that:

> **"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)…proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."**

40. 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."**

41. In this case, PW1 testified that she was 14 years old. This was on 19th May, 2014. The offence was however committed on 14th June, 2013. From the judgement, the age of the complainant at the time of the offence was 13 years. The production of the said report was not objected to by the appellant. It is however contended that the same ought not to have been admitted since it was not produced by the author. In my view, in the absence of any objection to the production of the said report, the appellant cannot at this stage question its admissibility. Accordingly, the failure to call its author cannot be aground for making adverse inference in so far as the age assessment was concerned. Therefore, based on both the oral evidence and the documentary evidence, there was satisfactory evidence that the complainant was aged 13 years at the tile of the offence.

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

43. In **Chipala vs. Rep. [1993] 16 (2) MLR 498** the Malawian High Court held at 499 that:

> **"It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."**

44. As regards penetration, section 2 of the ***Sexual Offences Act*** defines "penetration" as:

> ***the partial or complete insertion of the genital organs of a person into the genital organs of another person.***

45. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

46. In this case, the complainant testified that she did not see the appellant approaching her. However, the appellant caught her, tied her with a sweater and laid on her. He then pushed her clothes up and it would seem that at this stage the complainant became unconscious. Though the record reads that the appellant defiled the complainant, defilement is a term of art and in such cases, it is important that the actual action that the accused did be recorded instead of recording the same in technical terms. In fact, later in her evidence the complainant stated that she did not know what the appellant did since she was shocked and passed out.

47. From the evidence of PW1, therefore one cannot find beyond reasonable doubt that the appellant inserted his genital organs into the genital organs of the complainant. Apart from PW1, there was no other evidence as what happened. However, PW5 who examined the complaint found that her clothes were torn and were bloodstained. While there were no injuries on her neck, head, abdomen and legs, there were tears on her labia though not in her vagina and there was no vaginal discharge and the exertional part of her vagina was also normal. However, there was bleeding.

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

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

49. Section 2 of the ***Sexual Offences Act*** provides that "indecent act" means an unlawful intentional act which cause 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. In this case from the evidence of PW1 as well as the that of PW5, it is clear that there was contact between part of the appellant's body and the genital organs of the complainant.

50. The nest question is whether the appellant was positively identified as the assailant. In this case, it is clear that the only evidence connecting the appellant with the commission of the offence was that of the complainant. The clear is clear that the evidence of the complainant, a minor, required corroboration. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction since section 124 of the ***Evidence Act*** makes this quite clear:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, 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.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** [Emphasis added]

51. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** the Court held that:

> **"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."**

52. The learned trial magistrate, after warning herself of the danger of convicting on the complainant's sole evidence, considered the evidence adduced by the complainant and found based thereon that she was a truthful witness since her evidence was consistent and clear. On part I have considered the complainant's evidence and I agree with the finding of the learned trial magistrate as regards the consistency and clarity of her evidence. I am therefore in agreement with the learned trial magistrate that it was safe to found a conviction based on the uncorroborated evidence of the complainant and that finding cannot be faulted.

53. The appellant however took issue with the fact that the burden of proof was shifted to him. He relied on the statement by the learned trial magistrate to the effect that:

> ***"I find that the accused's defence has not created any doubt in the prosecution's case. I therefore dismiss the defence herein."***

54. In **Nguku vs. Republic [1985] eKLR,** it was held by the Court of Appeal that:

> **"Quite obviously when analyzing the facts and the opposing evidence in a trial the individual facts and the assessment of the relative credibility of the witness thereon come first. It is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so. In this case Mr Menezes' contention regarding the second ground is borne out by the record of the judgment, which shows that the general conclusion was arrived at in advance of the individual analysis of the facts. We do not think that this point was fully appreciated by the learned judges of the High Court on the first appeal for after reciting ground two of the memorandum, which is similar to ground two in the one to this court, they said simply that on their own reading of the file and the judgment they took the view that the allegation was unjust in relation to it. If the course taken in this case is followed the point is almost bound to be taken on an appeal that the directions of this court's predecessor in Okethi Okale v Republic [1965] EA 558 at page 559, which was cited to us by Menezes and which we now set out,**
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> **'He submitted that the passage suggests that the learned judge first accepted the case for the prosecution and then cast upon the appellants the burden of disproving it or raising doubts about it. We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in Ndege Maragwa v Republic (10), where the trial judge had used similar expressions this court said:-**
>
> **"…. We find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution.**
>
> **Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, or course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different)."**
>
> **We think that the observations of this court in that case apply with equal force to the present appeal' have not been complied**

with.

It is true that in that case there had been an acceptance of the prosecution case followed by an indication that the burden was cast on the appellant to rebut it, which is not the complaint here, but we nevertheless think that the direction given in that case should always be observed."

55. In this case, the learned trial magistrate first set out the prosecution's case followed by the defence case. Thereafter, she proceeded to do what in her view must have been an analysis of the prosecution's case in which she made some findings as regards the proof of the ingredients of the offence. After making such findings, she proceeded to dismiss the appellant's defence. With due respect the consideration of the defence case after making findings as regards the prosecution case was improper. It amounted to analysing the prosecution case separately and in isolation and arriving at conclusions thereof. In so doing the learned trial magistrate fell in error.

56. However, as stated above, this being a first appeal, this court is entitled and obliged to analyse the and re-evaluate the evidence and arrive at its own conclusions. In this case it is clear that the appellant had an opportunity of committing the offence. Although he alluded to the fact that there were other people within the vicinity he never expounded on this and this issue was not put to the complainant. As regards his evidence against the complainant's mother, it is clear that the complainant mentioned the appellant at the earliest opportunity and there is no evidence that she had been in contact with her mother before mentioning the appellant.

57. Therefore, notwithstanding the manner in which the prosecution and the defence cases were considered I find that there was no miscarriage of justice. I have however found that penetration was not proved beyond reasonable doubt. In the premises 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.

58. As regards the sentence I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

59. I therefore sentence the appellant to serve 8 years' imprisonment which sentence will, pursuant to section 333(2) of the ***Criminal Procedure Code,*** commence from 14th June, 2013 since the record does not show that the appellant was actually released on bond despite the fact that he was admitted to the same.

60. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 22nd day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Appellant

Ms Mogoi for the Respondent

CA Geoffrey