REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NUMBER 89 OF 2017

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 793 of 2013, **C Kisiangani, RM** on 14th July, 2017)

1. NDAMBUKI MUTIE

2. M M N...APPELLANTS

VERSUS

REPUBLIC....................................RESPONDENT

JUDGEMENT

Introduction

1. The 1st appellant herein, **Ndambuki Mutie**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No 793 of 2013 with 2 counts. In the first count, he was charged with the offence of defilement contrary to section 8(1)(3) as read with section 8 of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of this charge were that on the nights of 25th day of December, 2012 and 26th December, 2012 he intentionally and unlawfully caused his penis to penetrate the vagina of FNM, a girl aged 15 years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006*** in that on the nights of 25th day of December, 2012 and 26th December, 2012 he unlawfully and indecently touched the private parts (vagina) of FNM, using his penis, a girl aged 15 years.

2. As regards the 2nd appellant, **M M N,** he was charged before the same Court in the same case with the offences of defilement contrary to section 8(1)(3) as read with section 8 of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that on the 27th day of December, 2012 and 26th December, 2012 he intentionally and unlawfully caused his penis to penetrate the vagina of FNM, a girl aged 15 years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006*** in that on the nights of 27th day of December, 2012 and 26th December, 2012 he unlawfully and indecently touched the private parts (vagina) of FNM, using his penis, a girl aged 15 years.

3. After hearing the Learned Trial Magistrate found that the offence of defilement as against both appellants was proved beyond reasonable and they were convicted accordingly. The Learned Trial Magistrate proceeded to sentence the 1st appellant to serve fifteen (15) years in prison while the 2nd accused who was a minor at the time of the commission of the offence was sentenced to serve three years' probation.

4. Not being satisfied with the conviction and sentence the appellants have lodged the instant appeal based on the following grounds:

> **1. The Trial Court erred in law and fact by convicting the appellants when the case against them had not been proved beyond reasonable doubt.**
>
> **2. The Trial Court erred in law and fact by convicting the appellants in the absence of evidence to prove that the complainant was a minor.**
>
> **3. The Trial Court erred in law and fact by conducting the trial in a manner which violated the Appellants' constitutional rights to a fair trial.**
>
> **4. The Trial Court erred in law and fact by ailing to find and hold that the Prosecution's evidence was full of doubts which doubts ought to have been resolved in favour of the Appellants.**
>
> **5. The Trial Court erred in law by dismissing the Appellants'' defence and shifting the burden of proof to the Appellants.**

6. The Trial Court erred in law and fact by failing to find and hold that the Prosecution evidence did not support the charges facing the Appellants.

Prosecution Case

5. At the hearing of the case the prosecution called, as PW1, **F N M,** the Complainant herein. According to her she was staying in [Particulars Withheld] Children's Home in Kathiani District and at the time of her testimony she was due to go to Form 3 the following year. She disclosed that she knew the 1st appellant herein, **Ndambuki Mutie**, having stayed at his home in the years 2011 till 25th January, 2013 though they were not related. She said that she stayed with the 1st appellant because her parents were unable to afford her school fees despite being a top pupil in primary school. She testified that as a result, the wife of the 1st appellant, **Cornelia Mwaka**, who testified as DW3, was her teacher and who had become close to her and whom she considered to be her guardian, asked the Complainant to go and live with her in order for the said teacher to provide her with school needs. Prior to this, she used to assist the said teacher in cultivating her land and as a result the bond between them became close. After seeking her parent's views, she accepted the said teacher's request as her parents knew the teacher though they were from different villages. She accordingly went to stay with the said teacher on 27th September, 2011 till she did her KCPE in 2012. During the said period she was treated as **Cornelia's** child.

6. The Complainant testified that the said **DW3,** had 3 children, the 2nd appellant herein, **M N M**, **M N** and **M N**. The 1st appellant also lived with them.

7. The Complainant testified that on 25th December, 2012, DW3 went to Masii Market. The Complainant went to sleep at 7.45pm with **M N,** the last born who was in Class 4 with whom she was sharing a bedroom though they had separate beds. While the Complainant, the 1st appellant, **DW3** and **M N** were sleeping in the main house, the 2nd appellant, had his own house separate from the main houses which he shared with the 2nd born, **M N**.

8. It was her evidence that by the time she went to sleep, **DW3** had not returned though she was not aware when she returned. According to her, she was in the house with the 1st appellant and **M N**, the 1st appellant being in the sitting room at the time she went to sleep. When the Complainant woke up at 5.00 am on 26th December, 2012, she felt pain in her private parts and found the 1st appellant in her bed naked, asleep. Her attempts to talk to him, using the word "daddy" were fruitless as he did not respond. Upon turning the Complainant found herself without her underpants, saw blood on her petticoat and on the bed. According to her when she went to sleep, she had her petticoat, inner pants and a sweater on but in the morning her petticoat and underpants had been removed and the petticoat was on the bed.

9. The Complainant then went to the room where **DW3** was sleeping and narrated what had happened but was informed by **DW3** not tell anyone. She then went to relieve herself in the toilet outside the house and upon returning she did not find her petticoat. During this time she was having pain in her private parts. That day, she stated, she did not go outside.

10. It was her evidence that the 2nd appellant knew what the 1st appellant had done to her since she heard them speaking about the issue after lunch when the 1st appellant informed the 2nd appellant that he had given the 2nd appellant a chance to do whatever he wanted with the Complainant to which the 2nd appellant replied that he would do what the 1st appellant did. In her evidence she had left the two appellants and **M** in the sitting room when she heard the said conversation and she knew the 1st appellant's voice.

11. The Complainant further testified that on 27th December, 2011, the 1st appellant and DW3 left the house and she was left with the 2nd appellant and **M** while the 2nd born was riding a bicycle on the road. At 7.00pm while **M** was playing and the 2nd appellant was cleaning the sitting room, the Complainant came from the bathroom, next to her bedroom and as the bedroom door was faulty she did not lock it. While applying oil, the 2nd appellant went in, held her hand, took a piece of cloth and covered her mouth, pushed her onto the bed and inserted his penis into her vagina. In her evidence, her attempts to push the 2nd appellant away did not succeed as she was overpowered by the 2nd appellant. After defiling the Complainant, the 2nd appellant ran out of the room and locked it from the outside. Upon the return of **DW3**, the Complainant heard her asking the 2nd appellant the whereabouts of the Complainant and was informed that she was asleep and it was not until 8.00pm when **M** went to sleep that her room was opened. She however continued sleeping till the next day when she informed **DW3** about the incident but was once again informed to keep quiet. The Complainant thereafter stayed indoors till 14th January, 2013. In the meantime. She missed her periods but was informed by **DW3** that this was normal. **DW3** however told her and the 1st appellant to go to a chemist at Masii which had a clinic while **DW3** went to the saloon. At the chemist, the Complainant's urine samples were taken and they left and went to pick **DW3** from the saloon and returned home.

12. The Complainant testified that on 17th January, 2013, **Mr** and **Mrs Ndambuki** informed her that she would go somewhere and she with the 1st appellant went back to the said clinic operated by a **Dr Ken** where she was treated as a patient, injected on her buttocks though she was not feeling unwell. She then felt drowsy and fell asleep. When she woke up, she found that some cotton had been placed in her vagina which the said doctor told her to remove the following day at 1.00pm. She was then given some tablets to take upon reaching home. According to her she did not see any hospital records and did not sign any document at the clinic. However when the Complainant went to the pit latrine, the cotton wool dropped into the toilet and she saw some liquid dripping from her vagina. She however did not disclose this to anyone.

13. The Complainant testified that on 18th January, 2013, the 1st appellant asked her whether she saw anything but she replied in the negative after which she heard him call **Dr Ken** and relay the information to him and asked **Dr Ken** to come. On 19th January, 2013, the Complainant was informed that she would go back to see **Dr Ken**. She however testified that on 17th January, 2013, she had been given some tablets by **DW3** to take but she did not take them but threw them outside. On 20th January, 2013, the Complainant was taken back to **Dr Ken**, for the third time, injected and given some tablets but once again she did not swallow the tablets. She however took the one tablet she was given at the clinic by **Dr Ken**.

14. According to her, on 22nd January, 2013, the Complainant was in the sitting room with the 1st appellant, **M** and **DW3** when during supper, the 1st appellant served food on one plate and told her to take it to his mother. When she returned, **M** tried to take some food but was warned not to do so. Being suspicious, the Complainant informed the 1st appellant that she had eaten at his mother's house after which the 1st appellant took the food and threw it outside.

15. According to the Complainant she decided to do something. So on 25th January, 2013, when she was cleaning a thermos flask the same fell down and broke. Despite that she was not sent away. She then took all her clothes and went to sleep in the 1st appellant's mother's house and the following day went back to her parents but only found her grandmother there. However because of the threat made to her by **DW3** that she would die if she revealed what had happened to anyone, she did not reveal this to her grandmother. When the results of KCPE came out on 27th January, 2013, she was the top student with 345 marks but she decided to repeat so that she could obtain higher marks despite having been called to V Girls. However her mother went to collect her from school as the community had decided to pay her fees. On 11th April, 2013, she disclosed to the Principal of V Girls what had happened to her at the accused's' home. The Principal then called the mother and was told to report the matter to the Chief, **Salome Mutisya**, which they did on 14th April, 2013. The chief then summoned both the family of the Complainant and the **Ndambuki's** family and in the company of her parents and the Chief, the Complainant made a formal report with the police on 23rd April, 2013 at Masii.

16. According to the Complainant, since the time of the defilement she had not received her periods and suspected that she was pregnant. After leaving the office of the Chief, the Complainant and her mother went to Masii Hospital where her urine samples were taken but she was not informed of the results. However the Chief informed her that she was pregnant.

17. According to the Complainant she stayed at home till 26th June, 2013 during which period she was feeling stomach pains and blood was coming from her vagina. She was then taken to Masii Hospital and was referred to Machakos General Hospital where she went on 27th June, 2013. In the evening an ultra sound test was done and she was informed that the baby was dead. She was later discharged on 5th July, 2013 and was taken to the Rescue Centre. According to her she had been discharged on 30th June, 2013 but due to non-payment of the bill she stayed in hospital till 5th July, 2013. On 8th July, 2013 she was taken to Machakos Police Station where she recorded her statement and in September, 2013, she went back to school.

18. The witness identified the appellants as the persons who committed the offence against her and stated that she was 14 years old.

19. In cross examination, she maintained that her age was assessed and she was at the time of the incident 14 years though at the time of her testimony she was 16 years old. According to her she was molested by the appellants. According to her, the bed she was sleeping on was big and she was not sharing it with anyone as **M** had his own bed. Although she tried waking up the 1st appellant, he was asleep but she did not scream. Instead she walked out without checking whether **M** was in his bed. She insisted that her petticoat was bloody but was not taken for examination and she was not aware where it was. In her testimony the 1st appellant was wearing a vest and a short though she could not recall the colour and did not look at them to see whether they had blood.

20. According to her she heard the conversation between the appellants in the sitting room as she knew their voices. Asked further, she said that the 1st appellant was naked and suspected that she had been drugged as she never witnessed anything and did not witness the 1st appellant undress her or himself or having sex with her and did not feel anyone inserting something in her vagina. She reiterated that though the 2nd appellant was not on her bed the following morning, the 1st appellant was on her bed naked and her petticoat had blood while she felt pain in her vagina.

21. She repeated that on 27th December, 2012, at 7pm the 2nd appellant found her spreading oil on her body in her bedroom, inserted is penis into her vagina and defiled her while they were alone, and though she screamed, the 2nd appellant covered her mouth. According to her, the 2nd appellant's grandmother stays a distance from the appellant. She could not however remember the colour of the clothes the 2nd appellant had on. Though she was informed by her mother that she was born in 1998 her age assessment indicated she was 15 years though she had not seen either her birth certificate or notification of birth. She disclosed that she started receiving her periods in 2011 when she was 13 years old. According to the Complainant, the blood she saw on 25th December, 2012 were not her menses which used to come for 3-4 days a week and not just once and she had never felt that painful since she started her menses and had never seen any blood stain on her petticoat. In her view if it was her period, it would have continued for several days. She however admitted that she neither knew her blood group nor that of the 1st appellant though she saw a doctor take the 1st appellant's blood sample. She was however never informed by the doctor whether the 1st appellant's blood or spermatozoa were found in her private parts though she admitted that she went to the hospital after a long time in July, 2013. Between 26th December 2012 and 31st December, 2012, she did not go to the Hospital but went in January when the urine test was done.

22. While the P3 form indicated that she was pregnant, she however did not carry the pregnancy to full term. The Complainant disclosed that she saw the foetus of the baby that she miscarriaged. She conceded that she did not report the incidences to the police from December, 2012 to April, 2013 since she had been threatened that she would die if she revealed what had happened by **DW3** until she gained courage.

23. In re-examination, the Complainant said that she did not know why **M** did not record his statement. She revealed that she was shocked to find the 1st appellant naked on her bed. She however did not scream when she was being defiled by the 2nd appellant because she had her mouth was covered with a piece of cloth. In her evidence the petticoat was not taken by the police because after informing **DW3** of the incident she went to the toilet and upon coming back she neither found the 1st appellant nor the petticoat despite searching for it. She maintained that she never shared the bed with him though when she woke up, the 1st appellant was in the bed yet he was not supposed to be there and the blood in her private parts was not her monthly period. It was her evidence that she had never seen the whitish substance in her vagina. According to her the reason she kept quiet was because of the threat by **DW3** that she would die. She however gained courage when she joined form one since she was still traumatised.

24. The Complainant was emphatic that she knew both the appellants well before the incident since she had lived in the same house as them.

25. PW2 was **V W**, the Complainant's mother. According to her, she was informed by the head teacher of V Secondary School, where the Complainant was studying in Form One that her daughter, the Complainant, was sick. When she went to the School she was told by the said teacher to go home with the Complainant as she was pregnant. Accordingly, PW2 collected the Complainant's properties and went with her home but the Complainant continued feeling unwell. They then went to the Chief, though the Complainant had already gone to the Chief. From the Chief, they went to the Hospital after they had been told by the Chief to discuss the matter with the people at home.

26. According to PW2, it was the Chief who reported the matter to the police. She testified that she took the Complainant to Masii Health Centre after which they were referred to Machakos Level 5 Hospital where she was examined and it was found that the foetus had died in her womb. This was in June, 2013, by which time she had already recorded her statements. She however disclosed that she did not know who impregnated PW1.

27. PW3 was **Salome Muthoki Muthisya**, the Chief for Masii Location to whom the Complainant reported on 16th April, 2013 at 3.00pm saying that she had been suspended from school due to pregnancy. According to the Complainant's report she was staying with **Mr and Mrs Ndambuki** at their home since 2011 when she was defiled by the 2nd appellant, a son of the 1st appellant. According to the witness, the Complainant informed her that she had requested **DW3**, who was her teacher to stay with her in order to enable her study at night since her parents could not afford paraffin.

28. The witness then informed the Complainant go back with her after which they were referred to Masii Hospital since the Complainant informed her that she was pregnant which was confirmed when the test was done. Upon seeing the report of the test, she said that she referred them to Masii Police Station.

29. According to PW3, she knew the Complainant since they lived in her area. She also knew the people who were alleged to have defiled her and he identified them in Court.

30. In cross-examination PW3 disclosed that she had known the appellants for 17 years and had known the 2nd appellant since he was born. She revealed that the Complainant had in fact informed her that she had been defiled by both the appellants though she had forgotten to name the 2nd appellant in her earlier evidence. According to her, she did not write all the details in her statement and while she said that she went to the police station with the Complainant and her parents, she denied that she went with **Kilonzo Musyoka**. According to her she had no licence to authorise the burial of a foetus and did not carry the pregnancy report as the Complainant just reported the defilement to her and she could not link the appellants to the offence.

31. In re-examination, the witness testified that the Complainant informed her that she was pregnant and had been defiled by the appellants but she forgot to mention the 2nd appellant's name in her evidence in chief. This information, according to her, was from the Complainant. However since she was not the investigating officer, she could not say if the appellants committed the offence.

32. **Dr John Mutunga** from Machakos Level 5 Hospital, was called as PW4. He was called to produce the P3 form which was filled in by **Dr Mule** who had been transferred from the Station but whose handwriting and signature he was conversant with.

33. According to the said P3 Form, the allegation was that the Complainant had been defiled by two people on 25th and 26th December, whereby she conceived and at 26 weeks of gestation she expelled a dead foetus after complaining of vaginal bleeding. However her external genitalia was normal though she was bleeding from her vagina. According to the report, the Complainant's injury was classified as harm.

34. Apart from producing the P3 Form, the witness also produced the age assessment form, the x-ray request form from Machakos Level 5 Hospital and the Hospital notes. The assessment was done by **Dr Kiragu** with whom the witness worked for one year and was familiar with his handwriting and signature. According to the age assessment report, the Complainant was 14 years.

35. The witness disclosed that **Dr Onzere** was a consultant and that the final diagnosis was intra uterine fatal death and that the Complainant had fresh blood from the vagina. According to him, there was abdominal no pain and that the ultra sound confirmed that the foetus inside her was dead and she was put on medication and the dead foetus expelled together with the placenta without bleeding. At the time of the discharge, the Complainant had no complaint and she was put on medication. However before the discharge, the Children's officer was informed and she signed.

36. In cross examination, PW4 disclosed that he neither met nor examined the Complainant but just came across her discharge summary. Similarly, he had not looked at her treatment notes and did not peruse her hospital records. He stated that the P3 Form was issued at Masii Police Station on 18th July, 2013 and the Complainant's age was assessed at 15 years while **Dr Mule's** report gave her age as approximately 16 years. In his evidence one cannot assume varying ages in 1 year. However the age of the injury and probable type of weapon was not given. Nor was prior treatment indicated and there was no conclusion in Part C and some parts of the Form were left open. According to the witness **Dr Mule** had not been summoned to Court. In his testimony doctors do use initials when the work load is heavy. He however admitted that the discharge summary from Machakos Level 5 Hospital did not have the name of the maker and that he 1st part and last parts of the document were different and he was unable to tell whose handwriting it was. While the witness had no ultra sounds films, he had the reports. He however averred that he did not take blood samples from the appellants. In his evidence, dead foetus was expelled and taken to the mortuary and he was unaware of blood samples from the foetus were taken.

37. Asked about the whereabouts of **Dr Mule**, the witness averred that she was at Athi River District which is within Machakos but he did not make any attempt to get in touch with her. While he disclosed that **Fatuma** was still at the Hospital, he did not know if the police went looking for her.

38. In re-examination, the witness explained that the first part of the P3 Form was filed in at the Police Station by a police officer and that the dental formula of the Complainant, the complainant was done scientifically and the age was indicated as 14 years. In his view, the scientific evidence supersedes the information in the P3 Form. According to the witness, he had worked with **Dr Mule** and in his view **Dr Mule** was a competent and qualified doctor having worked with her for 4 years. He however admitted that the P3 Form was not complete though the doctors only fill in necessary parts and that the fact that some parts are incomplete does not render the form incomplete.

39. According to the witness the discharge summary bore the unit number which could be verified and that the name of the Consultant was **Dr Onzere** with whom he had worked. He averred that that was the format of the discharge summary and that the treatment notes are made at the end or special attention noted since the said notes are in the file. In this case the discharge summary was filed in by **Fatuma**. According to him, a Consultant mans the unit working with 50 people and it is these 50 people who fill in the discharge summary due to the workload. On the other hand the information is obtained from the patient's' file filed by the doctor treating the patient. According to him, Clinical Officers summarise the treatment notes in the discharge summary. He testified that he was familiar with **Fatuma's** handwriting though he did not know what happened to the foetus.

40. **Carolyn Njoki Wamae**, was PW5. According to her she was formerly with the Government Chemist Nairobi. On 2nd July, 2013 at the Laboratory of the Government Chemist, samples were taken by **PC David Mbugua** of Masii Police Station and these samples were a blood sample marked A1 of the 1st appellant, A2 of the 2nd appellant, C belonging to the Complainant and D belonging to the foetus. Upon analysing the same and generating DNA samples, she tabulated the results in her report. According to her every person inherits ½ of DNA from the mother and ½ from the father hence it is possible to establish elements of the DNA from the mother and the father.

41. From the said profiles, the witness concluded that there were 99.99% more chances that the 2nd appellant was the father of the foetus. She however excluded the 1st appellant from being the father of the foetus and prepared her report which she produced in evidence.

42. In cross-examination the witness, apart from stating her qualifications, averred that when samples are taken they do not know whose samples they are as they are only given blood samples. She testified that in line with international way of reporting in any DNA report, every finding giving analysis on parents is 99.99%. In this case the blood samples were taken ½ each from the father and the mother according to the paternity index.

43. In re-examination, the witness reiterated that when samples are taken to the Government Chemist the analyst does not know the party and they just go by the police memo.

44. PW6 was the Investigating Officer**, PC Moses Mathenge** who testified that on 23rd April, 2013 he was in the office when then OCS **Mbogu** allocated the case to him for investigations. According to him a report had been made by the area Chief, one **Salome Mutiso** in the company of the Complainant who was 14 years at the time in the company of her parent. However as he was going on leave, he did not immediately investigate the matter. Upon his return on 1st July, 2013, the OCS informed him that the Complainant was admitted at Machakos Level 5 Hospital having pregnancy complications. He then went to the Hospital and interrogated the Complainant who informed him that on the night of 25th and 26th December, 2013, she was defiled by the 1st appellant while living with the family of the appellants. On 27th December, 2013, while still living with the appellants she was also defiled by the 2nd appellant who was the 1st appellant's son. Thereafter the witness summoned the 1st appellant to the station who went with the 2nd appellant and they were requested to donate their blood samples for DNA analysis since the Complainant had already delivered a dead foetus.

45. According to the witness on 8th July, 2013 he formally recorded the Complainant's statement and from her statement, he could not tell who fathered the foetus which was by then in Machakos Mortuary. On 7th July, 2013 he took both the appellants to Machakos Level 5 Hospital where their blood samples were obtained for DNA test as well as from the Complainant and the foetus. These samples were later taken to the Government Chemist for analysis. The witness also recorded statements from other witnesses and later both the appellants were arrested and charged.

46. According to the witness he got the report from the Government Chemist which showed that 99.99% were probable chances that the foetus was sired by the 2nd appellant. He also issued the Complainant with a P3 Form which was filled in at Machakos Level 5 Hospital.

47. In cross-examination, the witness testified that on 23rd April, 2013 the Chief, the victim's father, **Mutinda Musyoka** and **Wayua Musyoka** were the ones who made the report, though the witness was not the one who recoded their statements since he was not there when they made their statements. According to him their statements were recorded by **Inspector Ngao**. He however stated that the person named in the OB was the 1st appellant as his name was indicated.

48. The witness reiterated that according to the report, the Complainant did not hear or feel anything. He stated that the victim was a minor and was taken for age assessment. In his evidence the incident of 25th and 26th December, 2012 was not in the OB. He however could not tell whether the victim was drugged.

49. The witness confirmed that blood was obtained from the foetus in his presence. In his evidence blood samples can be taken to the Government Chemist by any person and it is not mandatory that the Investigating Officer accompany the same and in this case they were taken by PC **David Mbugua** though he was the one who wrapped them with **PC Mbugua.**

50. According to him, he indicated the age of the victim as 15 years in the P3 Form. He however estimated the age of the victim to be 16 years. As a result, he took the victim for age assessment and she was assessed to be 14 years though the victim had informed him that she was 15 years. However, due to the time lapse, the clothes could not have any evidence.

The Defence Case

51. At the close of the prosecution case, the appellants were placed on their defence.

52. According to the 1st appellant, who gave sworn testimony, he knew the Complainant who asked to stay at his home as she went to school so that they could assist her as she had a lot of problems at home. It was his evidence that the Complainant stayed with them for 1 year and 3 months and in 2013, the Complainant had differences with the 1st appellant's wife, **Cornelia Ndambuki**, because she was breaking utensils and his wife told the Complainant to pack and go to her home. However, instead of leaving, the Complainant forcefully went to stay in the 1st appellant's mother, **Nthemba Mutie's** house. He testified that at around 7pm his mother went to his house which is 100 metres from hers and informed the 1st appellant's wife that if she sent the Complainant away she would shame her where she taught. To him, it was the Complainant who told the 1st appellant's wife that she would shame his wife at the school and ensure that she was sacked. However, the following day, the Complainant went back to her home.

53. He testified that after 2 days they got word that the Complainant had pretended to be mad and in April, 2013 he got a letter from the Chief summoning him but he did not know the reason. Upon going, he found the Complainant with 10 elders while his side had 7 elders and the Complainant was told to repeat what she had said the previous day when she was accompanied by **Mwangangi** and **Muloba**. When asked whose pregnancy it was, she said she did not know but said that when she went to the 1st appellant's bedroom she heard the 1st appellant and his wife saying that they would kill all the 1st appellant's colleagues and their best couple, **Benson** and **Joyce**. Previously, the Complainant had said she wanted assistance since the pregnancy was either the 1st appellant's or his son's which according to the 1st appellant was untrue. The Chief then referred them to settle the matter at home and they agreed with the elders on the date of the meeting. He went with 4 elders and when the elders from the Complainant's side insisted on payment for the expenses incurred by the Complainant, he refused and asked that DNA test be conducted and they left. According to him, the Complainant had said that he was the father of her unborn child.

54. Later he was arrested and after his finger prints were taken he was charged. In his view the charges were a way of getting back at him, ashaming him and undermining his marriage and to cause him to lose his job. In his evidence, he never shared a bed with the Complainant.

55. In cross-examination, the 1st appellant disclosed that they stayed with the Complainant as their child for 1 year and 3 months and the disagreements were in 2013. She averred that on 25th and 26th December, 2012, she was with his wife and children at home and that the complainant slept in a room with 2 children.

56. In re-examination she insisted that the charges against him were false.

57. The 2nd appellant who testified as DW2 gave an unsworn evidence in which he stated that the charges were untrue. According to him, the Complainant lived in their house as their sister for 1 year and months and started breaking utensils when his mother told her to go away. Instead she went to his grandmother's house and left the following day after the grandmother informed his mother that the Complainant had threatened to spoil the mother's name at the school where the mother taught.

58. The 2nd appellant stated that the Complainant reported the matter against him in order to pay back as a result of being chased away from their home since she had said that she would stay there until she got married. In his evidence, the Complainant lied

59. **Cornelia Ndambuki** testified as DW3. According to her she was the wife of the 1st appellant and the mother of the 2nd appellant. She admitted that she knew the Complainant who requested for her help due to the problems she was facing at home and after persistence, she accepted that the Complainant could stay with her as her parents had permitted her to do so. Accordingly the Complainant stayed with her from September, 2011 to January, 2013 when she left her home and went to back to her home.

60. According to DW3, she was staying alone with her younger son as her 2 children were in boarding school while the youngest was in class 2. In her evidence, they agreed to help the complainant so that their young child could get company when from school.

61. According to DW3, in 2012 when the Complainant was in class 8, DW3 went to her home in Malindi and asked the Complainant to go to her home first because DW3 was not comfortable leaving her with the boys and asked her to come back after the return of DW3. However, the Complainant refused as she said that since she had never travelled, she wanted to go with them. DW3 then asked her to seek her parents' consent and the parents agreed and they went to Malindi and came back.

62. In her evidence, she heard of these charges in April, 2013 when they were summoned by the area Chief. In her evidence the charges were untrue as on the days of the alleged defilement, Christmas day and 26th December, 2012, she was at home with the boys and her family all the day and night together with the Complainant.

63. It was her evidence that their house was 3 bedroomed with a veranda and a sitting room and the Complainant slept in one of the said rooms while the boys had their house outside. According to her, on 25th December, 2012, he was with the 1st appellant and they went to church then celebrated at home. The 1st appellant later went to the market to meet his friends and returned at 1.00pm and upon return, he slept in their bedroom. On 26th December, 2012, he again slept in their bedroom and on 27th December, 2012, the 2nd appellant was at home as well as the Complainant. In her evidence she did not notice anything abnormal till they slept. According to her, she did not know why the Complainant lied, though she admitted that she differed with her one day.

64. It was her evidence that she had told the Complainant to return home after her KCPE but she refused saying that since DW3 had boys, she was hoping to get married to one of them and because of this the Complainant started being spiteful. According to her, they would leave her at home and would find her having broken utensils and refused to talk to DW3. As a result DW3 told her to pack and go home but though she initially refused, upon DW3 threatening not to give her accommodation she went to sleep at her mother in law's house and left in the morning. She revealed that the mother in law informed her that the Complainant had threatened that she would make both of them lose their

jobs. In her view this is what motivated her to bring the charges. She however denied having taken the Complainant to the Hospital to abort.

65. In cross-examination, DW3 stated that she lived with the Complainant as her daughter upon the parents giving their consent. She however said that she informed PW1's mother that she was tired living with the Complainant. She denied that she was trying to hide something and stated that the allegations were false. She however admitted that the Complainant was pregnant and that DNA was conducted which showed that the baby was her son's. She however denied that the Complainant and her son had a relationship. In her evidence the Complainant was 13 years when she was living with her though she did not know when she was born.

66. DW3 stated that the Complainant stayed with her for 1½ years. She admitted that the 2nd appellant was said to be the father of the child and that before the Chief, the Complainant was said to have been defiled by her son. DW3 revealed that she had been married to the 1st appellant for 22 years and disclosed that the 1st appellant took alcohol. She disclosed that the 1st appellant went away from home on 25th December, 2012 and came back home while drunk and they both slept. In her evidence, she confirmed that her husband, the 1st appellant was in the bed at night. According to her, the big boys had their house while the Complainant slept with the youngest son. She insisted that the 1st appellant was in bed throughout the night as he did not leave the room at night while she was sleeping. According to her the Complainant lied as she did not take her to hospital to procure an abortion.

67. According to DW3 at her age, it was not unusual for the Complainant to know about abortions. She however did not inform the Complainant's parents that the Complainant wanted to get married to her son and did not inform the head teacher that the Complainant wanted to get married. DW3 however admitted that the Complainant was a top student in her class. On further cross-examination DW3 stated that the Complainant did not tell directly that she wanted to get married but that she told someone else who informed her. Pressed further, she insisted that the Complainant said she wanted to get married. She however reiterated that the Complainant had sought her help so that she could study.

68. In re-examination, he she said that they did not handcuff themselves while sleeping and re-affirmed that the Complainant never told her that she wanted to get married. She however confirmed that she was there when the DNA report was brought and that it was signed in Court. According to her the Complainant was never defiled by the 2nd appellant.

69. DW4 was **Esther Nthambi Mutie** the mother to the 1st appellant and the grandmother to the 2nd appellant. According to her the Complainant was staying in her home but in the 1st appellant's house since she was living in the 1st appellant's home. According to her when the Complainant went to their home, the 1st appellant took care of her and she used to take to her while she was at their home.

70. She disclosed that before the Complainant left she had differences with DW3, her daughter in law and the Complainant informed her that she would spoil DW3's name and make her get sacked. According to her she heard people talking about this when she was passing by. In her evidence the charges against the appellants were false and malicious as the Complainant was not defiled by the appellants.

71. In cross-examination, she admitted that she loved the appellants and could not allow anything bad happen to them though she insisted that she could not give false testimony due to her fear of God. She however admitted that she did not know what fabrication it was since he was not there.

72. In cross-examination she insisted that the appellants did not sleep with the Complainant since she was living with them.

73. At the end of the trial, the Learned Trial Magistrate found that the prosecution had proved the critical ingredients of the offence of defilement i.e. the age of the complainant, penetration and that the offence had been committed by the appellants. In her judgement, the Learned Trial Magistrate found that though in most cases penetration is proved by testimony which may be corroborated by medical evidence. Based on the decision in **Fappyton Mutuu Ngui vs. Republic Machakos High Court Criminal Appeal No. 296 of 2010**, she found that absence of medical evidence does not ipso facto mean that there was no penetration. It was the Court's view that since a long time had lapsed between the date of the defilement and the time when the matter was reported to the police, no medical evidence of penetration would have been found. However based on the testimony of the Complainant, the Learned Trial Magistrate found that the complainant was able to prove that she was penetrated based on her consistent testimony. In arriving at this finding the Learned Trial Magistrate relied on section124 of the ***Evidence Act***. The Court proceeded to find that the 1st appellant was well known to the complainant and they lived in the same house hence there was no reason why the complainant would lie against the appellants. Accordingly she found the 1st appellant guilty of the offence of defilement.

74. As regards the charge against the 2nd appellant, she found that there was penetration since without penetration, the complainant would not have become pregnant. It was also found that the DNA report proved that the 2nd appellant was the one who penetrated the complainant. She however was of the view that even without the DNA report, based on section 124 of the ***Evidence Act***, she would still have convicted the 2nd appellant of the evidence of the complainant alone.

75. Accordingly the appellants were convicted as charged in counts 1 and 2 and sentenced accordingly.

76. It was submitted on behalf of the appellants that the evidence adduced by the Respondent was insufficient to sustain the charge of defilement where the Respondents is statutorily bound to prove all the ingredients of the offence in order to secure a conviction. According to the said submissions, the age of the Complainant was not proved beyond reasonable doubt since neither the certificate of birth not the notification thereof was produced. Instead reliance was placed on the P3 Form and a purported age assessment all of which were conflicting. In any case the same were not produced by the maker thereof. In this respect the appellants relied on the Court of Appeal decision in Criminal Appeal No. 504 of 2010 – **Kaingu Elias Kasomo vs. R** where it was held that in criminal proceedings there is no room for assumptions, speculations or estimations.

77. It was further submitted that the prosecution failed to prove that the appellants penetrated the Complainant as defined under section 2 of the ***Sexual Offences Act***. It was submitted that as regards the 1st appellant there was no evidence that he penetrated the Complainant. In this regard the appellants relied on Machakos High Court Criminal Appeal No. 60 of 2014 – **Julius Kioko Kivuva vs. R** where it was held that the evidence of sensory details, such as what the victim heard, saw, felt and even smelled is highly relevant to prove penetration. It was submitted that the P3 form indicated that no injuries were noted while the Complainant's labia majora, labia minora, vagina and cervix were found to be normal as no injuries were seen. It was submitted that had the Complainant been defiled, conceived and expelled a dead foetus, her genitalia, and in particular the vagina and the cervix would show such evidence.

78. It was submitted that there was no evidence to support the finding that the Complainant was penetrated on 25th December, 2012 by the 1st appellant and on 27th December, 2012 by the 2nd appellant since the Complaint could not tell exactly what happened to her on 25th December, 2012 as she only mentioned pain in her private parts without being specific on the name. It was submitted that according to the charge sheet the complainant is alleged to have been penetrated on 25th and 26th December, 2012 while the 2nd appellant is alleged to have penetrated her on 27th December, 2012 while the statement to the police talked of September, 2012. Further, it was submitted that PW6's evidence was that no report was made to the police concerning the alleged defilement of the Complainant on 25th, 26th and 27th December, 2012. It was therefore submitted that there was no basis for charging the appellants with the offences which were allegedly committed on the said dates. It was submitted that the Trial Court failed to properly evaluate the evidence on record.

79. It was submitted that the trial Magistrate misdirected herself by purporting to rely on an unauthenticated DNA Report whose production in evidence had been objected to by the Appellants.

80. On its part, the Prosecution, the Respondent herein, opposed the appeal in respect of the 2nd appellant though it conceded the 1st appellant's appeal. In its submissions the Respondent relied on **Peter Kiio Kyuli vs. R [2015] eKLR**, and submitted that as regards the evidence against the 1st appellant there was no evidence that the pain the Complainant felt was as a result of penetration and there was no evidence that she had been drugged. It is however trite that a mere concession by the State does not automatically lead to the decision of the lower court being upset. This court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence".**

81. It was however submitted that the age of the Complainant was proved and the DNA report clearly corroborated the Complainant's evidence that she was penetrated by the 2nd appellant.

82. I have considered the material placed before the Court. 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.**

83. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

84. However, it must be stated that there is no format set for a re-evaluation of evidence by the first appellate court to which it should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya vs. Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko, JSC said at 11:**
>
> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

85. During the trial in the lower court the prosecution called 6 witnesses. Briefly their evidence was as follows:

86. Due to family difficulties which the Complainant was facing at home, DW3 took her in in order for the Complainant to have a conducive environment for studies. Accordingly, the Complainant was treated as a child of the family and was assigned one of the bedrooms

in the house which she shared with DW3's youngest son but in different beds while the two other sons of the family were sleeping in a house outside the main house.

87. On 25th December, 2012, DW3 had gone to Masii Market and the Complainant was left in the Company of the 1st appellant and his youngest son. By the time the Complainant but in different beds. By the time she went to sleep, the Complainant testified that DW3 had not returned while the 1st appellant was left in the sitting room. However when the Complainant woke up in the morning on 26th December, 2012, she found the 1st appellant sleeping on her bed naked and though she had gone to sleep with her pants and petticoat and a sweater on, she only had the sweater on while her petticoat was on the bed but was bloodstained. She however did not see her pant. Upon waking up she felt pain in her private parts and her attempts to wake up the 1st appellant whom she referred to as "daddy" were unsuccessful. The Complainant however confirmed that she never heard nor felt anything and did not see the 1st appellant undressing her. In her further evidence, the Complainant testified that when she woke up, the 1st appellant was in fact was wearing a vest and a short.

88. She then went and narrated this to DW3 who told her to keep quiet about the matter. She then went to the toilet outside the house but when she came back, her petticoat was missing. That day, she remained indoors but heard the 1st appellant informing the 2nd appellant, his son that the latter was free to do whatever he wanted to do with the Complainant.

89. On 27th December, 2012 upon coming from the bathroom which was adjacent to her bedroom, which bedroom had a defect and could not lock, the Complainant as applying oil on her body when the 2nd appellant entered her bedroom, covered her mouth, overpowered her and inserted his penis into her vagina. After that the 2nd appellant rushed outside the room and locked it from the outside and the room was only opened by the last born son when he was going to sleep. The following day, the Complainant once again narrated what had transpired to DW3 who informed her not to disclose the same.

90. When the Complainant missed her period, the 1st appellant and DW3 arranged for her to visit a doctor who prescribed some drugs for her after she had been injected and fell asleep. The Complainant however did not take the said drugs despite the same having been prescribed for her twice. Later the Complaint escaped from the house, spent a night with the 1st appellant's mother, (DW4) and went back home. By this time she had completed her primary school education and was admitted to a secondary school where she narrated her ordeal to the Principal who called the mother (PW2) and the Complainant was taken back home on the advice that the matter should be reported to the area Chief (PW3).

91. It seems that some attempts were made by PW3 towards reconciliation but the same failed and the matter eventually ended up in the hands of the police. However following bleeding by the Complainant, she was taken to Masii Hospital from where she was referred to Machakos Level 5 Hospital where upon ultra sound being conducted, the baby was found to have died. Accordingly the foetus was expelled.

92. It was the evidence of the prosecution that the DNA samples taken from the 1st appellant, the 2nd appellant, the Complainant and the foetus revealed that the baby was sired by the 2nd appellant. This was confirmed by the evidence of the officer attached to the Government Chemist (PW5).

93. The appellants were thereafter charged with the offences before the Court which offences they denied. Four witnesses gave evidence on the part of the defence.

94. According to the 1st appellant on the day it is alleged that he defiled the Complainant he spent the night with his wife while the Complainant spent the night with his two sons. According to him the whole story was concocted by the Complaint who wanted to pay them back for having been sent away from home by DW3.

95. Similarly the 2nd appellant averred that the whole story was made up by the Complainant who wanted to hit back at them for having been sent away from their home after she damaged the utensils.

96. DW3 on her part stated that on 25th, 26th and 27th December, 2012 she was at home the whole day and that nothing happened. In fact according to her evidence on 25th December, 2012, after they returned from the church, the 1st appellant went to meet his friends at the market and came back at 11.00pm drunk and they slept in the same bedroom till morning. It was her evidence that when she sent the Complainant away, she went to spend the night in the house of PW4 where she threatened to spoil the names of the 1st appellant and DW3 so as to make them lose their jobs. In fact according to DW3, there was even a suggestion that the Complaint wanted to be married by one of her sons.

97. DW4 on her part confirmed that the Complainant had spent the night in her house and made the aforesaid threats.

Determination

98. I have considered the material placed before me.

99. The main charge which the Appellants faced is defilement. Sections 8(1) and 8(2) of the ***Sexual Offences Act*** provide that:

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

100. Section 2 of the Act defines "penetration" as:

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

101. It is now trite that in cases of defilement the court needs to determine, first, 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.

102. Starting with the age, it must be appreciated that as was held in **Tumaini Maasai Mwanya vs. R, Mombasa CR.A. No. 364 of 2010**, proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing.

103. With respect to contradictions and discrepancies, the law is that where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of the events, which are mere discrepancies, that would not avail the accused person, because some of such discrepancies are expected as being natural (**The State v Sunday Dio Dogo (Alias Sunday Idogo)** HSO/3C/2012, **Oboh J** in the High Court of Nigeria).

104. Each case must be considered on its own peculiar 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). The contradictions in respect of the child's age therefore cannot assist the appellant to avoid criminal culpability. See **Moses Nato Raphael vs. Republic [2015] eKLR.**

105. The Malindi Court of Appeal in criminal appeal No. 504 of 2010 - **Kaingu Elias Kasomo vs. Republic** 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."**

106. It was therefore held in **Alfayo Gombe Okello vs. Republic [2010] eKLR** 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)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."**

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

108. It was therefore held in In **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** 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."**

109. 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.

110. What the Court frowns upon is mere averments of age without any documents in support thereof. In this case it is true that there was discrepancy between oral evidence and the age assessment report which placed the age of the Complainant at 14 years. In my view, the Learned Trial Magistrate was properly entitled to take the assessment report as evidence of the Complainant's age hence she cannot be faulted. It is therefore my finding that the Complainant was a child hence the first ingredient of the offence was proved.

111. As regards penetration, it is true that there was no direct evidence of penetration by the 1st appellant. The only evidence linking the 1st appellant was the testimony of the Complainant that when she woke up, she found the 1st appellant sleeping on her bed. While it was her evidence that she had pain in her private parts and that there was blood on her petticoat, for the prosecution to have proved its case, it was necessary to prove that there was partial or complete insertion of the genital organs of the 1st appellant into the genital organs of the Complainant. This was what was missing. Even if the 1st appellant was proved to have been found on the same bed as the Complainant, though the evidence was conflicting as to whether he was naked or dressed up, without direct evidence, the evidence of the prosecution would have been at best circumstantial. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held.

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

112. In **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

113. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

114. In **Mwangi vs. Republic [1983] KLR 327** **Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

> **"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."**

115. Therefore, for this court to find each of the 1st appellant guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** and **Teper vs. Republic [1952] AC 480** as follows:

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

116. This Court appreciates the old hat principle of law to the effect that the burden of proof in criminal matters lies with the prosecution. This Principle is well captured in the time honoured English case of **Woolmington vs. DPP (1935) A. C 462** where the court stated:-

> **"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject [to the qualification involving the defence of insanity and to any statutory exception].If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."**

117. In this case I agree with the Respondent that the evidence adduced before the Court fell short of proving penetration by the 1st appellant as defined under the law. Accordingly, the conviction of the 1st appellant was unsafe.

118. As regards the case against the 2nd appellant, I have already found that the evidence sufficiently proved that the Complainant was aged 14 years. As regards penetration, the evidence adduced by the Complainant was supported by the DNA report. Whereas the said report was disputed by the appellants, having considered the material on record, I do not agree that the same ought not to have been admitted. The mere fact that the same was not signed in court did not render the same inadmissible as it was produced by the person who prepared the same. I agree with the Learned Trial Magistrate that whereas pregnancy is not an ingredient of the offence of defilement, where pregnancy results from the act of defilement, the DNA test reports may corroborate the oral evidence of penetration. It is therefore my finding that there was penetration.

119. Was penetration by the 2nd Appellant? From the results of the DNA it was clear that the penetration was by the 2nd appellant. The 2nd appellant was well known to the Complainant. In his evidence, the 2nd appellant, while there was no burden on him to prove his innocence, neither seriously challenged the evidence of the Complainant nor explained his whereabouts on 27th December, 2012. Although the 1st appellant also contended that the Complainant merely made up the story so as to hit back, there was no reason why the Complainant would hit back at the 2nd appellant when the intention of hitting back, as disclosed by DW4 was to make the 1st appellant and DW3 lose their jobs.

120. Whereas the burden is on the prosecution to prove its case beyond reasonable doubt, the Court of Appeal dealt with what amounts to "reasonable doubt" in **Moses Nato Raphael vs. Republic [2015] eKLR** where it expressed itself as follows:

> **"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-**
>
> **'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"**

121. In other words proof beyond reasonable doubt is not the same thing as proof beyond a scintilla of doubt. What the Court is required to determine is whether the case raises reasonable doubt that the offence may not have been committed at all or not have been committed by the accused. If that is the case then the benefit of that doubt must inure to the accused.

122. In my view where the prosecution's evidence is consistent and water tight, it requires a strong evidence to dislodge the same. This is not to say that the burden of proof shifts. What it means is that where the prosecution evidence taken on its own is strong enough to give rise to a conviction, unless some other evidence emanates from the defence which would have the effect of dislodging the prosecution case, there would be no reason to interfere with the conviction. In those circumstances it is then said the evidence of the prosecution proves the case beyond reasonable doubt.

123. Having considered the evidence adduced in this case, I find that the conviction of the 1st appellant was unsafe. Accordingly, I allow the 1st appellant's appeal, set aside his conviction and quash the sentence and order that the 1st appellant be released forthwith unless otherwise lawfully held.

124. As regards the 2nd appellant, it is clear that the evidence against him was watertight. In the premises his appeal fails and is dismissed.

125. Right of appeal 14 days.

126. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 19th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngolya for the Appellants

Ms Mogoi for the Respondent

CA Geoffrey