BOO v Republic (Criminal Appeal 5 of 2017)
[2018] KEHC 4099 (KLR) (2 October 2018) (Judgment)

B O O v Republic [2018] eKLR

Neutral citation: [2018] KEHC 4099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 5 OF 2017

GV ODUNGA, J

OCTOBER 2, 2018

BETWEEN

BOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Kangundo Principal Magistrate's Court Criminal Case No. 4 of 2015, T N Sinkiyan, RM on 25th July, 2016)

Considerations applied before a court can impose a sentence of a fine or compensation on a child offender under sections 191 and 193 of the Children Act,

The decision discussed several key legal issues related to the sentencing of a child offender convicted of the offence of defilement. The court held that in the absence of medical evidence, the age of the victim could be established using various forms of evidence, such as birth certificates, age assessment reports, and testimony from parents or guardians. Additionally, the court discussed the imposition of fines, compensation, or costs on a child offender. It held that a court should first investigate whether the child had the means to pay, and if not, the fine or compensation could be imposed on the parent or guardian. Further, the court held that a surety's responsibility ended once the trial concluded and a conviction was made, meaning the surety should not be held liable for ensuring the payment of the fine or compensation. Thus, a court could not a court could not lawfully order that the cash bail paid be applied toward the fine imposed or as compensation. The court also held that the burden of proving that a parent or guardian's neglect contributed to the commission of an offence by a child was on the prosecution, not the defense.

Reported by Moses Rotich

Criminal Law *- sentencing - sentencing of a child offender - where the appellant (a minor) was charged and convicted of the offence of defilement contrary to section 8(1)(3) as read section 11 (1) of the Sexual Offences Act - where the appellant was sentenced to pay a fine of KES 100,000.00 and in addition ordered to pay the complainant compensation of KES 50,000.00 - whether the court could directly impose a sentence requiring a child offender to pay a fine, compensation, or costs - what were the necessary considerations before a court could impose a sentence of*

payment of a fine or compensation on a minor under sections 191 and 193 of the Children Act - Sexual Offences Act, cap 63A, sections 8(1)(3) and 11(1); Children Act, 2001(repealed), sections 191 and 193.

Criminal Law *- sexual offences - offence of defilement - ingredients of the offence of defilement - what were the ingredients of the offence of defilement - Sexual Offence Act, cap 63A, section 8 (1) & (3).*

Evidence *- evidence in sexual offences - whether in the absence of medical evidence, non-medical evidence could suffice to prove the age of a victim of a sexual offence - whether the evidence of the complainant who was a minor at the time of commission of the alleged offence of defilement, could alone, without corroboration form the basis of conviction - Evidence Act, cap 80, section 124.*

Criminal Law *- burden of proof - burden of in cases involving child offenders - where it was alleged the commission of the offence by the child offender was induced by the parent or guardian's neglect to exercise due care of the child - who bore the burden of proving that the child offender's commission of the offence was caused by the neglect of the parent or guardian in failing to exercise due care - Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14.*

Criminal Procedure *- bail and bond - cash bail - refund of cash bail upon conclusion of trial - where the court directed that the cash bail that was paid would be kept in the custody of the court pending full settlement of the fine imposed and the order compensation - whether, upon the conclusion of a trial, a court could lawfully order that the cash bail paid be applied toward the fine imposed or as compensation.*

Brief facts

The appellant who was a minor at the time of the commission of the alleged offence of defilement of a girl of 8 years old, brought an appeal against the judgment of the trial court in which he was found guilty of the main charge of defilement, convicted and sentenced to pay a fine of KES 100,000.00 and compensation of KES 50,000.00 to the complainant.

The appellant lodged the instant appeal contending that the trial court failed to consider the medical evidence presented did not link him to the cause of penetration. He further faulted the trial court's orders of compensation and imposition of fine.

Issues

i. What were the ingredients of the offence of defilement?
ii. Whether in the absence of medical evidence, non-medical evidence could suffice to prove the age of a victim of a sexual offence.
iii. Whether the evidence of the complainant who was a minor at the time of commission of the alleged offence of defilement, could alone, without corroboration form the basis of conviction.
iv. What were the various options available to the court when sentencing a minor?
v. Whether the court could directly impose a sentence requiring a child offender to pay a fine, compensation or costs.
vi. What were the necessary considerations before a court could impose a sentence of payment of a fine or compensation on a minor under sections 191 and 193 of the Children Act?
vii. Who bore the burden of proving that the child offender's commission of the offence was caused by the neglect of the parent or guardian in failing to exercise due care?
viii. Whether, upon the conclusion of a trial, a court could lawfully order that the cash bail paid be applied toward the fine imposed or as compensation.

Held

1. For the accused to be convicted of the offence of defilement, certain ingredients ought to be proved:
    1. Whether there was penetration of the complainant's genitalia;
    2. Whether the complainant is a child;
    3. Whether the penetration was by the appellant.
2. The burden of proving the age of the complainant rested upon the prosecution. While medical evidence was paramount when no other evidence was available to determine the victim's age, credible

non-medical evidence was sufficient to sustain a conviction. Age could be proved by age assessment report, a birth certificate, testimony from the victim's parents or guardian, as well as by observation and the application of common sense. Therefore, in determining age, a holistic approach was required, incorporating a broad spectrum of information, including but not limited to medical opinion, alongside other relevant evidence and circumstances.

3. The court frowned upon mere averments of age without any documents in support thereof. In the instant case, the evidence of age was clearly proved by way of birth certificate which clearly placed the complainant's age at 8 years at the time of the commission of the offence.
4. With respect to the evidence of penetration, the general rule was that even without considering the presence or otherwise of medical evidence, an offence of that nature could be proved by oral evidence of a victim of rape or circumstantial evidence. In the instant matter, the complainant had soreness inflammation of the vaginal orifice (canal) and her hymen was absent. She also had a bruised wound just before the anal region in the canal. It was therefore clear that there was evidence of penetration and for purposes of the offence of defilement it mattered not whether the penetration was partial or complete.
5. Both the appellant and the complainant knew each other very well. According to the complainant and other witnesses, the appellant was their neighbor. In those circumstances there could not be any mistake as to the identity of the appellant. As to whether it was the appellant who penetrated the complainant, the only evidence was that of the complainant. That brought to fore the issue whether that evidence alone could be the basis of conviction.
6. Pursuant to section 124 of the Evidence Act, cap 80, the evidence of the complainant, if a minor, required corroboration, save that in sexual offences where the minor was the victim of the offence, the evidence of that minor, if believed by the trial court, could, without corroboration, lead to a conviction.
7. The trial court not only found that the complainant was truthful but also recorded the reasons for the said belief. The complainant's evidence was never shaken in cross-examination hence the court's finding that her evidence was truthful was based on firm grounds and could not be unsettled. Thus, the conviction of the appellant was grounded on sound evidence and should not be disturbed.
8. The appellant testified, which testimony was not controverted, that that he was 16 years old. Thus, the court ought to adopt construction favourable to the appellant. Any doubts in a criminal case should be resolved in favour of the accused.
9. Sections 191 and 193 of the Children Act (the Act) for two instances of sentencing a minor. Firstly, the court could impose the sentence of a fine, compensation or costs directly on the child offender in which event the said fine, compensation or costs was payable by the child offender. The second scenario was where the court directed that the said fine, compensation or costs imposed upon the child offender be paid by the child's parent or guardian instead of by the offender. In the instant case, the court seemed to have opted for the sentence under section 191(1)(f) of the Children Act.
10. A fine should only be directly imposed on a child offender where there was evidence that the child had means of income in some form. Imposing a sentence of a fine on a child without any means of income amounted to failure to take into account a relevant factor which could justify interference by the appellate court. That sentence was however to be distinguished from the sentence provided for under section 193 of the Act where the said fine, compensation or costs was to be paid by the parent or guardian of the child.
11. The court could not impose the fine on the parent or guardian where the court was satisfied that the parent or guardian could not be found or that he or she had not induced the commission of the offence, by neglecting to exercise due care of the offender. In the instant case however, the sentence was passed against the appellant. Thereafter, the court called upon the guardian to be heard on whether he would be willing to pay the said fine and compensation on behalf of the minor.

12. Before the court imposed a fine, compensation or costs where the offender was a child it should first investigate whether the child had a source of income from which the same could be paid. Where the court intended that the same be paid by the parent or the guardian, it should similarly, before imposing such a sentence investigate whether the conditions precedent to the imposition of the fine, compensation or costs existed. To impose the same against the child and/or the parent or guardian prior to the conduct of such investigation amounted to placing the cart before the horse.
13. The respondent seemed to allude that the burden of proving that the parent or guardian could not be found or that he or she had not induced the commission of the offence, by neglecting to exercise due care of the offender lay on the defence. On the contrary, a finding for example that a parent or guardian had induced the commission of the offence by neglecting to exercise due care of the offender denoted some level of criminal culpability on the parent or guardian.
14. Therefore, the burden of proving that the commission of the offence by the child offender was induced by the neglect of the parent or guardian to exercise due care of the offender ought to fall on the prosecution and not on the defence.
15. In the instant case, the trial court directed that the cash bail that was paid would be kept in the custody of the court pending full settlement of the fine and compensation. The role and responsibilities of a surety in criminal proceedings ended once a trial ended and the accused person was convicted, as the main responsibility of a surety was to ensure the accused person attended court and observed the terms of any bail or bond granted to an accused person.
16. It was an error to extend the role of a surety to compliance with the sentence meted by the court, as the sentence could only be served by the person convicted of an offence and no other person. Once the accused was convicted and sentenced, the surety was thereby released. The committing of the offender to the care of a fit person, whether a relative or not, pursuant to section 191(1)(d) of the Children Act was one of the sentences under the Act and therefore could not be construed as a continuation of the criminal trial so as to extend the surety or the surety's liability past the conviction and sentence. It was therefore clear that the detention of the cash bail had no basis in law.

Appeal partly allowed.

Orders

i. *An order that the conviction of the appellant was proper and lawful.*
ii. *The sentence imposed on the appellant was quashed.*
iii. *The appellant was directed to report to the nearest Chief's office once a week for community service for a period of three months.*
iv. *An order that the instant judgment be served on the probation officer to liaise with the relevant officer to implementation.*
v. *Right of appeal 14 days*

Citations

Cases

Kenya

1. *CWK v Republic* Criminal Appeal 72 of 2013; [2015] KEHC 7553 (KLR) — (Explained)
2. *Dominic Kibet Mwareng v Republic* Criminal Appeal 155 of 2011; [2013] KEHC 1353 (KLR) — (Explained)
3. *Kaingu Elias Kasomo v Republic* Criminal Appeal 504 of 2010 — (Applied)
4. *Kassim Ali v Republic* Criminal Appeal 84 of 2005; [2006] KECA 156 (KLR) — (Explained)
5. *Kevin Kiprotich Amos v Republic* Criminal Appeal No 89 of 2016 — (Mentioned)
6. *Kiilu & another v Republic* Criminal Appeal 113 of 2001; [2005] KECA 335 (KLR) ; [2005] 1 KLR 174 — Mentioned
7. *Kogo , Shadrack Kipchoge v Republic* Criminal Appeal 253 of 2003 — (Followed)

8. *Mohamed v R* [2008] 1 KLR G&F 1175 – (Distinguished)
9. *Munyoki ,John Mutua v Republic* Criminal Appeal 11 of 2016; [2017] KECA 376 (KLR) — (Followed)
10. *Muriuki ,Arthur Muya v Republic* Criminal Appeal 31of 20 of 2010; [2015] KEHC 807 (KLR) — (Explained)
11. *Okello ,Alfayo Gombe v Republic* Criminal Appeal 203 of 2009; [2010] KECA 319 (KLR) — (Followed)
12. *Republic v Wilfred Muthikwa Nzioka* Criminal Revision 91 of 2016; [2016] KEHC 2124 (KLR) — (Followed)
13. *Wanyonyi , Martin Nyongesa v Republic* Criminal Appeal 661 of 2010; [2015] KECA 607 (KLR) — (Explained)

Uganda

Francis Omuroni v Uganda Criminal Appeal No 2 of 2000 — (Applied)

Regional Court

Okeno v Republic [1972] EA 32 — (Mentioned)

United Kingdom

Woolmington v Director of Public Prosecutions [1935] UKHL 1; [1935] AC 46 — (Applied)

Statutes

Kenya

1. Borstal Institutions Act (cap 92) In general— (Cited)
2. Children Act (cap 141) section 191(1)(d) — (Interpreted)
3. Evidence Act (cap 80) section 124 — (Interpreted)
4. Penal Code (cap 63) sections 35(1); 193 — (Interpreted)
5. Probation of Offenders Act (cap 64) In general— (Cited)
6. Sexual Offences Act (cap 63A) sections 8(1)(3)(7); 11(1) — (Interpreted)

Texts

Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 17 paras 13, 14

Advocates

Ms Mogoi for the respondent.

JUDGMENT

Introduction

1. The appellant, BOO, was charged in the Principal Magistrate's Court at Kangundo in Criminal Case No. 4 of 2015 with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that the appellant, on 28th day of March, 2015 at [Particulars Withheld] Market in Matungulu Sub-County within Machakos County, he intentionally caused his penis to penetrate the vagina) of MM, a child of 8 years old. Alternatively, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006, the particulars being that on 28th day of March, 2015 at [Particulars Withheld] Market in Matungulu Sub-County within Machakos County, he did an act of indecency with MM, a child of 8 years by touching her vagina.

2. After hearing the learned trial magistratefound the appellant guilty of the main count of defilement, convicted him accordingly and sentenced him to pay a fine of Kshs 100,000.00 and in addition to pay the complainant compensation of Kshs 50,000.00.

The Evidence for the prosecution Before the Trial Court

3. At the trial, the prosecution called four witnesses. The first witness for the prosecution who testified as PW1 was E N K. According to her, on April 1, 2015at around 6.30 am she was preparing her children for school when the complainant informed her that she wanted to go for a short call. She accordingly gave her a bucket to use and as the complainant was relieving herself, PW1 saw that the urine was stained with blood and whitish substance. Upon examining her private parts she found that the complainant's vagina was reddish. She then inquired from the complainant what had happened to her to which the complainant responded that on Saturday March 28, 2015after PW1 had gone to clean church at Kangundo leaving the complainant with her 12 year old brother, she was going to the toilet when the appellant herein, their neighbour, called her to the house and asked her to remove her panty and lie on the sofa after which the appellant inserted his penis into her vagina. According to PW1, the complainant said that the appellant inserted, "*Kitu yake kwa kitu yake*" and then told her not to disclose to anyone lest she be beaten. According to PW1, prior to the day she was the blood stained urine of the complainant her had not noticed any signs of an assault on the complainant as the complainant normally washed her own pants

4. PW1 then then informed the appellant's brother and the brother's wife who told her that they should go to the hospital and they went to Kangundo Hospital from where they were referred to the police. They then went to Tala Police Post where they were referred to Kangundo and they were escorted to the Hospital where the complainant was examined and the P3 form filled in.

5. According to PW1, based on the birth certificate the complainant was born on August 16, 2006. Thereafter the appellant was charged.

6. While PW1 admitted that she had a boy child older than the complainant, the said boy could not have done such a thing to the complainant.

7. The second witness to testify for the prosecution as PW2 was the complainant. After *voir dire* examination, she testified that she was 8 years old and knew the appellant who was staying in their plot.

8. According to her, there was a day her mother had gone to the church and she was going to the toilet outside their plot when the appellant called her locked door and told her to remove her panty then put his thing, the ones boys use for urinating into her private part. According to her she was told to lie on the sofa. Though she did not scream, it was painful. After that the appellant opened the door for her and she went home but did not inform anyone about the incident that day due to fear inculcated into her by the appellant that she would be beaten.

9. However there was one morning when her mum, PW1, gave her a bucket to pee on when P1 saw blood in her urine and upon pw1 inquiring what had happened to her she disclosed that the appellant had put his thing into her private part. After that she was taken to the Hospital where the doctor checked her private parts and they then went to Tala Police Post where she narrated what had taken place.

10. The complainant denied that she was forced to say what she told the court.

11. PW3 was Lilian Kioko, a clinical officer at Level 4 Kangundo Hospital. According to her on April 1, 2015she attended to the complainant herein who reported that she had had intercourse with neighbour, a boy in class 7. According to PW3, the complainant was calm and composed and upon

examination, she had soreness inflammation of the vaginal orifice (canal). Her hymen was missing and she had a bruised wound just before the anal region in the canal. She however had no discharge and in the urine only proteins were present. The other tests were negative. According to PW3, the complainant was sexually assaulted.

12. PW3 also testified that she saw the appellant who reported partial penetration of the complainant's vagina. Upon examination he was found to have no bruises on the penis or the shaft and had no discharge on the thighs or the anus. The other tests were similarly negative. While it was her evidence that bleeding should be immediate where the child is a virgin, in this case she did not see the blood at all and was not told that there was urine in the child's urine. Similarly, the complainant's underwear had no blood and she was informed that the incident took place on March 28, 2015 at around 3 pm and the child was taken to the facility on April 1, 2015.

13. Corporal James Miano testified as PW4. According to him, on 1st April. 2015 he was at the crime office when the complainant was brought by her mother after they booked a complainant of sexual assault by the appellant at the report office. He recorded the statements of the complainant and PW1 who identified the appellant and PW4 arrested him. He then took both the complainant and the appellant for examination at Kangundo Hospital where both of them were issued with P3 Forms.

14. According to him the complainant was born on August 6, 2006 as per her birth certificate.

Evidence for the Defence

15. At the close of the prosecution case the appellant was put on his defence. In his sworn evidence, the appellant testified that on March 28, 2015 at 7 am he went to school and returned at 1.30 pm as he wanted to do some revision. After lunch he was asked by his brother's wife to go for her child where the child works since the said sister in law wanted to go to the market. He then went to his friend Desmond's house and he sat with him till about 3.30 pm after which he went back to her sister's place of work in the company of Desmond till 5 pm when they all left and Desmond back to their home. He then went on with his revision. The following day, Sunday they went to church and on Monday he went to school. However on Tuesday at 8 pm he was called that his sister was at the gate asking for him. Upon going he was informed that he was wanted at home. At home he found his brother who asked him if he had done anything to the complainant which he denied. He was then taken to the complainant's house where PW1 made the allegations that they had had sex with the complainant allegation which he denied.

16. After that they went to Kangundo Hospital and they went referred to Kangundo Police Station where they were given letters to go to the Hospital. Upon returning to the Police Station he was detained in the cells and the next day he was charged.

17. In support of his case, the appellant called MKO, his sister in law who testified as DW2. According to her, she was living with the appellant who was like a son to him and she knew the complainant who used to be their neighbour. It was her testimony that on Saturday March 28, 2015B went to school while she went to work. It was her evidence that she usually called a neighbour's house help to inform the appellant to go for her daughter. On this day however, she informed by the said house help that the appellant had left and it was not till evening that the appellant returned and informed her that he was with Desmond watching DVD that Desmond had bought. After that she sent the appellant, her child and Desmond home.

18. On Wednesday after buying milk, the complainant's father asked her to go to their house where the complainant's mother alleged that the appellant had had sex with the complainant on Saturday and

that PW1 saw blood when the complainant was peeing though she did not show DW2 the said blood and denied DW2 access to the complainant.

19. DW2 then went to pick the appellant from school and the appellant denied the allegations. They then went to Kangundo Hospital where the child was examined but she did not know the results. Later the appellant was charged.

20. According to her on Saturdays the appellant used to leave school between 1.30PM and 2PM. In her evidence after the appellant took to her the keys and the child at 5pm informing her hat he was going to watch football, she did not know where she went.

The Judgement

21. In his judgement, the learned trial magistratefound that the age of the complainant was proved to be 8 years. As regards penetration, it was the court's finding that from both the evidence of the complainant and the medical examination documents, it was proved that the complainant was sexually assaulted. It was further found that the testimony of the complainant was truthful and it was therefore found that the appellant had intentionally caused his penis to penetrate the complainant and that the complainant and the appellant knew each other well.

22. The court therefore found that the prosecution had proved the charge beyond reasonable doubt and found the appellant guilty of defilement and convicted him accordingly of the main charge of defilement.

Appellant's Submissions

23. It was submitted by the appellant that the blood that was seen on the victim's under pant was never presented in court. Without any reason.

24. According to the appellant on the day of the incident there were people in the plot including the complainant's brother yet they were not called to testify.

25. It was further submitted that the trial court failed to consider the cause of penetration as the medical report did not link the appellant to the cause of the penetration.

26. It was further contended based on Machakos High Court Criminal Appeal No 91 of 2016 – *Republic v Winfred Muthikwa Nzioka*, that the trial court ought to have meted the appropriate sentence aimed at preventing such crimes in society rather than fining him.

Respondent's Submissions

27. The respondentin opposing the appeal submitted that the charge against the appellant was proved beyond reasonable doubt based on the evidence of the four prosecution witnesses especially PW1 and PW2. As regards the evidence of sexual assault, reliance was placed on the evidence of PW3.

28. According to the respondent, the appellant's guardian was given a chance to be heard before the court and in his own statement he never contested the imposition of the fine but instead asked for time within which to pay the same. It was submitted that it was within the court's discretion to impose such fines and that it is not mandatory to show that the guardian failed in his responsibility to take care of the appellant for the court to order him to pay such fine or compensation.

29. As regards the cash bail, it was submitted that the courtordered that after payment of the fine the same would be released back to the surety. It was further submitted based on *Arthur Muya Muruiki v*

Republic [2015] eKLR that sentencing is in the discretion of the court and ought not to be interfered with.

30. According to the respondent, the courtduly analysed the prosecution evidence and the defence and was satisfied that the appellant committed the offence hence the conviction and sentence ought to be upheld.

Determination

31. This being a first appeal, this courtis, 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 v Republic* [1972] EA 32 and *Kiilu & another v Republic* [2005]1 KLR 174.

32. 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.

33. 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 v 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."

34. As regards the age of the complainant, in *Dominic Kibet v 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."

35. The importance of establishing the complainant's age in defilement cases cannot be over-emphasised. In the case of *Francis Omuroni v 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."

36. Closer home in the case of *Kaingu Elias Kasomo v Republic* in Malindi the Court of Appeal in Criminal Appeal No 504 of 2010 stated as follows:

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

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

> " In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)... In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on October 16, 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 August 20, 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."

38. However in In the case of *Francis Omuroni v Uganda*, Court of Appeal in Criminal Appeal No 2 of 2000, was observed as follows:

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

39. 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 v Republic* - Criminal Appeal No 89 of 2016.

40. What the court frowns upon is mere averments of age without any documents in support thereof. In this there the evidence of age was clearly proved by way of birth certificate which clearly placed the complainant's age at 8 years at the time of the commission of the offence.

41. With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi v Republic* Criminal Appeal No 661 of 2010, (Eldoret), DK Maraga, J (as he then was), D Musinga & AK Murgor JJA citing *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the court stated that:

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"

42. However in *John Mutua Munyoki v Republic* [2017] eKLR, the Court of Appeal held that:

> " Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt...The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this court in the case of *Arthur Mshila Manga* (*supra*) observed while allowing the appeal that:
>
> > 'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3 No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'
>
> The court proceeded and stated that:
>
> > 'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never

> expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See *Mohamed v Republic* (2008) KLR G&F, 1175 and *Jacob Odhiambo Omuombo v Republic* (*supra*). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'

As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."

43. In this case upon examination, it was found that the complainant had soreness inflammation of the vaginal orifice (canal) and her hymen was absent. She also had a bruised wound just before the anal region in the canal. It is therefore clear that there was evidence of penetration and for purposes of the offence of defilement it matters not whether the penetration was partial or complete.

44. As regards the issue whether it was the appellant who penetrated the complainant on the said day, both the appellant and the complainant knew each other very well. According to the complainant, the appellant was their neighbour. This was confirmed by DW2. In those circumstances there cannot be any mistake as to the identity of the appellant. As to whether it was the appellant who penetrated the complainant, the only evidence is that of the complainant. That brings to fore the issue whether that evidence alone can be the basis of conviction.

45. However section 124 of the *Evidence Act* makes this quite clear that:

> " 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]

46. It is therefore clear that the evidence of the complainant, if a minor, requires corroboration, save that in sexual offences 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.

47. Dealing with a similar issue in the case of *Mohamed v 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."

48. However as was held in *John Mutua Munyoki v Republic* (*supra*)

> " As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."

49. In the said case it was held that:

> " What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school." What or where are the reason(s) for the belief?"

50. In this case, the learned trial magistrate expressed herself as hereunder:

> " Her testimony was firm...The court finds child's testimony to be truthful. The court believes her..."

51. It is therefore clear that not only did the court find that the complainant was truthful but also recorded the reasons for the said belief. For my part I have considered the evidence on the record and it is clear that the complainant's evidence was never shaken in cross-examination hence the court's finding that her evidence was truthful was based on firm grounds and cannot be unsettled.

52. It is therefore my finding that the conviction of the appellant was grounded on sound evidence and should not be disturbed.

53. As regard the sentence, in *Shadrack Kipchoge Kogo v Republic* Eldoret Criminal Appeal No 253 of 2003 it was held that:

> " Sentence is essentially an exercise of discretion of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

54. Section 8(7) of the *Sexual Offences Act* states that:

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.

55. In this case the appellant testified which testimony was not controverted that that he was 16 years old. Just like in *Alfayo Gombe Okello v Republic* [2010] eKLR , this court must adopt a construction favourable to the appellant. Similarly, in *John Mutua Munyoki v Republic* [2017] eKLR, the Court of Appeal held that any doubts in a criminal case must be resolved in favour of the accused.

56. The appellant having been below the age of eighteen years, section 191 of the *Children Act* provides as hereunder:

In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways— (a)By discharging the offender under section 35(1) of the *Penal Code* (cap 63);

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the *Probation of Offenders Act* (cap 64);

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (cap 64);

(k) by making a community service order; or

(l) in any other lawful manner.

(2) No child of fender shall be subjected to corporal punishment

57. Section 193 of the same Act on the other hand provides that:

(1) Where a child is charged with an offence for which a fine, compensation or costs may be imposed, if the court is of the opinion that the case would best be met by imposition of a fine, compensation or costs, whether with or without any other punishment, the court may in any case order that the fine, compensation or costs imposed or awarded be paid by the child's parent or guardian instead of by the offender, unless the court is satisfied that the parent or guardian cannot be found or that he or she has not induced the commission of the offence, by neglecting to exercise due care of the offender.

(2) Where a child is charged with an offence, the court may order his parent or guardian to give security for his good behaviour.

(3) An order under this section may be made against a parent or guardian who having been required to attend before the court, has failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity of being heard.

(4) Any sums imposed and ordered to be paid by a parent or guardian under this section, or forfeiture of any such security as aforesaid, may be recovered from him or her in a like manner as if the order had been made on the conviction of the parent or guardian of the offender.

(5) A parent or guardian may appeal to the High Court against an order made under this section by a Children's court.

58. What the foregoing provisions provide for in my view are two instances. Firstly, the court may imposed the sentence of a fine, compensation or costs directly on the child offender in which event the said fine, compensation or costs is payable by the child offender. The second scenario is where the court directs that the said fine, compensation or costs imposed upon the child offender be paid by the child's parent or guardian instead of by the offender. In my view in this case the court seems to have opted for the sentence under section 191(1)(f) of the *Children Act*. To my mind a fine should only be directly imposed on a child offender where there is evidence that the child has means of income in some form. Imposing a sentence of a fine on a child without any means of income in my view amounts to failure to take into account a relevant factor which may justify interference by the appellate court.

59. That sentence is however to be distinguished from the sentence provided for under section 193 of the Act where the said fine, compensation or costs is to be paid by the parent or guardian of the child.

60. It is clear however that the court cannot impose the fine on the parent or guardian where the court is satisfied that the parent or guardian cannot be found or that he or she has not induced the commission of the offence, by neglecting to exercise due care of the offender.

61. In this case however, the sentence was passed against the appellant. Thereafter, the court called upon the guardian to be heard on whether he would be willing to pay the said fine and compensation on behalf of the minor. In my view before the court imposes a fine, compensation or costs where the offender is a child it must first investigate whether the child has a source of income from which the same may be paid. Where the court intends that the same be paid by the parent or the guardian, it must similarly, before imposing such a sentence investigate whether the conditions precedent to the imposition of the fine, compensation or costs do exist. To impose the same against the child and/or the parent or guardian prior to the conduct of such investigation amounts to placing the cart before the horse.

62. The respondent seems to be of the view that the burden of proving that the parent or guardian cannot be found or that he or she has not induced the commission of the offence, by neglecting to exercise due care of the offender lies on the defence. In my view a finding for example that a parent or guardian has induced the commission of the offence by neglecting to exercise due care of the offender denotes some level of criminal culpability on the parent or guardian. However, Viscount Sankey LC in the case of HL (E)* *Woolmington v DPP* [1935] AC 462 pp 481 in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> " 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 what I have already said as to the defence of insanity and subject also 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."

63. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

> The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

64. In my view the burden of proving that the commission of the offence by the child offender was induced by the neglect of the parent or guardian to exercise due care of the offender must fall on the prosecution and not on the defence.

65. In this case the court directed that the cash bail that was paid would be kept in the custody of the court pending full settlement of the fine and compensation. A similar issue was dealt with in *Republic v Wilfred Muthikwa Nzioka*[2016] eKLR where this court (Nyamweya, J) was dealing with a revision from the same judicial officer as in this matter and expressed herself as hereunder:

> "The learned trial magistrate, after having been alerted that the accused was a minor and was unable to pay the fine, ought to have sought review of the sentence to accord with the provisions of the Children's Act. In light of the above, the sentence of imprisonment imposed on the Accused and her surety was therefore contrary to the law and is hereby set aside. In addition, the role and responsibilities of a surety in criminal proceedings ends once a trial ends and accused person is convicted, as the main responsibility of a surety is to ensure the accused person attends court and observes the terms of any bail or bond granted to an accused person. This leads me to the second error made in extending the role of a surety to compliance with the sentence meted by the court, as the sentence can only be served by the person convicted of an offence and no other person. Therefore, the trial magistrate erred in not only asking the mother of the accused person to pay the fine but also having her arrested for the non-payment of the fine."

66. I associate myself with the said decision. Once the accused is convicted and sentenced, the surety is thereby released. The committing the offender to the care of a fit person, whether a relative or not, pursuant to section 191(1)(d) of the *Children Act* is one of the sentences under the Act and therefore cannot be construed as a continuation of the criminal trial so as to extend the surety or the surety's liability past the conviction and sentence. It is therefore clear that the detention of the cash bail had no basis in law.

67. In the premises while I find that the conviction of the appellant was proper and lawful, I however quash the sentence imposed on him. In this case it was disclosed that the appellant was nolonger in school and was in fact learning building and construction in Nairobi. I, instead, direct that the appellant shall report to the nearest Chief's office once a week for community service for a period of three months.

68. This judgement shall be served on the probation officer to liaise with the relevant officer to implementation.

69. Right of appeal 14 days.

70. Judgement accordingly

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 2ND DAY OF OCTOBER, 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey