REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 47 OF 2015

BETWEEN

JOSEPH MAKAU KATANA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C. K Kisiangani- RM dated 6th March, 2014 in Machakos Chief Magistrate's Criminal Case No. 279 of 2014)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JOSEPH MAKAU KATANA.....ACCUSED

JUDGEMENT

1. The appellant, **Joseph Makau Katana**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 279 of 2014 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of the offence were that the appellant on the 3rd day of February, 2014 in Mwala District within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of **ENK**, a girl aged 9 years. Alternatively, the appellant faced the charge of Indecent Act with a Child Contrary to Section 11(1) of the ***Sexual Offences Act***, the particulars being that the appellant on the 3rd day of February, 2014 at Mango Location in Mwala District within Machakos County, intentionally and unlawfully touched the vagina of **ENK**, a girl aged 9 years using his penis.

2. After hearing, the Learned Trial Magistrate found all the three ingredients of the offence of defilement proved, found the appellant guilty of the main offence of defilement, convicted him accordingly and sentenced him to life imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

1. **That there was a procedural error caused by the trial court magistrate upon his arraignment in court on 24th February, 2014 which error caused injustice o him in that the record does not indicate the substance of the charge being read to him as the law demands.**

2. **That the burden of proof was not discharged to the standard required by the law.**

3. **That his defence was not properly considered.**

4. **That the Learned Trial Magistrate erred in law and in fact and misdirected himself by failing to make adverse inference as to the inconsistencies and contradictions in the evidence.**

5. **That his conviction was manifestly unsafe in that the charge was defective in nature due to the medical evidence that the offence was last committed on 29th January, 2014 whereas the particulars of the charge sheet indicates 3rd February, 2014.**

6. At the hearing of the case the prosecution called four witnesses.

7. PW1, **RNK**, was the complainant's mother. According to her, the complainant was 9 years old. She also knew the appellant who was their neighbour.

8. It was her evidence that on 3rd February, 2014 she arrived home from work at around 7.00 pm when she found the complainant sleeping with blood on her clothes. Upon inquiring from the complainant why she was sleeping at that time, the complainant informed her that she was unwell. The complainant explained that while she was coming from school she met the appellant who told her to change from her school uniform and then go to the river. The complainant did so and at the river, they sat beside the river where the appellant gave her chapatti.

9. The appellant then told her to remove her panty but the complainant refused and started crying. The complainant then informed PW1 that the appellant removed her panty and lay on her. Though the complainant screamed, the accused held her mouth and threatened to kill her if she screamed. After that the appellant wiped the complaint with leaves.

10. PW1 then took the complainant to Masii Police Station where the incident was reported at around 10pm and they were given a document to take to Masii Health Centre where the complainant was examined, treated, given drugs and the P3 Form filed in.

11. According to the witness, this was not the first time that the appellant was giving the complainant chapatti but PW1 did not see any issue with that since nothing wrong had been done to the complainant.

12. The complainant gave evidence as PW2. After voir dire, she testified that she knew the appellant whom she identified in court. According to her the appellant lived near their home.

13. It was her evidence that on 3rd February, 2014 at around 3pm she was coming from school when she met the appellant on the way coming from the opposite direction. The appellant then told her to go change from her uniform then find him by the river so that he could show her something nice. The complainant then changed from her uniform, went and found the appellant alone on the road by the river near their home. The appellant then gave her chapatti and then told her to lie down so that he could do to her "*tabia mbaya*". When the complainant refused, the appellant removed her panty and her clothes and did "*tabia mbaya*" to her by lying on her. She explained that the appellant inserted his thing which he uses to pass urine in her private part where she used to pass urine. Though she wanted to scream, the appellant held her mouth.

14. It was the complainant's evidence that as a result she bled. The appellant then took leaves, wiped the blood and she went home and slept since her mother was at work. According to the complainant this was the first time the accused did the said thing to her. When her mother returned home, the mother found her sleeping and she disclosed to her mother what had happened. She was then taken to the police station and to the hospital where she was given some cards.

15. PW3, **James Kilonzo**, was a clinical officer at Masii Health Centre. He produced the P3 Form for the complainant, a 9 year old female filled in on 14th March, 2014. According to him the complainant had a history of repeated sexual defilement by a known person with the last defilement being on 29th January, 2014 at around 7pm. This, according to the witness, was reported as the third such incident and that the appellant was using sweets to entice the complainant.

16. On examination, the complainant was found to be in fair medical condition, her external genitalia were normal but the hymen was not seen and the majora was not swollen. She had no injuries on the head, thorax and upper limb. According to her the age of the injuries was days and the probable cause of the injury was penis. In his opinion, the nature of the offence was defilement though there was no discharge of the genitalia and there were no injuries of the external genitalia. In his evidence, the cervix and the vagina was normal and there were no signs of penetration but the complainant was treated for repeated defilement. She was however of the opinion that where there is no hymen, it is a sign that there was penetration.

17. The witness produced both the P3 Form and the treatment cards as exhibits.

18. PW4 was **PC Fredrick Munyoki** who was attached to Masii Police Station. According to him, on 6th February, 2014 he was at the station when PW1 together with the complainant reported that the complainant had been defiled by the appellant who was their neighbour, a report which was recorded in the OB and the complainant referred to the hospital after their statements taken .

19. According to him, the age assessment of the child was done at Mwala District Hospital on 28th February, 2014 from which it was ascertained that the complainant's age was 9 years. He produced the report as an exhibit.

20. The appellant was then charged with the offence.

21. According to him, he went to the scene and the appellant was identified by the complainant as their neighbour.

22. Upon the close of the prosecution's case, the Learned Trial Magistrate found that a prima facie case had been established against the appellant and placed him on his defence.

23. In his defence, the appellant testified that on the alleged day of the offence he woke up in the morning and went to the complainant's (sic)

husband, **KM**, to borrow a cigarette, which he was given. The said **M** then started quarrelling his wife at which point the appellant left and together with his wife they went to the farm at around 9.00 am where they worked till 1pm at which point they went home for lunch. After lunch they returned to the farm and waited for payment from the owner of the arm till 7pm when they were informed that he was held up and would not make it.

24. According to the appellant on that day he was at the farm the whole day with his wife. At 7.30pm they went back home, he took a shower and rested. The following day, 4th February, 2014 he heard of the allegations from his brother, **Muthini Katana** and he reported the matter to the Chief who told him to discuss the matter with those who were making the said allegations. He then sent his brother, **Mutunga**, to the complainant's mother but he was told the father was not in. He was then arrested.

25. According to him, he was arrested on 26th February, 2014 and was told that he defiled the complainant on 3rd February, 2014, the day he was in the farm with his wife, **Kanini Kasove**. He confirmed that he knew the complainant's family including the complainant who also knew him by name. On 3rdFebruary, 2014, he was working in Teacher Mutua's farm with his wife. It was his case that the complainant might have hated him due to the fact that her mother was alleging that he stole their money. Though he could not remember, the name of the complainant's mother, he admitted that the complainant had been sent to him several times by her father and the complainant knew him well. He however insisted that the charges against him were untrue.

26. The appellant called his wife, **Virginia Kanini Katana**, also known as **Kanini Kaseve**, who testified as DW2. In her testimony, she stated that he appellant was arrested on 3rd February, 2014 at home, the same day that it was reported by the complainant's mother that he had defiled the complainant. According to her, the information was relayed to her by PW1 who visited her but found that the appellant had gone to herd the cattle. It was her evidence that she was the one who relayed the information to the appellant. She admitted that both herself and the appellant knew the complainant.

27. According to her evidence they were planting tomatoes at **Teacher Mbundo's** farm on 2nd February, 2014 and the appellant was arrested on 3rd February, 2014 at night. On that day she was with the appellant throughout as they were digging holes for the home of one of her children. In her evidence the complainant did not hate the appellant though there was hatred between the appellant and PW1 who accused the appellant of spending too much time with her husband.

Appellant's Submissions

28. In his submissions, the appellant contended that contrary to section 207(1) of the ***Criminal Procedure Code***, he was not accorded a fair trial since he was not informed about the substance of the offence with which he was charged. It was his submission that this omission was not curable under section 382 of the ***Criminal Procedure Code***. To him therefore his rights under Article 50(2)(b) of the Constitution were infringed. The appellant supported his submission by the fact that at the close of the prosecution's case, the charge was read to him in Kamba language as opposed to Kiswahili which was the language indicated initially.

29. According to him, if the offence was committed on 29th January, 2014 and the age of the injury was given as days then the victim must have been defiled some days prior to 29th January, 2014 hence there was variance between the evidence and the charge sheet which indicated the date of the offence as 3rd February, 2014. It was therefore his submission that in the absence of an amendment, the trial proceeded on the basis of a defective charge sheet.

30. It was further submitted that the appellant's conviction was based on conflicting evidence as to the date of the defilement and penetration.

31. To the appellant therefore the prosecution did not prove its case beyond reasonable doubt.

32. It was further submitted that the P3 Form was not signed and there was no sign of hymen.

Respondent's Submissions

33. In opposing the appeal, it was submitted that the appellant was not convicted on a plea of guilty and that the case went through the full trial. Accordingly, the appellant would only have suffered prejudice if a plea of guilty had been entered. In this case however the appellant was supplied with the statements and knew the offence he was facing.

34. According to the Respondent, the charges against the appellant were proved beyond reasonable doubt based on the evidence of the four witnesses.

35. As regards penetration, it was submitted that since PW3 examined the complainant on 14th February, 2014 when the defilement was on 3d February, 2014, more than 10 days after the incident, there is a possibility that if there were any injuries, the same might have healed by then.

36. It was further submitted that the appellant was identified by the complainant by name.

37. It was submitted that from the contradictions in DW2's evidence she was not a candid witness.

38. To the Respondent, the trial court considered the evidence tendered by both sides and was of the opinion that the prosecution had proved its case beyond reasonable doubt and that the defence did not shake the case hence e conviction. It was therefore submitted that the court discharged its duty as required by the law and this court was urged to confirm both the conviction and the sentence.

Determination

39. I have considered the issues raised in this matter.

40. It was contended by the appellant that his rights under Article 50 of the Constitution were violated since the particulars of the charge was not explained to him. The manner of recording of a plea is provided for in section 207(1) and (2) of the ***Criminal Procedure Code*** provides as hereunder:

> ***(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;***
>
> ***(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:***
>
> > ***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***

41. The manner of recording plea of guilty was dealt with in **Ombena vs. Republic [1981] eKLR** where the Court of Appeal held that:

> **"In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —**
>
> **'Held:**
>
> > **(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**
> >
> > **(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
> >
> > **(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
> >
> > **(iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**
> >
> > **(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**
>
> **In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said "Facts are as per charge sheets", and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the Adan case the court said, at p 447:**
>
> **"The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."**
>
> **We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."**

42. It is important to reproduce verbatim how the plea was taken before the trial court. The record of the proceedings is as hereunder:

> ***24/2/14***
>
> ***Magistrate – P N Gesora SPM***
>
> ***Prosecutor CPL Gatimu***
>
> ***Court Clerk – Mueni***
>
> ***Interpretation – Swahili***

Accused – present in person

Accused replies; in Swahili language – Not Guilty

Alternative charge – Not Guilty

Court: Plea of not guilty entered

43. It is clear that the manner in which the plea was taken fell short of the prescribed standards. However section 382 of the ***Criminal Procedure Code*** provides in material part, that:

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

44. Had a plea of guilty been entered this Court would have had no hesitation in finding that the appellant was prejudiced by the manner in which the plea was taken. However the Learned Trial Magistrate entered a plea of not guilty. While that does not excuse the trial courts from their duty to explain to the accused the substance of the charge in a language they understand, the failure to do so in the circumstances of this case is not fatal to the proceedings. This case must be distinguished from the cases where the offence with which an accused person is charged is not known to law. Here the offence was clearly provided for in the Penal Code and it is not alleged that the appellant did not know the charge which he was facing. In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** the Court expressed itself as hereunder:

> **"As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him" In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice" I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence. At the end of the day, therefore, the test is not at all a formalistic one but a substantive one. On my part, I have adopted a test that looks at the trial process in its totality rather than the retail defects separately. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal. Applying this approach to the facts of the present case, I can confidently say that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to "cure" it under section 382. If one needed evidence of that, one would begin with the very fact that the Appellant never raised the objection – including on appeal. That must be because he knew the charges he was facing. Second, a perusal of the Court record shows that the Appellant participated vigorously in the trial process and was well aware of the charges he was facing. All in all, I am certain that the trial process was fair and the Appellant had sufficient notice of the charges facing him."**

45. Applying the same test to the present case I am similarly satisfied that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to "cure" it under section 382 of the ***Criminal Procedure Code***.

46. 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.**

47. 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.

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

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

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

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

50. The importance of establishing the complainant's age in defilement cases cannot be over-emphasised. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

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

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

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

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

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

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

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

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

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

55. 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.

56. What the Court frowns upon is mere averments of age without any documents in support thereof. In this case, the evidence of the complainant's age came from the oral evidence of PW1 and the age assessment report from Mwala District Hospital. It is however clear that the maker of the said report was never called to testify and the report was produced by the police officer, PW4. In **Emmanuel Mwadime vs. Republic [2016] eKLR,** the Court (**Kamau, J**) expressed herself as hereunder:

"Against the backdrop of the aforesaid powers, this court nonetheless came to the firm conclusion that it could still not convict the Appellant on the charge of grievous harm. Appreciably, as was rightly pointed out by the Appellant, PW 5 had no power or authority to tender in evidence the P3 Form on behalf of Patterson Mwapula, who the Learned Trial Magistrate indicated to have been PW 5. 61. This was in contravention of Section 77 of the *Evidence Act* Cap 80 (Laws of Kenya) that provides as follows:-

"In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."

However, a P3 Form, being an expert report can only be tendered in evidence by a skilled expert as provided in Section 48 of the *Evidence Act*. The same provides as follows:-

"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."

Evidently, PW 5 was not skilled in medical matters. It was irrespective that the Appellant did not object to him producing the P3 Form because he did not lead evidence to demonstrate that he knew the signature of Patterson Mwapulu, attest that the said Patterson Mwapulu was the one who signed the said P3 Form or that he was well versed in medical matters. The situation would have been different had the said P3 Form been produced by a medical person and the Appellant failed to object to the production of the same. In the case of *Julius Karisa Charo vs Republic* (Supra), Ouko J also expressed similar reservations about police officers tendering in evidence P 3 Forms because they should only restrain themselves to tendering documents that would fall in their docket. He stated as follows:-

"To my mind police officers role in the production of documentary evidence ought to be restricted to police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature."

There is no doubt in the mind of this court that PW 1 sustained injuries as was evident from the photographs that were adduced in evidence. However, the P3 Form was critical to corroborate the injuries that he sustained because it is normal for it to be inconsistent with oral evidence that is tendered by witnesses. Failure to call Patterson Mwapulu thus dealt a fatal blow to the Prosecution's case as this court not therefore consider as the possible charge of the Appellant having caused grievous harm to PW 1 herein. In the circumstances foregoing, Amended Grounds of Appeal Nos 2, 5, 6, 7, 8 and 9 had merit and the same are hereby allowed."

57. **Ouko, J** (as he then was) in **David Jefwa Kalu vs. R Cr. Appl No. 133/03** held that:

"Medical evidence if sought to be adduced ought to be so done with propriety and not in such slipshod manner"

58. A very clear warning was issued by the Court of Appeal in **Sibo Makovo vs. R Criminal Appeal NKR No. 39/1996** in the following words

"it appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called".

59. In this case the age assessment report was similarly produced by a police officer without any reason being afforded for not calling the

maker or even another medical officer to do so. In the premises, I am unable to rely on the said document as evidence of the age of the appellant.

60. Dealing with proof of age **Odero, J** in **Bernard Kimngetich Rono v Republic [2016] eKLR** expressed herself as hereunder:

> **"I am mindful of the decision in the Richard Wahome Chege case. However I chose to be guided by the decision in the earlier Kaingu Elias Kasono case. The charge of defilement is a very serious charge. It is a charge which upon conviction carries very stiff mandatory minimum sentences. The courts ought not render convictions in such cases unless all ingredients of the charge are proved beyond reasonable doubt. A mere declaration by the victim and her parent regarding her age does not in my view mount to proof beyond reasonable doubt. It is important that such an assertion about age be accompanied by some documents to prove the actual age of the child. The requirement that actual documentary proof of age be availed is not unduly oppressive to the complainants. Most children (or their parents) will have obtained a birth certificate (given that this is now a requirement for school enrolment) a baptism card or a Ministry of Health vaccination card. Such documents are easily and readily available and failure to procure the same only smacks of laxity on the part of the prosecution. Given the serious consequences to the accused arising from a conviction of a charge of defilement, the very least that the court can expect is to have every aspect of the charge proved with reasonable certainty.**
>
> **In this case no proof was tendered that the complainant was actually 7 years old as alleged by the complainant and her mother. For this reason I find that a crucial ingredient of the charge remains unproven. The trial court ought not to have convicted the appellant on the main charge of Defilement. I quash that conviction and set aside the sentence of life imprisonment.**
>
> **Having so said I am satisfied that the evidence on record proves the alternative charge of Indecent Act with a child. The appellant pushed the complainant to the ground lay on top of her and pushed aside her underpants. Clearly this intention was to sexually assault her and indeed he proceeded to do just that. I substitute a conviction on the alternative charge of committing an Indecent Act on a child. Taking into account the fact that the complainant was a very young child. I impose a sentence of fifteen (15) years imprisonment. It is so ordered."**

61. As regards the evidence of penetration, though the complainant testified that the appellant inserted his organ for urinating (penis) into the complainant's organ for urinating (vagina), the medical evidence was to the effect that the complainant's external genitalia were normal, the hymen was not seen and the majora was not swollen. She had no injuries on the head, thorax and upper limb. According to the examination, the age of the injuries was days and the probable cause of the injury was penis. In the medical opinion, the nature of the offence was defilement though there was no discharge of the genitalia and there were no injuries of the external genitalia. It was concluded that there were no signs of penetration. However based on the statement of the complainant that she had been repeatedly defiled by the appellant she was treated for the same.

62. The question that arises is whether the loss of the hymen was as a result of the defilement on 3rd day of February, 2014 or the earlier defilement. Similar circumstances arose in **Dominic Kibet Mwareng vs. Republic [2013] eKLR** it where it was held that:

> **"The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time. According to the Medical Examination Report produced as MF1, there were no obvious tears on the Complainant's genitalia. There was however evidence of old penetration. In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence. The Complainant in the instant case testified that the Appellant was previously known to her. She even claimed that he had defiled her on two previous occasions, although she had not reported the previous defilements. According to the charge sheet, the Complainant was defiled on 20th June 2011 and from the Medical Examination Report, she was examined on 24th June 2011 at which point she showed evidence of old penetration with no obvious tears. The Court was therefore unable to reconcile the alleged defilement by the Appellant on 20th June 2011 with the Medical Examination Report. The Court treated the Complainant's evidence that the Appellant had defiled her on two previous occasions with extreme caution as it could well have been intended to fill in gaps in the Prosecution case."**

63. Similarly, in **John Mutua Munyoki vs. 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. Did the prosecution discharge this task? According to the appellant the prosecution failed in this undertaking, whereas the respondent is of a different view. Apart from the testimony of the complainant, there was no other evidence linking the appellant to the crime. The only reason why the appellant was the prime suspect was because he was the last person to be seen with the complainant. Much reliance was placed on the evidence of the complainant despite having been discredited by the evidence of the clinical officer. 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:**
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> **'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."**

64. While I find that there was no mistake in the identification of the appellant, the matter before the Court was a very serious matter which upon conviction meant that the appellant would spend his whole life in prison. However the matter was treated so casually that it failed to meet the standard of proof required in criminal cases – beyond reasonable doubt.

65. Therefore, it is my view that the prosecution failed to prove all the three ingredients of the offence of defilement beyond reasonable doubt. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR**:

> **"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."**

66. I associate myself with the sentiments of **Murima, J** in **JOO vs. Republic [2015] eKLR,** that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

67. In the premises, the appellant's conviction on the offence of defilement was unsafe. However just like **Odero, J** in **Bernard Kimngetich Rono v Republic** (supra) I am satisfied that the evidence on record proves the alternative charge of Indecent Act with a child. The appellant appellant removed the complainant's panty and her clothes and lay on her. Clearly this intention was to sexually assault the complainant and while there was no satisfactory evidence proving penetration for the purposes of defilement, the appellant committed an indecent act with the complainant.

68. Accordingly, I set aside the appellant's conviction on the offence of defilement, quash the life sentence imposed on him and substitute a conviction on the alternative charge of committing an Indecent Act on a child. Taking into account the fact that the complainant was a very young child and the offence in question is serious as it has a long lasting psychological trauma on the victim and that children ought to be protected from such perpetrators, I impose a sentence of fifteen (15) years imprisonment to run from the date he was incarcerated.

69. Orders accordingly.

70. Right of appeal 14 days.

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 Respondent

CA Geoffrey