REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

HIGH COURT CRIMINAL APPEAL NUMBER 242 OF 2014

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 917 of 2014, I M Kahuya, Ag.SRM on 11th December, , 2014)

WAITA MUNYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant, **Waita Munyoki**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 917 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 were that the appellant on the 13th day of May, 2012 at [particulars withheld] Location in Mwala Sub-county, within Machakos County, unlawfully and intentionally caused his penis to penetrate the vagina of **N N**, a girl aged 9 years. Alternatively, he was charged with the offence of indecent act contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he unlawfully and intentionally indecently touched the vagina of N N, a girl aged 9 years using his penis.

2. Upon being found guilty, the appellant was convicted of the offence of defilement and sentenced to life imprisonment. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1) That the learned trial magistrate erred in matter of law and fact by failing to find that one offence of defilement was not conclusively proved since the evidence did not ascertain penile penetration of the complainant's genitalia.**
>
> **2) That the learned trial magistrate erred in matters of law and fact by not finding that the entire prosecution case was based on mere suspicion, incapable of sustaining a conviction.**
>
> **3) That the learned trial magistrate erred in law and fact by basing my conviction purely on circumstantial evidence which failed to satisfy the standards of law.**
>
> **4) That the learned trial magistrate erred in matters of law and fact by not finding that I was positively identified as the perpetrator of the offence charged.**

3. In support of the prosecution's case the prosecution called 5 witnesses.

4. The first witness was the complainant in this case. According to her on 13th May, 2012 at 4.00pm, her father sent her for some water-guard at the market and he left at about 5.00pm. In her evidence, she diverted to her Aunt's farm which had tall grass at which point the appellant ran to where she was and pushed her into a ditch. When the complainant attempted to scram, the appellant put his finger into her mouth and pulled out her tongue. The appellant then removed her underpants and started having sex with her. When the complainant tried to scream, the appellant once again pulled out her tongue till it bled. The complainant then bit the appellant on the fingers but the appellant bit her back on the cheek and the forehead. The complainant then lied to the appellant that she wanted to relieve herself after which the appellant set her free and threw her panty at her after which the complainant took off. According to the complainant the appellant inserted his penis into her vagina. She accordingly exhibited the torn underpants.

5. Upon meeting her mother at the farm, the mother informed the father and they set out to search for the appellant but did not find him. That evening they reported the matter at Mwala Police Station after which they were referred to Mwala Hospital.

6. In cross-examination the complainant maintained that the appellant, who at the time had a white shirt and jeans, bit her on the forehead and left cheek. It was her evidence that the appellant used to herd cattle around their home. It was her evidence that the appellant passed her on his way from the market.

7. PW2, the complainant's mother confirmed that on 13th May, 2012 at about 4.30pm the complainant was asked to go and buy water-guard from the market a distance of 40 metres to and fro. However due to the delay in the complainant's return, the PW2, being concerned asked her friend to help her search for the complainant. They then met the complainant who was crying with a swollen face with a bite mark and blood coming from her mouth and her private parts. The complainant also had muddy clothes and her underpants were torn and bloody. Upon being asked who had defiled her, the complainant responded that she did not know her defiler by name but he had a white shirt and jeans and that he had pursued her from the market. Upon failing to track the culprit, PW2 and the complainant's father they reported the matter at Mwala AP Camp and they were issued with a note to go to Mwala District Hospital where the complainant was admitted till the following day. At home when asked who had defiled her, the complainant said it was the accused person and mentioned him by name as Waite. According toPW2 the accused used to be their neighbour.

8. Thereafter PW2 returned to the AP's Camp and informed the officers who promised to arrest the appellant. The complainant also disclosed that she had met her teacher, **Ms Muise**, on the way. When the hunt for the appellant commenced, on three occasions he fled from his hunters according to PW2 and disappeared for 2 years.

9. According to the witness on the first attempt to arrest the appellant the people spotted a bit mark on his hand. She denied that she had fabricated the case against the appellant because she had quarrelled with him or even the appellant's mother over grazing fields.

10. PW3, **APC Hussein Ali**, was based at Mwala AP Post. According to him, on 1st June 2014 at around 7.00 pm he was with his colleague, **APC Sila**, on an arrest mission based on the information that the appellant was drinking alcohol at a local bar. They then rushed there and arrested the appellant on allegation of defilement and took him to Masii Police Station.

11. **Riziki Zainabu**, PW4 was the Clinical Officer at Mwala Subcounty examined the complainant on 13th May, 2012 and found no spermatozoa. She conducted another examination on 18th May, 2014. According to her the complainant carried her underpants which she had on the day of defilement which was dirty and torn and had bruises on her face and lower lip and both legs were swollen. There were bruises on her vagina which were bleeding. The witness concluded that there was forceful penetration though she could not confirm whether the hymen was intact or not due to her age of 9 years. The witness produced the medical report and the age assessment report as exhibits. She however did not medically examine the appellant.

12. The investigating officer in the matter was **PC Bosire** who testified as PW5. According to him, on 2nd June, 2014 he was at Masii Police Station when PW3 took the appellant who was alleged to have defiled someone based on the report which had been made on 18th June, 2012 and had fled the locality for about 2 years. According to him the complainant's panty had been left behind as an exhibit. He accordingly charged the appellant with the offence. According to him, he believed the appellant was the culprit because the complainant identified him hence the reason the appellant was at large for two years. It was his evidence that immediately the incident was reported the police went for the appellant at his home but did not find him.

13. Upon being placed on his defence, the appellant gave sworn evidence. According to him, he was a casual labourer and on that day, a Sunday, he woke up and went to fetch water for her mother. Thereafter he went to graze animals up to 1.00pm when he returned home and took lunch. He thereafter left for the market where he was till 7.00pm when he decided to go for a drink and he was arrested at 7.30pm and taken to the police station where he learnt of the charge facing him.

14. The appellant admitted that he knew the complainant as a person from their locality but they never met on the alleged day. It was his evidence that the case was a fabrication due to a land dispute. He testified that at one time, their cattle trespassed into the complainant's farm and since then there was tension between PW2 and his mother and PW2 threatened to accuse him of defiling her daughter, a charge which was untrue. It was his case that he continued with his work till the day of his arrest.

15. According to him, he was not a friend of the complainant since they were not close friends though she was living within their locality. According to him, that day he was in the market the whole day. He denied that he defiled the complainant and threatened her not to speak out. He further denied that he was on the run for two years though he knew the police were looking for him. He however did not inquire from the police because he had done nothing.

16. In her judgement the Learned Trial Magistrate found that the complainant was aged 9 years at the time of the offence based on the medical age assessment report dated 5th June, 2014. She further found that based on the complainant's evidence, the torn and bloody under pants and the medical examination report there was forced penetration of the complainant's vagina. As regards the issue whether the appellant was the culprit e court believed that he was the one for the reasons that he was identified through his name by the complainant and he lived within the same locality as the complainant and PW2 and t witnesses stated that they had no grudge with him. In her view even if there was a grudge, the same did not imply that the case was a fabrication since the prosecution's evidence was too strong to rebut and placed the appellant at the centre of the offence hence the reason he fled from the locality for two years despite his knowledge that the police were looking for him.

17. It was submitted by the appellant that the evidence in its entirety, especially the medical evidence was insufficient to prove the penile penetration of the victim's genitalia in the absence of the evidence of spermatozoa and in the absence of any forensic tests carried out to link the appellant with the commission of the offence. Lt was his case that the injuries observed on the victim were not proved to be consistent with a sexual assault to the exclusion of any other reasonable explanation.

18. The appellant also submitted that though the prosecution witnesses said that the complainant called out his name as the person who defiled her, she failed to give that information at the first opportunity. It was his case that the inference is that the complainant did not know

the person who attacked her hence raising the issue as to whether he was the perpetrator. To him he was arrested, tried and convicted on mere suspicion and circumstantial evidence yet the circumstances relied on by the prosecution were insufficient to base his conviction on.

19. As regards the identity of the offender, it was submitted that there was possibility of mistaken identity by the complainant who was 9 years old and taking into account the fact that there was no evidence of the intensity of the light.

20. In opposing the appeal, the Respondent through **Ms Mogoi**, the Prosecution Counsel, submitted that the complainant's age of 9 years was proved by the assessment report. As regards penetration the evidence of the complainant and the medical examination proved penetration as required by the law.

21. It was submitted that since the offence took place at 5.00 pm and the accused was known to the complainant, there was no possibility of mistake in identifying the appellant as this was a case of recognition.

22. It was therefore the Respondent's case that the prosecution proved all the ingredients of the offence beyond reasonable doubt.

Determination

23. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

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

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

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

25. 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.***
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> ***(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.

26. 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."**

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

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

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

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."**

29. 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."**

30. In this case, there was evidence both orally and documentary that the complainant was aged 9 years at the time of the commission of the offence. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

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

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

32. I am therefore satisfied that it was proved beyond reasonable doubt that the complainant was aged 9 years at the time of the commission of the offence.

33. The next issue is whether there was penetration. Section 2 of the ***Sexual Offences Act*** defines "penetration" as:

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

34. In this case the complainant testified that the appellant inserted his penis into her vagina. She accordingly exhibited the torn underpants. According to the record of the proceedings, PW4 examined the complainant on 13th May, 2012 and found no spermatozoa. She conducted another examination on 18th May, 2014. According to her the complainant carried her underpants which she had on the day of defilement which was dirty and torn and had bruises on her face and lower lip and both legs were swollen. There were bruises on her vagina which were bleeding. The witness concluded that there was forceful penetration though she could not confirm whether the hymen was intact or not due to her age of 9 years. The exhibits produced however show that the examinations were done on 13th May, 2012 and 18th May, 2012 respectively. From the said exhibits, it is clear that there were healing bruises on the inner side of the labia. In this case although there was no spermatozoa found and there was no evidence that the complainant's hymen was broken, in **George Owiti Raya vs. Republic [2013] eKLR** it was held that:

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane."**

35. Based on the evidence I am satisfied that penetration of the complainant's genitalia was proved beyond reasonable doubt.

36. As to whether the act of penetration was done by the appellant herein, it was the evidence of PW2 that upon being asked who had defiled her, the complainant responded that she did not know her defiler by name but he had a white shirt and jeans. In fact the first search of the assailant according to PW2 was on the basis of this clothing description rather than on the basis that the assailant was the appellant. It was only later on that the complainant apparently revealed to PW2 that it was the appellant that had defiled her. In those circumstances one cannot rule out the possibility that the appellant's name could have been introduced by PW2 taking into consideration the existing bad blood between the appellant and PW2, more so as there was no evidence that the appellant threatened the complainant not to reveal his identity. As was appreciated in **Tekerali s/o Korongozi & 4 Others vs. Rep (1952) 19 EACA 259**:

> **"Their importance [of the firs report] can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [come] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."**

37. Although the evidence against the appellant is that of recognition as opposed to identification, in **Ali Mlako Mwero vs. Republic [2011] eKLR** the Court of Appeal expressed itself as follows:

> **"The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken. So may a number of them; see Roria v R [1967] EA 583. There is nevertheless some measure of reassurance when the case rests on recognition as stated in the case of Anjononi & Another v Republic [1980] KLR 59, thus:**
>
> > ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported)."***

38. In another case, **R vs. Turnbull (1976) 3 ALL E.R 549** the Court held:

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

39. In **Maitanyi vs. Republic (1986) KLR 198**, the Court of Appeal in, holding that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification held:

> **"The strange fact is that many witnesses do not properly identify another person even in daylight...It is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into....' See Wanjohi & Others vs. Republic (1989) KLR 415."**

40. It is therefore my view that in such cases the first report becomes important. In the case of **Rex vs. Shabani Bin Donaldi (1940) 7 EACA 60** it was held that:

> **"We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such reports (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all."**

41. In **Maitanyi vs. Republic (1986) KLR 198** ***(supra)***, the Court held that:

> **"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained."**

42. In this case the fact that the complainant did not immediately disclose to PW2 that it was the appellant that had defiled her, coupled with the fact that there was no evidence directly linking the appellant to the offence as well as the appellant's sworn evidence that there was a grudge between him and PW2, it is my view that there was reasonable doubt as to whether it was in fact the appellant who defiled the complainant. The Court's mind seemed to have been swayed by the fact that the appellant left the locality and did not report to the police despite the fact that he had knowledge that the police were looking for him. In my view this act even if true does not absolve the prosecution from its duty to prove all the elements of the offence of defilement beyond reasonable doubt.

43. In **James Tinega Omwenga vs. Republic [2014] eKLR**, the Court of Appeal held that:

> **"Nelco testified that the conduct of the appellant pointed to his guilt because he avoided attending both meetings which had been convened by the chief. It is trite law that suspicion alone cannot be the basis for inferring guilt. In *Mary Wanjiku Gichira -vs- Republic- Criminal Appeal No. 17 of 1998*, this Court held,**
>
> > **"*Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.*"**
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> **See also this Court's decision in *Sawe -vs- Republic (2003) KLR 364.*"**

44. It is trite law that the burden of proof in a criminal case lies on the prosecution throughout the proceedings. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 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.''**

45. As was held by **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64**:

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

46. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997} 3 SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt."**

47. In **JOO vs. Republic [2015] eKLR, Mrima, J** held 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."**

48. **Mativo, J** in In **Elizabeth Waithiegeni Gatimu vs. Republc [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."**

49. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 All ER 372** where he stated:-

> **"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

50. In this case I am not satisfied that the prosecution proved beyond reasonable doubt that it was the appellant who defiled the complainant. In this case the sentence which the appellant faced upon conviction and which was meted against him was life. 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."**

51. It is therefore my view that considering the totality of the evidence adduced by the prosecution, the conviction of the appellant cannot stand. The prosecution failed to prove all the three ingredients of the offence of defilement against the appellant.

52. The upshot of the foregoing is that I find the appellant's conviction was unsafe and that the appeal has merit. I allow the same, set aside the conviction and quash the sentence.

53. I order that the appellant be hereby set at liberty unless otherwise lawfully held.

54. Right of appeal 14 days.

55. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 13th day of November, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Njuguna for Miss Mogoi for the Respondent

CA Geoffrey