REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 6 OF 2016

LUCAS MASA HURA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. K. Rugut,

Senior Resident Magistrate in Rongo Senior Resident Magistrate's

Criminal Case No. 329 of 2014 delivered on 09/01/2015)

JUDGMENT

Introduction:

1. The Appellant herein, **LUCAS MASA HURA,** who is an elected Member of the Migori County Assembly representing the Ntimaru East Ward, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He also faced a second charge of escaping from lawful custody contrary to **Section 123** as read with **Section 36** of the **Penal Code**, Chapter 63 of the Laws of Kenya.

2. The particulars of the offences of defilement and escaping from lawful custody were as follows:

> ***"On the 11th day of May 2014 in Kuria East District within Migori County, intentionally caused his penis to penetrate the vagina of D.B.C., a girl aged 13 years."***
>
> ***"On the 11th day of May 2014 in Kuria East District within Migori County being in lawful custody of No. 42272 S/Sgt Justus Kasusya, No. 66409 PC Jacktone Ojera and No. 88497 PC Peter Gichaga escaped from the said custody."***

3. When the Appellant denied the offences, he was tried and convicted on the principal offence of defilement and the offence of escaping from lawful custody. He was eventually sentenced.

The Trial:

4. For purposes of having a clear view of how the trial was conducted before the trial courts, I will first revisit the events that led the matter to be transferred from Kehancha court to Rongo court for hearing and determination.

5. The Appellant was initially charged ***in absentia*** before the Kehancha Senior Resident Magistrates Court on 15/05/2014 and a Warrant of Arrest was issued against him. He was subsequently arrested and arraigned before ***Hon. Aganyo, Resident Magistrate*** on 20/05/2014 where he denied all the charges. The Appellant was then represented by Mr. Onyango Counsel. An application to have the Appellant released on bond/bail pending the hearing and determination of the case were strenuously opposed by the prosecution on *inter alia* grounds that further investigations were still underway with the possibility of preferring further charges and that the Appellant faced a charge of escaping from lawful custody. That made the court to schedule the ruling for 23/05/2014 and called for a Pre-Bail Report. The hearing of the case was also fixed for the same day as the ruling. In its ruling the court rightly found that all the offences the Appellant faced were bailable and that it would not deny the Appellant bond/bal on the allegations that further investigations were ongoing. Since the Pre-Bail Report was not ready the issue of whether or not the Appellant would be released on bond was not dealt with on that day.

6. On that same day, 23/05/2014, since the case was also scheduled for hearing the defence prayed for an adjournment on grounds that they had just been supplied with witness statements late the day before. The prosecution also informed the court that the pre-bail report was not ready. The hearing was rescheduled to the 5th and 6th June 2014. On 05/06/2014 Miss Owenga, Senior Principal Prosecution State Counsel, took over the prosecution of the case and prayed for an adjournment on the grounds that some of the exhibits which the prosecution intended to rely on were still with the Government Chemist in Nairobi undergoing some tests. The prosecution however promised to follow up the matter as not to delay the hearing.

7. In a scathing response, the defence raised concerns over the manner in which the court dealt with the case. Whereas the defence claimed that the pre-bail report was ready but its production before court was unduly delayed, it went further to state that the court had conducted itself in a suspicious manner by visiting the probation officer to discuss the matter with a view of the Appellant staying in custody for longer. The defence expressed its displeasure to proceed on with the case before that court and prayed that the court disqualifies itself. In an equally strong rejoinder, the prosecution opposed the application and stated that as the station had only two judicial officers it was aware of a scheme by the defence to manipulate the case before the other court and prayed that if anything then the matter should instead be moved to any other court within Migori County.

8. By a ruling delivered later that day the court declined to disqualify itself and with the consensus of all Counsels set the hearing date for 03/07/2014. The matter however came up on 25/06/2014 where the issue of bail/bond was dealt with. The report was not favourable to the Appellant's release on bond on the main grounds that the Appellant was likely to interfere with witnesses while out on bond. On hearing both parties on their responses to the report the court deferred its ruling but instead allowed an application by the defence that the Appellant be escorted to the Migori County Assembly Chambers to attend some sessions so as not to lose his Member of County Assembly seat.

9. The hearing resumed on 03/07/2017 as scheduled where the prosecution availed 6 witnesses and was ready to proceed with the hearing. The defence applied for an adjournment on grounds that Mr. Onyango although he was in court, was but indisposed. The prosecution opposed the application and prayed that at least the evidence of three witnesses who had travelled from far be heard. The court declined the adjournment and the defence Counsel applied to withdraw his representation of the Appellant. The court allowed the Counsel to withdraw from representing the Appellant and further allowed an application by the Appellant in person for time to engage the services of another Counsel to appear for him. The hearing was set for 10th and 11th July 2014 and the court set the bond terms at Kshs. 1,000,000/= with two sureties of similar amount. Upon his release the Appellant was to attend mentions before the court fortnightly and was warned against interfering with witnesses.

10. On 10/07/2014 Mr. Gichana Counsel appeared for the Appellant. He sought for an adjournment on grounds that he had just been appointed the day before and since the Appellant was in custody he had managed to see him that morning. The application was opposed in that the prosecution had 6 witnesses in court one who was the victim who had travelled from Machakos where she was held in a rescue centre and another witness had travelled all the way from Mombasa. It was decried that the defence was delaying the matter. The court then declined the adjournment and ordered the hearing to proceed and if need be then the defence would recall the witnesses at its own cost. The bewildered defence Counsel opted not to take part in the proceedings and sought for a stay of proceedings as he wanted to file an appropriate application at the High Court. That application was equally declined. The Counsel then indicated to the court that he was not ready to take part in any further proceedings before that court together with his client, the Appellant. As he walked out of the court, the Counsel beckoned the Appellant to return to the cells and the Appellant obliged.

11. When the Counsel had finally walked out of the court, the court ordered that the Appellant be brought back to court for the hearing to continue. After a struggle in the cells, the Appellant was finally arraigned before court where real drama ensued. The Appellant in protesting to proceed with the hearing without his Counsel wailed so loudly, threw himself on the floor, rolled thereon, hit himself all over the body and forced himself to vomit. It was total chaos. The court ordered that the Appellant be removed from court but was determined to proceed on with the hearing of the case. It proceeded to take the evidence of the victim, but after a short while the victim was so shaken and tearing uncontrollably and that forced the court to finally adjourn the hearing. The two sureties were however approved.

12. The matter came up again before the court on 16/07/2014 where the defence Counsel informed the court that the Appellant had filed an application in the High Court and was awaiting further directions. Hearing was set for 13/08/2014. The High Court then transferred the matter to Rongo court for expeditious and day-to- day hearing. Parties appeared before ***Hon. P. K. Rugut, Senior Resident Magistrate***, on 18/08/2014 and a hearing date was fixed for 22/08/2014.

13. The prosecution then called a total of 10 witnesses in its bid to prove its case against the Appellant. **PW1** was the victim. I shall henceforth refer to her as **'the complainant'**. **PW2** was the complainant's mother. The Caretaker at the [particulars withheld] Guest House testified as **PW3** whereas **No. 46471 PC Mwangi Kimani** of CID Kuria West and attached to Ntimaru Police Station testified as **PW4**. **No. 66409 PC Jacktone Ojera** stationed at Ntimaru Police Station testified as **PW5**. A Clinical Officer from Kehancha District Hospital was **PW6** while **No. 95052115 Corp. Pius Kimaiyo** stationed at Gekonga DC's office was **PW7.** The Government Chemist testified as **PW8** and **No. 42272 Senior Sergeant Julius Kasusia** who was also the investigating officer testified as **PW9** with **No. 232417 Insp. David Kemboi** from Migori Police Station testifying as **PW10**.

14. The prosecution's case was that in the early evening of 11/05/2014 at around 07:00pm or thereabout, PW2 went to Ntimaru Police Station and made a complaint that the complainant who was her daughter, a minor and a student at [particulars withheld] Primary School, was not at her home and had been seen with a man at [particulars withheld] Guest House. The report was made to PW5 who immediately called and informed his OCS. The OCS directed that PW5 teams up with the other officers led by PW9 and to immediately visit the scene before it was late. PW5 called and informed PW9 and they proceeded to the scene in the company of **PC Gichaga** (not a witness). They were three police officers and were in the company of the reportee, PW2. The four approached the Guest House and gained entry through the back door and quietly walked along the corridors while checking which rooms were occupied. All the rooms were open save one room number 10 christened as "Machakos" which was locked from inside. The officers knocked at the door and asked the occupant(s) to open the door. Instead of opening the door the male occupant instead opened the window and on seeing that they were police officers the occupant asked them to discuss the matter and reconcile. The officers and in the presence of PW2 refused the proposal and asked him to dress up and instead open the door. After a while the occupant opened the door and the officers entered into the room. The room had two beds. They found the complainant seated on one of the beds with an unopened Tusker beer bottle and a Coca Cola bottle placed near where she was.

There were also one Tusker bottle which was almost empty.

15. The officers searched the room for possible leads like condoms but in vain. They interrogated the complainant who informed them that although she had engaged in sex with the man who was in the room they nevertheless used any condoms. The officers arrested both the complainant and the man and took them out of the room. The man attempted to bribe the police officers with some money but again the police officers declined. The man, not relenting, attempted to bribe PW2 with Kshs. 4,000/= so as to end the matter there but PW2 also declined the illegal offer and immediately informed the police officers what the man was attempting to do. The police collected the bottles from the room as possible exhibits.

16. The three officers together with PW2 and the two persons then began their way to the Ntimaru Police Station through the back door they had used as they came into the Guest House. As they were still inside the Guest House PW3 approached the man who had occupied the room 10 and asked for the balance of Kshs. 50/= to clear the man's bills. PW9 interrogated PW3 who informed him she was demanding the balance of the bills as she had supplied the two occupants with drinks in the room. PW9 arrested PW3 as well. As PW9 was interrogating and arresting PW3 the rest of the people were heading towards the rear door. to the station. On reaching at the gate, they found a group of between 15 to 20 people waiting thereat and on seeing the officers and the man they had found in the room with the other people, the crowd began throwing stones at them and in the process of the police firing gunshots in the air to disperse the crowd the man got an opportunity and escaped into a nearby maize plantation leaving behind his shoes which were recovered by the police.

17. The rest of the people went back to the station and after placing the complainant and PW3 in custody, the police made appropriate entries in the Occurrence Book since they had had to urgently rush to the scene before so doing due to the urgency and the sensitivity of the matter. The complainant was that night taken to Ntimaru District Hospital by the police and PW2 but there was no medical officer and on returning to the police station she was held in custody until the following day when she was escorted to Kehancha District Hospital alongside PW2. The complainant was examined and treated and a P3 Form filled. On examination of the genitalia, PW6 found that the external genitalia was normal but the hymen was broken. There was also a smelly whitish discharge. On undertaking a high vaginal swab laboratory analysis, PW6 confirmed no presence of spermatozoa and likewise no presence of bloods cells and yeast cells was confirmed. H.I.V. and pregnancy tests were also conducted and yielded negative results. PW6 however gave the complainant preventive medication just in case H.I.V. was present. To PW6 the broken hymen indicated that the complainant had engaged into penetrative sex before the examination.

18. PW6 also produced an Age Assessment Report for the complainant which assessed her age at 13 years old. PW9 then gathered evidence that the complainant was a Standard 6 student at [particulars withheld] Primary School at the time of the incident but had been transferred to a rescue centre in Machakos immediately after the incident. The complainant and PW3 were then arraigned before the Kehancha court. The complainant was a child in need of care and protection whereas PW3 was charged with child prostitution. The police then arrested the Appellant on 20/05/2014 on the strength of the Warrant of Arrest and escorted him, with leave of court, to Migori District Hospital where his blood samples were taken and later on forwarded to the Government Chemist in Nairobi for analysis.

19. At the close of the prosecution's case, the defence filed detailed written submissions urging the court not to place the Appellant on his defence. The trial court however found that the Appellant had a case to answer and placed him on his defence. The Appellant conducted the defence by himself as the defence Counsel never turned up and the Appellant indicated to the court that it appeared that the defence Counsel was not taking the matter with the seriousness it deserved.

20. The Appellant opted to and gave sworn defence and called two witnesses. The witnesses were **James Machira Rioba (DW1)** and the Appellant's brother **Daniel Chacha Hura (DW2).** The Appellant raised an *alibi* that he was indeed not at the alleged place on the day and time as he was at his home at Kodela Bose in Ntimaru East the whole of the alleged 11/05/2014 as he held a ceremony since his wife had delivered. DW1 and DW2 corroborated the Appellant's evidence and the defence case was closed.

21. By a judgment rendered on 09/01/2015 the trial court found the Appellant guilty and convicted him of the offences of defilement and escaping from lawful custody. The Appellant was then sentenced to 15 years imprisonment on the charge of defilement and to a fine of Kshs. 10,000/= in default to serve 3 months imprisonment on the charge of escaping from lawful custody. The sentences were to run concurrently.

The Appeal:

22. Being dissatisfied with the convictions and sentences, the Appellant preferred an appeal through the firm of Amuga & Company Advocates. A Petition of Appeal was lodged on 20/01/2015 and challenged the convictions and sentences on eleven grounds. The Appellant contemporaneously filed a Notice of Motion seeking an order that the Appellant be released on bond pending the hearing and determination of this appeal. When the Notice of Motion came before ***Hon. Majanja, J.*** for hearing on 10/04/2015, the Judge disqualified himself from hearing the matter on personal reasons and the file was referred to the High Court at Kisii. The Notice of Motion was then heard before ***Hon. Nagillah, J.*** and the Appellant was eventually released on bond pending the hearing and determination of this appeal.

23. For ease of reference in this judgment, I will reproduce the eleven grounds of appeal as they appear in the Petition of Appeal. They are as follows:

> 1. ***The learned trial magistrate erred in la w and fact when he found and held that the Appellant "was positively identified as the perpetrator" yet there was no evidence placed before the court to prove that a proper identification of the Appellant had been done, save for the unreliable dock identification in court, considering that the offence in question had been allegedly committed at night.***
>
> 2. ***The learned trial magistrate erred in law and fact in basing the Appellant's conviction on the evidence of Prosecution Witness No. 6, which evidence only confirmed that the complainant's hymen was broken, but falling far short of proving that the broken hymen was as a result of sexual intercourse or penetrative sex between the complainant and the Appellant as had been***

alleged.

3. ***The learned trial magistrate erred in law and fact in finding and holding that the complainant had been defiled by the Appellant when there was no sufficient evidence to prove that the Appellant had had sexual intercourse or penetrative sex with the complainant as is envisaged under the provisions of Section 8 of the Sexual Offences Act, No. 3 of 2006. This finding contradicted the evidence of the Government analyst (PW8) and also contradicted the evidence of the Clinical Officer (PW6).***

4. ***The learned trial magistrate erred in law and fact in finding and holding that the complainant was a minor aged 16 years when the evidence on record regarding her age was very inconsistent and unreliable, putting the complainant's date of birth and age variously as 1995, 1998, 12 years, 13 years and 16 years. The trial magistrate should have held that the complainant's age was not sufficiently proved, more so considering the complainant's behaviour and conduct at the time material to the case and during her testimony in court.***

5. ***The learned trial magistrate erred in law and fact by believing and relying on the inconsistent and contradictory evidence of the complainant which the trial magistrate erroneously termed "consistent and cogent" and further erred when he found that the complainant's evidence had been corroborated by the other prosecution witnesses while the trial magistrate unreasonably disregarded the Appellant's defence of alibi and the consistent and unshaken evidence adduced by the Appellant and his witnesses, without assigning any good reason for not believing the Appellant's defence which created serious doubts as to the strength of the prosecution case.***

6. ***The learned trial magistrate erred in law and fact in declaring two prosecution witnesses (PW2 & 3) as hostile witnesses when there was no good reason for making such orders and further erred when he disregarded the evidence of theses witnesses yet they were prosecution witnesses whose testimony and evidence should have been given due consideration even if their testimony was not favourable to the prosecution case.***

7. ***The learned trial magistrate erred in law and fact in failing to consider that the allegations that the Appellant had defiled the complainant on 11th May, 2014 at about 7:30 p.m and thereafter escaped from lawful custody could not be true considering that the prosecution witnesses did not offer any explanation as to why it took until 20th May, 2014 to arrest the Appellant, yet their evidence was that the Appellant was a well known politician in the area.***

8. ***The learned trial magistrate erred in law and fact in finding and holding that the Appellant had escaped from lawful custody when here was no evidence that the Appellant had been arrested or had been placed in lawful custody in the first place.***

9. ***The learned trial magistrate erred in law and fact in convicting the Appellant on the basis of the inconsistent, contradictory, discredited and inconclusive evidence of the prosecution witnesses.***

10.The learned trial magistrate erred in law and fact in convicting the Appellant against the weight of the evidence on record.

11.The learned trial magistrate erred in law and fact in imposing on the Appellant a harsh and oppressive sentences."

24. At the hearing of the appeal **Mr. Amuga** Learned Counsel appeared for the Appellant whereas **Miss Owenga,** Senior Principal Prosecution State Counsel appeared for the prosecution. Mr. Amuga in prosecuting the appeal relied on the **Record of Appeal** dated and evenly filed on 20/01/2015, **the Appellant's List of Authorities** dated and evenly filed on 14/11/2016 and **the Appellant's Supplementary List of Authorities** dated 06/01/2017 and filed on 08/02/2017.

25. The appeal was argued by way of oral submissions. Mr. Amuga Counsel argued all the eleven grounds in three clusters. Grounds 1, 5, 7 and 8 were argued together as well as grounds 2, 3, 4, 9 and 10. Ground 8 was solely argued. Grounds 1, 5, 7 and 8 largely dealt with the identification of the Appellant. It was submitted that since the incident occured at night, took at most 3 minutes in the dark, the complainant had never seen or known the assailant and that the assailant was not arrested at the scene then the dock identification relied on in finding that the assailant was the Appellant was worthless and ought to be disregarded. Alot of emphasis was laid on the fact that the trial court record never dealt with the issue of the light at the scene or at all. The decisions of **Gabriel Kamau Njoroge vs. Republic (1982- 88)1KAR 1134**, **Osiwa vs. Republic (1989) KLR 469**, **Wamunga vs. Republic (1989) KLR 424** and **Kiarie vs. Republic (1976-1985) ALR 213** were variously cited in support of those grounds.

26. Grounds 2, 3, 4, 9 and 10 dealt with the twin issues of the age of the complainant and the aspect of penetration. It was strenuously argued that the age of the complainant was not properly settled and given the different ages tendered in evidence then the age was to be settled to the benefit of the defence at 20 years old at least. On penetration it was submitted that there was no such evidence as the missing of the hymen was not proved to have been occasioned recently and even if so, there was no evidence pointing to the Appellant. Further submissions were made that indeed what transpired was a consensual act by the conduct of the complainant and the persuasive decision in **Martin Charo vs. Republic (2016) eKLR** was refereed to. The issue of corroboration was also raised and the Counsel relied on the decision in **Mwangi vs. Republic (1984) LKR 595**.

27. Ground 8 was on the offence of escaping from lawful custody. It was submitted that there was no evidence that the Appellant was at the scene in the first instance and even if he was, no arrest was effected on him as he was not informed that he was under such arrest in the first instance. The decision in **Wilson Owiti Matete vs. Republic (2013) eKLR** was cited in such support. This Court was finally urged to allow the appeal, quash the convictions, set-aside the sentences and the Appellant be ordered at liberty unless otherwise lawfully held.

28. The appeal was strenuously opposed. Miss Owenga made responses on each cluster of the grounds. On the issue of identification, it was submitted that the incident did not take 3 minutes as alleged but 10 minutes. The 3 minutes was the time taken while the two were on the bed engaging in the sexual act. Further that PW5 and PW9 had known the Appellant so well for such a long time since he was the Area

Councilor until now that he was the Member of the County Assembly and that they knew whom they were dealing with without any possibility of mistaken identity. On the issue of the light at the scene, it was submitted that all those events could not have occured in the dark and the Court was urged to so find that the place was well lit. On corroboration, it was submitted that PW5 and PW9 corroborated the evidence of the complainant. On the issue of the age of the complainant it was submitted that the same was properly settled by the trial court and it was proved that in any way the complainant was a minor in law and as such the complainant could not engage in any consensual sex. Further submissions were made that there was ample evidence of penetration. It was also submitted that the Appellant was arrested at the scene and only escaped as he was being led to the police station through the unlawful intervention of his supporters. This Court was urged to accordingly dismiss the appeal.

Analysis and Determinations:

29. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

30. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. The Court is also to satisfy itself that the offence of escaping from lawful custody was proved. Needless to say I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the parties' oral submissions with all the decisions referred to.

On the offence of defilement:

31. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them singly.

(a) On the age of the complainant:

32. There was indeed contestation on the age of the complainant. The charge sheet put the age at 13 years old. The complainant testified that she was 13 years and that she was born in 1995. PW2 stated that the complainant was 12 years old although she could not recall the complainant's date of birth. PW6 produced the complainant's Age Assessment Report which had been prepared by his senior colleague who was undergoing further studies. The production of the report as Exhibit 5 on 28/08/2014 was not objected to. by the defence. According to the report the complainant's age was 13 years.

33. When the trial court dealt with the issue of the age of the complainant in its judgment, it referred to mainly two documents. They were the [particulars withheld] **Primary School Admission Register** and the **Age Assessment Report**. In settling for the age of the complainant as it appeared in the School Admission Register, the trial court had the following to say:

> ***"The charge sheet, treatment documents and the age assessment report indeed carried an approximation of 13 years in its content. The School Admission Register differed though; it showed the year of birth of the minor as 1998 when she joined class 1 in*** [particulars withheld] ***Primary School in 2008. The register not only contains very reasonable details regarding admission of various minors in the same school but also revealed some notable consistency on the various ages of minors joining a certain class. Those born in 1998 or thereabout mostly joined class 1 between year 2007 and 2008. I find this register the only appropriate document when it comes to DBC's age and that DBC must have been around 16 as at 11/5/14. I have keenly looked at the circumstances around the production of the photocopy register document as well as its content and nothing has presented itself in my mind to doubt its authenticity. Section 4 of the sexual Offences Rules of the Court 2014 allows a court to consider school documents in ascertaining the age of a person also observed the minor testify and she was indeed a child above tender years at the time. Based on the school admission register, I will therefore take PW1's age as 16 on the material day. The approximation of the child's age as 13 or the fact that the minor was in class 6 at the time do not show utter fault or mischief."***

34. The trial court indeed found as a fact that three other documents stated the age of the complainant to be 13 years old. Those were the charge sheet, the treatment documents and the Age Assessment Report. However the trial court instead compared the ages of the pupils in the School Admission Register and found some consistency in the ages of the pupils in Standard 6 as compared to that of the complainant. It then adopted the date of birth as it appeared in the School Admission Register that the complainant was born in 1998 and as such the court found that complainant was aged 16 years old at the date of the alleged offence.

35. I wish to pose here and point out that the information that was contained in the School Admission Register must have been supplied to the School by most likely the parents to the pupils. In this case PW2 may have been the one who supplied that information. However PW2 gave the age of 12 years in court. By placing the evidence on the age of the complainant as contained in the School Admission Register on one hand and such evidence as contained in the charge sheet, treatment documents and the Age Assessment Report on the other hand, the trial court ought to have been persuaded by the latter especially the Age Assessment Report. I say so because the complainant and PW2 only approximated the age. The information contained in the School Admission Register was as well an approximation. These two sets of approximations have no sound basis whatsoever. Whereas it can also be argued that the Age Assessment Report is an approximation, that approximation is with a sound and settled medico-scientific basis. PW6 testified on what had informed the approximation of the age of the complainant by the Medical Officer as follows:-

> ***"...the age assessment was carried out.....She has not started menstruating, she had 28 teeth, she had 155cm, she had a fair pubic hair, her breasts had began growing. Her age was approximately 13 years old...."***

36. This Court therefore finds that the correct age of the complainant was 13 years old at the time of the alleged incident. However since the age of the complainant in sexual offences has all the bearing in sentencing, and in view of the fact that the prosecution did not lodge any cross-appeal against the trial court's finding on the age and moreso that the issue of finding the age of the complainant to be 13 years instead of 16 years was not argued before this Court and as such the Appellant did not have an opportunity to respond to it, this Court would wish to leave the matter at that.

37. The complainant was hence a minor within the meaning of the law as at 11/05/2014.

(b) <u>On the issue of penetration:</u>

38. **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 organ of another person.'***

This position was fortified in the case of **<u>Mark Oiruri Mose vs R (2013)eKLR</u>** when the Court of Appeal stated thus:

> ***'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. <u>So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ</u>….'*** (emphasis added).

39. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** held as such on the aspect of penetration:

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."***

40. In dealing with this issue I will revert to the record. It is not in dispute that as at the time the complainant was examined by PW6 her hymen was missing. There is however no evidence as to when that possibly happened. According to PW6 the broken hymen indicated that the complainant had engaged into penetrative sex before the examination.

41. When the complainant gave her sworn testimony-in-chief after a *voir dire* examination she stated as follows:

> ***"....I didn't get the items home...I heard somebody running behind me,.....It was a man,...near my home, he held my hand, my left hand and pulled me...He pulled me into a house. It was a lodge...It was at Ntimaru town.....I was given one beer to drink, I drunk the beer. I didn't finish the drink.....The man removed his clothes.....The man removed my clothes and my pant, it was yellow in colour....The man carried me and placed me on the bed. Something happened. The man joined me in bed and laid on top of me, he had laid me in the bed. He laid on me with his stomach. Something happened. He slept on my stomach.....The man had removed his clothes....The man did something to me (witness covers her face with her hand.....He removed his thing and parted my legs. He had sex with me...I heard somebody knocking the door the man went and peeped through the window they were 4 police officers they told him to open the door, he didn't open the door he dressed up and opened the door....."***

42. On being cross-examined by the then defence Counsel the complainant stated as follows:-

> ***"....He gave me the beer first but I refused, he threatened to lock me in the room till morning. I didn't drink the whole bottle, I took 4 sips. The accused undressed me.....the accused had also undressed. The accused put his thing in me, it's true.***
>
> ***No body coached me on what to say in court.....I didn't know the name of the room, the lady told the accused it was room 10...The accused undressed me, put me on the bed and climbed on top of me, the police didn't tell me what to say in court. He parted my legs, he told me to sleep with him until 10 am the following morning. we had sex. I am aged 13. I was born in 1995. Sex is doing something that should not happen. He took his thing and inserted in me. The thing is what he uses to urinate, he took it and put it in me. When the accused saw the policemen he told me to dress up. The window had curtains .....When he peeped out, he was naked, he came and dressed up.....***
>
> ***.....The accused took the thing he uses to urinate and put it inside my thing. The thing I use to urinate..... "***

43. And, on being re-examined by the prosecution, the complainant stated as follows:

> ***"...I am testifying what happened on that day not what I was told...."***

44. The complainant was very clear on what she told the court. Although she indicated that some parts of the statement recorded at the police station were untrue she sternly stated that what she was stating in court was what exactly happened on the material day. She repeatedly stated that neither the police nor her Advocate had told her to say what she stated in court but she said what she personally witnessed happening on that day. She described what happened to her - that she was engaged in a sexual act. She went ahead to describe how the act happened; that a male organ used to urinate was inserted into her organ she uses to urinate. There can be no precise description of sexual intercourse than that.

45. The evidence of PW6 is also worth consideration as it partly has some bearing on what the complainant stated above. PW6 on examining the complainant stated as follows:

> ***".....She stated that she was dragged and defiled in a guest house. She admitted to penetrative sex. The incident had been reported to the police. She was treated...."***

46. This Court therefore notes the consistency in that what the complainant told PW6 was exactly what she told the trial court.

47. From the foregone analysis and by taking the entire body of evidence on the issue of penetration into account and by further guidance of the binding judicial precedents referred to hereinabove, this Court is satisfied that there was indeed a penile penetration into the complainant's vagina. Penetration was hence proved.

c) <u>On whether the appellant was the perpetrator:</u>

48. The Appellant denied the offence and went further to prove his *alibi*. The gist of the Appellant's main contention is that whereas the complainant may have truly engaged into a sexual act with a man, that man was not the Appellant. It is true that the incident happened at night on the 11/05/2014. It also remains truthful that the complainant who was on her way to her home after visiting PW2 at her workplace in Ntimaru town was accosted by a man who took her into a Guest House. It is also true that police officers visited the said Guest House that night and that the complainant and PW3 were arrested therefrom.

49. The starting point would therefore be a look at how the police officers found their way into the Guest House. According to PW5 he reported on duty at the Ntimaru Police Station at around 06:00pm on 11/05/2014 and at around 07:00pm a lady who introduced herself as one B C came to the station and made a complaint. The lady was PW2 and from that report all in this case thereafter happened. On being cross-examined PW5 stated as follows:

> ***"The complainant was specifically reported to me the first time. The reportee identified the suspect to me, she didn't disclose her source of information, she said in Swahili "Niko na hoteli Ntimaru, mtoto alikuja ale alipo rudi nyumbani hakumpata, aliambiwa alionekana [particulars withheld] Guest House".....It was about 7:20pm....."***

50. On her part PW2 denied making that report. She stated that on her return to her home from her workplace she found the complainant missing and went out to look for her. She then heard noises near the police station which was about 3 metres away and went to find out what the problem was. On reaching there she found the complainant being held by her hand and the police told her that the complainant had been found with another person and that the complainant was being taken to Ntimaru District Hospital. She did not know why she was being taken to hospital. At the hospital the Doctor said that the complainant had no problem and they returned to the police station but the complainant was held by the police until the following morning. PW2 returned to the police station where she accompanied the complainant and some police officers again to Ntimaru District Hospital and then to Kehancha District Hospital. PW2 remained outside the hospital and again she was not told why the complainant was taken for medical examination. She also denied recording any statement with the police and even going to the Guest House with the police.

51. PW2 in effect denied virtually everything and from her conduct the court, on application by the prosecution, declared PW2 a hostile witness. Apart from the evidence of PW5 and PW9 on PW2's involvement in the matter, there was also the evidence of PW6 who examined the complainant at Kehancha District Hospital. PW6 stated partly as follows in examination-in-chief:

> ***"....I have clinical attendance card for DBC aged 13 from [particulars withheld], she came to us on 12/5/14, I examined her she was brought to the facility with police officers and her mother with a history of having been defiled earlier.....***
>
> ***.....The girl was born in 2002, the mother could not fill the exact date of birth....***
>
> ***.....I established so from her mother's history. The mother and the victim told us the victim knew the assailant....".***

52. The complainant also said something about PW2. She recalled that:

> ***"....I saw my mother, she the one who summoned the police. I saw my mother when I got out of the room. She was near the room....."***

53. This Court has patiently reconsidered the evidence of PW2 alongside that of the complainant, PW5, PW6 and PW9 and it is satisfied that PW2 was not truthful to the trial court. I say so partly because it is not possible for a parent who is looking for a lost child and who finds that child in the hands of the police not to find out what happened to the child. Moreso that parent accompanies the police and the child on two occasions to hospital where the child is examined even without the parent knowing what was going on. Even if it is to be taken that there were issues between the police and PW2 (just a supposition), then what of PW6 who stated that PW2 was present during the examination and indeed PW6 interrogated her. Further what about the complainant who stated that she saw her mother, PW2, at the Guest House near the room she was in. This Court hence finds that it was PW2 who made a complaint to the police on 11/05/2014 and on which complaint the police swang into action.

54. Having so found, PW2 accompanied the police to the Guest House. It is in that Guest House where PW5 and PW9 made arrests of some three people. PW5 and PW9 stated categorically that the man they found in the room 10 was the Appellant. Both PW5 and PW9 knew the Appellant well and they also spent some time with him in the room and as they were proceeding to the police station. PW5 had the following to say of the Appellant:

"...The occupant of the room is the accused person. I know him by name, he is Lucas Chacha Masa. I knew him before, he is a leader in that area, he is a member of the county assembly for Bwireri East Ward. I knew him when he was a councilor. He ran away from the scene....."

55. PW9 also stated how he knew the Appellant. he so said:

"...I re-arrested him the accused is a person seated in the dock, he was known to me before for not less than 3 years, I knew him in October 2010 he was a councilor in Ntimaru ward, he later became the Minister of County Assembly for Ntimaru East Ward to date...."

56. The fact that PW5 and PW9 knew the Appellant well was not resisted at all. Both knew him for well over 3 years since he was a councilor under the old legal dispensation until he became a Member of the County Assembly under the now constitutional regime. Further to that, there was an encounter at the Guest House between PW5 and PW9 and the male person they found in room 10. That person attempted to bribe the officers. He infact asked them to receive some money so that the matter would be amicably resolved. The police officers declined. That particular incident was also witnessed by the complainant who stated that:

"...They told me to go out, the man tried giving the police officer Kshs. 4,000/= but they refused....."

57. After declining to accept the bribe, the police proceeded to search he room for possible exhibits including condoms. Since the complainant told them that they never used any condom during the sexual act, truly none was recovered from the room. Some bottles of beer and soft drink were instead recovered. All these events go a long way to show that the police had ample time with the occupants in the room.

58. There was however the hotly contested issue of the identification of the Appellant given that none of the prosecution's witnesses led evidence of how the Guest House was lit, if at all it was. I have carefully perused and re-perused the record to satisfy myself of this issue. None of the prosecution's witnesses truly led evidence on how the place was lit. It is also not in doubt that the incident took place at night. I will now revisit the events that took place in the Guest House. The first event was the entry by the complainant and the man who had caught up with her on her way home. The complainant had the following to say:

"....He pulled me into a house. It was a lodge . He knocked a door and it was opened. I saw the person who opened the door. It was a lady. It was at Ntimaru town. The man who held my hand gave out money, it was 1,000/=. It was one note. The man gave the money to the lady. I didn't know why the money was given out.....

59. On cross-examination the complainant said that:

"....I didn't know the name of the room, the lady told the accused it was room 10....."

60. The fact that the Guest House had a room 10 was not only said by the complainant, PW5 and PW9 but also by PW3 who confirmed that she had actually assigned the room 10 to a guest that very night. The second event was what happened in room 10 upon the entry of the complainant and the man. The complainant confirmed that the lady who had served them on their entry brought into the room several drinks including 2 Tusker beers. That the beers were opened and she was forced to drink one beer lest she was going to be locked inside the room until the following day. That she drunk part of the beer. Thirdly, the complainant witnessed the man undress his clothes which included a white and black shirt and then the man undressed her clothes which she identified later in court. That the man carried her to the bed where they engaged in a sexual act. The complainant then witnessed the fourth event; the knock on the door. That man went to the window and peeped outside. The complainant saw some police officers who ordered the man to open the door. The man did not open the door promptly. He first dressed up and asked the complainant to dress up as well. They both dressed up and then the door was opened by the man.

61. The complainant then witnessed the fifth event; two police officers entered into the room and found her seated on the bed. She saw the police search the room as they interrogated her. She was later on ordered to go out of the room and witnessed the man attempting to bribe the police officers. When the complainant went outside the room, she saw and recognized her mother, PW2. The complainant then saw the man run away from the police at the gate of the Guest House as they were heading to the police station. It is that man which the complainant identified in court as the Appellant.

62. Further to what the complainant witnessed, it is not in dispute that PW3 was also arrested during the police raid. PW3 was first interrogated and then arrested. PW3 admitted to having served customers and allocated them rooms that night.

63. The foregone must however be weighed against the settled judicial precedents on the issue of identification and recognition. The Appellant Counsel through his submissions made reference to some judicial decisions on the issue which decisions I have carefully read. They are the decisions of **Gabriel Kamau Njoroge vs. Republic (1982-88)1KAR 1134**, **Osiwa vs. Republic (1989) KLR 469**, **Wamunga vs. Republic (1989) KLR 424** and **Kiarie vs. Republic (1976- 1985) ALR 213.**

64. I will make reference to further decisions on the issue but first to the Court of Appeal decision in the case of **Wamunga Vs Republic (1989) KLR 424** where the Court held that;-

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

65. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... 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."***

66. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***
>
> *"I flashed my torch and I saw the accused he was 2 meters away from me.That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

67. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary.The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

68. Apart from the complainant, PW5 and PW9 knew the Appellant well. To the two this was a case of identification by recognition. Even though no witness testified on the light in the Guest House, this Court finds it reasonable that all the said events could not have taken place in the darkness. PW3 could not have been serving her customers in the dark. The Guest House was a running business premises and could not be expected to have been in darkness. Likewise the complainant could not have precisely narrated all the occurrences if they had occured in darkness. Further PW5 and PW9 could not have searched room 10 and arrested the three people in darkness. This Court takes further notice of the fact that the Guest House had two wings. One wing was a bar wherein some revelers were continuing taking their evening drinks and food and on the other wing were the rooms. The Guest House also had a rear door which opened directly into the rooms. The set up of the Guest House was alluded to by PW9 who even produced its sketch map as an exhibit. This Court is hence persuaded that the Guest House was sufficiently and well lit to enable all those events take place.

69. Indeed it has to be made clear that there was also the Appellant's *alibi* which this Court has equally considered. Having weighed that defence alongside the prosecution evidence, this Court finds that the *alibi* does not cast any reasonable doubts on the prosecution evidence since the Appellant was properly placed at the scene of the incident. The defence is hence found to be highly doubtful and is for rejection.

70. The Court has also taken into account the evidence of PW3 and found it unreliable. That is because PW3 just like PW2 went on a denying spree. She denied virtually everything including the fact that she had initially been charged with the offence of child prostitution. She later on however admitted.

71. The issue of corroboration was also one of the grounds raised by the Appellant in this appeal. The same has also been given due consideration. I find that there was ample corroboration in the case. The evidence of the complainant was properly and adequately corroborated by that of PW5 and PW9. As rightly pointed out by the trial court, the law on corroboration in sexual offences has by now significantly changed to an extent that a court may convict on the sole evidence of the victim on recording the reasons for believing the victim. **Section 124** of the **Evidence Act**, Chapter 80 of the Laws of Kenya states as follows:

> ***" 124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where th 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 o f the offence, the court shall receive the evidence pf 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."

72. The Court of Appeal decision of **Mohammed vs. Republic (2006) 2 KLR 138)** is also one of the very many such decisions which restated the foregone position in law.

73. This Court is therefore persuaded that PW5 and PW9 knew the Appellant quite well and for years before the day of the incident. That being so, there was no need for an identification parade to be conducted. The Court has further carefully examined the evidence of PW5 and PW9 and in light of the foregone judicial decisions, this Court is satisfied that the circumstances of identification were favourable and free from possibility of error. The Court therefore returns a finding that the Appellant was positively identified as the one who was at the Guest House on 11/05/2014 with the complainant.

74. On the foregone analysis, it is clear that the offence of defilement was proved as required in law. The finding of the trial court is hereby affirmed.

On the offence of escaping from lawful custody:

75. I will now turn to ascertain if the offence of escaping from lawful custody was proved. Having found that the Appellant was the one at the scene as alleged by the prosecution, the question that now begs an answer is whether the Appellant was indeed arrested by the police. Upon PW2 lodging the compliant at the police station in respect to the complainant, three police officers hurried to the scene. Their purpose needless to say was to ascertain if any offences had been or were being committed and if so, to arrest such culprits. On reaching the scene the police officers found the Appellant, in room 10 with the complainant, who was a juvenile. Upon interrogating the complainant the police gathered that she had engaged in a sexual act with the Appellant. The Appellant and the complainant were then asked to proceed to the police station and they were led by the police towards the rear gate of the Guest House.

76. The complainant on being cross-examined had the following to say on the issue:

> ***".....the police told us to go the police station. The accused went ahead of me, a police officer told another that the accused wanted to abscond, the accused ran away. It was outside the gate.....The police were behind, when one tried to hold the accused's hand he ran away, they chased him and shot severally I couldn't see the accused.....The accused ran away....."***

77. PW5 and PW9 also reiterated that the Appellant escaped from their custody. PW5 explained that as they were leaving the Guest House the Appellant was co- operative until when they reached at the gate where they saw a group of youths who, unknown to the police, were waiting to rescue the Appellant. The group then began pelting stones at the police and in the process the police opened fire. It was during that time that the Appellant got an opportunity and escaped. The police pursued the Appellant who disappeared into a nearby maize plantation. He denied that he left the Appellant to freely walk away. PW9 heard gunshots as he was still interrogating PW3. He rushed to the gate and noticed that the Appellant had already escaped. He also saw the crowd. He joined his colleagues in pursuing the Appellant into the maize plantation in vain.

78. It was submitted that asking a suspect to accompany the police to the station is not an arrest since one has to be made well aware of the offence and be told that he had been placed under police arrest. The prosecution was of the view that when a suspect accused of having committed an offence is eventually found the police explain to him why they need him for further action then that amounts to an arrest and that is what happened in this case.

79. The trial court dealt with this aspect so well in its judgment. I can only add my voice that the Appellant had been placed under arrest at the Guest House when he was asked to accompany the police officers to the station. The Appellant knew of that fact so well and that is why he attempted to bribe the police officers. That is to say that had the police officers accepted the bribe then they would not have taken the Appellant to the station. The only reason why the Appellant was fighting to avoid to go to the police station was that he knew that he had been eventually arrested by the police. The police also explained that they would have handcuffed the Appellant but had not carried the hand cuffs since they had to leave the station in such a hurry after receiving the complaint from PW2 and on the orders of the OCS.

80. This Court therefore finds no difficulty in affirming the trial court's finding that the offence of escaping from lawful police custody was proved.

Conclusion:

81. I have also looked into the aspect of the sentences. Save what this Court observed on the age of the complainant, the Court is well satisfied that the sentences are lawful and very fair. The same are also affirmed.

82. Since there is no reason to disturb both the convictions and sentences, the judgment of the trial court is hereby affirmed and the appeal is hereby dismissed accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of March 2017.

A. C. MRIMA

JUDGE