Republic v Mutie (Sexual Offence E067 of 2021)
[2024] KEMC 36 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEMC 36 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

SEXUAL OFFENCE E067 OF 2021

CN ONDIEKI, PM

MAY 2, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JAMES KIMEU MUTIE ..... ACCUSED

JUDGMENT

1. On 30th November 2021, the Accused was arraigned in Court and charged with the offence of incest by a male person contrary to section 20(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that between 1st August 2020 and 10th October 2021, at [particulars withheld] area, Mumbuni Location in Machakos Sub-County within Machakos County, the Accused intentionally and unlawfully caused his penis to penetrate the vagina of CM, a female child aged 5 years, who to his knowledge was his daughter.

2. In the alternative, the Accused was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same dates and place, using his penis, the Accused intentionally and unlawfully touched the vagina of the CM, a child aged 5 years.

3. When the substance of both the main charge and the alternative charge were stated to the Accused and ingredients thereof explained by the Court, the Accused denied the truth of each charge.

Part II: The Prosecution's Case

4. The state called six witnesses. PW1, CM, told this Court that she is 6 years old but she does not know the date she was born. She told this Court that the Accused is her father. She informed this Court that every time she returned from school, she used to be received by her father at home since her mother was busy working in the shop. She testified that her father "did bad manners" to her in his bedroom. She narrated that several times, his father used to put her in bed and remove her clothes and

"do bad manners by inserting his thing into (pointing to the groin)." She narrated that she informed her grandmother and mother. She narrated that every time he did it, she used to feel pain and even bleed. She narrated that she was taken to hospital for examination.

5. In cross-examination, PW1 stated that the Accused used to "do bad manners" to her whenever her mother was away. She stated that she was not coached by her mother to falsely implicate the Accused.

6. PW2, 12-year-old MK, informed this Court that PW1 is his younger sister. He testified that the Accused is his father. He narrated that upon return from school, they used to be received at home by their father and thereafter go to their grandmother's house since his mother used to be busy at work. PW2 narrated that it is his father who used to bath PW1 every evening. He narrated that sometimes he could go to fetch water as his father bathed his sister, PW1. He narrated that in the process, his father could do "bad manners" to PW1 in the bedroom at a time when he (PW2) was at his grandmother's house playing with other children. He narrated that every time they returned from school, his father could send him away to his grandmother's house to provide time and space to do "bad manners" to his sister.

7. During cross-examination of PW2, PW2 stated that the Accused used to "do bad manners" to his sister. He stated that she was not coached by her mother to falsely implicate the Accused.

8. PW3, Magdalene Wayua, a village manager, recalled that on 10th October 2021, received information for the Assistant Chief and went to their home and interviewed PW1 and PW2 who gave consistent stories. She narrated that PW1's grandfather later came to the office of the chief, assistant chief and village manager and reported that the Accused was "sleeping" with PW1. She narrated that the Accused was thus arrested and taken to the police station.

9. In cross-examination of PW3, PW3 stated that it was PW1 who narrated the story to her. PW3 stated that she did not witness the act of incest.

10. PW4, Jacqueline Syokau, an Assistant Chief in charge of Mung'ala Sub-Location, recalled that at the material time, she was in the office when she received a call from Machakos Level 5 Hospital from one Kanini Nathan who informed her that someone called Mutie will come to the office to report an incident. She narrated that later, the said Mutie, the grandfather of PW1 and PW2, came in company of two children, PW1 and PW2. He narrated that the grandfather reported that his son, the Accused, was sleeping with PW. She narrated that she reached out to the village manager and directed her to inform her once she spots the Accused. She narrated that the Accused was later arrested and taken to the police.

11. In cross-examination of PW4, PW4 stated that when she received the report, she caused his arrest.

12. PW5, Dr. John Mutunga of Machakos Level 5 Hospital, told this Court that upon examination of CM, he found lacerations on the vaginal walls, the hymen broken, the urine with pus cells, deposits of spermatozoa and epithelial cells. He produced the P3, PRC Forms, laboratory Request form, discharge summary and receipts as Exhibits 1-5 respectively.

13. During cross-examination of PW5, he stated that he did not examine the Accused because he was not presented by the police for examination.

14. PW6, Police Constable Felistus Tabitha Muli, was the Investigating Officer. PW6 stated that upon investigations, she was convinced that there was sufficient evidence to support a charge of incest and thus charged the Accused therefor. She produced the Birth Notification as Exhibit 6.

15. During cross-examination of PW6, she stated that the Accused was not taken for medical examination because the report was brought late.

Part III: The Accused's Case

16. In his defence under oath, the Accused narrated on the material date, he took CM to hospital since she was unwell and upon return, he heard rumours that he and his father had "slept" with CM. He narrated that both him and his father, were arrested and charged for the same offence. He denied committing the offence.

17. In cross-examination, he stated that Cm is his daughter. He stated that CM was 5 years then and in PP2. He admitted that PW2 is his son. He stated that CM's mother does casual jobs. He stated when they took CM to hospital together with CM's mother, he heard that CM's private parts were found with injuries and rumours started to circulate that he had "slept" with CM. He conceded that the P3 was indicative of sexual activity.

18. DW2, HMK, the Accused's father stated that the Accused is his last born. He narrated that when CM was taken to hospital, she was found with diabetes and they concluded that she had been defiled. He narrated that when he went to see her in Machakos Level 5 Hospital, the doctor called him aside and asked him to investigate because there were signs of sexual activity. He narrated that the Accused and his wife alleged that he (DW2) was the one defiling CM. he narrated that he protested the allegation.

19. In cross-examination, DW2 stated that it was the Accused who defiled CM.

Part IV: Points For Determination

20. This Court has distilled five points for determination as follows:

    i. First, whether the prosecution has proved beyond reasonable doubt that an act which causes penetration was committed upon CM.

    ii. Second, whether the prosecution has proved beyond reasonable doubt that the said act which causes penetration, was committed by the Accused.

    iii. Third, whether the said act which causes penetration, was committed intentionally and unlawfully.

    iv. Fourth, whether CM was a daughter of the Accused.

    v. Fifth, whether at the material time, the Accused knew that CM was his daughter.

21. Regarding the alternative count, this Court has framed four points for determination as follows:

    i. First, whether the prosecution has proved beyond reasonable doubt that an indecent act was committed upon CM.

    ii. Second, whether the prosecution has proved beyond reasonable doubt that the complainant was a child at the material time.

    iii. Third, whether the prosecution has proved beyond reasonable doubt that an indecent act was committed by the Accused.

    iv. Fourth, whether the said act was done intentionally and unlawfully.

Part V: Legal Analysis, Factual Examination, Evidential Evaluation And Determination

22. The legal burden of proof (onus probandi incumbit ei qui dicit, non ei qui negat) is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position

taken. In criminal cases, this duty (otherwise originally known as brocard ei incumbit probatio qui dicit, non qui negat) is on the shoulders of the prosecution. It essentially means that the legal burden of proof rests on who asserts, not on who denies. This said legal burden draws impetus from a fair hearing principle now enshrined in Article 50(2)(a) of *the Constitution* that a person Accused of an offence ought to be presumed innocent until proven guilty.

23. Sections 107, 108 and 109 of the *Evidence Act* are germane in this discourse. Section 107 states thus: - "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Section 108 states thus: - "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." Section 109 states thus: - "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

24. What then amounts to proof? In the Australian case of Britestone Pte Ltd v Smith & Associates Far East Ltd [2007] 4 SLR 855, which has been adopted in Kenya in inter alia Paul Thiga Ngamenya v Republic [2018] eKLR, V.K. Rajah, JA expressed a view that "The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory definitions contained in the *Evidence Act*. The term proof whenever it appears in the *Evidence Act* and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact."

25. The legal burden of proof in criminal cases never leaves the prosecution's backyard, except in very rare occasions. In fact, acts or conduct or even legislation which has attempted to do has been sternly frowned upon. In Senator Johnstone Muthama v Director of Public Prosecutions & 3 Others [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ frowned upon section 96(a) of the Penal Code for shifting the burden of proof to the Accused and consequently declared it as offending the fair trial principle of being presumed innocent until proven guilty as enshrined under Article 50(2)(a) of *the Constitution* and the Constitutional guarantee against self-incrimination as enshrined under Article 49(1)(a)(ii), which act is further in flagrant violation of *the Constitution* which exempts, under Article 25 thereof, from limitation contemplated under Article 24 thereof of inter alia the fair trial principles enshrined under Article 50 thereof. The Court explained that the right to a fair trial was a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which were the right to life and liberty of the person. It was guaranteed under article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of the right to fair trial was illustrated not only by the extensive body of interpretation it had generated worldwide but, by the fact that under article 25(c) of *the Constitution*, it was among the fundamental rights and freedoms that could not be limited or abridged.

26. Before I invoke an old English decision, it's instructive to observe that our criminal justice system did not start on a clean slate. Kenya built its legal system on the English common law system. In Peter Wafula Juma & 2 Others v Republic [2014] eKLR, F. Gikonyo and A. Mabeya, JJ, had this to say about the legal burden of proof in criminal cases: "Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of

law. This law is consistent with and upholds the Constitutional right of the Accused; presumption of innocence, not to give incriminating evidence and to remain silent..."

27. In the English cause celebre decision in Woolmington v DPP [1935] A.C 462, Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright laid the golden thread (presumption of innocence) principle in criminal cases. Reginald Woolmington had shot his wife after falling out and was therefore charged with murder of his wife. Wilmington's defence was that he did not intend to kill his wife and thus lacked the requisite mens rea. He told the jury that he had planned to scare her by threatening to kill himself if she refused to return and reunite with him and in the process, he had attempted to show her the gun which discharged accidentally, killing her instantly. Swift, J. ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. He was convicted and sentenced to hang. It was upheld on appeal to the Court of Criminal Appeal on the premise of the statement of law in Foster's Crown Law that if a death occurred, it is presumed to be murder unless proved otherwise. He appealed to the House of Lords. The issue brought to the House of Lords was whether the statement of law in Foster's Crown Law, which the Court of Criminal Appeal applied, was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise. Viscount Sankey made a statement which was unanimously adopted by the rest in what has now come to be known as the 'Golden Thread' speech. At page 481, Viscount Sankey L.C. enunciated the law on legal burden of proof in criminal matters as follows: "Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in R. v. Davies (8 C.A.R. 211) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the Defendant to prove that the act alleged was accidental. Through 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...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."

28. It bears underscoring that this golden thread principle is now enshrined in our Constitution of Kenya 2010, under Article 50(2)(a) thereof, as part of the wider package of fair trial principles and in that regard, the holding in that decision holds true in Kenya. In Mkendeshwo v Republic [2002] 1 KLR 46, the Court of Appeal enunciated thus: "In criminal cases the burden is always on the prosecution to establish the guilt of the Accused beyond any reasonable doubt and generally, the Accused assumes no legal burden of establishing his innocence."

29. However, in considerably limited instances, once the onus of proof placed on the shoulders of the prosecution by dint of sections 107, 109 and 110 of the *Evidence Act* and the incidence of burden contemplated by section 108 thereof, is discharged, the evidential burden of proof shifts to the Accused Courtesy of and the limited circumstances outlined under section 111 of the said Act. Section 111 of the *Evidence Act* provides thus: "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence. (2) Nothing in this section shall - (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts,

omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or (c) affect the burden placed upon an Accused person to prove a defence of intoxication or insanity."

30. What is the standard of proof in criminal cases? In English cases of Re H (minors) sexual abuse; standard of proof [1996] AC 563 and 505 for the Home Department v Rehman [2003] 1 AC 153, which was adopted in Kenya in inter alia Paul Thiga Ngamenya v Republic [2018] eKLR, the House of Lords laid down a series of guiding principles on standards of proof for civil and criminal cases and their purport as follows: "(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred. (3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others."

31. The standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt. The doubt referred to in this standard is the doubt that can be given or a reason assigned as opposed to speculation. A person Accused of an offence is the most favourite child of the law. Adverting to the standard of proof in criminal cases, Mativo, J. says in Philip Muiruri Ndaruga v Republic [2016] eKLR that "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. 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."

32. The purport of the words 'beyond reasonable doubt' which define the standard for proof of a criminal offence, has been attempted in manifold decisions of the superior Courts, locally and beyond. The locus classicus English case in this regard is the decision in Miller v Minister of Pensions [1947] 2 All ER 372, where Denning J. who holds that "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's 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 would suffice."

33. Also, in Walters v R [1969] 2 AC 26, approved in R v Gray 58 Cr. App. R. 177 at 183, Lord Diplock attempted to define 'reasonable doubt' as follows: "A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow you to influence you one way or the other."

34. What is the entry point in criminal trials? When hearing of the matter begins, the Court begins from a tabula rasa which is that the Accused is innocent and this state of affairs perpetuates itself throughout the trial proceedings until such time as the prosecution has put on the table evidence which satisfies the Court beyond reasonable doubt that the Accused is guilty. In 1997, the Supreme Court of Canada in R v 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 ingrained 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 guilty beyond reasonable doubt."

35. The standard is such that, in William Blackstone's formulation (in his seminal work, Commentaries on the Laws of England, published in the [1765] states that "It is better that ten guilty persons escape than that one innocent suffer." Blackstone holds a thesis that "All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer." Benjamin Franklin (in Benjamin Franklin, Works 293 [1970], Letter from Benjamin Franklin to Benjamin Vaughan [14 March 1785], subscribes to the same school of thought (and thus echoes Blackstone's jurisprudence) and states that "It is better 100 guilty Persons should escape than that one innocent Person should suffer."

36. While defending British Soldiers who were charged with murder for their role in the Boston Massacre, John Adams also expanded upon the rationale behind Blackstone's Formulation when he stated that "It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever."

37. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) reasons that evidence is weighed and not numbered. He argues that it is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. Save for the requirement of corroboration under section 124 of the *Evidence Act*, this position ties well with section 143 of the *Evidence Act* which provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Section 124 of the Evidence requires that before an Accused is convicted, the Court satisfies itself that the evidence of the victim is corroborated but in sexual offences, a window and exception to the general rule has been provided to take care of situations where the only evidence available is that of the alleged victim of the offence, in which case the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. The text of section 124 of the *Evidence Act* reads as follows: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

38. The standard of proof, as I discern it, is that though be some doubt, it should be of such measure that it cannot affect a reasonable person's belief regarding whether or not the Accused is guilty. It does not therefore mean that the proof must be beyond a shadow of a doubt. If it were so, it would be so high a standard that it may not be practically attained. It certainly does not mean that every peripheral fact has to be established up to this standard. What has to be proved is the body of material facts which make up the charge against the defendant.

39. Having laid the broad framework within which this case will be determined, the Court now embarks on analysis of the law, examination and interrogation of facts and evaluation of evidence.

(i) Whether the prosecution has proved beyond reasonable doubt that an act which causes penetration was committed upon CM

40. This is a question of fact. The only direct evidence in this regard was that of CM (PW1), coupled with the expert evidence of PW5.

41. Section 20(1) of the *sexual Offences Act* states that "(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the Accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

42. What meaning is assigned to an "act which causes penetration" and "penetration" as applied in section 20(1) of the *Sexual Offences Act*? Section 2 of the Sexual Offences defines an "act which causes penetration" to mean "an act contemplated under this Act". The same section defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

43. Gleaning from section 20(1) of the *Sexual Offences Act* therefore, the determinative ingredients of incest are two namely: (i) penetration, or an indecent act; and (ii) of a relative falling within the degree of consanguinity circumscribed thereunder. While discussing the ingredients of incest in GMM vs. Republic [2019] eKLR, J. Mulwa, J. stated that "5. The ingredients for the said offence – Incest and attempted incest – are 1. Knowledge that the person is a relative 2. Penetration or Indecent Act..."

44. What meaning is assigned to an "act which causes penetration" and "penetration" as applied in section 20(1) of the *Sexual Offences Act*? Section 2 of the Sexual Offences defines an "act which causes penetration" to mean "an act contemplated under this Act". The same section defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

45. In this regard, CM testified that on diverse dates she could not recall, the Accused did "tabia mbaya" translated to "bad manners" to her. It has been appreciated by Courts that the language employed by minors to narrate embarrassing experiences coupled with the restrictive African culture, is more often than not couched in euphemism and in this regard, a Court is now reasonably expected to take judicial notice and construe the euphemism as an act which cause penetration. Certain euphemisms frequently used by victims in such circumstances have thus gained notoriety as to qualify for judicial notice. See the Court of Appeal holding in Muganga Chilejo Saha v Republic [2017] eKLR, where Makhandia, Ouko & M'Inoti, JJA, observed and held that "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy,

embarrassed and ashamed to relate that experience before people and more so in a Court room. If the trend in the decided cases is anything to go by, Courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE v R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel *Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015*), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial Courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi H.C Cr. App. No. 35 of 2014, EMM v R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial Courts should record as nearly as possible what the child says happened to him or her." See also a concurring judicial view of another bench of the Court of Appeal in Philip Origo Elemon vs. Republic, Eldoret Court of Appeal, Criminal Appeal No. 103 of 2019, per F. Sichale, F. Ochieng & L. Achode, JJA. In other words, CM testified that on diverse dates, the Accused committed a series of acts which cause penetration upon her.

46. In such cases, the proviso to section 124 of the *Evidence Act* notwithstanding, it's desirable that this assertion is reinforced with corroborative evidence. In this case, the corroborative evidence was circumstantial in form of the expert evidence adduced of PW5, Dr. John Mutunga, who produced the P3 Form (the Prosecution Exhibit 1) and the Post-Rape Care Form (the prosecution exhibit 2). Dr. Mutunga's evidence was to the effect that there were lacerations on the vaginal walls, the hymen was broken, the urine had pus cells, and deposits of spermatozoa and epithelial cells. The expert's conclusion was that the findings were suggestive of penile penetration, and this was not shaken at all.

47. Which leads to the determinative question. What can reasonably be inferred from the circumstances which were presented by PW5? Since the evidence in support of this ingredient is largely circumstantial, it is now imperative that consider the principles governing circumstantial evidence. In R v Taylor, Weaner & Donovan [1928] 21 C.A., APP. R. 20, the Court came to a conclusion that circumstantial evidence is the best evidence. The Court went ahead to attempt a definition of circumstantial evidence as the "evidence of the surrounding circumstances which, by intensified examination, is capable of proving a proposition with mathematical accuracy and that it is no derogation of evidence to say that it is circumstantial."

48. What is the test of circumstantial evidence? In R v Kipkering Arap Koske & Another [1949] 16 EACA 135, the Court of Appeal for Eastern Africa held "That in order to justify, on circumstantial evidence, the inference of guilt, the inculputory facts must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the Accused." Similarly, in the Court of Appeal decision in Bernard Otieno Okello v Republic [2019] eKLR, Koome, JA (as she then was) Sichale, Kantai, JJ.A., echoed the tests laid in the decision of Abanga alias Onyango v Republic CA CR. A No 32 of 1990 (UR) to guide a case determinable on circumstantial evidence as follows: "[18] The tests to be applied in a case determinable on circumstantial evidence were set out in the case of; Abanga alias Onyango v Republic CA CR. A No 32 of 1990 (UR) as follows; "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused; and iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by

the Accused and none else." See also Nahashon Isaac Njenga Njoroge v Republic [1969] eKLR, per Newbold, P., Duffus and Spry JJ.A. (as they then were).

49. However, circumstantial calls for a thorough examination because of the danger inherent in this model of evidence. When dealing with circumstantial evidence, the incriminatory facts must point conclusively to the guilt of the appellant and be incompatible with any reasonable hypothesis of his innocence. In Simoni Musoke vs. R [1958] EA 715, the Court quoted with approval the decision of the Privy Council in Teper v R [1952] AC 480 at Page 489 where that Court had stated that "It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference." Similarly, in R v Mdoe Gwede [2004] eKLR, Maraga J. (as he then was) held that "circumstantial evidence must, however, be thoroughly examined as it is the kind of evidence that can be fabricated..."

50. Do circumstances in this case point to the one and only direction that an act of penetration was committed upon CM? Section 119 of the *Evidence Act* plays out in this circumstance. In Senator Johnstone Muthama vs. Director of Public Prosecutions & 3 Others [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ held that section 119 of the *Evidence Act* suggested that a Court can presume the existence of any fact, which it thought likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The learned judges further held that under section 111 and 119 of the *Evidence Act*, presumptions of facts were inferences that could be drawn upon the establishment of a basic or primary fact. The primary or basic facts had to be established before the presumption could come into play.

51. What is likely to have happened in the common cause of natural events and human conduct in circumstances described by PW5, in further circumstances where no explanation which the Court is prepared to accept as reasonably possible, has been offered or appears from the circumstances? This Court infers that the said lacerations and broken hymen, must have been attained by an act of penetration having received no alternative explanation.

52. The foregoing finding yields a firm conclusion that the prosecution has proved beyond reasonable doubt that there was an act of penetration.

(ii) Whether the prosecution has proved beyond reasonable doubt that the said act which causes penetration was committed by the Accused

53. This is a question of fact. Principles governing criminal liability underline certainty, precision and specificity of the identity of the perpetrator of an offence. For this reason, cautionary principles have been developed to guide Courts in handling evidence purporting to lay a nexus between the offence alleged and the perpetrator. Before criminal liability attaches, therefore, the Court must caution itself accordingly and be satisfied beyond reasonable doubt that the perpetrator of the alleged offence has been properly and sufficiently identified. It is in this connection that the standard of identification evidence should rise to an altitude as not to be effortlessly impeached and brought down. As already discussed, of course, this onus lies on the shoulders of the prosecution.

54. Proof of this fact was anchored only on the oral evidence of CM only. None of the other five prosecution witnesses can be said to have been armed with evidence, whether direct or circumstantial, in this regard.

55. Section 143 of the *Evidence Act* states that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Further, section 124 of the *Evidence Act* reads: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with

that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

56. It should be noted that despite the clear provision of section 143 of the *Evidence Act*, traditionally, corroboration was required in all criminal cases until 2006 when a Proviso was introduced to section 124 of the *Evidence Act* obviate the need for corroboration in sexual offences which need was ostensibly driven by the need to take care of situations where the only evidence available in a sexual offence case is that of the alleged victim of the offence. This Proviso, however, does not make it enjoin the Court to admit such evidence of the alleged victim of a sexual offence unconditionally. It instead reposes a discretionary power on the Court to receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. In this connection, it is now trite law that where circumstances are such that it will be unsafe to convict premised on uncorroborated evidence of the complainant, the Court should warn itself of the danger of acting on the uncorroborated testimony of the complainant such circumstances strongly demand corroboration. Otherwise, it will lead to a miscarriage of justice. Superior Courts have enunciated cautionary principles to be invoked when a Court is faced with visual identification.

57. In this regard, the manner of approaching evidence of visual identification was enunciated by Lord Widgery C.J, in the case which has now become the locus classicus in this regard, of R v Turnbull [1976] 3 All E.R. 549 at page 552 where his Lordship expressed himself as follows: "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." This test was adopted in Anjononi v Republic [1980] KLR 59, where it was held that recognition is better than identification of a stranger.

58. However, although recognition is stronger than identification of a stranger, its strength may also be diminished by an honest mistaken identity or honest error. And cognitive of this, a cautionary principle on this was laid down in Wanjohi & 2 others v Republic [1989] KLR 415, at pages 418-419, Platt, Gachuhi & Masime JJA (as they then were) rendered themselves as follows: "In these circumstances, where the attack was swift rendering Nelson unconscious, the possibility of correct recognition is remote. It may well be that Nelson appeared to be an honest witness, and that his failure to identify the appellants David and Peter indicated that he was not prone to exaggeration. But that was the situation in Roria v Rep [1967] E.A. 583 where at page 584 the Court of Appeal remarked:- "In the present case the learned trial Judge thought Samaji an honest witness. We do not quarrel with his assessment of her honesty, but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the learned Judge, with respect, erred in our view." It will be said that recognition is stronger than identification. That may be so; but an honest recognition, but yet be mistaken. The trial Court did not observe this distinction. The Court was impressed by the demeanour of Nelson, and although the "identification" was made at night, the Court had no hesitation in accepting that evidence. The trial Court approached the problem from the wrong angle. The High Court set out all the principles laid down in Abdullah Bin Wendo v R [1953] 20 E.A.C.A 166; Roria v Rep. (supra) and Turnbull v Reg C.A.R. [1976] Vol. 63, P. 1132 at P. 1137 and thus realized that the vital question upon which there is special need for caution is the correctness of the identification, i.e excluding any mistake. Unfortunately the High Court devalued this principle in the following passage: "The trial magistrate was impressed by the quality of this evidence and therefore omitted any reference to the possibility of the appellants'

identification as mistaken, though such a reference might have been desirable. We do not think that the omission or error resulted in any failure of justice. That is, with respect, wrong. It is not that a reference to mistaken identification is desirable. It is the vital question. It is the vital question which has to be answered beyond reasonable doubt. Was the appellant recognized beyond reasonable doubt? Whether the error caused a failure of justice is the next step." {Emphasis supplied}

59. Sections 124 and 143 of the *Evidence Act* notwithstanding, before convicting, a Court should warn itself against the danger convicting on uncorroborated identification evidence of a single witness, especially if it is oral evidence. See Marie & 3 others v Republic [1986] eKLR; Gikonyo Kuruma & Another vs. Republic [1977] eKLR and Njeri v Republic [1979] eKLR. The need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo v R 20 EACA 166 at page 168, where the Court expressed the following empathic view: "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

60. Further, in the Court of Appeal decision in Wamunga v Republic [1989] KLR 424 at pages 426-427, Masime JA, Gicheru & Kwach Ag JJA (as they then were) laid the following test of identification evidence: "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 a conviction."

61. Further, but not in derogation from the test laid in Wamunga case, the Court of Appeal laid down guidelines to be applied in analysing identification evidence in Richard Mwaura Njuguna & Another v Republic [2019] eKLR, Karanja, JA, Visram & Koome, JJ.A (as they then were) while quoting with approval the locus classicus case in this regard of R v Turnbull & Others [1976] 3 All ER 549, stated: "First, wherever the case against an Accused depends wholly or substantially on the correctness of one or more identifications of the Accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the Accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 the Accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? 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 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 the actual appearance?"

62. See also Evans Odhiambo Anyanga v Republic [2015] eKLR, per Majanja, J.; Mwenda vs. Republic [1989] KLR 464, Masime JA, Gicheru & Kwach Ag JJA (as they then were); and Osiwa v Republic [1989] KLR 469, per Masime JA, Gicheru & Kwach Ag JJA (as they then were).

63. Since I am faced with the visual and recognition evidence of a single witness, CM, the alleged victim of the offence, I now turn to carefully and thoroughly analyze the evidence of CM. First, this Court

having carefully observed as CM testified and fielded questions in cross-examination, this Court found CM consistent, reliable and a witness who cannot be said to be of questionable integrity. CM did not come across as a coached witness. For these reasons, this Court is satisfied that CM is telling the truth. Second, upon considering the time, period, conditions and circumstances of identification, this Court finds that having occurred during the daytime, it was favourable for sight. Third, the incident having lasted for a considerable length of time between 1st August 2020 and 10th October 2021, this Court finds that CM had sufficient time and opportunity to take notice of the appearance of the Accused. Fourth, there was overwhelming evidence that CM knew the Accused long before the incident as her father, making it unnecessary for an identification parade, which could have been otherwise necessary for a stranger.

64. Consequently, this Court concludes that both positive identification and recognition were possible, this Court finds that identification and recognition were to the highest extent, free from any possibility of error.

65. Wherefore this Court concludes that the prosecution has adduced identification evidence which generate persuasion in the mind of this Court beyond reasonable doubt that the said act - which causes penetration - was committed by the Accused.

(iii) Whether the said act of penetration was committed intentionally and unlawfully

66. This is both a question of law and fact. In this regard, since it has a direct impact of ability to act intentionally or otherwise, this Court has also to consider whether or not the state of mind of the Accused was not sound at the material time.

67. What brings an act within the purview of being intentional and unlawful? It is lawful that which is sanctioned by law to be so. Section 3 (2) of the *Sexual Offences Act*, No. 3 of 2006 provides that "(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act." Section 43 (1) of the *Sexual Offences Act*, No. 3 of 2006 then formulates an "intentional and unlawful" as follows: "(1) An act is intentional and unlawful if it is committed— (a)in any coercive circumstance; (b) under false pretences or by fraudulent means; or (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence."

68. The meaning of "coercive circumstances" is assigned in section 43 (2) of the *Sexual Offences Act*, No. 3 of 2006 as follows: "The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is— (a) use of force against the Complainant or another person or against the property of the Complainant or that of any other person; (b) threat of harm against the Complainant or another person or against the property of the Complainant or that of any other person; or (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act."

69. The meaning of "false pretences or fraudulent means" is assigned by section 43 (3) of the *Sexual Offences Act*, No. 3 of 2006 as follows: "(3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person— (a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person; (b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or (c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmittable disease."

70. The meaning of "a person who is incapable of appreciating the nature of an act which causes the offence" is assigned by section 43 (4) of the *Sexual Offences Act*, No. 3 of 2006 as follows: "(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act— (a) asleep; (b) unconscious; (c) in an altered stated of consciousness; (d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected; (e) mentally impaired; or (f) a child."

71. The unlawfulness contemplated by sections 3(1) read with 43 of the *Sexual Offences Act*, No. 3 of 2006 does not apply to persons who are married to each other. Section 43 (5) of the *Sexual Offences Act*, No. 3 of 2006 exempts acts which cause penetration, however without consent, committed by lawfully married persons from being deemed intentional and unlawful. It states thus: "(5) This section shall not apply in respect of persons who are lawfully married to each other."

72. Just like want of consent, this can only be inferred from circumstances and of course the law. An act which causes penetration is lawful if it is committed to a lawfully married person; or committed to a consenting adult who understands and appreciates the nature of the act with his or her consent; or committed for justified medical procedures. To benefit from the defence that the act which causes penetration was committed lawful, the defence that the act which causes penetration was lawful should preferably be raised during cross-examination and also in defence or as preliminary objection intended to cause a withdrawal of the charge. In this case, the evidentiary burden shifts to the defence Courtesy of section 111 (1) of the *Evidence Act* which states that "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence."

73. Gathering from the special circumstances of this case including but not limited to the fact that the act which causes penetration was done repeatedly, it is the conclusion of this Court that the said act was committed intentionally and unlawfully.

(iv) Whether CM was a daughter of the Accused; and (v) whether at the material time, the Accused knew that CM was his daughter

74. Apart from an act which causes penetration or an indecent act, the other primary ingredient of incest by a male person is a defined degree of consanguinity with the female person. It will be discerned from section 20(1) of the *Sexual Offences Act* that the degrees of consanguinity, for which the offence of incest will pass the test is whenever the person with whom an indecent act or an act which causes penetration was committed is a female person who is the Accused's daughter, granddaughter, sister, mother, niece, aunt or grandmother.

75. Through PW1, PW2, and PW6, the prosecution led oral evidence to the effect that CM was and is the Accused's daughter, and that the Accused knew this fact at the material time. This was not denied. In fact, in cross-examination of the Accused, he admitted as much.

76. This Court, thus, concludes that CM was a daughter of the Accused, and that at the material time, the Accused knew that CM was his daughter.

Part VII: Disposition

77. The Accused is therefore found guilty of the offence known as incest by a male person contrary to section 20(1) of the *Sexual Offences Act* and accordingly convicted under section 215 of the Criminal Procedure Code therefor.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 2ND DAY OF MAY, 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In the presence of:

Prosecution Counsel:.....

The Accused:.....

Court Assistant:.....