



**Republic v Muindi (Sexual Offence 29 of 2020)
[2024] KEMC 43 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 43 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
SEXUAL OFFENCE 29 OF 2020
CN ONDIEKI, PM
JULY 29, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBERT KULA MUINDI ACCUSED

JUDGMENT

PART I: Background

1. On 6th July 2020, the Accused was arraigned in Court and charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 1st day of July 2020, at (Particulars withheld) Village, (Particulars withheld) Location in (Particulars withheld) Sub-County within Machakos County, the Accused intentionally caused his penis to penetrate the vagina of CN, a child aged 5 years.
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 1st day of July 2020, at (Particulars withheld) Village, (Particulars withheld) Location in (Particulars withheld) Sub-County within Machakos County, using his penis, the Accused intentionally and unlawfully touched the vagina of the CN, 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.
5. PW1, CN, informed this Court that by the time of her testimony (on 26th October 2021), she was in Grade 2. PW1 recalled that on the material date, she was standing at their gate when she saw a motor



cycle approaching. She testified that the rider, the Accused herein, pulled up at their gate invited her, one FM and M2 to have a ride on the motor cycle and they gladly agreed. She narrated that the Accused took them to a farm where he cut napier grass for a while, after which he took out his mobile phone from his pocket and played some pornographic videos and handed the phone over to them to watch. She narrated that after a while, he separated CN from the FM and M2 to a secluded place and left FM and M2 watching the videos. She narrated that he removed his sweater, spread it on the ground at the secluded place and removed her undergarment and he removed his trouser and did “tabia mbaya” to her. She explained that “tabia mbaya” means inserting his penis into her vagina. She narrated that the Accused also inserted his penis in her mouth before inserting it in her vagina. She narrated that when FM and M2 found them, they started pelting stones and the phone at the Accused. She narrated that the Accused gave her Kshs. 10 before FM and M2 arrived.

6. In cross-examination of PW1, she stated that she attends K primary school. She stated that if she lies, she is aware that she will be punished. She stated that they were playing near the gate with FM and M2 when the Accused pulled up. She stated that she did not know the Accused before that incident but she had seen him at the market with her grandmother. She stated that she heard the name Kula in radio. She stated that she could not tell whether FM and M2 knew him before that material date. She stated that she was persuaded to mount the motor cycle by FM and M2. She stated that M2 is her sister and FM her aunt. She stated that M2 was in grade 6. She stated that after he played the video, the Accused handed over the phone to FM. She narrated that the Accused held her hand and took her to a thicket nearby. She stated that while doing the “tabia mbaya”, she did not scream. She stated that the Accused attempted to choke her. She stated that she did not see any neighbour around that farm. She stated that the Accused gave her Kshs. 10 and warned her against divulging the secret. She stated that while they were there, she heard M2 asking FM where CN had disappeared to. She stated that she felt pain but she did not scream. She stated that FM and M2 threw objects at the Accused including the Accused’s phone. She stated that it was FM who was holding the Accused’s phone. She stated that FM is the oldest amongst them all. She stated that it was FM who hurled the phone at the Accused. She stated that FM and M2 also hurled stones at the Accused. She stated that GWN is her aunt.
7. PW2, SN, informed this Court that she is CN’s grandmother. She recalled that on 1st July 2020, she went to the market and left her children at home. She narrated that she her daughter, GWN, to look after the younger ones and that she comes for vegetables from the market at 12 pm. She narrated that GWN did not come at 12 pm as directed but instead left home at around 1.30 pm and left the young ones at home. She narrated that while GWN was her way to the market, the Accused came and took away CN, FM and M2 while she (SN) was still in the market. She narrated that CN narrated to her that the Accused when GWN had just left for the market. She narrated that when she arrived at home at around 5 pm, she found CN in a foul mood and she started to sob and upon inquiring why she was sobbing, she went mute. She testified that CN, FM and M2 narrated to her the same story narrated above by CN. She testified that FM and M2 informed her that she found them on the act and screamed. She narrated that she reported to the village head woman who came with another lady called Jackline and they took CN to Mitaboni Health Centre. She narrated that upon examination, her vagina was found with visible injuries. She narrated that they reported to Kathiani Police Station. She identified the P3 Form and it was marked PMFI 1. She stated that the Accused was her school contemporary.
8. In cross-examination PW2, she stated that the Accused was her school contemporary. She stated that the Accused owns a plot next to her home. She stated that there is no land dispute and there was no animosity before the incident. She stated that she did not witness the incident. She stated that by the time she arrived, FM and M2 had narrated to GWN and GWN in turn narrated to her. She stated that GWN found CN crying and upon inquiry, FM and M2 narrated to GWN the incident.



9. PW3, FM, informed this Court that she was 13 years as the time of her testimony and in grade 7 at K primary school. She recalled 1st July 2020, at around 2 pm, they were playing with CN and M2 near their gate when they saw a motor cyclist approaching and he pulled up and offered to ride them and they complied. She narrated that upon arrival in a farm of napier grass, the Accused pulled out a phone, played pornographic video and gave them to watch. She narrated that while they were busy watching with M2, the Accused walked away with CN. She narrated that later, when it took long, they decided to look for CN and they stumbled upon the Accused on top of CN, doing “tabia mbaya” to her. She explained that “tabia mbaya” means rape. She explained that she saw the Accused in a state where he had lowered his trousers. She narrated that they hurled objects at the Accused, mainly broken pieces of bricks. She identified the person who did so as the Accused herein. She stated that she did not know the Accused before that material date.
10. In cross-examination PW3, she stated that they were playing near the gate. She stated that it was a weekend day. She stated that she did not know the Accused before that date. She stated that the Accused pulled up the motor cycle, called them and they complied. She stated that they were give a free ride on the motor cycle which ended at the napier grass farm. She stated that the farm is adjacent to their home. She stated that it can be seen from home. She stated that no other person witnessed the incident except them. She stated that they did not request the phone and the Accused pulled it out on his own volition and handed the phone over to M2, after playing the video. She stated that she did watch the video. She stated that while watching with M2, the Accused left with CN and left them watching. She stated that they did not scream. She stated that they only hurled his phone and broken pieces of bricks. She stated that by rape she means inserting a penis into a vagina. She stated that it was her mother who reported to nyumba kumi.
11. PW4, Jennifer Mwangeli Joseph, informed this Court that at the material time, she was working at Kathiani Level 4 Hospital. She narrated that she examined CN and found all other parts normal, except the pus cells which were found in her urine indicative of an infection. She stated that there was no spermatozoa. She testified that she found a laceration of the labia minora at 9 o'clock with redness and that the hymen was partially torn. She further testified that she found a foul smelling vaginal discharge. She finally testified that the syphilis and HIV test were negative. She formed an opinion that CN had been defiled. She produced the P3 and PRC Forms as Exhibits 1-2. She also produced the Laboratory Request Form as Exhibit 3. She also produced the P3 Form of the Accused and the accompanying Laboratory Request Form as Exhibits 4 and 5 respectively.
12. In cross-examination of PW4, she stated that there were no choke marks. She stated that when pus cells are seen in urine, it's indicative of an infection like UTI. She stated that the high vaginal swap revealed a bacterial infection. She stated that a laceration looks like a bruise and not a deep cut. She explained that a laceration is caused by a rough object. She stated that the redness was indicative of an inflammation. She stated that there was a lab test which was conducted upon the Accused and both HIV and urinalysis tests turned out negative. She stated that she saw CN after about 16 hours after the alleged incident on 2nd July 2020 and the Accused was seen on 5th July 2020.
13. PW6, Police Constable Mercy Kamwara attached to Mitaboni Police Post was the Investigating Officer who took Over from PC Monicah Wangechi who was transferred. PW6 testified that upon carrying out investigations, PC Monicah Wangechi was satisfied that the evidence was sufficient to sustain a charge and charged the Accused accordingly. She produced the statement of the said PC Monicah Wangechi as Exhibit 6.



14. In cross-examination of PW6, she stated that she was not the one who investigated the incident. She stated that the alleged Accused's mobile phone was not before the Court. She stated that the scene was not visited.

PART III: The Accused's Case

15. The Accused was the only defence witness. In his statement under oath, the Accused adopted a statement he recorded on 23rd April 2024 as his evidence-in-chief. In the statement, the Accused states that on Wednesday 1st July 2020, he was selling tomatoes from his own farm and that later, at around 2 pm, he went to fetch nappier grass for his cows. He stated that on his way to the farm, he met three children who stopped him and asked for a lift on his motor cycle which he gladly granted. He states that when he inquired where they hail from, they pointed to a home near his nappier grass farm. He states that when they arrived near their home, they asked him to stop and he complied after which they alighted and he parked his motor cycle there and entered the farm which is a few metres away. He states that while cutting grass, the three girls appeared again and started talking to him. He states that one older girl requested for his phone to entertain themselves and he complied as he continued cutting grass. He states that the youngest of them all separated herself from the rest and offered to collect the grass into bundles and he allowed her to do so. He states that after he was done, he loaded the grass onto his motor cycle and asked them to return his phone which they did. He states that he gave the girls Kshs. 5 to thank them and they again requested that he offers them a lift to the nearest shop which he did and they parted ways. He states that on 2nd July 2020 at around 6 pm, when he was done with preaching in town, he was approached by a lady who introduced herself as Jackline Mutuku and she said that she was a member of nyumba kumi and that she went on to inform her that she wanted to introduce him to another lady who wanted a mason. He states that as they were talking, another lady joined them and told him that she was the one who wanted a mason and while they were talking, police officers approached him and informed him that he was under arrest but they did not inform him the reason for the arrest. He states that he was shocked. He states that he was escorted to Machakos Level 5 Hospital where he was examined against his will and without his permission.
16. In cross-examination of the Accused, he stated that he was cutting grass at around 1 pm. He stated that he gave the three girls Kshs. 5. He stated that he gave them his phone to entertain themselves.
17. Despite having been granted an opportunity to file written submissions, none was filed.

PART IV: Questions For Determination

18. In relation to the main Count, this Court has distilled four questions for determination as follows:
- i. First, whether the prosecution has proved beyond reasonable doubt that on the 1st day of July 2020, an act which causes penetration was committed upon CN.
 - 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 prosecution has proved beyond reasonable doubt that CN was a child at the material time.
 - iv. Fourth, whether the said act which causes penetration, was committed intentionally and unlawfully.
19. In the event the prosecution fails to prove the main Count, regarding the alternative count, this Court will consider the following:



- i. First, whether the prosecution has proved beyond reasonable doubt that an indecent act was committed upon CN.
- ii. Second, whether the prosecution has proved beyond reasonable doubt that an indecent act was committed by the Accused.
- iii. Third, whether the prosecution has proved beyond reasonable doubt that the complainant was a child at the material time.
- iv. Fourth, whether the said act was done intentionally and unlawfully.

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

20. The legal burden of proof (onus probed 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. See sections 107, 108 and 109 of the *Evidence Act*.
21. What then amounts to proof? In the Australian case of *Britestone Pte Ltd vs. 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.”
22. 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 vs. 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.



23. 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 vs. 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...”

24. In the English cause celebre decision in *Woolmington vs. 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.”

25. 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 vs. 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.”

26. 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.”

27. 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 vs. Rehman* {2003} 1 AC 153, which was adopted in Kenya in inter alia *Paul Thiga Ngamenya vs. 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.”
28. 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 vs. 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.”
29. 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 vs. 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.”



30. Also, in *Walters vs. R* [1969] 2 AC 26, approved in *R vs. 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."
31. 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 vs. Lifchus* [1997] 3 SCR 320, suggested the following explanation: "The Accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the Accused is guilty.the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so 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."
32. 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."
33. 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."
34. 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.”

35. 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 as to be practically unattainable. It certainly does not mean that every peripheral fact has to be established up to this standard.
36. Having discussed 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 on each of the four questions, in turn.

(i) Whether the prosecution has proved beyond reasonable doubt that on the 1st day of July 2020, an act which causes penetration was committed upon CN

37. Section 8(1) of the *Sexual Offences Act* provides that “8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
38. What meaning is assigned to an “act which causes penetration” and “penetration” as applied in section 8(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”.
39. Section 8(1) has been construed by superior Courts to be built on two ingredients of the offence of defilement namely (i) that the victim is a child; and (ii) that an act which causes penetration was committed upon the victim. In *GOA vs. Republic* [2018] eKLR, A.C. Mrima, J. discussed the ingredients of the offence of defilement as follows: “8. 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.” See also *Dominic Kibet vs. Republic* [2013] eKLR; and *George Opondo Olunga vs. Republic* [2016] eKLR.
40. This is a question of fact. What’s the nature of evidence required to prove this fact? In *Mohamud Omar Mohamed vs. Republic* [2020] eKLR, at paragraph 25, C. Kariuki, J. expressed a judicial view that “The key evidence relied by the Courts in rape cases and defilement in order to prove penetration Is the complainant own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was a minor, the evidence of the Clinical Officer



is key so as to corroborate such testimonies. I have critically analyzed the evidence of PW4 the clinical officer who testified herein.”

41. This is a question of fact. The only direct evidence in this regard was that of CN (PW1) and PW3, coupled with the expert evidence of PW4.
42. Expert evidence was presented by PW4 who testified and produced a P3 Form (exhibit 1); and the PRC Form (exhibit 2). PW4 testified that upon examining CN on 2nd July 2020, 16 hours after the alleged incident, she found a laceration of the labia minora at 9 o'clock with redness, the hymen partially torn and a smelly whitish discharge. Further, upon laboratory tests and high vaginal swap, pus cells were seen in urine indicative of a bacterial infection, no spermatozoa were seen, and that HIV and syphilis tests turned negative. PW4 ultimately formed an opinion that CN had been defiled.
43. The direct evidence of CN and PW3 and that of PW4 were consistent and not shaken at all by the Defence.
44. Which leads to the determinative question, anchored on this proved fact. What can reasonably be inferred from the said state of affairs? In other words, do circumstances of this case point to the one and only direction that an act which causes penetration was committed upon CN? 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.
45. What is likely to have happened in the common cause of natural events and human conduct in the context of state of affairs afore-described, in circumstances where no explanation which the Court is prepared to accept as reasonably possible, has been offered or appeared from all the circumstances?
46. Considering the totality of evidence in support of this fact and further invoking section 119 of the *Evidence Act*, this Court infers from the evidence presented by the prosecution that the results, must have been achieved by penile penetration of the vagina of CN. This Court finds no alternative explanation available, which this Court is prepared to accept as reasonably possible.
47. Wherefore this Court concludes that the prosecution has proved beyond reasonable doubt that on the 1st day of July 2020, an act which causes penetration was committed upon CN.

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

48. 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.



49. Proof of this fact was anchored on the oral identification evidence of CN and PW3. None of the other four prosecution witnesses can be said to have been armed with evidence, whether direct or circumstantial, in this regard.
50. 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.”
51. 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, and especially in weighty cases like this, 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.
52. 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 vs. 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 vs. Republic [1980] KLR 59, where it was held that recognition is better than identification of a stranger.
53. 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 vs. 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}

54. 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 vs. Republic* [1986] eKLR; *Gikonyo Kuruma & Another vs. Republic* [1977] eKLR and *Njeri vs. 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 vs. 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.”
55. Further, in the Court of Appeal decision in *Wamunga vs. 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.”
56. 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 vs. 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 vs. 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?”
57. See also *Evans Odhiambo Anyanga vs. Republic* [2015] eKLR, per Majanja, J.; *Mwenda vs. Republic* [1989] KLR 464, Masime JA, Gicheru & Kwach Ag JJA (as they then were); and *Osiwa vs. Republic* [1989] KLR 469, per Masime JA, Gicheru & Kwach Ag JJA (as they then were).
 58. Since this Court is faced with visual identification evidence of CN and PW3, this Court is enjoined and will thus carefully and thoroughly analyze the evidence of CN and PW3 in this regard.
 59. First, this Court having carefully observed as CN and PW3 testifying and fielding questions in cross-examination, this Court found CN and PW3 consistent, reliable and witnesses who cannot be said to be of questionable integrity. Besides, CN and PW3 did not come across as coached witnesses. In the premise, this Court is satisfied beyond reasonable doubt that CN and PW3 were telling the truth.
 60. Second, upon considering the time, period, conditions and circumstances of identification, this Court finds that the Accused and the three girls having met and interacted for quite a while during daytime at around 2 pm, the conditions were favourable for visual identification.
 61. Third, the incident having lasted for a considerable length of time, this Court finds that CN and PW3 had sufficient time and opportunity to take notice of the appearance of the Accused.
 62. Fourth, in any event, although CN and PW3 asserted that they did not know the Accused before the material date, an assertion which was admitted by the Accused in his defence, the Accused admitted that they did meet with the three girls and interacted for a considerable period.
 63. Consequently, this Court reaches a conclusion that identification evidence was to the highest extent, free from any possibility of error.
 64. 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 of penetration was committed by the Accused.

(iii) Whether the prosecution has proved beyond reasonable doubt that MMM was a child at the material time

65. This is a question of fact. Section 2 of the *Sexual Offences Act* defines a child as follows: “child” has the meaning assigned thereto in the *Children Act* (No. 8 of 2001).” The *Children Act*, Number 8 of 2001 was repealed and re-enacted as the *Children Act, 2022*. Section 2 thereof defines a “child” to mean “an individual who has not attained the age of eighteen years.” The same section 2 of the *Children Act, 2022*, defines “age” to mean “the actual chronological age of the child from conception or the child’s apparent age as determined by a Medical Officer in any case where the actual age of the child is unascertainable.”
66. The significance of proving age of the victim cannot be overemphasized. P.N. Waki, J. (as he then was) had occasion to underline its importance in *Alfayo Gombe Okello vs. Republic* (2010) eKLR, where His Lordship rendered himself as follows: “In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) ...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.”



67. What form of evidence is admissible to prove age of the victim? What emerges from decisional law is that age can be proved by either documentary (a Certificate of Birth, a Notification of Birth, a Baptismal Certificate, a clinic card) or oral evidence of the parent/victim/guardian or expert evidence or age apparent to the Court where the actual age of the victim is not known and that even in circumstances where conflicting evidence of age is presented, unless the age places the victim outside the bracket of a child, then dismissing a case on this basis only amounts to uplifting an undue technicality to the chagrin of *the Constitution*. See the Court of Appeal decision in Paul Syengo Musyoka vs. Republic [2015] eKLR, where Koome & Visram, JJA (as they then were), Karanja JA held: “24. Proof of age for purposes of conviction and sentencing for the offence of defilement has been considered by this Court on numerous occasions and is now well settled. There is no need to rehash the same save to state that ideally the actual age of the victim should be proved through a birth certificate, birth notification card or other formal documents. Be that as it may, where actual age of a victim is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act* through evidence.” Faced with a similar dilemma where conflicting age was presented in Faustine Mghanga vs. Republic [2012] eKLR, where there was conflicting evidence whether the minor was 7 or 8 years old, Nzioka, J. reasoned had this to say: “I do appreciate the importance of age assessment in such cases. But honestly, who can know the age of a child better than the mother of a child and or the child (if of age?). I personally take judicial notice of the fact that most people in rural area (and even urban areas) would not purpose to have a birth certificate unless required for a specific purpose. If the Courts are going to insist of birth certificates as the scientific methods of proof of age there may be no successful matters especially under *Sexual Offences Act*. What kind of justice then shall we be giving, if we released all the suspects, not based on the totality of the evidence but on technicalities of failure to prove one single issue of age. I note that Article 159 of *the Constitution* of Kenya has impressed upon the Courts to do justice by avoiding “technicalities”. What justice will be done if victim are left without redress simply because they are helpless in the hands of “careless, unconcerned or intentional default on the part of investigating officer who fail to demand, during investigation or prosecution? establish and or prove age of a victim beyond reasonable doubt? For how long shall the Courts lament in their Judgment that age was not proved and set free all suspects? Isn’t it injustice? In deed no justice will be done, nor seem to be done. And the society will continue to lose confidence in the Judiciary. Is there anything like “social justice?”. Does the society understand the Court’s language of “proof of age?” Is the Judiciary rife to the fact that justice is done when seen to be done? I find no difficulties in relying on the evidence of the witnesses herein, as to the age of the complainant and believe she was 7 years at the time off the offence. In Mangunyu vs Republic Hon. Justice W. Ouko, quoting reference from I.E. Collingwood’s Criminal Law of East and Central Africa (London: Sweet and Maxwell) 1967 Ed of page 123, observed “Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person present at the birth.” Who can be better person present at birth, than, the mother of the child? Similarly in the case of Kenneth Kiplagat Rono Vs Republic CRA No. 66 of 1999 it was held that age can be proved by evidence other than documentary evidence. I am therefore convinced that the applicant herein was a minor at age 7 years at the time of the commission of the offence. Even, though I have spent quite an amount of time dealing with the issue of age. It is important to note that the Appellant has been charged with the offence of “Attempted” defilement. Under this section, what is important to establish is that, the complainant is a child. As I have already observed the victim herein was a child.” See also the Court of Appeal Decision in Evans Wamalwa Simiyu vs. R [2016] eKLR; Joanes Oduor Otieno vs. Republic [2020] eKLR, per Aburili, J.; and Joseph Kieti Seet vs. Republic [2014] eKLR, per Mutende, J.
68. The Court should be alive to the fact that the *Sexual Offences Act* places age of the victim at two strategic stages of the criminal process namely age for purposes of conviction and age for purposes of sentences.



What emerges from decisional law is that wherever a Court is faced with conflicting evidence of the victim, then for purposes of conviction, all the Court has to be persuaded beyond reasonable doubt is that the victim is a child within the meaning assigned thereto under section 2 of the *Sexual Offences Act*. However, for purposes of sentencing, then the Court should go for the lowest risk and adopt the highest age of the victim guided by section 8(2), 8(3) and 8(4) of the *Sexual Offences Act*. See the Court of Appeal decision in Paul Syengo Musyoka vs. Republic [2015] eKLR, Koome & Visram, JJA (as they then were), Karanja JA had this to say: “24. Proof of age for purposes of conviction and sentencing for the offence of defilement has been considered by this Court on numerous occasions and is now well settled. There is no need to rehash the same save to state that ideally the actual age of the victim should be proved through a birth certificate, birth notification card or other formal documents. Be that as it may, where actual age of a victim is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act* through evidence. 25. It is not in dispute that the actual age of DM was not established through a birth certificate. The only evidence in that regard was given by DM who testified she was 9 years old which was corroborated by the P3 form which indicated the same as her estimated age. We concur with the two Courts below that the foregoing was sufficient to prove her apparent age was 9 years.” See also the Court of Appeal Decisions in Evans Wamalwa Simiyu vs. R [2016] eKLR; and Moses Nato Raphael vs. Republic [2015] eKLR.

69. And so, because one of the ingredients of defilement is that the victim must have been a child, as discussed in GOA vs. Republic [2018] eKLR, per A.C. Mrima, J., proof of age for purposes of establishing defilement should not be confused with proof of age for purposes of appropriate punishment for defilement. See Riako Philent Ouma vs. Republic [2015] eKLR, where D.S. Majanja, J. held as follows: “17. I now turn to the issue of age of the child. The age of a child is a question of fact and I would echo what the Court of Appeal stated about proof of age for purposes of the *Sexual Offences Act* in Moses Nato Raphael v Republic NRB CA CRA No. 169 of 2014 [2015] eKLR. It stated that; On the challenge posed by the uncertainty in the complainant’s age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanja v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child’s age cannot therefore assist the appellant to avoid criminal culpability. 18. The appellant did not contend that PW1 was not below the age of 18 years. For purposes of the sentence, PW 1 was sufficiently intelligent and gave her age as 15 years. PW 4, her father also testified that PW 1 was aged 15 years. This was sufficient proof of age. Under section 2 of the *Children Act*, age means the apparent age where the exact age is not known. In this case there was sufficient proof that PW 1 was aged 15 years.”
70. Astoundingly, beyond the statement in the charge sheet that CN was 5 years at the material time, no evidence was led in this regard.
71. However, on authority of Paul Syengo Musyoka vs. Republic [2015] eKLR; Faustine Mghanga vs. Republic [2012] eKLR; Evans Wamalwa Simiyu vs. R [2016] eKLR; Joanes Oduor Otieno vs. Republic [2020] eKLR; Joseph Kieti Seet vs. Republic [2014] eKLR; and Riako Philent Ouma vs. Republic [2015] eKLR, this Court resorts to the ultimate recourse which is to apply the apparent age. Having observed CN physically, and gleaned further from her speech which this Court found not fully developed, this Court infers that as at the time of testimony, CN was not older than 8 years. Further, this fact was not contested by the Accused in defence. This thus places her within the category of children.



72. The foregoing reason yields a conclusion that the prosecution has proved beyond reasonable doubt that CN, having been an individual who had not attained the age of eighteen years at the material time, was a child.

(iv) Whether the said act which causes penetration was committed intentionally and unlawfully

73. 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.

74. 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.”

75. 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.”

76. 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.”

77. 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.”

78. 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.”



79. 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.”
80. Gathering from the circumstances of this case and particularly the picture depicted by PW1 and PW3, this Court reaches the inexorable conclusion that the act which caused penetration was committed intentionally and unlawfully.

PART VI: Disposition

81. Consequent upon this Court finds the Accused guilty of the offence defilement contrary to section 8(1) read with section 8(2) of the Sexual Offences Act, 2006 and accordingly convicted under section 215 of the Criminal Procedure Code.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 29TH DAY OF JULY, 2024

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C.N. ONDIEKI
PRINCIPAL MAGISTRATE

In the presence of:
 Prosecution Counsel:.....
 Advocate for the Accused:.....
 The Accused:.....
 Court Assistant:.....

