Republic v Kyalo (Sexual Offence E058 of 2022)
[2024] KEMC 24 (KLR) (8 August 2024) (Judgment)

Neutral citation: [2024] KEMC 24 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

SEXUAL OFFENCE E058 OF 2022

CN ONDIEKI, PM

AUGUST 8, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JONAH KYALO ALIAS BABA RODA ..... ACCUSED

JUDGMENT

Part i: Background

1. On 4th November 2022, the Accused was arraigned in Court and charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 29th day of October 2022, at Mung'ala Village in Machakos Sub-County within Machakos County, the Accused intentionally caused his penis to penetrate the vagina of FNM, a child aged 13 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 29th day of October 2022 at Mung'ala Village in Machakos Sub-County within Machakos County, using his penis, the Accused intentionally and unlawfully touched the vagina of the FNM, a child aged 13 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 four witnesses.

5. PW1, FNM, informed the Court that she was 14 years by the time of testimony (16th October 2023). She further informed this Court that she was at the material a student at M Junior Secondary School.

She recalled that on 29th October 2022, at around 5 pm, she went to fetch water from the nearby river and met Baba Roda, the Accused herein armed with a catapult and he directed her to stop or else he will kill her. She testified that the Accused shepherded her to a nearby thicket where he removed her undergarment and he also removed his trouser and inserted his penis in her vagina. She testified that she went back home and informed her mother and the landlord. She testified that her mother reached the Accused on phone but he denied. She testified that she was escorted to Machakos Level 5 where she was examined and treated. She identified the P3 Form, Laboratory Request Form, PRC Form and Age Assessment Report and they were marked PMFI 1-4 respectively.

6. In cross-examination of PW1, she stated that she was 13 years old at the time of the incident. She stated that both at the police station and hospital, the story was narrated by one Jessicah. She stated that on 28th October 2022, she was collecting firewood in company of her sister and brother. She stated that a similar incident occurred on 30th October 2022 at around 6 pm when she was sent to a shop by her mother. She stated that she did not record this incident in her witness statement. She stated that on that date, she was not sent by her mother but the landlord. She stated that when the Accused penetrated her vagina, she did not scream. She states that they live in rental houses which belong to one Susan Mutinda. She stated that her mother did not coach her to lie in Court. She stated that there was no pre-existing dispute or animosity between the Accused and FNM's mother.

7. PW2, WMM, informed this Court that she is FNM's mother and that she is 14 years old. She recalled that on 29th October 2022, she was at work when her landlord asked her to check whether FNM has been sexually assaulted. She narrated that she informed nyumba kumi and upon arrival, she inquired from FNM in their presence and she confirmed that she had been defiled by the Accused herein. She narrated that she escorted FNM to Machakos Level 5 Hospital where she was examined and it was confirmed that she had been defiled.

8. In cross-examination of PW2, she stated that FNM is 14 years old. She stated that she usually leaves at 6 am for work and returns home at around 6 pm. She stated that the Accused used to waylay FNM and defiled her several times. She stated that she could not recall the exact dates. She stated that Jones Mutinda was her landlord. She stated that Jones asked her to check her because she was being defiled. She stated that Jones is not a witness in this case. She stated that she did not coach FNM to lie in Court. She stated that she is aware that the Accused is HIV positive. She stated that FNM was not found HIV positive. She stated that she was not aware whether there was animosity between Jones and the Accused. She stated that there was no animosity between her and the Accused before the incident.

9. PW3, Police Constable Jessicah Kisilu of Machakos Police Station informed this Court that she was the Investigating Officer. She narrated that upon concluding investigations, she was satisfied that there was sufficient evidence to sustain a charge and thus proceeded to arrest the Accused. She stated that no condom was used. PW3 produced the age assessment report as Exhibit 4.

10. In in cross-examination of PW3, she stated that she did not demand a bribe from the Accused to let him go. She stated that she was aware that the Accused is under antiretroviral therapy. She stated that FNM's age was assessed at 13 years.

11. PW4, Dr. Peter Ngumbi attached to Machakos Level 5 Hospital, informed the Court that he was producing reports which were prepared by Dr. Mutunga. He testified that upon examination of FNM on 3rd November 2022, there no injuries on the head, neck, chest, and abdomen, both lower and upper limbs but upon examination of the genital organ, the hymen was broken but not freshly, with a whitish discharge. He formed an opinion that it must have been attained by penile penetration. He testified that a high vaginal swap revealed epithelial cells in urine and that pregnancy, HIV and syphilis tests

turned out negative. He produced the P3 Form, Laboratory Request Form and PRC Form as Exhibits 1, 2 and 3 respectively.

12. In cross-examination of PW4, he stated that FNM was examined on 3rd November 2022. He stated that FNM came to hospital on 2nd and 3rd November 2022. He stated that she was found HIV negative. He stated that the police did not bring the Accused for examination. He stated that he cannot tell whether the Accused is HIV negative. He stated that according to the PRC Form, no condom was used. He stated that FNM did not bleed.

Part iii: The Accused's Case

13. The Accused was the only defence witness. In his sworn statement, the Accused denied that he committed the offences. He stated that he has been living with HIV from 2009. He recalled that on 29th October 2022, he was on duty at the Airtel Booster where he used to serve as a watchman and at 6 pm, a young man came to his place of work and left his motor cycle for him to watch over. He stated that he entered the generator room to switch lights on and when he stepped out, he found two men removing something from the motor cycle and when they saw him, they fled. He stated that he knew one of the two young men and reported to the owner of the motor cycle. He stated that he later discovered that a radio had been stolen from the motor cycle. He stated that one of the young men was a son of WMM, FNM's mother. He stated that later, FNM's mother accused him of falsely implicating his son to theft and animosity started. He stated that he was falsely implicated to this offence because of the animosity between him and FNM's mother. He produced a letter from Machakos Level 5 Hospital as the defence Exhibit 1, which states that he is under antiretroviral therapy.

14. In cross-examination of the Accused, he stated that he has no document to prove that he was a watchman at the said booster. He stated that he did not know the girl before the incident. He stated that there is no thicket where they live.

15. In his submissions, the Accused urges that if indeed he defiled FNM, then she must have contracted HIV. He submits that he was falsely implicated to the offence by FNM's mother because of animosity.

Part iv: Points For Determination

16. Regarding 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 29th October 2022, an act which causes penetration was committed upon FNM.

    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 FNM was a child at the material time.

    iv. Fourth, whether the said act which causes penetration, was committed intentionally and unlawfully.

17. Should the prosecution fail to prove the main count, this Court will determine whether the available evidence can prove the alternative count and more particularly: (i) Whether the prosecution has proved beyond reasonable doubt that an indecent act was committed upon FNM; (ii) Whether the prosecution has proved beyond reasonable doubt that an indecent act was committed by the Accused; (iii) Whether the prosecution has proved beyond reasonable doubt that the complainant was a child at the material time; and (iv) Whether the said act was done intentionally and unlawfully.

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

18. 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. See sections 107, 108 and 109 of the *Evidence Act*.

19. 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."

20. 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.

21. 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..."

22. 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."

23. 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."

24. 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."

25. 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."

26. 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."

27. 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."

28. 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."

29. 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."

30. 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."

31. 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."

32. 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."

33. 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.

34. Having discussed the broad framework within which this case will be determined, for reasons to be apparent hereinafter, this Court will analyze all the four questions concurrently.

(i) Whether the prosecution has proved beyond reasonable doubt that on 29th October 2022, an act which causes penetration was committed upon FNM

35. 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."

36. 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".

37. 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."

38. This is a question of fact. The only direct evidence in this regard was that of FNM (PW1), coupled with the expert evidence of PW4, which expert evidence can be invoked to test whether it can pass the threshold of circumstantial evidence.

39. FNM testified that on 29th October 2022, her vagina was penetrated.

40. Expert evidence was presented by PW4 who testified and produced P3 Form, Laboratory Request Form and PRC Form as Exhibits 1, 2 and 3 respectively. PW4 testified that upon examining FNM on 3rd November 2022, he found her hymen broken but not freshly, with a whitish discharge and he formed an opinion that it must have been attained by penile penetration. PW4 further testified that a high vaginal swap revealed epithelial cells in urine and that pregnancy, HIV and syphilis tests turned out negative.

41. This Court finds the evidence of FNM and that of PW4 consistent and unshaken at all by the Defence.

42. Which leads to the determinative question, anchored on this proved fact. What can reasonably be inferred from this state of affairs? Since the evidence in support of this ingredient is largely circumstantial, it is now imperative that consider the principles governing circumstantial evidence. In R vs. 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."

43. What is the test of circumstantial evidence? In R vs. 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 vs. Republic [2019] eKLR, Koome, JA (as she then was) Sichale, Kantai, JJ.A., echoed the tests laid in the decision of Abanga alias Onyango vs. 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 vs. 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."

44. 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 vs. 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 vs. 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..."

45. And so, in the trial of Nahashon Isaac Njenga Njoroge over the murder of Thomas Joseph Mboya, Simpson, J. (as he then was) convicted Nahashon purely on circumstantial evidence. Nahashon appealed in Nahashon Isaac Njenga Njoroge v. Republic (1969) eKLR, and while deploying the test of circumstantial evidence laid down in the Musoke case and doctrine of recent possession laid down in the Obonyo case in dismissing the appeal, Newbold, P., Duffus and Spry JJ.A. (as they then were) had this to say about circumstantial evidence and whether the evidence had passed the said test: "... It is normally said, when dealing with circumstantial evidence, that the incriminatory facts must point conclusively to the guilt of the appellant and be incompatible with any reasonable hypothesis of his innocence... Before a person can be convicted the evidence for the prosecution, the evidence pointing to the guilt of the appellant must be such as to leave no reasonable doubt in the mind of the trial judge, and must be such that he is completely sure of the guilt of the Accused person, and must be such that it points irresistibly to that guilt... That evidence, and particularly the evidence of the possession of the murder weapon so shortly after the event and the circumstances of its possession, pointed in the mind of the trial judge irresistibly to the guilt of the appellant. It was incompatible that his innocence taken by itself. It is possible that some explanation might then have been given by the appellant which, while the trial judge did not necessarily believe it, may nevertheless have raised some doubt in his mind. If that was so, then of course it was the duty of the trial judge to have acquitted the appellant and if the trial judge did not do so it would be the duty of this Court to allow the appeal. But in the absence of any explanation which could have raised some doubt in the mind of the trial judge, we are satisfied that the evidence pointed to the guilt of the appellant and was such as to leave it beyond reasonable doubt as to his guilt. Such explanation as was given by the appellant was not accepted by the trial judge. In one respect has been abandoned by the appellant as being false. The second explanation, that is that the gun was handed to him by a friend, was also not accepted as being reasonably and possibly true. As has been said in the case to which Mr Waruhiu referred, that is the Bassan case: ([3]) (3) Bassan 1960

E.A.854 at P. 861. "It is, of course, correct to say that these circumstances – the failure to give evidence or the giving of false evidence – may bear against an Accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight". In this case the other evidence, that is the evidence of possession so shortly after the shooting of the gun used for the murder, was such as in the circumstances to leave no doubt in the mind of the trial judge of the guilt of the appellant. The explanations given by the appellant were so contradictory, in one respect admittedly false and in the other not accepted by the trial judge, that these contradictory explanations cannot but have had the effect of confirming the irresistible impression created by the evidence of the prosecution. We are satisfied, therefore, that in all the circumstances the trial judge was correct in coming to the conclusion that the evidence showed beyond reasonable doubt the guilt of the appellant and that none of his explanations raised any reasonable hypothesis which would shake in any way whatsoever this certainty, this sureness, in the mind of the trial judge of the guilt of the appellant."

46. Do circumstances in this case point to the one and only direction that there was penetration? 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.

47. 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 appears from all the circumstances?

48. Considering the totality of evidence in support of this fact and further invoking section 119 of the *Evidence Act*, this Court infers that the broken hymen of FNM, must have been achieved by penile penetration of the vagina of FNM by a male person, in coitus. I find no alternative explanation available, which this Court is prepared to accept as reasonably possible.

49. Wherefore this Court concludes that the prosecution has proved beyond reasonable doubt that on 29th October 2022, an act which causes penetration was committed upon FNM.

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

50. 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.

51. This is a question of fact and the only evidence in this regard was the direct evidence of FNM. None of the other three prosecution witnesses can be said to have been armed with evidence, whether direct or circumstantial, in this regard.

52. 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."

53. It should be noted that despite the clear provision of section 143 of the *Evidence Act*, owing to the high standard of proof for criminal cases, corroboration is required in all criminal cases except sexual offences since 2006, when a proviso was introduced to section 124 of the *Evidence Act* obviate the need for corroboration in sexual offences on condition that the Court believes that the alleged victim is telling the truth. This proviso was ostensibly driven by the need to take care of recurrent 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 enjoin the Court to admit such evidence of the alleged victim of a sexual offence unconditionally. It instead reposes a discretionary power upon 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.

54. 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.

55. 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}

56. 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."

57. 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."

58. 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?"

59. 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).

60. Since I am faced with the visual and recognition evidence of a single witness, FNM, the alleged victim of the offence, this Court will proceed with due caution, to carefully and thoroughly analyze the evidence of FNM.

61. While under examination-in-chief, FNM testified that on the material date, at around 5 pm, she went to fetch water from the nearby river and met Baba Roda, the Accused herein armed with a catapult and he directed her to stop or else he will kill her. She testified that the Accused shepherded her to a nearby thicket where he removed her undergarment and he also removed his trouser and inserted his penis in her vagina. She testified that she went back home and informed her mother and the landlord.

62. In his defence, the Accused took a position that there was no sufficient identification evidence since he was at the material time HIV positive and if indeed he penetrated the vagina of FNM without a condom, she should have been infected with HIV. The Accused exhibited a report from Machakos Level 5 Hospital that he is indeed under management of HIV.

63. First, the Accused depicted a picture that his is an absolute defence. Is it an absolute defence? It's instructive to underline that it is now a medical scientific fact and this Court takes judicial notice that it is incorrect to hold that once a victim is exposed to unprotected sexual intercourse with a person who HIV positive - who admittedly is under antiretroviral therapy which is medially established that it considerably reduces chances of transmission - the victim automatically contracts HIV. Connected to this, it is also medically established fact and this Court takes judicial notice that if within a period of 72 hours, Pre-Exposure Prophylaxis (PrEP) is administered to a victim who has come into unprotected sexual contact with a person who is HIV positive – which was administered to FNM within the said period – then it considerably reduces the risk of contracting HIV by approximately 99%.[1] In the premise, the Accused's defence cannot be deemed an absolute defence but rather, a partial defence which can conceivably succeed in considerably constrained and exceptional circumstances, in the following environment: (i) where it is demonstrated by the Accused that first, he is HIV positive; and (ii) he has never been under antiretroviral therapy; (iii) that he had unprotected penetrative sexual intercourse with the victim; and (iv) that Pre-Exposure Prophylaxis (PrEP) was not administered to a victim within 72 hours of exposure.

64. Second, although the Accused raised the defence of animosity which is readily recognized as a complete defence in inter alia Republic vs. Brian Nzioki Muli [2020] eKLR; Ayub Muchele vs. Republic [1980] KLR 44; and Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004 (UR), the Accused unfortunately failed to place sufficient evidence before this Court to aid it finding that it was so.

65. Third, this Court having carefully examined the record of examination-in-chief and answers offered in cross-examination, this Court found FNM candid, reliable and a witness who cannot be said to be of questionable integrity. FNM did not come across as a coached witness. For these reasons, this Court is satisfied that FNM was telling the truth.

66. Fourth, upon considering the fact that FNM knew the Accused long before the incident and that the incident took place during the daytime at around 1700 hours, and taking further into consideration the

[1] See the World Health Orgnaization website at https://www.who.int/news-room/fact-sheets/detail/hiv-aids?gad_source=1&gclid=CjwKCAjw5Ky1BhAgEiwA5jGujsNN-Lo6vBhXQDo0Z33cw3JlKKW-IHffp4YsQrOLt1bqC6CZmcBdixoChjEQAvD_BwE. Checked on 2nd August 2024.

fact that the incident lasted for a considerable period, the conditions were favourable for recognition since FNM had sufficient time and opportunity to take notice of the appearance of the Accused.

67. Fifth, evidence to the required standard was presented to the effect that FNM knew the Accused long before the incident making it unnecessary for an identification parade which could have been necessary for a stranger.

68. Sixth and finally, it will be a remiss of this Court fails to underline that it observed a few inconsistencies and discrepancies between PW1 and PW2. The general guiding ray in construing whether the discrepancies are trifling and inconsequential is whether before a Court, well directed in law and fact, the discrepancies will found reasonable doubt. In Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question." A cautionary principle was developed to the effect that statements or words or instances should not be taken in isolation, lest the plot will be lost. In a Tanzanian case of Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007, which was quited in approval by Odunga, J. in Bernard Mutisya Mutuva vs. Republic [2022] eKLR, the Court of Appeal of Tanzania addressed spoke to this caution in the following words: "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter." In accord with the said cautionary principle, it follows that contradictions should not be automatically equated to the notion that a witness is lying. See Nyakisia vs. Republic, [1971] E. A. C. A. Crim. App. 35 of 1971, per Duffus P., Spry VP. & Lutta JA. In this case, this Court has warned itself accordingly. This Court having considered the threshold of the contradictions – while appreciating the fact that they cannot miss in any case - finds them trifling.

69. Consequently, this Court concludes that recognition was possible and having known the Accused for long, this Court finds that the recognition was the highest extent, free from any possibility of error.

70. 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 prosecution has proved beyond reasonable doubt that FNM was a child at the material time

71. 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."

72. 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."

73. 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 if s 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.

74. 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.

75. 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 Mwanya 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."

76. In support of this, PW1, PW2 and PW3 testified that FNM was 14 years at the time of giving her testimony. PW3 testified that her age was assessed at 13 years and exhibited an age assessment report as Exhibit 4.

77. This fact was not contested by the Accused.

78. The foregoing reasons yield a conclusion that the prosecution has proved beyond reasonable doubt that FNM, 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

79. 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.

80. 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."

81. 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."

82. 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."

83. 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."

84. 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."

85. 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."

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

Part vi: Disposition

87. Consequent upon this Court finds the Accused guilty of the offence defilement contrary to section 8(1) read with section 8(3) 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 8TH DAY OF AUGUST, 2024

.....

C.N. Ondieki

Principal Magistrate

In the presence of:

Prosecution Counsel:.....

The Accused:.....

Court Assistant:.....