



**Republic v Nyagah (Sexual Offence 27 of 2020)  
[2023] KEMC 151 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEMC 151 (KLR)

**REPUBLIC OF KENYA  
IN THE LAMU LAW COURTS  
SEXUAL OFFENCE 27 OF 2020  
AT SITATI, SPM  
JUNE 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**AYUB NYAGAH ..... ACCUSED**

**JUDGMENT**

1. The accused person denied all the counts preferred against him.  
In Count I, he was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars were that on diverse dates between the month of July 2020 and 6<sup>th</sup> October, 2020 within Kiunga area of Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of I.M.D.A (Initials) a female minor aged 15 years old.
2. The alternative count to the Main Offence was committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on diverse dates between the month of July 2020 and 6<sup>th</sup> October, 2020 within Kiunga area of Lamu County, he intentionally and unlawfully caused his penis to touch the vagina of I.M.D.A (Initials) a female minor aged 15 years old.
3. In Count II, he was charged with the offence of abuse of position of authority contrary to section 24(2) of the *Sexual Offences Act*. diverse dates between the month of July 2020 and 6<sup>th</sup> October, 2020 within Kiunga area of Lamu County, he took advantage of his position as a Kenya Wildlife Service Ranger to have sexual intercourse with I.M.D.A (Initials) a female minor aged 15 years old within the limits that he was appointed.
4. In Count III, he was charged with the offence of attempt to procure abortion contrary to section 158 of the Penal Code. The particulars were that on 6<sup>th</sup> October, 2020 at Kiunga own in Lamu County he, with intent to procure the miscarriage of a woman namely I.M.D.A. (initials) unlawfully administered to her a whole cup of very bitter tea without sugar with concentrated tea leaves.



5. The Accused person was represented by Mr. Alfred Olaba, Advocate while the DPP's case was conducted by Prosecution Counsel David Onyango.

### **The Dpp's Case**

6. PW1 I.M.D.A. told the court that she had sexual intercourse with one Osman thrice in his official quarters at the KWS Camp before she fell pregnant. She told the court further that Osman made her pregnant before Kamau got her. She told the court that she had run to Osman to escape a beating from her parents. She added that after fleeing home, she went to the bush to hide and that was where the accused person found her. He helped her to go to the police. She added that following her pregnancy, she was given some unknown pills by her aunt to swallow and she eventually lost her pregnancy. She defended the accused person as the one who had rescued her.
7. After he was arrested, she gave the investigating officer her DNA samples for comparison with the DNA samples of the accused person. She pointed out that the clothes that she handed over SGT Saumu belonged to her sister.
8. PW2 Clinical Officer Madi Sheyumbe of the King Fahd Hospital produced the Treatment notes of 6<sup>th</sup> August, 2020, ultrasound scan report of 8<sup>th</sup> October, 2020 and P3 Form dated 8<sup>th</sup> October, 2020 as P.Ex.1-3 all showing that she was pregnant as a result of sexual intercourse on unknown dates.

In cross-examination the following evidence came to light:

1. The minor had stains on her panty which PW2 thought were from her vaginal discharge.
  2. At the time of the medical exam and P3 Form filling, the doctor took blood samples from the accused person and the minor, sealed it and handed over to SGT Saumu who escorted the accused and the samples to the Mombasa Govt Chemist for analysis. In his (PW2's) professional view this was unprocedural because ideally the blood sample ought to be taken at the lab where the testing is to be done due to the deteriorating nature of blood samples – the samples deteriorate quickly leading to destruction of DNA content unless they are transported in a special portable refrigerated container.
  3. The minor's hymen was missing of longstanding.
  4. The accused person did not undergo medical examination other than his providing the blood sample.
9. In re-examination, the witness admitted that he did not understand the procedure for DNA testing. He, however, admitted that DNA could be extracted from blood, saliva or sperm. He added that once the blood samples were extracted and sealed at the King Fahd Hospital, they were handed over to SGT Saumu in sealed containers.
  10. PW3 F.N.K. (initials) a sister of the Minor's mother (and consequently an aunt to the Minor) told the court that on 6<sup>th</sup> October, 2020 the Minor's father called her on the mobile phone saying that I.M.D.A. went missing from the house the previous evening. Together with other women, they formed search parties for the missing girl. In one of the search parties was a woman called M (initials) who told them that on a previous date she had spotted the accused person in the company of the Minor along the Kiunga beaches and that when M asked them what they were doing, I.M.D.A told her that she was just headed to one A's (initials) house. M added that the present accused lived in the KWS camp which was along the same road to M's house.



11. Acting on this information, they visited the KWS camp and found CPL Hussein and complained to him that KWS rangers were sexually predated on underage girls in Kiunga. While they were complaining to CPL Hussein within the precincts of the KWS Camp, the accused person showed up from his quarters and was asked by PW3 if he had seen I.M.D.A (The Minor) to which the accused person pleaded ignorance saying that he had interacted with many people and could not remember. The women led by PW3 left the camp empty-handed without I.M.D.A.
12. Later that day at 3pm, PW3 received a phone call from the girl's father alerting her that he had been informed that the girl had been found and was then at the police station. When PW3 dashed to the police station, she found I.M.D.A, her father, the chief and the accused person. When PW3 found the accused person at the police station with I.M.D.A. and others, she confronted him over the saga but he kept silent. The police blocked PW3 from speaking to the girl at the police station but agreed to have PW3 accompany SGT Saumu who was escorting the child to the Kiunga Sub-County Hospital for medical examination. The accused person also accompanied SGT Saumu to the hospital on this visit with I.M.D.A.
13. PW3 further testified that when they got to the hospital, the clinical officer on duty immediately recognized both I.M.D.A and the accused person and disclosed openly that both I.M.D.A. and the accused person had been visiting the hospital together for regular and repeated HIV tests. The clinician examined the minor and confirmed that she was pregnant.
14. PW3 accompanied SGT Saumu to Lamu where blood samples were extracted before she stayed with the minor in the guesthouse while SGT Saumu took the extracted blood and DNA samples to Mombasa govt. Chemist for analysis. While in the guesthouse in Mokowe, the child began complaining of severe stomach pains and complained that Kamau had given her concentrated tea to trigger a miscarriage. She was rushed to a clinic. They changed locations to a guesthouse in Lamu the next day. It was while they were in the Lamu guesthouse that the minor slipped out of the hotel and vanished for a day before the police traced and took her in custody again.

In cross-examination, the following evidence came to light:

1. PW3 had never seen the Minor going to the accused person's quarters at the KWS camp.
  2. When PW3 arrived at the Kiunga Police Station, the accused person claimed that he had rescued the child from the forest.
  3. PW3 was present at the King Fahd Hospital for the extraction of blood samples from the minor and the accused person.
15. PW4 M.D.A. a paternal uncle to the child told the court that on 1<sup>st</sup> October, 2020 he got some information that his brother's daughter I.M.D.A had been seen hanging around the Kiunga KWS Camp. Later, he received the alert that she had gone missing from her father's house on 5<sup>th</sup> October, 2020 at 10pm. A search could not be done that night due to the COVID-19 Curfew order so the next day they launched the search. As they began the search, he told the child's father that he strongly suspected that the child was inside the KWS Camp. This made the father to go to the KWS camp but he returned empty handed. While chatting the child's father at the chief's camp which was close to the police station, he observed the accused person walking in the company of a woman called Habala and moments later saw a police vehicle approach the accused person before he was swooped down on by the police and bundled into the Land Cruiser. When he rushed to the police station he discovered I.M.D.A there with the accused person.



16. PW3 affirmed that he was present when his niece was escorted to the Kiunga Hospital whereupon on arrival, the clinical officer exclaimed that both the Minor and I.M.D.A had visited the hospital just the previous day for medical tests in each other's company. PW4 added that he knew the accused person well as he was one of his regular clients.
17. In cross-examination by Mr. Olaba, the following evidence came to light:
  1. On 6<sup>th</sup> October, 2020 he did not see the Accused person.
  2. The real name of the woman who was walking with the accused person was AJAWO not HABALA.
  3. On the date of the discovery of the missing girl, he had seen the accused person board the police land cruiser at the police station before driving away towards the KWS camp before returning with the female minor aboard but the story was changed to say that she came from the forest.
  4. The accused person claimed that he had rescued the child from the forest.
18. In re-exam, he emphasized seeing the accused person boarding the police vehicle before it headed towards the KWS camp and later returning with the accused person and the minor aboard. He pointed out that the distance between the chief's camp from where he was following the movement of the police car and the police station was very short – only separated by a well.
19. PW5 Government Analyst Irene Furaha Mwaringaproduced the DNA analysis report dated 28<sup>th</sup> October, 2020 as P.Ex.2. She told the court that in order to prepare the report, she received the following exhibits from SGT Saumu on 9<sup>th</sup> October, 2020 under an Exhibit Memo Form of that date:
  1. High vaginal swab of the Minor I.M.D.A.
  2. Blue innerwear of the Minor I.M.DA.
  3. Maroon innerwear checked colour with a black waistband of I.M.D.A.
  4. Blood sample of Ayub Kamau.
20. SGT Saumu asked PW5 to extract any DNA materials from the 4 listed samples and conduct a comparison to see if the stains on the blue innerwear and the stains on the maroon innerwear tested positive for spermatozoa and whether the same matched with the DNA of the said Ayub Kamau.
21. To carry out the DNA test, she utilized the S.P.A. Test which is a spot test using the standard DNA test kit. Thus, she went ahead to extract the stains from the blue innerwear and tabulated the sample. After applying the necessary processes, she came to the conclusion that the HVS generated a female DNA profile.
22. Further, when she extracted the DNA samples from the blue innerwear, it generated the DNA profiles of 2 different persons: male and female.
23. As for the DNA samples from the maroon checked innerwear trousers, the DNA samples generated a male DNA profile which matched with the referenced blood sample of Ayub Kamau with a probability random match of 1 out of several billions which meant that Ayub Kamau had deposited his DNA sample on the maroon innerwear trouser. PW5 affirmed that the DNA was extracted individually and separately then these were run through the genetic analyser machine. She added that the DNA profile is then read through a software called the Gene-Marker Software which displays the results. The displayed results would then be tabulated and compared so as to calculate the probability of a random match.



24. PW5 also told the court that the DNA samples delivered by SGT Saumu were delivered in 2 vacutainer tubes which were usually had preservatives. Ordinary tubes do not contain preservatives. According to PW5, when the blood samples were brought to her she noted that the blood sample was still in good condition with extractable DNA which had not degenerated.

To clarify her testimony, PW5 said that she analysed 4 DNA samples:

- i. The HVS sample marked “A-1”.
- ii. The blue innerwear trouser marked “A-2” from which she cut the portion containing the stains.
- iii. The maroon innerwear trouser marked “A-3” from which she cut the portion containing the deposited stains.
- iv. Ayub Kamau preserved blood sample marked “A-4”.

The analyst produced the report dated 28<sup>th</sup> October, 2020 as P.Ex.7.

25. PW5’s testimony showed the following when subjected to testing during the cross-examination by Mr. Olaba the defence counsel:

1. PW5 personally received the exhibits from SGT Saumu on 9<sup>th</sup> October, 2020.
2. After she received the materials, she tasked a newly employed analyst to extract the DNA samples from the exhibits but the new analyst experienced challenges prompting PW5 to conduct the DNA extraction and analysis herself.
3. She denied that SGT Saumu had contacted her and got informed that the DNA samples were insufficient.
4. She affirmed that she repeated the exercise a number of times just to ascertain the consistency of the result and in her view it was unnecessary for further tests at the DCI Headquarters.
5. The procedure entailed cutting portions of the inner-wears and the pieces of cuttings are then subjected to extractive chemicals. Once this is done, the cuttings become useless – they can only be subjected to chemical extraction once.
6. In the Exhibit Memo form, the I.O. had indicated that the blue and maroon inner-wears belonged to the complainant I.M.D.A.

26. In re-examination, PW5 affirmed that her analyst report was authentic and true and free from error. She pointed out that the analysis took place in a sealed lab chamber with controlled conditions to prevent contamination and also due to the hazardous chemicals used in the extraction and analysing process during which the analyst wore protective gear. She explained further that the cuttings would be put in chemicals in tubes and thereafter disposed. The witness clarified that the only communication that she had with the investigating officer was when she called in asking if the report was ready. She also confirmed that the first analyst could not complete the process due to inexperience and this made PW5 to personally undertake the analysis. She also affirmed that the DNA had not degraded by the time she undertook the analysis.

27. PW6 N.A.D (initials) told the court that she joined PW3 at the hotel room where the minor was being accommodated with PW3 and that she took a bath, the minor secretly used her phone to contact unknown people. When she asked the child whom she had called, the child said that she had only contacted her father but as PW6 later discovered she had actually contacted the accused person. This



discovery was made after the minor went missing ostensibly to meet the accused person whereupon PW6 gave the strange number to the police who in turn tracked the number that the Minor had contacted. It turned out to be Ayub Nyaga's number. No questions in cross-examination were asked of this witness.

28. PW7 S/no. 120056 PC Kipchoge Frederick of Kiunga Police Station told the court that on 6<sup>th</sup> October, 2020 he received a phone call from Ranger Ayub Kamau informing him that he (Ayub) had seen a girl hiding near their KWS Camp. This made PC Kipchoge, PC Muchoki and PC Mutunga to proceed to the scene aboard a Police Land Cruiser. He added that it was Ranger Ayub who led the officers to the bush from where they picked her up and took her to the station.
29. In cross-examination, according to PC Kipchoge, when they got to the location inside the bush, the officers found the girl looking fearful and was trembling. She did not utter a word. He added that as of 6<sup>th</sup> October, 2020 no report had been filed at their station about a missing girl.
30. PW8 S/no. 113717 PC John Musyoka Mwanthi told the court that at around 12noon he received a call from Ranger Ayub who informed him that he had seen a girl inside the forest while he was walking towards the market. PW8 said that there is a forest 500metres from the police station. This made PW8 to ask Ranger Ayub why the girl was in the forest to which Ranger Ayub responded saying that the girl had told him that she had been threatened by her father. When he received this call, he alerted the OCS and OC Ocholla.
31. Later, he accompanied his colleagues aboard the police Land Cruiser to the location stated by Ranger Ayub. As they made their way there, Ranger Ayub told them that he was walking towards the police station and indeed they met him on the way. Ranger Ayub boarded the police vehicle with another lady but that lady disappeared. Those who went in the police vehicle were PW8, PC Ocholla, PC Kipchoge, PC Mutunga (driver) and Ranger Ayub. The said Ranger took them to a location which was 300metres from the KWS camp and walked them 50metres off the main road to the exact location in the forest whereat the girl was sitting under a big tree that was surrounded by bushes and smaller trees. He briefly questioned the girl and she responded to all his 3 questions by stating her name, saying that she had not eaten overnight and stating that she had taken cover from her father's wrath after he threatened to kill her. PW8 added that the girl had a buibui and hijab. After being questioned, she walked herself to the vehicle up the main road.

In cross-examination the following evidence came to light:

1. The Accused person led the team of officers into the forest to the exact point where the Minor was sitting under a tree.
  2. This location was 50metres off the main road.
  3. The girl was wearing a long dera which completely covered her lower limbs and PW8 could not tell if she had trousers under the dera.
  4. When the accused person showed up at the station, he was in the company of a woman whom PW8 came to learn was called Ajavo but she later vanished after the minor was found.
  5. While en-route back to the station aboard the Police Land Cruiser, the Accused person sat with the minor at the backside of the vehicle.
32. PW9 S/no. 8096 KWS Corporal Hussein Shaabu told the court that on 6<sup>th</sup> October, 2020 2 Somali women including Ms F (initials) and Ms M(initials) visited him at the KWS camp at 10am and asked if he had seen their missing girl and he told them that he had not. Later, the child's uncle Mr. M (Initials) visited him at 2pm and asked the same question and he gave him the same answer.



33. PW10 A.M.. (initials) told the court that on 10<sup>th</sup> October, 2020 he visited Ms. F (initials) and Ms. N (Initials) at a local hotel where they were staying with the Minor herein pending legal processes when he was informed by Ms. N (initials) that the child had slipped out of the hotel. Ms N (initials) later discovered that the Minor had called a certain number and when the number was given to the police it led to the accused person. No questions were asked of this witness by the defence counsel.
34. PW11 A.D. (initials) father to the Minor herein said that on 5<sup>th</sup> October, 2020 he returned home from the pastures with his cattle and found his daughter missing. He was informed by his family members that the Minor had vanished earlier that day at around 11am. Later that evening, he child resurfaced by herself at 11pm. When she showed up, he scolded her for the disappearing act and late return. The child told him that she had come from playing at the KWS Campsite. After saying this, she sped off from the house and disappeared into the darkness.
35. The family conducted an overnight search for the girl without finding her. In the morning, the KWS Camp was alerted about the missing child. He also d an announcement made at the local mosque. The Chief was also alerted. Later, he was alerted that the child had been found.
36. According to him, when the accused person, the minor, the police and himself arrived at the local dispensary for the child to be examined, the clinician on duty exclaimed that he had attended to both the child and the accused person on 6 prior occasions when the 2 visited his clinic for medical attention.
37. In cross-examination, the father's evidence showed the following:
  1. On 5<sup>th</sup> October, 2020 he saw his daughter wearing a red dera and stripped trousers underneath the dera.
  2. She stormed out of the house after the father scolded her and this she did when they were taking late supper in the house.
  3. The said Ajavo was a young woman who had been previously impregnated by the accused person. When Ajavo was visited at her house by PW10, she denied knowledge of the child's whereabouts.
38. PW12 S/No. 69207 SERGEANT SAUMU JUMA testified as the Investigating Officer. She told the Court that on 6<sup>th</sup> October, 2020 she was instructed by Inspector Ondieki to take up the investigatory role of the matter. As a result, she looked at the O.B. Entry no. 11/20/10/2020 at 12:05pm. At that time, the suspect and the minor were in the station and SGT Saumu immediately commenced her work.
39. SGT Saumu told the court that she first interviewed the Minor at the station. In that interview, the Minor told SGT Saumu that she was in a love and sexual relationship with the Accused person. She specifically said that the Accused person who was a KWS officer had firmly instructed her not to reveal anything about their relationship and in exchange he was going to fulfil her some promises that she had made. In the disclosures, the child said that the sexual relationship had been running for some time from August, 2020 but she could not break down the specific dates. She added that the accused person and herself used to meet regularly either at his house or along the Kiunga Beach near Kwa Mutua for the sex.
40. The child further told SGT Saumu that their last meeting took place on 5<sup>th</sup> October, 2020 at the beach where they ha sex thrice- twice with a condom and once without a condom. The Minor said that after the sex, the accused person took her to his house to rest briefly but she overslept and work up late before she rushed back home late that night. Her late arrival at the parents' house triggered their anger towards



her. Following the threat of severe punishment, she stormed out of the father's house and went back to the suspect's house. when she got to his house, he gave her very concentrated tea saying that it would prevent her from falling pregnant.

41. Following the disclosure, SGT Saumu and Inspector Ondieki escorted the Minor, her relatives and the accused person to the Kiunga Health Centre. No sooner had they arrived at the clinic than the Clinical Officer on duty Kipnge'tich Bii retorted that the Minor and the Accused person had been coming together to him for HIV Testing on previous days. At this revelation, SGT Saumu obtained a certified extract of the Patient/Visitors Book showing that the Accused person and the Minor had been going together to the hospital for HIV Testing. The Book showed that the last such visit by the Minor accompanied by the Accused person for HIV Testing and Counselling took place on 19<sup>th</sup> September, 2020. SGT Saumu produced this Book extract as P.Ex.6.
42. SGT Saumu told the court that the retrieval of the Book Entry made her believe the child's story that they were in a sexual relationship. While SGT Saumu interviewed the Minor, Inspector Ondieki summoned the Accused person for interviewing since by this time he had not been arrested but the accused person ignored the summons. When the accused person disregarded the summons, he instead assembled a team of his colleagues who then showed up with him at the police station at 2pm in a Land Rover while in full combat gear and armed with G3 Rifles each. Their presence in such a state caused a huge security stand-off at the station as the accused person refused to be disarmed before being interviewed.
43. SGT Saumu noted that the accused person had already placed his right index finger on the trigger ready to fire at the police officers manning the station including SGT Saumu. The accused person kept saying that no one was going to interview him on anything. The stand-off only ended 4 hours later when a senior KWS Officer showed up at the station and disarmed the accused person. This was at 6pm which was 4 hours after the accused person and his colleagues had placed the police station under siege. When he was disarmed of his G3 Rifle, it was discovered that he had already cocked and loaded a bullet in the chamber and was ready to fire upon the police officers at the Kiunga Police Station. The seized rifle and ammunition were safely tucked away in the armoury before the interview of the accused person began. He was interviewed briefly that 6pm before he was given police bond and ordered to return on the follow days for further interviews.
44. PW12 recovered the girl's underclothes and dera that she was wearing on the night that she allegedly had sex with the accused person after on 5<sup>th</sup> October, 2020.
45. A High Vagina Swab was taken for examination and upon a laboratory examination, it was discovered that spermatozoa had been deposited in her vaginal canal. PW12 prepared an exhibit memorandum form for analysis of the underclothes for any DNA belonging to the accused person. The Accused person's blood samples were extracted and forwarded to the government chemist for analysis.
46. Upon the analysis, the Govt. Chemist confirmed that the accused person's DNA was on the underclothes belonging to the child. The child's age was assessed at the King Fahd Hospital and found to be between 14 and 15years old. Later, her parents showed her the birth Certificate which indicated 21<sup>st</sup> September, 2005 at her date of birth meaning that as of 5<sup>th</sup> October, 2020 she was 15 years 1month old. In support of her investigatory work, SGT Saumu produced the following as exhibits:
  1. – 2 pairs of trousers belonging to the Minor
  2. – birth certificate
  3. – Age assessment report



4. - Exhibit Memo Form dated 8<sup>th</sup> October, 2020
5. – visitors book extract
47. In closing her testimony, SGT Saumu told the court that on or around 9<sup>th</sup> December, 2020 the Minor lost her pregnancy in unclear circumstances just before she was to give her testimony in court. According to SGT Saumu, during the pendency of the case, the accused person eloped twice with the child on 10<sup>th</sup> October 2020 and 27<sup>th</sup> October, 2020 which resulted in the child being given abortifacient drugs at the Kiunga Health Centre causing her to lose the foetus. Following this discovery, the accused person got charged with the offence in Court 2 here at Lamu Law Courts. SGT Saumu added that when the child went missing on 10<sup>th</sup> October, 2020 a multi-agency team was mobilized to look for her and she was traced the next day at Mokowe centre and the accused person arrested and charged again.
48. To bolster her work as an investigator, SGT Saumu prepared a sketch plan of the scene where the child was allegedly ‘rescued from’ by the accused person. She noted that the scene was neatly set up and so well arranged that this convinced SGT Saumu that it was a staged scene.
49. To test the accuracy of the child’s account, SGT Saumu asked the child to pinpoint to her the accused person’s house and the child easily led them up to the doorstep of the accused’s house. The investigation team, however, failed to gain entry after the accused person failed to show up to open the door.
50. The cross-examination of the Investigating Officer’s testimony led to the following material:
  1. In the Clinic Register produced as P.Ex.9, the child and the accused person visited the HIV Testing and Counselling Clinic on 16<sup>th</sup> September, 2020. The accused person signed in as no.3 on the register while the child signed as no. 4.
  2. The precise time that the minor and the accused person visited the clinic is not indicated.
  3. the maroon inner trousers were given to SGT Saumu at the police station during the interview. She was wearing the trousers at the station and was ordered by SGT Saumu to remove the trousers and the child complied.
  4. The DNA on the maroon trousers matched the Accused person’s DNA.
  5. PW12 produced the trousers in court but the child had no opportunity to identify them as hers in court.
  6. On 20<sup>th</sup> October, 2020 the child pinpointed to SGT Saumu and her team the accused person’s house inside the KWS Camp compound.
  7. Osman was the accused person’s assumed name or alias which she had told the Minor and the Minor affirmed the name Osman as the accused person’s alias.
  8. Osman was not a different or distinct person other than the accused person.
  9. The child was pregnant by September, 2020.
  10. SGT Saumu relied on a composite set of facts to prosecute the accused person: sperms in the child’s vagina, sperms on her clothes, DNA results and the child’s first testimony to the police.
  11. GT Saumu told the court that if the child disowned the accused person, she (SGT Saumu) would disbelieve it because it could only be as a result of manipulation that the child could reject the story of Ayub’s involvement.



12. At one point when SGT Saumu was escorting the child to court, the child locked up SGT Saumu in her hotel room before fleeing to go and meet the accused person.
  13. The KWS officers were very protective of Ayub from being arrested and prosecuted.
  14. Ayub Kamau denied all liability.
  15. The accused person's sperms on the girl's inner trousers were indicative of sexual activity between the accused person and the minor.
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51. In re-examination SGT Saumu affirmed that the Accused person and the Minor visited the hospital together on the same date. In her account, the DNA samples of the accused person were escorted by SGT Saumu and the analyst confirmed, after due analysis, that the Accused person's DNA was on the child's inner clothes. The Minor explained to SGT Saumu that the name 'Osman' was the assumed name of the accused person which he himself told the Minor was his alias and the use of 'Osman' was meant to trick her.
  52. The Minor had also explained further that in their second sexual encounter, she asked the accused person for his real name. Finally, SGT Saumu said that the maroon trouser was being worn by the Minor at the station and she personally retrieved it from the Minor while at the station. SGT Saumu also confirmed from her investigation that the Minor did not have a sister of her age bracket who could fit into the same maroon trousers which the minor usually wore under her dera. When the Investigating officer visited the clinic with the child for medical examination, the clinical officer confirmed that the child had been visiting the hospital with the accused person for testing and counselling.
  53. The DPP closed his case informing the court that the clinical officer who was expected to testify was no longer traceable after he left the job and left Kiunga. Following the closure of the DPP'S case, the court ruled that the accused person had a case to answer on counts 1 and 2 only while he was acquitted of count 3 relating to the attempt to procure abortion. He was put to his defence on counts 1 and 2.

### **The Defence Case**

54. Ayub Kamaugave sworn defence and called no witnesses. He denied the charges. He told the court that he was a KWS Ranger.
55. DW1 told the court further that on 6<sup>th</sup> October, 2020 at 130pm he was headed to Kiunga Shopping centre through a shortcut. On his way, he heard the cries of a woman and when he turned to pay attention, he saw a small woman coming to him from the thickets. She had a small body frame and cried that her father wanted to slaughter her because she had returned home late at night. When he heard her story, he called the police on his mobile phone saying that he had found a child in need of care and protection. He said that the police went over and collected the Minor who is now the complainant and accompanied them to the station.
56. On arrival, the child immediately recorded her first report while he was there. He went away but was summoned back to the station the next day to record his side of the story. He explained the circumstances of how he came across the Minor but to his surprise SGT Saumu arrested and detained him. He said that while it was not true that he had sexual relations with the Minor herein, it was true that he was in a sexual relation with the Minor's older sister H(initials). He added that his blood samples were extracted at the King Fahd Hospital.
57. In his further defence, he said that after he went to the Mokowe KWS Camp, the child disappeared from police custody. He was arrested and charged for his alleged involvement in that crime of kidnapping the Minor but the trial magistrate in court 2 subsequently acquitted him of the charges.



58. He told the court further that the clothes that SGT Saumu brought to court belonged to H (initials) the older sister of I.D.M.A(initials) who is the Minor herein. He challenged SGT Saumu's account that the clothes belonged to the complainant herein saying that neither I.D.M.A nor H had positively identified the clothes in court as hers. He added ha the court should reject the DNA evidence because the Court did not issue an order for the extraction of the same. He closed his case at that stage.
59. In cross-examination by the DPP the testimony of Ayub Kamau showed the following :
1. It was true that he was a KWS ranger and that he lived in the KWS Camp at Kiunga.
  2. He learnt that the child's parents had visited the camp looking for their missing daughter.
  3. He insisted that H was his lover and that he used to see I.D.M.A.
  4. He called the police alerting them of his finding the child and the police responded by visiting the location.
60. At that stage, the accused person closed his defence. The court was then called upon to determine if the DPP had proved their case beyond any reasonable doubt.

### **Count I (defilement): Issues for Determination**

61. In DS v Republic[2022]eKLR (Korir-Lagat J.) the superior court stated that the ingredients of the offence of defilement are as follows:

“ 14. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the [sexual Offences Act](#) No. 3 of 2006 and must each be proven for a conviction to issue. (see George Opondo Olunga v Republic [2016] eKLR.)”

### **Issue 1: AGE**

62. From the same authority of DS v Republic[2022]eKLR (Korir-Lagat .) the learned Judge had this to say on this issue:

“ 16. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo v Republic [2016]eKLR stated as follows in respect of proving the age of a victim in cases of defilement :

“ ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.” (emphasis added).”

63. In the age assessment report, the medical expert had estimated the child's age to be between 14 years and 15 years old. Thereafter, the child's parents surrendered the original birth certificate issued on 23<sup>rd</sup> August, 2019 which showed that as of 5<sup>th</sup> October, 2020 she was 15 years 1month old.
64. This shows that the age assessment and the birth certificate were consistent and tallied. It is, therefore, the finding of this Honourable Court that the Complainant herein was a Minor on account of her



age of 15 years 1month old as of 5<sup>th</sup> October, 2020 when the last alleged defilement was reported to have taken place.

#### **A. Issue 2: Penetration**

65. On this element of the offence, the DPP relied on the testimony of the child and medical documents.
66. In her oral account, PW1 confirmed to the court that she had sexual intercourse with ‘Osman’ on various dates. She confirmed that the sexual intercourse took place with the said ‘Osman’ who wore a condom on his penis before inserting it into her vagina. She affirmed that this took place again next day at 7pm in his police quarters causing her to return late to her parents’ house.
67. The DPP’s further evidence is based on the medical evidence namely the treatment notes, laboratory result forms and P3 Form which showed that the Minor had spermatozoa on her vaginal canal as of 6<sup>th</sup> October, 2020 shortly after she had been found. The medical evidence strongly supported her testimony that she had been penetrated. This satisfies the court that she was vaginally penetrated and the evidence is overwhelming on this ingredient.

#### **B. Issue 3: Identity of The Offender**

68. On this ingredient of the offence, the court noted that the DPP relied on 3 aspects of evidence:
  - i. The first report that the Minor gave to the police.
  - ii. The testimony that she gave in court.
  - iii. The medico-documentary evidence.The defence countered this with 2 aspects:
  1. The accused person’s sworn defence.
  2. The accused person’s reliance on the Minor’s testimony in court.
69. It is the duty of the court to determine which of these aspects of evidence proves or disproves the identity of the person who penetrated the child’s vagina. In making this determination, the court was guided by the compass of law in section 3(2), 3(3) and 3(4) of the [Evidence Act](#) which provide as follows:
  3. Interpretation
    - (1) ...
    - (2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.
    - (3) A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.
    - (4) A fact is not proved when it is neither proved nor disproved.
70. The Child told the court that she had sexual contact with Osman before Kamau got her. There was no cross-examination on the identity of Osman because the defence counsel opted not to challenge that aspect. The court later received the testimony of SGT Saumu who explained that in the First Report to SGT Saumu, the child had explained that the accused person Ayub Kamau had introduced himself



to her using his nom de guerre (alias) ‘Osman’ and that she had discovered he had tricked her about his real name.

71. The value of a first report given to a person in authority regarding the identity of the offender has been found to carry a lot of weight. In *Terekali S/O Korongozi & Another v REX* [1952] EA 259 applied as recently as 2021 in *Abel Maina Mburu v Republic*[2021]eKLR the superior courts held thus:-

“Evidence of a first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth always comes out in the first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultations with others.”

72. When the child made her disclosures about the identity of the perpetrator to SGT Saumu in her first report, the matter was still sizzling fresh & hot and she had not yet been subjected to consultations, duress and interferences by persons who might have been interested in shutting down her revelation of the true story. Even in his sworn defence, the Accused person corroborated the DPP’s version when he stated that upon arrival at the police station, the child immediately recorded her first report.

73. Ideally, she ought to have maintained this trajectory of evidence when she came to court but when she did come to court, the court noted in the proceedings, that she was so vulnerable and in such a broken and under such duress that she failed to testify on 3 different dates. The evidence of the interference was from the fact of the child disappearing from police hands and also from the hands of her caretakers under interference from third parties. She came to court eventually after all the drama when she had already been interfered with. Therefore, it would be prudent, taking into account the provisions of section 3(2) and 3(3) of the *Evidence Act* that the child became economical with the truth after she had been interfered with by persons who wanted a favourable result for the accused person. But this interference did not change the contents of her truthful first report to SGT Saumu in which she clearly named the accused person as Osman who had sexual intercourse with her.

74. If those who interfered with the Minor thought that they had succeeded in destroying the direct oral evidence, they forgot that the court is also required to consider circumstantial evidence in arriving at a considered judgement. A recent pronouncement of the principles applicable to circumstantial evidence were highlighted in the authority of *Chiragu & another v Republic (Criminal Appeal 104 of 2018)* [2021] KECA 342 (KLR) (Asike-Makhandia, A. Mbogholi & H.A. Omondi JJ.A) where the learned Judges of the Court of Appeal had this to say about the probative value of circumstantial evidence:

“In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence.

It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics.



It is no derogation from evidence to say that it is circumstantial.’

”Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) in which this court held 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;
- 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.”

75. And in *Sawe v Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

76. Applying the above principles guided the court to consider that there were 7 major circumstantial aspects of the DPP’s case which pointed to one direction of the true identity of the perpetrator:

A. the HIV Testing and Counselling visitor’s book kept at the Kiunga Health Centre was admissible and was relevant under section 38 of the *Evidence Act* which provides as follows:

38. Entries in public records

An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.

77. In court’s considered view, this certified extract of the book entries made on 16<sup>th</sup> September, 2020 by the clinician on duty showed that the accused person AYUB KAMAU accompanied the Minor to the hospital for a HIV test and counselling session. This was about 1month before the matters erupted into the public domain. This record was made in the ordinary course of book-keeping at the clinic and the court is satisfied that the accused person, having sexually contacted the child in September, 2020 went with the child to the clinic for the sex testing and counselling. This directly linked him to the sexual relationship with the Child which she had disclosed in her First Report to the police.

B. Not only was the HIV Clinic Register admissible under section 38 of the *Evidence Act*, it was also relevant under section 6 of the *Evidence Act* governing res gestae evidence:



6. Facts forming part of the same transaction Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.

78. In the authority of *Teddy Ingosi Mudeku v Republic* [2013]eKLR (Achode J. )(as she then was) explained this principle thus:

“ 11. In my humble view the actions exhibited by the appellant as described by PW2 and which I have set out in paragraph 5 and 6 of this judgment formed part of the “res Gestae”. Black’s Law Dictionary, Ninth Edition pg 1423 defined “res gestae” as: “The events at issue, or other events contemporaneous with them.”

The res gestae embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence. *State v. Fouquette*, 221 p. 2d 404, 416-17 (Nev.1950).”

79. One wonders why someone who is neither the spouse nor the parent or caretaker of a female person would accompany such a female to the HIV Clinic which by itself is a private counselling session. The only plausible explanation as to why he had accompanied the child to the clinic for a sexually related medical exercise (HIV testing and counselling) was that he had had sexual intercourse with the child and this further points to his identity in the sexual transaction consistent with the Minor’s disclosures that the sex had been happening for weeks starting either late August 2020 or early September, 2020 up to and including 5<sup>th</sup> October, 2020.

- C. The res gestae evidence did not stop with the accused person accompanying the child to the HIV Clinic registration. It also manifested itself when the accused person, a few days before the discovery of the sexual relationship, and accompanied by one Ajavo, visited the home of the Complainant’s father looking for the Minor herein under the false pretext that they wanted to buy vegetables from the Minor’s father. That he was accompanied by another female was aimed at cunningly masking his true target who was the Minor herein.
- D. The medical treatment notes P.Ex.1 showing that as of 6<sup>th</sup> October, 2020 she was 5weeks pregnant and this was consistent with sexual intercourse taking place in early September, 2020 or late August, 2020 which fell within the hospital visits by the accused person and the child. The visit of 16<sup>th</sup> September, 2020 was found by SGT Saumu to have been the 6<sup>th</sup> visit. Taking judicial notice of natural course of events under section 60 of the *Evidence Act*, the court finds that having made sexual contact with the child in September, 2020 the pregnancy was about 5 weeks old as of 6<sup>th</sup> October 2020 when it was finally discovered.
- E. The discovery by SGT Saumu that the alleged ‘rescue and discovery’ of the girl in distress by the accused person was in fact a staged event. This was based on the factual findings when the investigating officer went to the scene of the alleged ‘discovery’. The scene was about 50metres from any road and was inside a very thick forest which was close to the KWS Camp. How on earth could the Accused person possibly see through the thick foliage and forest cover and spot a petite girl sitting under a big tree surrounded by thick bushes at a distance of more than 50metres away? This was practically impossible as SGT Saumu found because the accused person had no special equipment such as a pair of binoculars that could have assisted him see the child concealed in the forest.



80. The Sketch Plans P.Ex.10 showed that the forest extended all the way to the ocean shoreline where there was no market and it was therefore a lie for the accused person to claim that he was walking towards the market through the forest when he stumbled upon the child. The most probable position which a prudent person would conclude from that situation was the accused person having learnt that there was a search of the girl, took the girl to the concealed location in the forest and then pretended to have discovered and rescued her. Only a person with the special knowledge of where the girl was located would have led PC Kipchoge and PC Musyoka to that specific spot and this is what the Accused person did in this case and this proves his link to the ‘disappearance’ of the child.

F. The same pair of trousers that the Minor wore as her father left the home on the morning of 5th October, 2020 was the very same pair of trousers that SGT Saumu recovered from the Minor the next day on 6th October, 2020 at the police station and these were analysed and the accused person’s DNA probably from his semen or sperms found. The proved circumstances of the recovery of child’s trousers were that SGT Saumu ordered the child to remove the trousers in the presence of SGT Saumu at the police station and SGT Saumu forwarded the maroon trousers to the Govt. Chemist for analysis leading to the discovery of the Accused person’s DNA on the clothes. This eliminated room for the implantation of the trousers as had been suggested by the accused person who claimed that the trousers belonged to the victim’s sister H(initials). As the DPP had proved, nowhere did the Minor’s sister feature in the transactions giving rise to this case and it was not factual that the said H(initials) was in a sexual relationship with the Accused person.

81. The Accused person challenged this DNA evidence saying that since there was no court order to sanction the extraction, the resultant evidence should be treated as illegally obtained evidence. Following this challenge, the court found guidance from In the authority of Paul Ng’angá Wanjiru v Republic [2020]eKLR (M.Warsame, K. M’Inoti & S.Ole Kantai JJ.A)the Court of Appeal held as follows:

“The next issue we shall consider is the DNA evidence which the appellant contends was illegally admitted in violation of sections 122A, 122B and 122D of the Penal Code. These provisions were in-troduced in the Penal Code by the Criminal Law (Amendment) [\*Act No 5 of 2003\*](#) and provide for DNA sampling procedure.

“By dint of sections 122A, whenever it is suspected on reasonable grounds that DNA sampling of a person suspected to have committed a serious offence may confirm or disprove commission of the offence by that person, a police officer of or above the rank of Inspector of Police is required, in writing, to order that person to undergo DNA sampling.

82. A serious offence is defined as one punishable by imprisonment for a term of 12 months or more. DNA sampling procedure is defined as a procedure carried out by a medical practitioner and en-tailing taking of the following samples for test or analysis to confirm or disprove suspicion concerning the identity of the person who com-mitted the crime in question.

83. The samples in question are sample of saliva or a sample by buccal swab, a sample of blood, sample of hair from the head or underarm and sample from a fingernail or toenail or from the nail.

84. Section 122B of the Code empowers the police, led by an officer of or above the rank of an Inspector, to use reasonable force to effect the procedure if a suspect resists to comply with an order made under section 122A. Section 122C further provides that a suspect may voluntarily accede to the procedure, but his or her consent must be in writing. Lastly, under section 122D, the results of DNA sampling are



not admissible in evidence against a suspect in the absence of the order provided for in section 122A or consent of the suspect under section 122C.

85. Our reading of the above provisions convince us that the order or consent are required when the DNA samples have to be obtained from the body of the suspect.”

86. As the Court of Appeal authority above shows, a court order is not necessary in all cases. In the present case, the DNA sampling process was under the express written authority of Inspector Ondieki who initiated it by Police Summons and then ordered SGT Saumu to commence the inquiry and the same Inspector Ondieki ensured that the accused person was escorted to the medical facility for the DNA extraction process and the court is satisfied that the entire process was transparent and lawful. The court, therefore, rejects the defence submission that the process was illegal.

G. The conduct of the accused person within the meaning of section 8 of the *Evidence Act* which provides as follows:

8. Facts relating to motive, preparation and conduct

- (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
- (2) The conduct of any party, or of any agent of a party, to any suit or proceeding, in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
- (3) When evidence of the conduct of a person is relevant any statement made to him, or in his presence and hearing, which affects such conduct, is relevant.

87. As the tested evidence of SGT Saumu showed, the girl was the first to record her report and after she had done so, she named Ayub Kamau alias Osman as the defiler. Upon receipt of this information, the lead Investigator Inspector Ondieki issued summons to the accused person to return to the station to record his version of events and for related DNA processes.

88. When he received the Police Summons, the accused person, knowing that he had staged the “rescue” and “discovery” of the child in forest, and knowing with certainty that the child had spilt the beans regarding his commission of a serious offence, showed up with a battalion of heavily armed colleagues and menacingly threatened to shoot SGT Saumu who had commenced her police investigations. Such misconduct only came from a guilty mind and was aimed at intimidating SGT Saumu into abandoning her line of inquiry which Inspector Ondieki had directed her to undertake but SGT Saumu did not yield to these threats. Although the DPP has the final say on what charges are to be preferred, the court’s humble view is that the overt misconduct of the accused person and his colleagues in staging an armed stand-off at Kiunga Police Station constituted a distinct criminal offence and wonders why the Accused person was not charged with criminal intimidation under section 238 of the Penal Code which provides:

238. Intimidation and molestation.

- (1) Any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years.



- (2) A person intimidates another person who, with intent to cause alarm to that person or to cause him to do any act which he is not legally bound to do or to omit to do any act which he is legally entitled to do, causes or threatens to cause unlawful injury to the person, reputation or property of that person or anyone in whom that person is interested.

89. That the accused person would have the temerity to intimidate an officer of a higher rank with a view to force the officer to abandon questioning him speaks volumes about his misconduct and would be taken to show that he was under great duress of a guilty mind and he would do anything to actuate a termination of the criminal inquiry against him. He was so prepared to shoot to, at least injure or, at most, kill SGT Saumu and other officers at Kiunga Police Station that he cocked and chambered his G3 Rifle and remained ready to shoot for 4 hours until a senior officer from the KWS showed up and disarmed the Accused person before SGT Saumu commenced interviewing him about his being fingered by the Minor in the crime.

### **Conclusion On Count I**

90. Having weighed closely the tested evidence by the DPP and the having considered the defence, the court comes to the inevitable conclusion that the accused person is guilty of the offence of defilement of a minor aged 15 years 1month old and he is convicted under section 215 of the Criminal Procedure Code. Right of appeal is 14 days.

### **Count Ii: Abuse Of Position Of Authority**

91. The accused person has been charged under section 24(2)(a) of the *Sexual Offences Act* which provides as follows:

24. Sexual offences relating to position of authority and persons in position of trust

- (2) Any person who being a law enforcement officer takes advantage of his or her position and has sexual intercourse or commits any other sexual offence under this Act—
- (a) within the limits of the station to which he or she is appointed; or
  - (b) in the premises of any station house whether or not situated in the station to which he or she is appointed; or
  - (c) on a person in his or her custody or in the custody of a law enforcement officer subordinate to him or her, commits an offence of abuse of position of authority and is liable upon conviction to imprisonment for a term of not less than ten years.

92. From the totality of the material placed before the court, there is proof to show that the accused person took the Minor herein to his police quarters within the KWS Camp in Kiunga where he had sexual intercourse with the underage person. This proved the offence of abuse of position of authority. As the court found, his defence created no reasonable doubt and is dismissed. He is guilty as charged and is convicted of this count under section 215 of the Criminal Procedure Code. Right of appeal is 14 days.

**DATED, READ AND SIGNED AT LAMU THIS 27TH DAY OF JUNE, 2023**

.....

**HON. T. A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**



LAMU LAW COURTS

