



**Republic v Wekesa (Sexual Offence E004 of 2021)  
[2022] KEMC 21 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEMC 21 (KLR)

**REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)  
SEXUAL OFFENCE E004 OF 2021  
E KIMILU, SPM  
APRIL 27, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**VIOLET NEKESA WEKESA ..... ACCUSED**

**Exposure of a child to pornography renders them in need of care and protection as it affects their social and mental development**

*The court established that where there is no scientific evidence to prove the offence of defilement, the court is at liberty to believe the uncorroborated evidence of a child who is a victim of a sexual offence. The court also discussed the offence child pornography holding that it was a form of abuse which a child could not consent to. Thus, exposure of pornography to children rendered them in need of care and protection as it affected their mental and social development.*

Reported by Moses Rotich

**Evidence Law** – elements of the offence of defilement – where the complainant was a male minor aged 13 years old – where the accused was charged with the offence of defilement contrary to section 8(3) of the Sexual Offences Act – where the accused was charged with the offence of promoting a sexual offence with a child contrary to section 12(b) of the Sexual Offences Act – where the complainant was introduced to sexual intercourse by the accused – where the accused unlawfully displayed pornographic films to the complainant – where the accused touched the complainant inappropriately leading to them having sexual intercourse - whether the prosecution proved all the elements of the offence of defilement beyond reasonable doubt – Sexual Offences Act, No 3 of 2006 sections 8(1), 8(3) and 12(b).

**Evidence Law** – admissibility – admissibility of evidence of a minor who was a victim of a sexual offence – where the victim of a defilement was a male minor aged 13 years – where the medical evidence adduced before the court was inconclusive and failed to establish the offence of defilement – where the complainant being a male minor, had no injuries in his genitalia and specimen could not be extracted to prove defilement – whether the court could rely on the uncorroborated evidence of a minor who was a victim of defilement to convict the accused person – Evidence Act, cap 80, section 124.



## **Brief facts**

The accused was charged with the offences of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act), and promoting a sexual offence with a child contrary to section 12 of the Sexual Offences Act. 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.

After a *voire dire* examination, the complainant who was aged 13 years old gave sworn evidence. He testified that the first instant of defilement had occurred in July 2020 when he together with the accused, and an infant were watching a Nigerian movie one afternoon. The complainant testified that the accused explained to him what sexual intercourse was and then proceeded to touch him inappropriately which led to them engaging in sexual intercourse for the first time. The complainant stated that the accused asked him not to tell anyone what had happened and that it would be their little secret.

Further, the complainant testified that he continued to have sex with the accused whenever they were left with the accused in the night to watch Nigerian movies as the other family members retired to bed. He stated that they had sex in the laundry room, the accused person's bedroom and the kitchen over the entirety of the period. It was the complainant's testimony that they had sex at least three times a week.

## **Issues**

- i. Whether the prosecution proved all the ingredients of the offence of defilement, *to wit*:
  1. The age of the complainant;
  2. Penetration; and,
  3. The accused committed the alleged act of defilement.
- ii. Whether the court could rely on the uncorroborated evidence of a minor who was a victim of defilement to convict an accused person.

## **Held**

1. The court was informed that the complainant was a minor and a birth certificate produced to establish that fact. The birth certificate showed that the complainant was born on April 11, 2007 and therefore was aged 13 years as of February 22, 2021 and therefore a minor as defined by section 8(3) of the Sexual Offences Act.
2. The complainant's testimony that the accused engaged in sexual acts with him seemed truthful as the details and the descriptions he gave seemed highly unlikely to be made up. He had no reason to set up the accused. It was without doubt that in sexual offence cases, an eye witness was not easy to avail. The act was performed in secrecy.
3. After considering the medical evidence adduced and presented before the court by the clinical officer, the court determined that it was not conclusive and failed in proving that defilement had indeed occurred. That was owing to the nature of the offence where the victim was a male minor. It was really difficult to prove scientifically that defilement had occurred. That however did not rule out the possibility of the commission of the offence. The court was at liberty to believe the truthfulness of the complainant where there was no scientific evidence to prove that the offence occurred.
4. Penetration in most cases was proved by production of medical evidence. Traditionally, a medical officer would produce evidence to confirm presence of spermatozoa and discharge or injuries in the genitalia. All that could not be noticed when time had lapsed. The complainant gave a graphic narration of what transpired and taking all the circumstantial evidence into consideration, the court believed that he was telling the truth. The complainant being a male minor had no injuries in his genitalia and no specimen could be extracted to prove defilement. After conducting a *voire dire*, the court was satisfied that the victim knew that he had a duty to tell the truth. The court concluded that the complainant was truthful and penetration had occurred. The prosecution proved beyond reasonable doubt that the accused committed the offence she was charged with in the main charge.



5. The offence of child pornography was committed when it was proved that an offender had with the intention of encouraging or enabling a child to engage in sexual acts, knowingly displayed, showed, exposed or exhibited obscene images, words or sounds by means of print, audio-visual or any other media. A child could not consent to any form of abuse. Exposure of pornography rendered any child to be in need of care and protection, as it affected the child's mental and social development.
6. Although no pornography history search or review was retrieved from the accused mobile phone, the victim was clear that it was the accused who introduced him to the same. The victim confirmed that after viewing the pornography, they practiced the same hence the charge of defilement. The court found that the victim was truthful and the accused defence was just a mere denial. She claimed bad relations with her employer yet she never quit employment. The victim had to be enrolled to counseling sessions due to the sexual abuse and pornography exposure.
7. The court undertook a *voire dire* on the complainant and satisfied itself that the witness evidence was tenable. The accused was guilty of the main charge of defilement and the alternative charge of committing an indecent act with a child. The court convicted the accused under section 215 of the Criminal Procedure Code, cap 75 Laws of Kenya for the offence of defilement contrary to section 8 (3) of the Sexual Offences Act and indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

*Accused person convicted.*

## **Citations**

### **Cases**

#### **Kenya**

1. *BOO v Republic* Criminal Appeal 5 of 2017; [2018] KEHC 4099 (KLR) - (Mentioned)
2. *JMM v Republic* (Criminal Appeal 155 of 2017) [2020] KEHC 463 (KLR) - (Explained)
3. *JWA v Republic* Criminal Appeal 100 of 2013; [2014] KECA 484 (KLR) - (Followed)
4. *Kionji, Geoffrey v Republic* Criminal Appeal No 270 of 2010 - (Explained)
5. *Obiri, Dennis Osoro v Republic* Criminal Appeal 279 of 2011; [2014] KECA 598 (KLR) - (Mentioned)

### **Statutes**

#### **Kenya**

1. Children Act (cap 141) section 119 (1)- (Interpreted)
2. Criminal Procedure Code (cap 75) section 215- (Interpreted)
3. Evidence Act (cap 80) section 124- (Interpreted)
4. Sexual Offences Act (cap 63A) sections 2(b); 8(1) (3); 11(1); 12B - (Interpreted)

## **JUDGMENT**

1. The accused person, Violet Nekesa Wafula, was charged the following offences under the [Sexual Offences Act](#) No 3 of 2006.
2. Count one: defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No 3 of 2006.

The particulars of the offence are that on diverse dates of the month of July 2020 to February 21, 2021 at [particulars withheld] within Kasarani area within Nairobi County



intentionally and unlawfully used her genital organ namely vagina to be penetrated by the genital organ namely penis of EGM, a child aged 13 years.

3. Count 2: Promoting a sexual offense with a child contrary to section 12(B) of the [Sexual Offences Act](#) No 3 of 2006.

The particulars of the offence are that on diverse dates of the month of July 2020 to February 21, 2021 at [particulars withheld] within Kasarani area within Nairobi County intentionally and unlawfully displayed to EGM a child aged 13 years' pornographic films which was intended to be used in the performance of the sexual act.

### **Alternative Charge**

4. Indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) 2006.

The particulars of the offence are that on diverse dates of the month of July 2020 to February 21, 2021 at [particulars withheld] within Kasarani area within Nairobi County intentionally and unlawfully displayed pornographic materials to EGM a child aged 13 years.

5. Accused person having entered a plea of not guilty, the prosecution availed five (5) witnesses. A summary of the testimony of each witnesses is as follows. The Complainant (PW 2) gave sworn evidence after voir dire examination. He informed the court that he was aged 13 years old. He testified that the first instance of defilement occurred in July 2020. They (the complainant, the accused and an infant, TJ) were watching a Nigerian movie one afternoon. He walked out and later on came back to the house and inquired on what had happened in the movie while he was away. PW2 further stated upon asking, the accused explained that the actors had/were engaging in sexual intercourse. The accused explained to him what sexual intercourse was and proceeded to touch the complainant inappropriately and this led to them engaging in sexual intercourse for the first time. She proceeded to afterwards ask that the complainant not to tell anyone what had happened and that it would be their little secret.
6. He further stated that they continued to have sex whenever they were left in the night to watch Nigerian movies as the other family members retired to go to sleep. They had sex in the laundry room, the accused person's bedroom and the kitchen over the entirety of the period. The complainant also testified that they had sex an average three times a week.
7. It was on 21/02/2021 (Sunday) he had the urge of doing sex. He used his sister's (PW1) mobile phone to watch how to do sex. He began to masturbate while in his bedroom. He heard someone touch the door to his room. He returned the mobile phone on the table and it went off. He did not know anyone would know he was watching pornography. His sister went to the bedroom and picked her mobile phone. It was at that time, PW 1, Diana Njambi, charged her mobile and notice PW2 was watching pornography. PW1 went on to report the same to his parents. Their father, JM, beat him and he confessed to having sex with the accused. The following day while at school he was picked up by his sister and undertook medical examinations.
8. PW IDN, (the complainant's sister) she testified that on 21/02/2021 she noticed her phone was missing. She therefore went around the house looking for it. She headed to the complainant's room where she found the phone. The complainant was at his homework table studying. She felt that her phone was hot and upon checking her browser history discovered that the phone had been used to browse pornographic sites. PW1 produced copy of the complainant birth certificate as exhibit 1 confirming has date of birth as April 11, 2007. He There were pornographic videos which the IO proceeded to print and produced as exhibit 2 in a bundle.



9. This discovery shocked her since she testified that her brother was an obedient boy. She therefore went ahead and reported the matter to her parents. Later upon checking, everyone's phones discovered that hers and her mother's phones had been used to access pornography sites. EGM (the complainant) having been discovered and beaten by his father he confessed that they had been engaging in sexual intercourse with the accused who was their house help. This discovery outraged everyone and they confronted the accused person. The father, JM slapped and beat her and PW 2 confiscated her personal effects.
10. The following day, on 22/2/2021, officers from Kasarani Police Station arrived at the family's home and arrested her. PW 1 went and picked EGM from school and he was subjected to medical tests and a report was filed at the police station.
11. PW3, Loran Kerubo a clinical officer at MSF Mathare, presented a medical certificate in respect of the victim herein as (Exhibit 5) on behalf of her colleague Doris Kerubo. She testified that the complainant /victim was brought at MSF and that it was alleged that he had been defiled. The victim gave an history of when and how the violation occurred on diverse days. A genital exam had not been conducted due to lapse of time from the time of last episode and date to hospital. On general examination the victim was anxious with no physical injuries as seen on his body. She however contended that there was no conclusive scientific evidence that indeed defilement had occurred. This in her opinion was not evidence that defilement of the male minor had not happened. She also produced a PRC and P3 Form issued to the victim as exhibit 3 and 4 respectively. She did not have any information that the complainant had been beaten up by his father.
12. PW4, a Police Constable AJW attached at Vigilant House. He is a relative to the father of the victim herein. He was called by his cousin (father to the victim) who briefed him about defilement incidence. He was told the perpetrator was their house help. On the 22/2/2021 he visited his cousin at Mwiki within Kasarani where he found everyone in the house except for the victim who was already in school. He was introduced to the perpetrator. This is after receiving the complaint from the father. He also reported the matter to Kasarani Children Protection Unit. He was accompanied by a lady officer where they arrested the perpetrator from his cousin house. He found the victim had been brought from school. They went with the complainant to the station. PW4 and the victim as well recorded statement and went to hospital at MSF. He confirms he never interrogated the suspect directly. He did not even know whether the accused had a mobile phone or not. He was involved in the case as a relative and also as a police officer.
13. PW5, Corporal of police namely, Hellen Morgan attached at Kasarani police station Children Protection Unit testified as the investigating officer handling children cases and their protection. She testified that on the 22/2/2021 at around 01000 hours she was handed over this case for investigation by her in charge in the Children Protection Unit. It was a case if a minor who had been sexually abused at [particulars withheld] Area. She proceeded to the scene of crime in company of Corporal Gisembe but in different vehicles. On arrival at the station she interrogated the suspect and decided victim ought to get medical attention. They proceeded to MSF where a medical certificate was issued. He was issued with a PRC form and P3 Form. She recorded statements of the witnesses as the suspect was in the station cells. The suspect as well claimed to have been assaulted by the victim family. She also escorted her for treatment but P3 form was filled.
14. In her investigations the I/O was satisfied there was penetration despite the fact that the victim was a male child. She was supplied with the victim original birth certificate to confirm the victim minor age. The victim was born on the 11/04/2007 as per exhibit 1. He was thirteen years of age at the time of perpetration. The perpetrator was identified at the accused person who was the family house help.



Accused person indecently touched the victim genital organs to erect and penetrate her vagina. The perpetrator exposed the minor victim to pornographic materials. She used mobile phones belonging to the victim sister and also his mother's phone. The family was reluctant in handing over the mobile phones used to the investigating officer. She however got PW1 mobile phone and as they were going through they managed to come across the pornographic materials viewed by the victim and they were printed and produced as exhibits. (Refer to exhibit 2). In the investigation the I/O established that accused person would indecently touch the victim to ensure he erects for penetration. This was repeated on several occasions until the boy was used to performing sex with accused. There was hostility in the house on the night of 21/02/2021 when the incidence was discovered. She did not notice any physical injuries on the body of the accused or the victim herein.

15. In cross examination the I/O testified that the suspect at the victim were booked at the police station. The incidence having happened in a family set up, the family was reluctant in having the same prosecuted in court. She was presented that two mobile phone used in viewing pornographic material and non-belonged to the suspect. The victim and accused would watch pornography in secret for a long period. Accused person interacted with the victim throughout in her capacity as a house help. Accused exposed the victim to pornography intentionally. The I/O charged accused person accordingly.

### **Defence Case**

16. The defence case is that between July 8, 2020 and February 21, 2021 accused lived with the family of J M (victim's family) as a house help. Her duties were to take care of an infant who was a niece to the victim. She had a button mobile phone christened kabambe until July 2020 when she purchased a mobile phone make infinix make. Other family members each had a smart phone. She never shared her mobile phone with the victim. The victim would from time to time use her parents and also sisters smart mobile phone. He would carry them to his bedroom. On the Sunday of February 21, 2021 she performed a daily chores and by 8.00AM as usual she went away since she was off duty. The victim and other family members left for church. She returned to the house at around 6.00pm and went straight to her bedroom and later to the kitchen. While at the kitchen she heard N (PW1) looking for her mobile phone. She continued to prepare supper. She went out to purchase cooking oil. She heard commotion inside the victim bedroom, PW1 went to the kitchen and cautioned her. She saw the victim being slapped four times. While in the kitchen PW1 told her to go and pack her personal items. She was asked to hand over her mobile phone and identity card to PW1. She learned that the victim was found watching programmes in N's mobile phone while inside his bedroom. The victim mother and sister (PW1) assaulted her and demanded her to key in her mobile phone password. She was locked up in her bedroom until the following day when police officers walked in and she was interrogated and assorted to Kasarani Police Station. She declined ever defiling the victim despite the threats by the family and arresting officers. She was taken to hospital for treatment and returned back to the police cells. She was not examined neither was she given any medicine. According to the accused, the victim was not truthful. He gave false testimony because he was threatened and beaten up. She denies ever watching television at night with the victim as alleged. She saw the pornographic materials in court for the first time. The relationship in the family was not cordial.
17. In cross examination accused person told court she is a mother of five children and a resident of Kakamega. She was employed by PW1 as a house help. According to accused her employer was generally very rude on her. She however never assaulted her any other time prior to the allegations of defilement. Her employer lived in the servant quarter. She lived in the main house. She served the family although her employer was PW1. The victim used to go to school from 6.30 a.m to 5.00 p.m. The victim used to share his bedroom with his sister who was a day scholar. She used to clean the victim's bedroom. She admits she used to watch Nigerian movies with N's baby and a coco melon movie for



infants. She used to watch programme by the name of Akili Kids and Afro-cinema. As a mother she has always ensured her children go to church and good morals have been instilled to them. The victim was not truthful. He was coerced to fix her.

### Issues for Determination

18. I have carefully considered and evaluated the evidence adduced by the prosecution. I bear in mind that the standard of proof in criminal cases is that of beyond reasonable doubt and the burden is always on the prosecution to prove the charge beyond reasonable doubt. At no time does the burden shift to the accused. I have also considered defence submission on record. All the offences have been denied as well as the particulars.
19. The main issue for determination is whether the prosecution has satisfied and proved the ingredients of the offence of defilement and that of promoting a sexual offense or the alternative charge of committing an indecent act with a child. I will attempt to determine the following intertwined issues:
20.
  - a) Whether the prosecution proved the age of the complainant.
21.
  - b) Whether the ingredient of penetration was proved.
22.
  - c) Whether the accused committed the alleged act of promoting a sexual offense and in the alternative indecent act with a child.

### Analysis and Determination

23. I have already summarized the evidence adduced by the prosecution and in particular the testimony of the PW2, the victim of the alleged sexual act.
24. In order to prove its case, it is incumbent on the prosecution to prove the age of the victim of the alleged offence. The court was informed that the complainant was a minor and a birth certificate produced to prove that. The birth certificate shows that the complainant EG was born on 11/04/2007 and therefore as at February 22, 2021 he was aged 13 years and therefore a minor in the bracket defined by section 8(3) of the [Sexual Offences Act](#). I find that the prosecution had proved the age of the complainant.
25. The other key issue for determination is whether the accused defiled PW2. The complainant, in his evidence, explained how the incidences occurred. The complainant identified the accused as the one who defiled him. The credibility and truthfulness of his testimony goes to the root of the prosecution case and which I shall endeavour to determine. I am alive of the provisions under section 124 of the [Evidence Act](#), applicable to minors, which provides as follows;

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.
26. The complainant's testimony that the accused engaged in sexual acts with him seem truthful as the details and descriptions he gives seem highly unlikely to be made up. The complainant has no reason I believe to 'set up' the accused.



27. The accused, in her defence maintained that the evidence and testimony levelled against her was all fabricated and should not be believed since the complainant was beaten into confessing and making it up. It is without doubt cases of this nature an eye witness is not easy to avail. The act is performed in secrecy. This court shall be guided by the proviso of section 124 of the *Evidence Act* cap 80 Laws of Kenya as quoted in the case of *BOO v Republic* [2018] eKLR Justice GV Odunga,

It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See *Mohamed v Republic* (2008) KLR G&F, 1175 and *Jacob Odhiambo Omuombo v Republic* Cr App No 80 of 2008 (Kisumu), However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.’

28. I have considered the medical evidence adduced and presented before the court by the clinical officer and determined that it was not conclusive and it failed in proving that defilement had indeed occurred. This is however owing to the nature of the said offence where the victim is a male minor it is really difficult to prove scientifically that defilement had occurred. This however does not rule out the possibility. The court is at liberty to believe the truthfulness of the complainant where there is no scientific evidence to prove the offense occurred.

29. The court having set out the key ingredients of the offence of this nature, the case at hand involves a male minor victim and female adult perpetrator. The minor age of the victim was proved by the production of his birth certificate and there is no doubt at the time of the alleged perpetration the male minor victim was aged 13 years and hence a child.

30. The second issue is penetration. The victim testified that he has sexual intercourse with the perpetrator on diverse dates. By the time victim was being taken for medical examination he could only give an outline of the how they had sexual intercourse with the suspect. Genital examination was not done. Other tests including HIV and STI were all negative. It was noted the victim was anxious with no physical injuries. It was only recommended he proceeds with counselling. PRC form and P.3 form were filled and produced in court as exhibits. The medical officer produced a medical certificate. Samples could not be taken due to the lapse of time. But the medical officer concluded that there was sexual assault after interrogating the victim. Penetration in most case is proved by the production of medical evidence. Traditionally medical officer would produce evidence to confirm presence of spermatozoa and discharge or injuries in the genitalia. All this might not be noticed when time has lapsed. The court of higher jurisdiction had this to say on the same.

31. In the case of *JMM v Republic* [2020 eKLR, the Court of Appeal (Ouko JJA, Makhandia JJA and J Mohammed JJA) stated as follows;

“.....that is the correct expression of the law; that the presence of spermatozoa cannot in itself be proof of penetration, and that penetration can either be partial or complete insertion of the genital organ of a person into the genital organ of another person. Here penetration was complete, according to the complainant 's testimony and medical evidence...”

32. In *Denis Osoro Ohiri vs Republic* 2014 eKLR, the court cited *Geoffrey Kionji -v- Republic* Cr Appeal No 270/2010 (Nyeri) where the court while considering the issue of medical evidence in a case of defilement, stated as follows: -

“Where available medical evidence arising from examination of the accused linking him to the defilement would be welcomed, we however hasten to add that such medical evidence



is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the victim was penetrated by the accused person.

33. The complainant/victim gave a graphic narration of what transpired and taking all the circumstantial evidence I believe he was telling the truth as guided by the proviso under section 124 of the Evidence Act Cap 80 of the Laws of Kenya. The complainant/victim being a minor male, had not injuries in his genitalia and no specimen could be extract to proof defilement. The court conducted *voire dire* and was satisfied victim knew he had a duty to tell the truth and court conclude he was truthful an indeed penetration did occur. I find that the prosecution has proved, beyond reasonable doubt, that the accused committed the offence she is charged with in the main charge.
34. Accused is facing another count of promoting a sexual offense with a child contrary to section 12(b) of the Sexual Offences Act No. 3 of 2006.

Section 12. Promotion of sexual offences with a child

A person including a juristic person who—

- (a) ...; or
- (b) who supplies or displays to a child any article which is intended to be used in the performance of a sexual act with the intention of encouraging or enabling that child to perform such sexual act, is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than five years and where the accused person is a juristic person to a fine of not less than five hundred thousand shillings
35. The offence of child pornography is committed when it is proved that an offender has with the intention of encouraging or enabling a child to engage in sexual acts knowingly displayed, shown, exposed or exhibited obscene images, words or sounds by means of print, audio-visual or any other media.
36. In the alternative, accused is charged with an offence of Indecent act with a child contrary to section 11(1) of the Sexual Offences Act 2006. Although the victim demonstrated that after watching Nigeria movies accused person indecently touched his genitalia to wit the penis to erect, she led him to complete penetration hence the charge of defilement. The form of indecent act in the context of this trial is as defined under section 2(b) of the Sexual Offences Act “

as exposure or display of any pornographic material to any person against his or her will;

37. A child cannot consent to any form of abuse. Exposure of pornography renders a child to be in need of care and protection, as it affects the child mental and social development, section 119(1)(n) Children Act;

“Section 119. When a child is in need of care and protection

- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography;”

Section 42 Sexual Offences Act defines consent:

“For the purpose of this Act, a person consents if he or she agrees by choice and has the freedoms and capacity to make that choice.”



38. The *Sexual Offences Act* makes it clear that children, persons under the age of eighteen (18) do not have the freedom or capacity to make that choice as it is forbidden to expose them to such materials.
39. PW1, a big sister to the victim testified that after trying to trace her mobile phone, she eventually found it on the table inside the victim bed room. The mobile phone was hot and it was off. She charged it and it opened straight to the last sight where the user was viewing. The victim was found to have watching pornography. After interrogation he confirmed he was introduced to the same by accused person and they would even practice the same. The phone viewer's history printouts were produced in court as exhibits. Accused however denied watching the same with the victim. The victim went ahead to confirm that he would watch movies with accused at late night when all family members had slept and they would have sexual intercourse with accused at the sitting room and even in her bedroom and outside around the cloth lines when the parents and siblings were away. The period within which the offence was committed, the court take judicial notice was during the country wide lock down due to Covid 19. Schools had been closed and therefore accused was not truthful when she told court the victim used to go to school and at no time she was left home alone with him.
40. Accused person even went ahead to purchase a smart phone and yet she was allowed to use mobile phone of PW1 when feeding the minor or even to entertain her. Although no pornography history search or review was retrieved from accused mobile phone, the victim was clear she is the one who introduced him to the same. The victim confirmed after viewing the pornography they practiced the same hence the charge of defilement. It is the finding of this court that the victim was truthful. Accused defence was just a mere denial. She claimed bad relations with her employer yet she never quit employment. The victim had to be enrolled to counseling sessions due to the sexual abuse and pornography exposure.
41. I also take note that the courts are not hamstring by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful. This was reaffirmed in the case of *JWA v Republic* [2014] eKLR, the Court of Appeal observed: -

“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”

Consequently, be as it may in this case the victim is a child of tender years and indeed, before a child of tender years is allowed to testify in court the court is required to satisfy itself that the child understands the duty of speaking the truth and whether he/she is of sufficient intelligence to allow his/her evidence being taken. This is done by conducting a *voire dire* examination before the evidence is taken. In the instant case the court indeed undertook the same on the complainant and satisfied herself that the witness evidence was tenable, which position I agree with.

42. In conclusion, I find accused guilty of both the main charge of defilement and the alternative charge to count 2 of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* by exposure or display of any pornographic material and accordingly to a minor and convict the accused under section 215 of the *Criminal Procedure Code* for the offence of defilement contrary to section as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* of the *Sexual Offences Act* No 3 of 2006.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL, 2022.**



.....

**ESTHER. K. KIMILU**

**SENIOR PRINCIPAL MAGISTRATE**

