Republic v Kumbu (Sexual Offence 24 of 2017)
[2022] KEMC 42 (KLR) (27 September 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

SEXUAL OFFENCE 24 OF 2017

CN ONDIEKI, PM

SEPTEMBER 27, 2022

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

THOMAS KIOKO KUMBU ..... ACCUSED

JUDGMENT

Part I: Background

1. The Accused 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 of the offence were that on 2nd September 2017, at [Particulars Withheld] within Machakos County, the Accused intentionally caused his penis to penetrate the vagina of PMM, a child aged 5 years.

2. In the alternative, the Accused was charged with the offence of committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act*. The particulars of the offence were that on 2nd September 2017, at [Particulars Withheld] within Machakos County, using his penis, the Accused intentionally and unlawfully touched the vagina of the PMM, a child aged 5 years.

3. When the substance of both the main charge and the alternative charge were stated to the Accused and ingredients thereof explained by the Court on 6th September 2017, the Accused denied the truth of each charge.

Part II: The Prosecution's Case

4. Before I embark on determination, I wish to highlight the causes of delay of this case, which has now taken about five years to determine. From the record, the Accused was at some point found unfit to stand trial leading to mental assessments and re-assessments which gobbled quite some time until 8th December 2021 when the Accused was found fit to understand the proceedings.

5. The state called five witnesses. PW1, not under oath, PMM told this Court that she stays with her parents and siblings. She stated that on the material day, she was with her sister called M when "Joshua" (the Accused) called her, carried him and they went to collect firewood. She told the Court that while in the thicket, the Accused removed her skirt, requested her to remove her undergarment which she did, pinched her thighs, and did bad 'manners' to her. At this point, the prosecution sought PMM to be stood down twice and explore the possibility of an intermediary and the request was granted. But the prosecution seems to have abandoned this idea.

6. PW2, SKM, PMM's mother, told this Court that PMM is her last born daughter and that she was born in May 2012. She told the Court that PMM was at the time of testimony (23rd August 2018) aged 6 years. She recalled that on 2nd September 2017 at around 5.30 pm, she sent PMM and her sister M to a posho mill to have maize ground into flour. She testified that M returned home alone at around 7 pm and when she was asked about the whereabouts of PMM, she told PW2 that "Joshua" had called her and carried her away on a wheelbarrow to fetch firewood from a nearby thicket. She testified that she directed M and her brother M to go out and look for PMM. She testified that she was informed that M and M found PMM at a local shopping centre and that the Accused had bought biscuits for her and they returned her home. She testified that when PMM arrived, she noted that she was shivering. She testified that when she inquired where she was, she went mute and that she directed M and M to get out of the house and she examined her private parts and noted traces of semen around her vagina and anus. She testified that PMM told her that the Accused 'slept' with her. She testified that she contacted her husband immediately and he came home and together, they rushed PMM to Machakos Level 5 Hospital but unfortunately, they found the doctors on strike but PMM was admitted and then she was examined and treated the following day. She exhibited treatment notes and P3 Form which were marked PMFI 1 and 2 respectively. She told the Court that the Accused was well known to them as their neighbour's farmhand.

7. In cross-examination of PW2, she stated that M was in class 6 and M in class 4 (as at the time of testimony being 23rd August 2018). She stated that the undergarment PMM was wearing was pink in colour and that she had it in her purse. She stated that she has never washed it. She stated that her vagina had some blood stains. She admitted that she did not indicate the blood stains in her witness statement. She stated that M informed her that the Accused called PMM while they were waiting for their turn to have the maize ground.

8. PW3, Police Constable Dominic Mbithi, was the arresting officer. He testified that on 4th September 2017, together with Sergeant Kobia, they arrested the Accused at his place of work.

9. In cross-examination of PW3, he stated that he did not have a Warrant of Arrest.

10. PW4, Police Constable Konzolo based at Machakos Police Station, was the Investigating Officer. She recalled that on 3rd September 2017, this matter was reported by PW2 and she was assigned this matter to investigate. She testified that she recorded witness statements, issued a P3 Form which was filled by a doctor and took the minor for age assessment. She testified after considering the evidence, she was satisfied that there was sufficient evidence to charge the Accused. She identified the age assessment form which was marked PMFI 3.

11. During cross-examination of PW4, she stated it was reported on 2nd September 2017 at about 9 pm. She stated that she did not record statements of the siblings of PMM because they were not eye witnesses.

12. PW5, Dr. John Mutunga based at Machakos Level 5 Hospital, told the Court produced the age assessment of PMM which indicated that she was approximately 5 years (as at 13 may 2019) as PEXH1. He further produced treatment notes dated 9th September 2017 in which it was recorded that no vaginal

bruises were noted on PMM; that her thighs were stained with semen; and that the hymen was partially broken. The treatment notes were produced as PEXH2. He stated that the P3 Form reflects what was record in the treatment notes and it was produced as PEXH3. He stated that there was evidence of penile penetration as suggested by the partially broken hymen.

13. During cross-examination of PW5, he stated that he examined PMM five days later and that he relied on the primary history recorded in the treatment nots. He stated that the Accused was not brought for examination.

Part III: The Accused's Case

14. The Accused was the only defence witness. In his unsworn testimony, he incoherently stated that he did not know why he was in Court. He stated that he could not recall what happened. He produced his treatment notes DEXH 1.

15. In her written Submissions dated 1st August 2022 and filed on the even date, Mrs. Wambua instructed by Maingi Musyimi & Associates Advocates representing the Accused submits that the prosecution has failed to prove their case beyond reasonable doubt on the following grounds. First, on various occasions, orders were issued by this Court for inquiry of the state of soundness of the mind of the Accused and that various psychiatric reports were made and produced before this Court indicating that the Accused was not of sound mind and incapable of making his defence. Second, in his evidence, Dr. Mutunga indicated that no bruises were seen and that has the minor been laid in the thorny thicket, bruises would have been seen. Third, although PW5 testified that he saw semen stains, he did not order examination of the Accused to confirm whether the semens came from the Accused. Fourth, the evidence of PW2 amounted to hearsay. Fifth, the evidence of PW1 was disjointed and incoherent and that although she was stood down to have an intermediary called, the prosecution failed to call an intermediary. In this connection, it is submitted that the evidence of PW1 is unreliable staking this in Ndungu Kimanyi vs. Republic HCCR No. 22 of 1979. Sixth, partial sexual penetration cannot be said to be connected to the Accused for lack of evidence looking him to the offence.

Part Iv: Points For Determination

16. This Court has distilled four points for determination as follows:

    a. First, whether the prosecution has proved beyond reasonable doubt that on 2nd September 2017, an act which causes penetration of a male genital organ into the female genital organ of PMM was committed.

    b. Second, whether the prosecution has proved beyond reasonable doubt that the said act (which causes penetration of a male genital organ into the female genital organ of PMM) was committed by the Accused.

    c. Third, whether the prosecution has proved beyond reasonable doubt that PMM was a child at the material time (videlicet 2nd September 2017).

    d. Fourth, whether the said act (which causes penetration of a male genital organ into the female genital organ of PMM) was done intentionally and unlawfully.

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

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

b. Second, whether the prosecution has proved beyond reasonable doubt that the complainant was a child at the material time (videlicet 2nd September 2017).

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

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

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

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

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

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

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

only by the extensive body of interpretation it had generated worldwide but, by the fact that under article 25(c) of *the Constitution*, it was among the fundamental rights and freedoms that could not be limited or abridged.

22. Before I invoke an old English decision, I wish to restate that our criminal justice system did not start from scratch. We build our system on the English common law system. In Peter Wafula Juma & 2 Others vs. Republic [2014] eKLR, F. Gikonyo and A. Mabeya, JJ, had this to say about the legal burden of proof in criminal cases: "Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the Constitutional right of the Accused; presumption of innocence, not to give incriminating evidence and to remain silent..."

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

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

25. However, in considerably limited instances, once the onus of proof placed on the shoulders of the prosecution by dint of sections 107, 109 and 110 of the *Evidence Act* and the incidence of burden

contemplated by section 108 thereof, is discharged, the evidential burden of proof shifts to the Accused Courtesy of and the limited circumstances outlined under section 111 of the said Act. Section 111 of the *Evidence Act* provides thus: "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence.

(2). Nothing in this section shall -

(a). prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or

(b). impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or

(c). affect the burden placed upon an Accused person to prove a defence of intoxication or insanity."

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

27. The standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt. The doubt referred to in this standard is the doubt that can be given or a reason assigned as opposed to speculation. A person Accused of an offence is the most favourite child of the law. Adverting to the standard of proof in criminal cases, Mativo, J. says in Philip Muiruri Ndaruga vs. Republic [2016] eKLR that "To give an Accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an Accused is sufficient. The Accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An Accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

28. The meaning of the words 'beyond reasonable doubt' required in proving criminal offences has been attempted in multiple cases. In the case of Miller vs. Minister of Pensions [1947] 2 All ER 372, Denning J. who holds that "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's favour, which can be

dismissed with the sentence, 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt. But nothing short of that would suffice."

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

30. What is the entry point in criminal trials? When hearing of the matter begins, the Court begins from a tabula rasa which is that the Accused is innocent and this state of affairs perpetuates itself throughout the trial proceedings until such time as the prosecution has put on the table evidence which satisfies the Court beyond reasonable doubt that the Accused is guilty. In 1997, the Supreme Court of Canada in R vs. Lifchus [1997] 3 SCR 320, suggested the following explanation: "The Accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the Accused is guilty. .....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the Accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the Accused and acquit because the crown has failed to satisfy you of the guilty of the Accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the Court, you are sure that the Accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

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

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

33. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) reasons that evidence is weighed and not numbered. He argues that it is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. Save for the requirement of corroboration under section 124 of the *Evidence Act*, this position ties well with section 143 of the *Evidence Act* which provides that "No particular number of witnesses shall, in the

absence of any provision of law to the contrary, be required for the proof of any fact." Section 124 of the Evidence requires that before an Accused is convicted, the Court satisfies itself that the evidence of the victim is corroborated but in sexual offences, a window and exception to the general rule has been provided to take care of situations where the only evidence available is that of the alleged victim of the offence, in which case the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. The text of section 124 of the *Evidence Act* reads as follows: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

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

35. Having discussed the broad framework within which this case will be determined, it's now time to embark on analysis of the law, examination and interrogation of facts and evaluation of evidence on each of the four points, seriatim.

Whether the prosecution has proved beyond reasonable doubt that on 2nd September 2017, an act which causes penetration of a male genital organ into the female genital organ of PMM was committed

36. This is a question of fact. The only direct evidence in this regard was that of PW1 plus the expert evidence of PW5.

37. Section 8(1) of the *sexual Offences Act* provides that "8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

38. What meaning is assigned to an "act which causes penetration" and "penetration" as applied in section 8(1) of the *Sexual Offences Act*? Section 2 of the Sexual Offences defines an "act which causes penetration" to mean "an act contemplated under this Act". The same section defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

39. Section 8(1) has been construed by superior Courts to be built on three pillars, the ingredients of the offence of defilement. The three pillars are age (child), penetration and identification of the perpetrator. In GOA vs. Republic [2018] eKLR, A.C. Mrima, J. discussed the ingredients of the offence of defilement as follows: "8. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them."

40. Expert evidence was presented by PW5, Dr. John Mutunga, who testified and produced treatment notes in which it was recorded that no vaginal bruises were noted on PMM; that her thighs were stained

with semen; and that the hymen was partially broken. Dr. Mutunga produced the treatment notes PEXH2; and P3 Form as PEXH3. Dr. Mutunga concluded that the examination results suggested penile penetration.

41. The evidence of PW1 and PW5 were not shaken at all by the Defence. It follows that the mind of this Court is persuaded beyond reasonable doubt that the PMM's thighs were stained with semen and that her hymen was partially broken.

42. Which leads to the determinative question, anchored on this proved fact. What can reasonably be inferred from circumstances where PMM's thighs were found stained with semen and that her hymen was found partially broken, shortly after she reported that she had been defiled? Since the evidence in support of this ingredient is largely circumstantial, it is now imperative that consider the principles governing circumstantial evidence. In R vs. Taylor, Weaner & Donovan [1928] 21 C.A., APP. R. 20, the Court came to a conclusion that circumstantial evidence is the best evidence. The Court went ahead to attempt a definition of circumstantial evidence as the "evidence of the surrounding circumstances which, by intensified examination, is capable of proving a proposition with mathematical accuracy and that it is no derogation of evidence to say that it is circumstantial."

43. What is the test of circumstantial evidence? In R vs. Kipkering Arap Koske & Another [1949] 16 EACA 135, the Court of Appeal for Eastern Africa held "That in order to justify, on circumstantial evidence, the inference of guilt, the inculputory facts must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the Accused." Similarly, in the Court of Appeal decision in Bernard Otieno Okello vs. Republic [2019] eKLR, Koome, JA (as she then was) Sichale, Kantai, JJ.A., echoed the tests laid in the decision of Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR) to guide a case determinable on circumstantial evidence as follows: "[18] The tests to be applied in a case determinable on circumstantial evidence were set out in the case of; Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR) as follows; "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused; and iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else."

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

45. And so, in the trial of Nahashon Isaac Njenga Njoroge over the murder of Thomas Joseph Mboya, Simpson, J. (as he then was) convicted Nahashon purely on circumstantial evidence. Nahashon appealed in Nahashon Isaac Njenga Njoroge v. Republic (1969) eKLR, and while deploying the test of circumstantial evidence laid down in the Musoke case and doctrine of recent possession laid down in the Obonyo case in dismissing the appeal, Newbold, P., Duffus and Spry JJ.A. (as they then were)

had this to say about circumstantial evidence and whether the evidence had passed the said test: "... It is normally said, when dealing with circumstantial evidence, that the incriminatory facts must point conclusively to the guilt of the appellant and be incompatible with any reasonable hypothesis of his innocence... Before a person can be convicted the evidence for the prosecution, the evidence pointing to the guilt of the appellant must be such as to leave no reasonable doubt in the mind of the trial judge, and must be such that he is completely sure of the guilt of the Accused person, and must be such that it points irresistibly to that guilt... That evidence, and particularly the evidence of the possession of the murder weapon so shortly after the event and the circumstances of its possession, pointed in the mind of the trial judge irresistibly to the guilt of the appellant. It was incompatible that his innocence taken by itself. It is possible that some explanation might then have been given by the appellant which, while the trial judge did not necessarily believe it, may nevertheless have raised some doubt in his mind. If that was so, then of course it was the duty of the trial judge to have acquitted the appellant and if the trial judge did not do so it would be the duty of this Court to allow the appeal. But in the absence of any explanation which could have raised some doubt in the mind of the trial judge, we are satisfied that the evidence pointed to the guilt of the appellant and was such as to leave it beyond reasonable doubt as to his guilt. Such explanation as was given by the appellant was not accepted by the trial judge. In one respect has been abandoned by the appellant as being false. The second explanation, that is that the gun was handed to him by a friend, was also not accepted as being reasonably and possibly true. As has been said in the case to which Mr Waruhiu referred, that is the Bassan case: ([3]) (3) Bassan 1960 E.A.854 at P. 861. "It is, of course, correct to say that these circumstances – the failure to give evidence or the giving of false evidence – may bear against an Accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight". In this case the other evidence, that is the evidence of possession so shortly after the shooting of the gun used for the murder, was such as in the circumstances to leave no doubt in the mind of the trial judge of the guilt of the appellant. The explanations given by the appellant were so contradictory, in one respect admittedly false and in the other not accepted by the trial judge, that these contradictory explanations cannot but have had the effect of confirming the irresistible impression created by the evidence of the prosecution. We are satisfied, therefore, that in all the circumstances the trial judge was correct in coming to the conclusion that the evidence showed beyond reasonable doubt the guilt of the appellant and that none of his explanations raised any reasonable hypothesis which would shake in any way whatsoever this certainty, this sureness, in the mind of the trial judge of the guilt of the appellant."

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

47. What is likely to have happened in the common cause of natural events and human conduct in the context of state of affairs afore-described, in circumstances where no explanation which the Court is prepared to accept as reasonably possible, has been offered or appears from all the circumstances?

48. In the circumstances of the said established primary fact, this Court infers that the staining of the thighs of PMM and partially broken hymen, must have been attained by way of forced penile penetration of the vagina of PMM by a male person, in coitus. I find no alternative explanation available, which

this Court is prepared to accept as reasonably possible. Wherefore this Court concludes that the prosecution has proved beyond reasonable doubt that on 2nd September 2017, an act which causes penetration of a male genital organ into the female genital organ of PMM was committed.

Whether the prosecution has proved beyond reasonable doubt that the said act (which causes penetration of a male genital organ into the female genital organ of PMM) was committed by the Accused

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

50. Proof of this fact was anchored only on the oral evidence of WKS (PW1). Being oral evidence, I wish first to test whether it passes the test prescribed therefor. Section 62 of the *Evidence Act* states that "All facts, except the contents of documents, may be proved by oral evidence." Further, section 63(1) of the *Evidence Act* states that "Oral evidence must in all cases be direct evidence."

51. And what amounts to direct evidence? Section 63 (2) thereof states that "For the purposes of subsection (1), "direct evidence" means- (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it; (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it; (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner; (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds: Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable. (3) If oral evidence refers to the existence or condition of any material thing, other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

52. In this case, except PMM (PW1), none of the other four prosecution witnesses can be said to have been armed with direct evidence on the issue of identification of the perpetrator of this offence. In fact, PW2 merely narrated what they were told by PW1. However, I note that PW2 did not assert that what she was told by PW1 is nothing but the truth and for this reason alone, her testimony cannot be said to amount to hearsay. PW4 only presented results of investigations. In this scheme of things, therefore, only the evidence of PW1, passes the test of oral evidence. I further conclude that the said oral evidence of PMM is the only identification evidence available in this case.

53. What is the normative position regarding the circumstances immediately foregoing? Section 143 of the *Evidence Act* states that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Further, section 124 of the *Evidence Act* reads: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof

implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

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

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

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

to mistaken identification is desirable. It is the vital question. It is the vital question which has to be answered beyond reasonable doubt. Was the appellant recognized beyond reasonable doubt? Whether the error caused a failure of justice is the next step." {Emphasis supplied}

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

58. Further, in the Court of Appeal decision in Wamunga vs. Republic [1989] KLR 424 at pages 426-427, Masime JA, Gicheru & Kwach Ag JJA (as they then were) laid the following test of identification evidence: "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

59. Further, but not in derogation from the test laid in Wamunga case, the Court of Appeal laid down guidelines to be applied in analysing identification evidence in Richard Mwaura Njuguna & Another vs. Republic [2019] eKLR, Karanja, JA, Visram & Koome, JJ.A (as they then were) while quoting with approval the locus classicus case in this regard of R vs. Turnbull & Others [1976] 3 All ER 549, stated: "First, wherever the case against an Accused depends wholly or substantially on the correctness of one or more identifications of the Accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the Accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the Accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the Accused before? How often? If only occasionally, had he any special reason for remembering the Accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the Accused given to the police by the witness when first seen by them and the actual appearance?"

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

61. Since I am faced with the visual and recognition evidence of a single witness who is the complainant, I now embark to carefully and thoroughly analyze the evidence of PW1 (PMM). Upon considering the time, conditions and circumstances of identification, first, this Court finds that the time which was about 1800 hours and the conditions were favourable for sight. Second, the circumstances being that

the Accused was well known to PMM made it possible for recognition and as it was recognized by Lord Widgery C.J. R vs. Turnbull [1976] 3 All E.R. 549 and adopted in Kenya in Anjononi vs. Republic [1980] KLR 59; Wanjohi & 2 others vs. Republic [1989] KLR 415; Marie & 3 others vs. Republic [1986] eKLR; Gikonyo Kuruma & Another vs. Republic [1977] eKLR; Njeri vs. Republic [1979] eKLR; Abdallah Bin Wendo vs. R 20 EACA 166; Wamunga vs. Republic [1989] KLR 424; Richard Mwaura Njuguna & Another vs. Republic [2019] eKLR; Evans Odhiambo Anyanga vs. Republic [2015] eKLR; Mwenda vs. Republic [1989] KLR 464; and Osiwa vs. Republic [1989] KLR 469, recognition is better than identification of a stranger. Third, having spent considerable time with the Accused during the act and even after when the Accused bought biscuits for PMM, I find that PMM had sufficient time and opportunity to take notice of the appearance of the Accused. It is on the basis of the foregoing reasons that this Court concludes that the visual identification of the Accused was, to the highest extent, free from any possibility of error.

62. In the context of section 143 of the *Evidence Act* read in accord with the Proviso to section 124 of the *Evidence Act*, nothing stops a Court from convicting on a single identification evidence, provided a Court has cautioned itself against the attendant dangers of a conviction reliant on a single identification evidence and satisfied itself that there is remote possibility of an identification error or mistake. I now proceed as follows after cautioning myself against convicting on a single identification evidence (in the absence of corroboration). From the examination-in-chief, cross-examination and re-examination of PMM, she comes across as an honest girl who is consistent and free of material contradictions. Finally, when viewed through the prism the expert evidence of PW5, this Court finds that the possibility of her testimony being vitiated by an honest identification error or mistake are remote.

63. Wherefore I conclude that the prosecution has placed before this Court identification evidence which only leave a remote possibility in favour of the Accused that the said act (which causes penetration of a male genital organ into the female genital organ of PMM) was committed by the Accused.

Whether the prosecution has proved beyond reasonable doubt that PMM was a child at the material time (videlicet 2nd September 2017)

64. This is a question of fact. In support of this, PMM's mother, PW2 testified that PMM was born in May 2012 and that as at the time of her testimony (23rd August 2018), PMM was aged 6 years. Since PMM had no Certificate of Birth, an age assessment was carried and in the Age Assessment Report dated 13th May 2019 (PEXH 1), the age of PMM was approximated to be 5 years. It is clear from the material placed before this Court that the age of PMM oscillated between 5 and 6 years.

65. The significance of proving age of the victim cannot be overemphasized. P.N. Waki, J. (as he then was) had occasion to underline its importance in Alfayo Gombe Okello vs. Republic (2010) eKLR, where His Lordship rendered himself as follows: "In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) ...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

66. What form of evidence is admissible to prove age of the victim? What emerges from decisional law is that age can be proved by either documentary (a Certificate of Birth, a Notification of Birth, a Baptismal Certificate, a clinic card) or oral evidence of the parent/victim/guardian or expert evidence or age apparent to the Court where the actual age of the victim if s not known and that even in circumstances where conflicting evidence of age is presented, unless the age places the victim outside the bracket of a child, then dismissing a case on this basis only amounts to uplifting an undue

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

67. The Court should be alive to the fact that the *Sexual Offences Act* places age of the victim at two strategic stages of the criminal process namely age for purposes of conviction and age for purposes of sentences. What emerges from decisional law is that wherever a Court is faced with conflicting evidence of the victim, then for purposes of conviction, all the Court has to be persuade beyond reasonable doubt is that the victim is a child within the meaning assigned thereto under section 2 of the *Sexual Offences Act*. However, for purposes of sentencing, then the Court should go for the lowest risk and adopt the highest age of the victim guided by section 8(2), 8(3) and 8(4) of the *Sexual Offences Act*. See the Court of Appeal decision in Paul Syengo Musyoka vs. Republic [2015] eKLR, Koome & Visram, JJA (as they then were), Karanja JA had this to say: "24. Proof of age for purposes of conviction and sentencing

for the offence of defilement has been considered by this Court on numerous occasions and is now well settled. There is no need to rehash the same save to state that ideally the actual age of the victim should be proved through a birth certificate, birth notification card or other formal documents. Be that as it may, where actual age of a victim is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act* through evidence. 25. It is not in dispute that the actual age of DM was not established through a birth certificate. The only evidence in that regard was given by DM who testified she was 9 years old which was corroborated by the P3 form which indicated the same as her estimated age. We concur with the two Courts below that the foregoing was sufficient to prove her apparent age was 9 years." See also the Court of Appeal Decisions in Evans Wamalwa Simiyu vs. R [2016] eKLR; and Moses Nato Raphael vs. Republic [2015] eKLR.

68. And so, because one of the ingredients of defilement is that the victim must have been a child, as discussed in GOA vs. Republic [2018] eKLR, per A.C. Mrima, J., proof of age for purposes of establishing defilement should not be confused with proof of age for purposes of appropriate punishment for defilement. See Riako Philent Ouma vs. Republic [2015] eKLR, where D.S. Majanja, J. held as follows: "17. I now turn to the issue of age of the child. The age of a child is a question of fact and I would echo what the Court of Appeal stated about proof of age for purposes of the *Sexual Offences Act* in Moses Nato Raphael v Republic NRB CA CRA No. 169 of 2014 [2015] eKLR. It stated that; On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability. 18. The appellant did not contend that PW1 was not below the age of 18 years. For purposes of the sentence, PW 1 was sufficiently intelligent and gave her age as 15 years. PW 4, her father also testified that PW 1 was aged 15 years. This was sufficient proof of age. Under section 2 of the *Children Act*, age means the apparent age where the exact age is not known. In this case there was sufficient proof that PW 1 was aged 15 years."

69. Having not been contested by the defence, at all, that the victim was under eighteen years and thus a child, in accord with section 2 of the *Sexual Offences Act*, No. 3 0f 2006, which instructs that "child" has the meaning assigned thereto in the *Children Act*, (No. 8 of 2001)" and in accord with section 2 of the *Children Act*, No. 8 of 2001 (which was in force at the time), which defines a child to mean "any human being under the age of eighteen years", it is the conclusion of this Court that although the prosecution evidence is conflicting as to whether the victim was 5 and 6 years old at the material time, the victim was in any event a human being under the age of eighteen years and thus a child.

Whether the said act (which causes penetration of a male genital organ into the female genital organ of PMM) was done intentionally and unlawfully

70. This is both a question of law and fact. In this regard, since it has a direct impact of ability to act intentionally or otherwise, this Court has also to consider whether or not the state of mind of the Accused was not sound at the material time. In this connection, Counsel for the Accused submitted that on various occasions, orders were issued by this Court for inquiry of the state of soundness of the mind of the Accused and that various psychiatric reports were made and produced before this Court indicating that the Accused was not of sound mind and incapable of making his defence.

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

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

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

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

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

76. Just like want of consent, this can only be inferred from circumstances and of course the law. An act which causes penetration is lawful if it is committed to a lawfully married person; or committed to a consenting adult who understands and appreciates the nature of the act with his or her consent; or committed for justified medical procedures. To benefit from the defence that the act which causes penetration was committed lawful, the defence that the act which causes penetration was lawful should preferably be raised during cross-examination and also in defence or as preliminary objection intended to cause a withdrawal of the charge. In this case, the evidentiary burden shifts to the defence Courtesy of section 111 (1) of the *Evidence Act* which states that "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and

the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence."

77. First, it is important to underline that this Court proceeded after the Accused was found fit to understand proceedings as evidenced in the Report of Dr. Muia Janet of Machakos Level 5 Hospital, dated 8th December 2021.

78. At the entry of every trial, a Court proceeds on the basis of a rebuttable presumption that the Accused is sane, until and unless the contrary is proved. Section 11 of the *Penal Code* provides that "11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

79. On whose shoulder does the burden to rebut this presumption rest? In all criminal charges, the golden thread rule (the presumption of innocence which then enjoins the prosecution to prove the charge beyond reasonable doubt) is the norm. Put differently, the Accused assumes no legal onus of establishing his innocence. However, the evidential burden shifts to the Accused whenever a defence of insanity is raised, as one of the limited exceptions to the golden thread rule. Once the prosecution discharges its legal burden of proof, the evidential burden shifts under section 111(1) of the *Evidence Act* to the person denying, to rebut this presumption. In the English cause celebre decision in Woolmington vs. DPP [1935] A.C 462, Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright laid the golden thread (presumption of innocence) principle in criminal cases. Reginald Woolmington had shot his wife after falling out and was therefore charged with murder of his wife. Wilmington's defence was that he did not intend to kill his wife and thus lacked the requisite mens rea. He told the jury that he had planned to scare her by threatening to kill himself if she refused to return and reunite with him and in the process, he had attempted to show her the gun which discharged accidentally, killing her instantly. Swift, J. ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. He was convicted and sentenced to hang. It was upheld on appeal to the Court of Criminal Appeal on the premise of the statement of law in Foster's Crown Law that if a death occurred, it is presumed to be murder unless proved otherwise. He appealed to the House of Lords. The issue brought to the House of Lords was whether the statement of law in Foster's Crown Law, which the Court of Criminal Appeal applied, was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise. Viscount Sankey made a statement which was unanimously adopted by the rest in what has now come to be known as the 'Golden Thread' speech. At page 481, Viscount Sankey L.C. enunciated the law on legal burden of proof in criminal matters as follows: "Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in R. v. Davies (8 C.A.R. 211) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the Defendant to prove that the act alleged was accidental. Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." {Emphasis supplied}

80. And so, in limited instances like where the defences of insanity or intoxication (both of which are excepted by section 111(2)(c) of the *Evidence Act* read with sections 9, 11 and 12 of the *Penal Code*) or any other express statutory exception, the evidential burden shifts to the Accused. See sections 9, 11 and 12 of the *Penal Code*; section 111(2)(c) of the *Evidence Act*; and Woolmington vs. DPP [1935] A.C 462, per Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright; M'Naghten's Case (1843) 8 Eng. Rep. 718; Kangoro s/o Mrisho vs. R [1956] 23 EACA 532; Muswi s/o Musela vs. R [1956] EACA 622; Elisha Andai Karani vs. Republic [2020] eKLR, per Odek, JA (as he then was), Makhandia & Kiage, JJA.

81. What is the standard of proof required to discharge this burden? Unlike the prosecution case which demands for evidence capable of persuading the Court beyond reasonable doubt, the standard of proof required in rebutting this presumption is a balance of probabilities. See Bratty vs. Attorney-General for Northern Ireland [1963] AC 386, per Lord Denning; and R vs. Clarke 1972 1 All E R 219. Locally, see Richard Kaitany Chemagong vs. Republic [1984] eKLR, per Kneller, Hancox & Nyarangi, JJA.; CNM vs. Republic [1985] eKLR, per Nyarangi, Platt & Gachuhi, JJA.; and Republic vs. IKI [2019] eKLR, per Lesiit, J.

82. What then is the purport of proof on a balance of probabilities and what may be deemed as sufficient enough to reach or meet the standard of proof on a balance of probabilities? The balance of probability standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. In the case of Miller vs. Minister of Pensions [1947] 2 All ER 372, Denning J. who holds that "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's favour, which can be dismissed with the sentence, 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt. But nothing short of that would suffice... the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determine conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not." {Emphasis supplied}

83. Also, in the English cases of Re H (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the Home Department vs. Rehman {2003} 1 AC 153, which was adopted in Kenya in inter alia Paul Thiga Ngamenya vs. Republic [2018] eKLR, the House of Lords laid down a series of guiding principles on standards of proof for civil and criminal cases and their purport as follows:

> "(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.
>
> (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred.
>
> (3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than

others." {Emphasis supplied}. Put differently, it means that the case will be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place and in percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. See William Kabogo Gitau vs. George Thuo & 2 Others (2010) 1 KLR 526, per Kimaru, J. It can again be said that degree which is not so high as is required in a criminal case so as that a tribunal can say 'we think it more probable than not' and the burden is discharged thereby, but, if the probabilities are equal it is not. See Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Court of Appeal adopted the reasoning of Denning, J. in Miller vs. Minister of Pensions (1947) 2 All ER 372.

84. And what are the mechanics involved and how should a Court approach evidence? The proper way on how one should consider the evidence at the conclusion of the case is to weigh the evidence given by the Accused against that given by the Prosecution and to decide the case on the plane of whether the fact in contention has been proved (if the Court has been led to believe it exists or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists). In other words, if at the end of the case, the Court considers that there is a preponderance of evidence in favour of the Accused, a decision in favour of the Accused should result and conversely if the preponderance is in favour of the Prosecution. See HMB Kayondo vs. Somani Amirali Kampala (1995) IV KALR 78; and Kesi Jindwa Karuku vs. Steel Makers Ltd [2019] eKLR, per R. Nyakundi, J.

85. Section 12 of the *Penal Code* provides that

"12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission." The state of one's mind has a direct impact of being a master of one's mind. In this connection, section 9 of the *Penal Code* provides that a person is not criminally responsible if it is proved that the act or omission occurred independently of the exercise of his will. The text of section 9 of the *Penal Code* reads as follows:

"9.

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

(2). Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3). Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility." And so, in Leonard Mwangemi Munyasia vs. Republic [2015] eKLR, Ouko, JA (as he then was), Makhandia & M'Inoti, JJA, took a view that "It is a rule of universal application and of criminal responsibility that a man cannot be condemned if it is proved that at the time

> of the offense he was not a master of his mind...We reiterate that this is the basis of the generally accepted notion that persons who cannot appreciate the consequences of their actions should not be punished if those actions happen to be criminal acts... Both section 12 aforesaid and the McNaughten Rules recognize that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the Accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the Accused person at the time of the commission of the crime. Borrowing from a medieval English Judge, Brian CJ in a 1468 case of Greene vs Queen, and who in turn reiterated Cicero who famously remarked that: -"The thought of man is not triable, for the devil himself knoweth not the intendment of man."

86. Sections 9 and 12 are woven along the M'Naghten rule (or test) which was enunciated in the locus classicus M'Naghten's Case (1843) 8 Eng. Rep. 718, in which case the House of Lords laid down the following test: "The jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party Accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

87. The M'naghten rule is built on three pillars. First, that at the material time, the Accused suffered from a defect of reason. Second, that the said defect of reason was caused by a disease of the mind. Third, that as a result, the Accused could or did not know the nature and quality of the act or that the act or omission was wrong.

88. What then constitutes a disease of the mind? This has been accorded a liberal meaning to include any disease which produces a malfunctioning of the mind and not necessarily a disease of the mind or brain per se (non-functioning of the mind). In M'Naghten's Case (1843) 8 Eng. Rep. 718, Lord Diplock drew parallels between malfunctioning of the mind and non-functioning of the mind thus: "There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but cause of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a 'disease of the mind' within the meaning of the Mc'Naghten Rules in Mc'Naghten's Case (1843) 10 C1 & Fin 200, even if the effect was transient or intermittent. On the evidence the defendant was therefore 'insane' at the time of his act, and the only possible verdict was that provided for by the Act of 1883 as aMd." The Court of Appeal of Kenya decision in Richard Kaitany Chemagong vs. Republic [1984] eKLR, Kneller, Hancox & Nyarangi, JJA. adopted the distinction which was enunciated in M'Naghten's Case (1843) 8 Eng. Rep. 718 (between malfunctioning of the mind and non-functioning of the mind) in the following words: "This statement of the law is, in our opinion, applicable to a case where at the time of the offence, an Accused person is in the throes of an epileptic fit, provided that a suitable evidential foundation for it has been laid, and provided, of course, that it is established on the balance of probabilities. In the instant case, several witnesses other than the appellant said he suffered from epilepsy, including his mother, DW 4 and his wife, DW 3. The latter, for instance, said that while in a fit the appellant "urinates and gets foam in his mouth". Moreover his uncle, Sawe Chemagong,

was also said to have suffered from fits and to have killed somebody in 1976. Dr Okonji concluded his second report by saying... In his evidence, he emphasized that when he had examined the appellant on February 14, 1983, he was at that stage normal. This then, would seem to be the explanation for Dr Okonji's earlier report which was regarded with such disfavour by the judge. A Court on appeal will not normally interfere with a finding of fact by the trial Court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. In the present case we think the preponderance of the evidence clearly showed that the appellant suffered from epilepsy and was prone to fits at frequent intervals. We think that the judge misapprehended the effect of the evidence on this issue and should have held that the appellant suffered from epilepsy as a disease. Was the appellant, due to an epileptic fit, likely to have been legally insane at the time he killed the deceased? We appreciate that the remaining two assessors (one having been wrongly allowed to be absent during a small part of the trial) took the view that the appellant was guilty of the full offence, but we are satisfied from the nature of the crime and the appellant's proved actions, and all the surrounding circumstances, including the frequency of his attacks of epilepsy, the appellant's addiction to alcohol and other aggravating factors which would be likely to precipitate an attack, that it was established on the balance of probabilities that the appellant was legally insane when he did the act charged."

89. It is need not be permanent. It can be anything ranging from a temporary attack to a permanent condition. See R vs. Sullivan [1984] AC 156.

90. And so, in the above construct, a disease of the mind has been construed to include arteriosclerosis (hardening of the arteries which sometimes causes loss of self-control) as was the case in R vs. Kemp [1957] 1 QB 399; epileptic episodes as was the case in M'Naghten's Case (1843) 8 Eng. Rep. 718; R vs. Sullivan [1984] AC 156; and locally the Court of Appeal decision in Richard Kaitany Chemagong vs. Republic [1984] eKLR, per Kneller, Hancox & Nyarangi, JJA.; hypoglycaemia (which was caused by a mix of insulin, alcohol and low blood sugars) as was the acse in R vs. Paddison [1973] QB 910; hypoglycaemia (of an a diabetic who stole a car and drove it while suffering from a mild attack caused by stress and failure to take insulin) as was the case in R vs. Hennessy [1989] 1 WLR 287; post-partum phsychosis as was the case in Republic vs. CMW [2018] eKLR, per Lesiit, J.; acute psychosis leading to hallucinations as was the case in CNM vs. Republic[1985] eKLR, per Nyarangi, Platt & Gachuhi, JJA; intellectual disability (a condition which is not curable but social adaptability can be improved through training in a special school) as was the case in BN vs. Republic [2019] eKLR, per F. Gikonyo, J. and LM vs. Republic [2019] eKLR, per A.C. Mrima, J.; bipolar, schizophrenia and depression as was observed in Lucy Wangari Muhia vs. Republic [2022] eKLR, per G. Nzioka, J.; schizophrenia as was the acse in Republic vs. E N W [2019] eKLR, per Lesiit, J. (as she then was) and even sleep-walking as was the case in Bratty vs. Attorney-General for Northern Ireland [1963] AC 386; and R vs. Burgess [1991] 2 QB 92.

91. And so, this Court is enjoined to determine whether the Accused was at the time of committing the act which caused penetration, suffering from any disease which rendered his mind incapable of understanding what he was doing or incapable of knowing that he ought not to have done the act which caused penetration or that the act which caused penetration occurred independently of the exercise of his will.

92. How should the Court proceed in circumstances where the evidence does not come out clearly in Defence but it becomes apparent from the proceedings? In this regard, counsel from the Court of Appeal is to the effect that a trial Court should consider surrounding circumstances and rely on evidence from which it can form an opinion regarding the mental status of the Accused person at the time when the crime was committed including but not limited to evidence immediately preceding

or succeeding the incident; contemporaneous conduct of the Accused person; medical history of the Accused person, et alia. In Leonard Mwangemi Munyasia vs. Republic [2015] eKLR, Ouko, JA (as he then was), Makhandia & M'Inoti, JJA, gave the following general guidance to trial Courts: "We are of the view that a Court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the Court to rely on evidence from which it can form an opinion regarding the mental status of the Accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the Accused person. There is also medical history of the Accused person to be considered as the backdrop. What must be avoided and what this Court has warned against in the two decisions relied on by the appellant's advocate in this appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial Courts, where the defence of insanity is raised or where it becomes apparent to the Court from the Accused person's history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice, like it is in England, to call evidence based on the opinion of an expert in such cases in terms of Section 48 of *Evidence Act* to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the Accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the Accused person's state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials. In the famous case of Richard Kaitany Chemagong v. R. Criminal Appeal No. 150 of 1983 the appellant, during his trial made no mention of his mental illness, but upon application by the defence he was examined by a psychiatrist who found that although he was, at the time of examination normal, he had a history of mental illness for which he had been admitted in a mental hospital. For this and other reasons, the Court found that the appellant was legally insane. What we are emphasizing here by reiterating what this Court said in Julius Wariomba (supra) in addition to the provisions of Sections 162 and 166 of the *Criminal Procedure Code* is that it is the duty of the trial Court to ensure that the Accused person's mental status at the time he is alleged to have committed the offence is established, if that question becomes relevant." See also Richard Kaitany Chemagong vs. Republic [1984] eKLR, per Kneller, Hancox & Nyarangi, JJA.

93. The statutory home of the exception to the golden thread rule is found in section 111 of the *Evidence Act*. In instances such as this, section 111(1) of the *Evidence Act* provides that when a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon the accused, provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist and provided further that the Accused shall be entitled to be acquitted, if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused. Section 111(2) of the *Evidence Act* expressly excepts the defences of insanity and intoxication from the golden thread rule.

94. This Court has guardedly and agonizingly considered the Accused's Defence Exhibit 1 (constituting seven booklets of Treatment Notes of diverse dates; and diverse documents from Ngelani Youth Polytechnic to the effect that the Accused herein was being trained in the category of persons of special needs; and the psychiatric Report dated 16th January 2018 from Mathare Teaching & Referral Hospital) plus the Counsel's submissions that the Accused was of unsound mind at the material

time; and having considered the history of the Accused as set out in the diverse reports of psychiatric consultants including the Report dated 16th January 2018 from Mathare Teaching & Referral Hospital; the Report dated 14th September 2020 from Mathare Teaching & Referral Hospital, all of which point to poor cognition abilities occasioned by intellectual disability, and having considered the holdings BN vs. Republic [2019] eKLR and LM vs. Republic [2019] eKLR, regarding intellectual disability (a condition which is not curable but social adaptability can be improved through training in a special school), the mind of this Court has been impinged with reasonable doubt contemplated under section 111(1) of the *Evidence Act* and persuaded on a balance of probabilities that it was more likely than not that as at the time of the act causing penetration, the Accused was suffering from a mental condition which rendered his mind incapable of understanding what he was doing or incapable of knowing that he ought not to have done the act which caused penetration and therefore, the act which caused penetration of PMM, occurred independently of the exercise of his will.

95. What then is a Court of law expected to do in the circumstances? Section 166 of the *Criminal Procedure Code* that in such circumstances, a Court of law should enter a special finding of guilty but insane and proceed to report the case for the order of the President and in the interim, order the accused to be kept in custody in such place and in such manner as the court shall direct. The text reads as follows: "166. Defence of lunacy adduced at trial (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

(2). When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

(3). The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.

(4). The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.

(5). On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

(6). Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to

his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

(7). The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital."

96. Section 166 has been subject of a litany of litigation challenging its constitutionality. For instance, in Republic vs. SOM [2018] eKLR, Majanja, J. declared section 166 of the *Criminal Procedure Code* unconstitutional on the premise that it embraces an indeterminate detention in custody and to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to Article 160 of *the Constitution* by vesting the discretionary power to the President to determine the nature and extent of the sentence. Having so did, Majanja, J. directed that the accused in that matter be committed to a mental institution namely Mathari Mental Hospital for a terms of fifteen (15) years subject to period review by the court in accordance with section 166 of the *Criminal Procedure Code* and in any case before the expiry of every two (2) years.

97. Mwongo, J. also found the indeterminate sentence contemplated by section 166 of the *Criminal Procedure Code* unconstitutional in Republic vs. JKN [2021] eKLR, where he had been convicted of murder.

98. In Lucy Wangari Muhia vs. Republic [2022] eKLR, G. Nzioka, J. endorsed and echoed the finding of unconstitutionality of section 166 of the *Criminal Procedure Code* and added that "49. I therefore, hold the view that, people with mental issues don't belong in a correctional facility or detention in prison. They need to get treatment in a mental health hospital, so they can receive care instead of confinement. 50. In fact, sending a mentally ill person to prison accomplishes nothing. Without treatment, a person who has been incarcerated before is likely to end up back in jail again because of the same ailment. The Bureau of Justice Statistics in Canada, reported in 2006 that, almost one-fourth of inmates with mental illness had been incarcerated at least four times."

99. In Charles Kipkoech Chirchir vs. Republic [2021] eKLR, Prof. Ngugi, J. held the same view and advanced four reasons as follows: "6. Other cases are in accord. And I agree. It is not well established from our decisional law that a sentence that a person be held at the President's Pleasure is unconstitutional for at least four reasons: a. First, it impermissibly gives the President a sentencing role in a way which breaches the doctrine of separation of powers since sentencing is a judicial function. b. Second, the sentence abrogates judicial discretion in sentencing since it gives the Judicial Officer hearing a case no opportunity to consider the facts and circumstances in order to fashion an appropriate sentence. c. Third, a sentence to hold an individual at the President's pleasure is an indefinite sentence which, according to emerging and evolving standards of decency and international human rights law is an inhuman and degrading punishment. d. Fourth, a mandatory sentence to send a person who has been adjudged insane is, in essence, disregarding the rights of the Accused Person as a person with disability. This is because there is no process or judicial determination whether the Accused Person is need of medical treatment for his condition. Instead, it is left to the unchecked and unreviewable discretion of the President to determine the place of detention; and whether the Accused Person is in need of medical treatment or attention."

100. What position has been taken by the COA in this regard? In Wakesho vs. Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR) (3 December 2021) (Judgment), which was rendered recently (on 3rd December 2021), Kairu, Mbogholi & Nyamweya, JJA approached the challenge as follows:

"59. For purposes of the present appeal, however, we are satisfied that the learned judge ought to have made a special finding of guilty but insane. We therefore allow the appeal. We quash the conviction and set aside the sentence of death. We substitute therefor, a special finding that the appellant did the act charged but he was insane at the time he did it. We order that the appellant, who has been in custody since his arrest on May 18, 2012, shall immediately be taken to a mental hospital for medical treatment where he shall remain until such time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself. Orders accordingly."

101. See also Hassan Hussein Yusuf vs. Republic [2016] eKLR; BKJ vs. Republic, Criminal Appeal No. 16 of 2015; Joseph Melikino Katuta vs. Republic [2016] eKLR; and H. M. vs. Republic and Another [2017] eKLR.

102. Most recently and precisely on 1st February 2022, Mrima, J. followed suit in Kimaru & 17 others vs. Attorney General & another; Kenya National Human Rights and Equality Commission (Interested party) [2022] eKLR (KEHC 114 (KLR) and issued the following orders and comprehensive directions:

"153. In the end, and flowing from the above, this Court hereby makes the following final orders: -

a). A declaration hereby issues that detaining of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were 'guilty but insane' in prisons at the President's pleasure pursuant to Sections 162 (4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167 (1) (a), (b), (2), (3) and (4) of the *Criminal Procedure Code* or under any other law constitute a threat to the doctrine of separation of powers and the independence of the Judiciary.

b) A declaration hereby issues that Sections 162(4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167(1)(a), (b), (2), (3) and (4) of the *Criminal Procedure Code* or any other law providing for the detaining of any person with mental challenges who face a criminal trial or has been tried and a special finding made that such a person was 'guilty but insane' at the President's pleasure contravenes Articles 25(a), 27(1), (2), (4), 28, 29(d) and (f), 50, 51(1) and (2), 159(2)(a), (b) and (d) and 160(1) of *the Constitution*. Such provisions are hereby declared unconstitutional, null and void.

c). A declaration hereby issues that an accused who is found to be unfit to stand trial or to continue participating in a criminal trial due to mental challenges or an accused who is tried of a criminal offence, and was found to have been insane at the time of committing the crime is a person with disability and ought to be accorded the necessary protection and assistance required under *the Constitution* and the law. d) A declaration hereby issues that no Court of law shall henceforth commit any person facing a criminal trial found to suffer from mental challenges to any prison facility in Kenya to be detained under the President's pleasure pursuant to any law. e) A declaration hereby issues that no prison facility in Kenya shall accept and detain any person found to suffer from mental challenges under the President's pleasure. For clarity, a prison facility shall only accept such persons with mental challenges committed to the facility under the orders of the Court which orders shall not include any order to hold such persons under the President's pleasure. f) A declaration hereby issues that any continued detention of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were 'guilty but insane' and that they be detained at the President. g) A declaration hereby issues that the Advisory Committee on the Power of Mercy established under Article 133 of *the Constitution*

has no jurisdiction to deal with persons with mental challenges who are facing criminal trials or who have been tried and special findings made that they were 'guilty but insane' until such a time when such persons are sentenced by Courts of Law. h) An order hereby issues that any prison facility in Kenya holding any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was 'guilty but insane' and be detained at the President's pleasure shall forthwith make arrangements and arraign such a person before the Court that committed the person to the prison facility. i) Once any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was 'guilty but insane' is arraigned before Court pursuant to order (h) above, the Court shall make appropriate orders and directions upon taking into account the mental status of the accused and the period the accused has been detained in prison at the President's pleasure. j) In the event the prison facility is unable to arraign such a person before Court as ordered in order (h) above, the facility shall immediately so inform the Court and the Court shall make appropriate orders and directions as it deems fit. k) The Honourable Deputy Registrar of the Constitutional and Human Rights Division of the High Court shall, in the next 14 days, transmit copies of this judgment to the parties in this matter as well as to the Commissioner-General of the Kenya Prisons Service, the Speaker of the National Assembly, the Registrar of the High Court and the Registrar of the subordinate Courts. The Speaker of the National Assembly shall take steps towards ensuring that the impugned sections of the *Criminal Procedure Code*, Cap. 75 of the Laws of Kenya are aligned with *the Constitution* and in terms of this judgment. l) The Speaker of the National Assembly shall file an Affidavit in this Court on the status of implementation of this judgment in the next 12 months. m) The Honourable Deputy Registrar shall, at the expiry of 12 months from the delivery of this judgment, fix this matter before Court for appropriate directions. n) There shall be no orders as to costs."

103. In precis, although section 166 of the *Criminal Procedure Code* has been found unconstitutional to the extent that it entertains indeterminate detentions and for violating the consecrated doctrine of separation of powers (by invading the independence of the judiciary), I have found no challenge which succeeded on the front of questioning the constitutionality of the special finding of 'guilty but insane' housed in section 166(1) of the *Criminal Procedure Code*. I have further found no decision which has conclusively addressed the ever-raging tension between sections 9 and 12 of the *Penal Code* which exempt a person who committed an offence while labouring under insanity from criminal liability on one hand and section 166(1) of the CPC which directs a court to make a special finding of guilty but insane. The only most recent decision which was rendered on 3rd December 2021, which inconclusively and periphery dealt with the controversy by recommending legal reforms is Wakesho vs. Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR) (3 December 2021) (Judgment), where Kairu, Mbogholi & Nyamweya, JJA stated as follows: "57. We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the *Criminal Procedure Code* in two respects. First, in our view, it is legal paradox to and a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that fora person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances wherein accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity. 58. Second, the subs-stratum of the provisions as regards the

right to fair trial in criminal cases in article 50(2) of *the Constitution* is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further still to be convicted on the basis of such a trial as is provided for in section 166 of the Criminal Procedure Act, is in our view manifestly unfair in light of our current constitutional dispensation. We therefore direct the Registrar of the Court send a copy of this judgment for the attention of the Attorney General. Enough said on that."

Part V: Disposition

104. Pursuant to section 166(1) of the *Criminal Procedure Code* read in context of Republic vs. SOM [2018] eKLR, per Majanja, J.; Kimaru & 17 others vs. Attorney General & another; Kenya National Human Rights and Equality Commission (Interested party) [2022] eKLR (KEHC 114 (KLR), per Mrima, J.; and Wakesho vs. Republic [2021] KECA 223 (KLR), per Kairu, Mbogholi-Msagha & Nyamweya, JJA, I find the Accused guilty of the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*, No. 3 of 2006 but insane.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 27TH DAY OF SEPTEMBER, 2022

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In The Presence Of:

Prosecution Counsel:.....

Advocate For The Accused:.....

Court Assistant:.....