REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO E072 OF 2023

PETER EBENYO LEKIRIKAI.......................................

.........APPELLANT

VERSUS

REPUBLIC...

RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case E059 of 2021– Kithinji A.R-CM)

J U D G M E N T

1. The Appellant, **PETER EBENYO LEKIRIKAI,** was convicted after trial of ***defilement*** contrary to ***section 8(1)*** as read with ***section 8 (3)*** of the ***Sexual Offences Act, No 3 of 2006***. The particulars were that between the night of 21/07/2021 and 22/07/2021 at Timau area Buuri sub-county in Meru County intentionally caused his penis to penetrate the vagina of E.N a child aged 13 years old. On 12/09/2023, he was sentenced to fifteen (15) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he filed the petition of appeal on 18/09/2023. He also filed amended grounds of appeal alongside his submissions and sought the leave of this court pursuant to **section 350(2)(v)** of the **Criminal Procedure Code**. The conviction and the sentence are being challenged on the following grounds;

i. The learned magistrate erred convicting him while relying on contradicting evidence without considering that the same was tinted with a lot of doubts.

ii. The learned magistrate erred basing his conviction on evidence that was inconclusive.

iii. The learned magistrate erred basing his conviction on contradicting and uncorroborated evidence.

iv. The learned magistrate erred shifting the burden of proof to him and rejected his defence without cogent reasons.

v. The learned magistrate erred convicting him without considering that the birth certificate was not availed.

vi. The learned magistrate erred convicting him without considering that he was not taken for medical examination.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that there was a dispute between PW2 and his wife which was confirmed by PW3 when he testified that at one time, his mom differed with his wife. PW2 also testified that the Appellant had separated with his wife and that PW2 had a case of assault against him. Hence, PW2 had a grudge against him and the case was false to punish him. Further, he was the caretaker in their plot and the dispute would arise every month when she failed to pay rent or delayed in paying and this dispute led to him being imprisoned. That PW2 and PW3 coached the complainant. There were contradictions in that PW2 testified that she did not know him yet she testified that she knew his wife and she had a case of assault against him which shows that she lied to the court. PW1 testified that a neighbour called and she went to meet her with her aunt and told them what had happened whereas PW2 testified that she was the one who called PW1. PW2 testified that the complainant was 14 years old whereas

the complainant testified that she was 13 years old. That he went on leave on 06/07/2021 and returned home on 23/07/2021 at 4pm whilst PW2 testified that he defiled the complainant on the night of 21st and 22nd July yet he had not returned.

4. He submitted that the doctor who examined the complainant failed to attend court and the investigating officer was on transfer which shows that this was a planned scheme against him. That identification was not proved since PW3 testified that she did not see the person who knocked the door but saw him when he was escorting PW1 at 2:00am. As to penetration, he submitted that medical evidence revealed that PW1 was not a virgin and that the incident of sexual activity was old which shows that he was innocent since her virginity was broken long time ago and PW2 framed him out of a grudge. Further, missing hymen is not proof of penetration through sexual act hence it was incumbent upon the prosecution to prove that her hymen was torn by an act of defilement by him. Age was not proved as PW1 testified that she was 13 years whereas PW2 testified that she was 14 years. Further, birth certificate was not produced. That the trial court

shifted the burden of proof on him and his defence and the evidence of DW2 was dismissed without cogent reasons.

5. He also filed supplementary submissions and further argued that the trial court failed to conduct voir dire examination on PW1 who was 13 years old which undermined the reliability of the evidence. The court also failed to consider the existence of a grudge between him and PW2 and failure to address the grudge and its potential impact on Pw2's testimony compromised the fairness of the trial. That he was denied a chance to recall PW1 and PW2 and the trial court failed to record reasons for denying him that chance which was a violation to his right to fair trial. That his alibi defence that he was not at the scene which he proved by production of a receipt was not challenged by the prosecution. That the charge sheet was defective as it failed to indicate whether the act was unlawful which undermined the specifity and clarity required in a charge sheet. It was also defective as it failed to indicate the exact time the act of defilement was committed which could lead to confusion and uncertainty affecting an accused's ability to prepare an adequate defence. That he was held in police custody for 10 days before being arraigned in court which was a

violation to his right under **Article 49(1)(f)(i)(ii)** of the **Constitution.**

6. In rejoinder, the Respondent's counsel urged the court to disregard the amended grounds of appeal filed without leave of the court pursuant to section **350(2**) of the **Criminal Procedure Code.** He submitted that age was established through the age assessment report Pexhibit6 which indicated age to be 13 to 14 years. There was also oral evidence and medical evidence that she was 13 years old. PW1 testified that she was 13 years and PW2 testified that she was 14 years and the trial court found that she was 14 years which was sufficient considering court of appeal decisions in ***Edwin Nyambogo Onsongo vs Republic (2016) eKLR*** and ***Mwalengo Chichoro Mwajembe v Republic, Criminal appeal No. 24 of 2015.*** As to penetration, he submitted that the findings by the clinical officer remained unchallenged as the Appellant did not find fault in the evidence of the clinician as he chose not to cross examine. Penetration was further supported by the victim's testimony as she clearly stated that she spent the night with him and they had sex. That identification was through recognition as he was known to her and

she referred to him as a neighbour therefore, there was no doubt in her mind that he was the one who defiled her. Identification was also not challenged during cross examination.

7. He submitted that the charge sheet was properly framed as he failed to show that his right was violated by the omission of the word unlawful and during plea taking, he pleaded not guilty which shows that he understood the charges. He participated in the trial and cross examined the witnesses and raised his defence without raising any such issue. That the trial court acted properly in rejecting his defence as he only spoke to a time between when he went on leave and did not state of his whereabouts on the alleged days between 21/07/2021 and 22/07/2021 so his defence was an afterthought and a mere denial. The sentence was proper, justified and lenient considering the nature of the offence and provision on mandatory minimum sentences. The trial court considered his mitigation and aggravating factors.

8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an

independent conclusion as to whether or not to uphold the decision of the trial court.

9. This duty was set out in **Okeno vs. Republic [1972] EA** by the Court of Appeal as follows;

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

10. Similarly, in ***Kiilu & Another vs. Republic [2005]1 KLR 174,*** the Court of Appeal stated thus:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
> ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then***

can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

11. To this end a summary of the evidence at trial becomes necessary.

12. Complainant in her sworn testimony testified that she was 13 years old and she was not going to school. She was living with her aunt and her two children and on 21/07/2021 at 11:00pm, she left her aunt's house and went to Appellant's house which was adjacent to her aunt's house. They had talked during the day so she went to his house since they had agreed that she was to go there. It was a one room and he found him there. She slept on his bed and he told her to remove clothes and he also removed his clothes and they did bad manners. He used protection and he did it once. She stayed there up to 2:00am and she left to her house and the older boy asked her where she was from. The next day, a neighbour called her and she went to meet her with her aunt and she told them what had happened. They reported and she was treated.

13. On cross examination, she testified that nobody saw her when she was going to his house and she did not tell her

cousins where she was going. She did not wake them up as they were sleeping. That she did not know Stella. That he was a security guard where her aunt was working. That she could not report as she did not want them to know and that she was not forced. That she knew who reported about the incident. The plot had two houses but none of them saw him. That she had not planned against him with her aunt and she was not forced to record a statement. That her cousin told her neighbour that she was not in the house.

14. PW2, complainant's aunt testified that she had two houses at a distance and she was living in one house and her children in another house. The complainant went to stay with her. On 22/07/2021, she went to pay electricity bill to the caretaker who asked her if she was aware that the complainant did not sleep in the house. She told her that the complainant left the house and returned at 2:00am. She called her elder son and asked him whether Eunice had slept in the house and he said that she slept with Appellant. She contacted the complainant and asked her why she was not telling her and she said that she slept with the Appellant up to 2:00am. She reported and took her for treatment.

That she did not know him before and that she did not force her to tell her where she slept. She testified that the complainant was 14 years old.

15. On cross examination, she testified that Stella was the Appellant’s wife but they separated. That she had a case of assault against him and there was no time that he called her to ask for electricity money. She said that PW1 slept at his place and that there were other people living in the plot but they said they did not want to be involved in the case. That she did not force the complainant to say that she slept with him. Stella was not in his house and she did not go to his house. That she had never threatened him before.

16. PW3, a minor testified that on the night of 21/07/2021 while sleeping, he heard a knock on the door and his cousin, the complainant went out. His younger brother was also in the house. After the complainant left, they slept. He heard some noise on the roof at around 2:00am and he woke up but he could not see the complainant. He told his brother and they called mama Muthama who was their neighbour. Later, he saw the complainant being escorted by the appellant who was their neighbour. She asked her

where she was and she said she will tell them the following day. That when his mom went to pay electricity at Mama Muthama, she was asked if they had told her what had happened. He identified the Appellant.

17. On cross examination, he testified that his mom was asked if they had told her anything by Mama Muthama. That he did not see the person who was knocking on the door but he saw him while escorting the complainant at 2:00am. She told them that she was going for a short call and never said she went to his house. He told his mother what the complainant did. That he knew the Appellant's wife, Stella, and one time, his mom had differed with his wife. The Appellant was a night guard.

18. PW4 testified on behalf of the initial investigating officer who was on transfer. She testified that she took over the matter when investigations were complete and her duty was to bond witnesses. She produced the investigation diary as Pexhibit4. That she was objecting to recalling of witnesses as they could not be traced since they left after corona. She produced the court order to take the complainant for age assessment as Pexhibit5 and age assessment report as Pexhibit6.

19. PW5, the doctor testified that he filled the P3 form for the complainant who was 13 years old. On genital examination, her hymen was old torn and it was not a recent sexual engagement. There were no unusual findings. There were no spermatozoa, pregnancy tests, HIV and VDRL tests were negative. That the incident of sex was old and he produced the P3 from as Pexhibit2. 7 days could be termed as old and she was not a virgin. He testified that the PRC form was filled by Gichuki, a clinician but she was not available. That the P3 form is filled using the PRC form. PRC form did not show anything remarkable and he produced it as Pexhibit3. He testified that he had an age assessment report made at Meru teaching and referral hospital.

20. On cross examination, he testified that there were no visible injuries and degree of injuries was harm because of psychological trauma. Broken hymen is evidence of penetration.

21. The Appellant in his sworn defence testified that he was a security officer at Tima flour and on 06/07/2021, he went on leave and he went to his home in Rumuruti. On 23/07/2021, he went back to work and he arrived at Timau at 4:00pm and he produced a receipt as DMFI1. He went to an Mpesa shop and

realised that he did not have an identity card and so he went to police station where he was arrested and was informed that investigations will be done. He was charged with an offence he did not know.

22. DW2 testified that the Appellant was his neighbour and on 06/07/2021, he met him. He was from work. He said he was on leave and they stayed in Rumuruti up to 23/07/2021. He later told him that he had been arrested.

23. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved. Tied to this, the court has to resolve the issues relating to submissions on constitutional and statutory transgressions that the Prosecution is faulted for.

24. I propose to deal with the issues of law raised in the Appellant's submissions first as the outcome therefore may determine whether it will be necessary to consider the appeal on its merits.

25. In his submissions, the Appellant submitted that his right under **Article 49 (1)(f)(i)(ii)** of the **Constitution** was violated as he was held in police custody for 10 days before being arraigned in court.

26. It is trite that not all cases of constitutional violations shall lead to an accused person being acquitted. In ***Douglas Komu Mwangi V R [2013] eKLR*** the Court of Appeal stated:

> ***"There are many instance in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessary entitle the suspect to an acquittal. (See Dominic Mutie Mwalimu – v – R Criminal Appeal No. 217 of 2005; and Evanson K. Chege –v- R Criminal Appeal No. 722 of 2007). This court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In Julius Kamau Mbugua –v – R Criminal Appeal No. 50 of 2008, this court stated that:-***
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> ***"A trial court takes cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused***

has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of criminal court and which is by section 72(6) expressly compensatable by damages.'

In Julius Kamau Mbugua –v- r Criminal Appeal No. 50 of 2008, this court upheld the proposition that even where violation or right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrate that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit."

27. It is submitted that the charge sheet was defective in two fronts, one the charge sheet omitted the word unlawful and two, the time when the offence was committed was not indicated. The court in ***Nyongesa v Republic [2022] KEHC 12476 (KLR)*** held that;

"On whether the charge sheet was defective for omitting the words 'unlawful' and 'intentionally', this court finds that the particulars of the offence fully captured the offence the appellant was charge with. The same was proper. It was clear from the court's record that the appellant understood the charges preferred against him and entered his plea of "not guilty" once they were read out to him. He ably defended

himself during the entire trial. He suffered no prejudice in the manner in which the charge was drafted."

28. Expounding on a similar challenge to a charge, the court in ***Patrick Kioko Mulwa v Republic [2018] KEHC 4202 (KLR)*** held that;

> ***"It is obvious that an offence stipulated under any law can never be lawful. The omission to include the word "unlawful" cannot therefore render a Charge Sheet defective. There is nothing in the said provision that requires that the word "unlawful" must be included when drafting the charge. Notably, the word "unlawful" is missing from the provision. Having said so, Section 382 of the Criminal Procedure Code provides that no finding, sentence or order passed by a court of competent jurisdiction can be reversed or altered on account of an error or omission in a charge…..In the absence of any demonstration by the Appellant of what prejudice he suffered due to the non-inclusion of the word "unlawful" in the Charge sheet, this court was not persuaded to find that the said Charge Sheet as drafted was defective. His plea was proper as the said facts of the offence were read out to him."***

29. With respect to omissions of time in the charge sheet, I find guidance in the court of appeal decision in ***Michael Saa Wambua & another v Republic [2017] KECA 236 (KLR)***- where the court held as follows;

> ***"In response to issue number 1, it is not disputed that the charge sheet as framed does not indicate the time when the offence was committed. Sections 134 sets out the prerequisites of any criminal charge while section 214 provides for curative procedures for any defective charge through an***

amendment and or substitution. In Kimeu versus Republic [2002] 1KLR 756 the Court held inter alia that:

"The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction especially with conflicts that are minor or of such nature that no discernible prejudice is caused on the accused."

In the instant appeal, the appellants have not demonstrated in their submissions before us what prejudice they suffered due to the failure to indicate in the charge sheet the time when the offence was committed. In view of the clear provisions of section 382 CPC no prejudice or injustice was occasioned to the appellants by the failure of the prosecution to indicate in the charge sheet the time the offence was committed, especially when there is undisputed evidence from both sides, that appellants had been drinking in the deceased's bar on the very night when the deceased was robbed and murdered. The evidence tendered by either side demonstrated clearly that the incident occurred at night. We also note that the issue was never raised before the two courts below. It is being raised for the first time before us. We are not therefore persuaded that the appellants are genuinely aggrieved by this omission. It has definitely come as an afterthought. We find no merit in it and it is accordingly rejected."

30. It is the Appellant's submission that *voir dire* was not conducted on PW1 who was 13 years old which undermined the reliability of her evidence.

31. The trial court when the complainant was testifying noted on record that she was mature and could proceed on oath. The complainant testified that she was 13 years old and she was

not going to school. The age assessment report placed her age in between 13 years and 14 years old.

32. The court in ***George Kioko Nzioka v Republic [2020] eKLR,*** while being guided by the case of ***Maripett Loonkomok v Republic [2016] eKLR*** where in ***Maripett*** reviewed cases going back to ***Kibageny Arap Kolil v Republic [1959] EA 82*** which held that:

> ***"There is no definition in the Oaths and Statutory Declaration Ordinance of the expression 'child of tender years' for the purpose of Section 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years."***

33. In ***MK versus Republic [2015] eKLR,*** the court held that voir dire examination is done where a child witness is a child of tender years. The Court of Appeal concluded by saying that a child of tender years is one who is fourteen (14) years and below.

34. In the instant case, the trial court observed that the complainant appeared to be mature and did not see the need to conduct voir dire examination. She was 14 years. The court's finding on this issue cannot be faulted.

35. The Appellant submitted that he was denied an opportunity to recall PW1 and PW2 even after making an

application to do so. It is clear from the record that he applied to recall PW1 and PW2 on 13/01/2022. The trial court indicated that it was a sexual offence and the complainant who was a minor could not be recalled for it will be subjecting her to psychological torture. He further directed PW2 to be recalled but PW2 was not recalled. He also made a written application for them to be recalled but when the investigating officer was testifying, she stated that the witnesses could not be traced since they relocated after Corona.

36. **Section 146 (4)** of the **Evidence Act** provides:-

> ***"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross examination, and if it does so the parties have the right of further cross-examination and re-examination respectively."***

37. The above provision allows the court to allow recall a witness who has already testified. By the use of the word "may" full discretion is given to a court in an application to recall a witness to decide whether the recall is allowed.

38. I have anxiously considered this particular complaint by the Appellant. He by right is entitled to a fair trial. The order of a recall of a witness is a discretionary one. I note the witnesses sought to be recalled had testified and subjected to unlimited cross examination. The trial court exercised discretion against the recall

of PW1, the minor in a bid to protect her from trauma associated with going through the rigours of recounting the ordeal. For such a recall there must be very compelling reasons advanced. I do not find any such reasons presented before the trial court and this court lacks the basis to interfere with the exercise of discretion.

39. In respect of the recall of PW2, again no sound reasons were given why the witness was to be recalled. The court acceded to the request but the investigating officer indicated the witnesses had relocated after corona. The court takes judicial notice of the corona pandemic and its effects on the populations, not only in Kenya but world over whereby people closed businesses, moved to other areas, others died and there was general disruption of life. It was a plausible explanation the witness had relocated. No prejudice was occasioned to the Appellant as this witness had been called and cross examined and no tangible reasons were laid before the trial court why the recall of PW2 was necessary.

40. On the submission that the case was marred with contradictions and inconsistencies, it is trite law as set out in numerous authorities that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a

witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. (See ***Erick Onyango Ondeng' v Republic [2014] eKLR,*** where the Court of Appeal cited with approval***Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6,).***

41. Further, it is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in ***Njuki & Other Vs Republic (2002) 1 KLR 771*** held that:

> ***"Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indisrepanincies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code".***

42. In ***Richard Munene –v- R Cr. Appeal No. 74/2016 (2018) eKLR*** the court of appeal stated:-

> ***"It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the***

prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it."

43. It therefore follows that the contradictions and inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful and create doubt as to the guilt of the Appellant.

44. I find no merit on any of the points of law raised.

45. Turning to the substance of the Appeal, It is trite that for the charge of defilement to stand, the Prosecution must prove the **age** of the victim (must be a minor), that there must be **penetration** and a clear **identification** of the perpetrator. This is provided for under ***Section 8(1)*** of the ***Sexual Offences Act No. 3 2006***.

46. Proof of age is important in a sexual offense. *In* ***Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR),*** the Court of Appeal stated that:

"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be

proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

47. In the present appeal, the Appellant submitted that age was not proved as there was conflicting evidence as to her age since the complainant testified that she was 13 years old and her aunt testified that she was 14 years. While considering whether age was proved, the trial court observed that the complainant testified that she was 13 years old and PW2 testified that she was 14 years. PW5 testified that she was 13 years old and PW4 produced age assessment report which shows the age was assessed to be between 13-14 years.

48. In this case, age assessment was conducted by the dentist in charge in Meru level 5 hospital and a report was produced by PW4, the investigating officer. The report indicated that the approximate age was between 13 and 14 years.

49. The Court of Appeal in ***Thomas Mwambu Wenyi v Republic (2017) eKLR*** cited with approval ***Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000*** which held that:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the

victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."

50. In ***Moses Nato Raphael v R {2015} eKLR*** the court of appeal stated as follows:

> ***"On the challenge posed by the uncertainty in the complainants age, this Court had occasion to deal with similar issue in Tumaini Maasai Mwanya v R Mombasa CRA No. 364 of 2010 where the Court 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 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."***

51. And in ***Macharia v Republic [2023] KECA 1556 (KLR)*** the court of appeal stated as follows;

> ***"On the issue of the age of PW1, PW4 the investigating Officer produced the medical assessment report placing the age of PW1 as 9 years old. The initial charge sheet had placed his age as 11 years. This age was later amended to read 9 years. In our view the age difference (if any) did not prejudice the appellant as the sentence for a child of 9 years or 11 years is provided for in one section being s.8(2) of the Sexual Offences Act. It provides;"...a person who commits an offence of defilement with a child aged eleven years or less shall upon***

conviction be sentenced to imprisonment for life." We also find that there was nothing offensive by PW4, the investigating Officer producing the medical assessment report on the age of PW1. Section 77 of the* Evidence Act *permits such production it provides; -"In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

52. Based on the medical evidence produced, am satisfied that the complainant was 14 years old at the material time and therefore a child.

53. With respect to penetration, the complainant testified how she had agreed with the Appellant to meet in his house and she went there at night and he ordered her to remove her clothes and they did bad manners. He used protection. Her cousins saw her leaving and she lied to them that she was going for a short call. PW3 testified that she did not return and so they slept but woke up at around 2:00am due to some noises on the roof. They called

Mama Muthama since the complainant was not in the house. Mama Muthama told them that the door was locked from outside. PW3 further testified that he saw the Appellant escorting the complainant at around 2:00am. PW2 also testified that she was informed by the caretaker that the complainant did not sleep in the house and when asked where she was, she said she slept at the Appellant’s house.

54. PW5, the clinician testified that there was nothing unusual in the complainant’s genetalia. He testified that though the hymen was broken, it was old.

55. It is trite law that defilement can be proved by the evidence of the victim alone.

56. This is in line with **section 124** of the **Evidence Act** which states that;

> ***“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."

57. I have perused the judgment of the learned magistrate and note that he based the conviction on the complainant's evidence. The trial court held that the inevitable conclusion from the analysis of the evidence was that there was ample evidence to prove that penetration did occur. That he carefully considered the testimony of PW1 and PW3 and found that they were truthful. They had no grudge against the Appellant.

58. I have re-evaluated the evidence. PW1 gave a graphic detail of her agreement earlier in the day to go to the Appellant's house, the fact of her going there at 11pm, the request from the Appellant that she removes her clothes as he also removed his, the engagement in protected sexual intercourse with the Appellant, her return to the house where she was sleeping with her cousins and her answer when asked about where she was by PW3.

59. There is adequate direct evidence from PW1, a victim of a sexual offence whom the trial court found truthful and the circumstantial evidence of PW3 who realized that PW1 was missing from the room and who saw the Appellant escort her back at 2am.

60. The absence of medical evidence does not necessarily vitiate the conviction of the Appellant and am satisfied there was adequate evidence to prove penetration. It was proved.

61. It is trite law that defilement can be proved even in absence of medical evidence. In ***Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)*** the court held thus;

> ***"the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

62. I have considered the alibi evidence offered by the Appellant in his defence. The Appellant had no duty to prove his innocence. He submitted that his alibi defence was rejected without cogent reasons and that the issue of grudge between him and PW2 was not given much weight. It is to be noted that he did not raise the issue of grudge as a defence during trial. His defence was that he was not at the scene at the material time which was properly rejected by the trial court when the court considered a copy of the receipt that he produced and found that the receipt dated 23/07/2021 did not bear his name. That there was also no evidence from Tima flour that he was on leave as he alleged. The circumstances that led to his arrest in which he asserts that he

went to the police station to report the loss of his identity card and was arrested is in the absence of explanation bizzare.

63. Having weighed the evidence holistically, however, the defence evidence cannot possibly be true. It has been shown that he was present in his house on the material day, lured PW1 to go to his house in the night and she duly went. She has given details of what the Appellant did and the evidence finds corroboration through the circumstantial evidence of PW3.

64. Regarding the identity of the Appellant as the perpetrator of the act, the uncontroverted evidence before the trial court was that the complainant and the Appellant knew each other. They were neighbours and this was therefore evidence of recognition and not identification of a stranger.

65. Regarding sentence, it is noteworthy that the Appellant did not challenge the sentence of 15 years that was imposed by the trial court. I do note however that under the Sexual Offences Act, the charge herein fell in the bracket for a term of 20 years imprisonment upon conviction. Noting that there is no notice of enhancement served on the Appellant, I shall let the matter lie.

66. With the result that the appeal herein lacks merit and is dismissed.

Dated signed and delivered virtually this 5th day of November, 2025.

A.K. NDUNG'U

JUDGE