REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E057 OF 2023

HOWARD OMWOHA ……………………………………………………. APPELLANT

VS

REPUBLIC……………………………. …………………………………RESPONDENT

(Being an appeal from the Judgement of Hon. A MUNYUNY in the Chief Magistrate's Court at Migori S.O.A NO. E009 of 2022 delivered on 10th August 2023)

JUDGMENT

The Appellant Howard Omwoha was convicted and sentenced to serve 15 years' imprisonment for the offence of defilement contrary to **section 8(1) as read with section (3) of the Sexual Offences Act No. 3 of 2006**.

The particulars of the offence are that on diverse dates between 1st March 2021 and 30th April 2021 at Rapogi police post, Uriri Sub-County in Migori County within the republic of Kenya, intentionally and unlawfully caused his penis to penetrate the Vagina of J.A.O a child aged 16 years.

The Appellant was aggrieved by the whole judgement and lodged his petition of appeal which was undated on the following grounds:

1. **That the offense herein was not proved.**
2. **That the learned Trial Magistrate disregarded all the open discrepancies in the evidence of the complainant thereby occasioning an injustice on his part.**

3. **That the Trial Magistrate misdirected herself when she failed to critically analyze the entire evidence and realize that the inconsistencies could not sustain a conviction.**
4. **That based on the foregoing the sentence meted was illegal in its entirety.**
5. **That he begs to adduce more grounds once supplied with the lower court records.**

Reasons wherefore he prayed that the appeal be allowed, conviction quashed and sentence set aside or any other order deemed fit to grant.

The Prosecution's case was supported by the evidence of nine (9) witnesses who testified as follows: -

PW1 the Complainant herein testified that she was at the Appellant's house located at the DO's office area in the police quarters taking care of the Appellant's child at the request of his wife who had gone to the market. That while still therein, the Appellant came home at around 6:30Pm dressed in police uniform and went to the bedroom where he changed into civilian clothes and left the house. It was PW1's testimony that the Appellant returned shortly at around 7Pm, greeted her and asked her to have sex with him but she refused and the Appellant led her by the hands to his bedroom where he undressed her and took his penis which he inserted into her vagina and after the act, gave her Kshs. 1000/= to buy her silence. That she then went home and her mother arrived at around 8Pm but she did not disclose to her what had happened. PW1 further testified that it was the month of March or thereabout when the Appellant defiled her and she conceived

as a result of the same. She stated that it was only after she went back to school that she was tested and found to be pregnant that she went to Uriri Police Station with her sister Quinter and recorded statements. PW1 also testified that while home for the half-term break, the Appellant's wife approached her and wanted to settle the issue by paying her Kshs. 3000/= to her family monthly and inquired whether her parents would agree to the arrangement. That on 16/12/2021 she was taken to the Children's office in Awendo where she was taken to Nyamasare for 3 weeks under protection and she delivered on 20/01/2022. PW1 identified the Out Patient Record Book of St Monica Rapogi Mission Health Centre, P3 Form, Mother & Child Health Handbook, Treatment Notes Migori County Referral Hospital, Patient Visit Slip, and Ultra Sound Report marked as MFI 1-5.

On Cross-examination she stated that she did not have her periods in the months of April, May and June and that in her statement she only indicated that she did not get her periods in the month of July. She also stated that she did not record in her statement that Diana had told her that Howard would pay Kshs. 3000/= on a monthly basis since that time Diana had not yet approached her and she recorded the statements with Luciana. She stated that she had a good relationship with her mother but she did not inform her of the same. That the matter was pushed by the Catholic school and she blamed Howard for impregnating her as she had never had sex with anyone else before the incident with Howard and neither did she tell anyone about the incident because she was scared.

PW2 Caroline Anyango Otieno the Complainant's mother testified that when the Complainant came home for her mid-term, she observed that her appearance had changed and that she noticed PW1's

protruding stomach and her complexion which had become lighter and her breasts bigger. That she had a discussion with the Complainant who refused to reveal the last time she had her periods. PW2 stated that one week after the Complainant went back to school, she was called by sister Quinter a teacher at the Complainant's school and summoned to school where she was informed about the pregnancy. It was her testimony that the Appellant met up with her and inquired on the Complainant's well-being and whether the Complainant had mentioned him as the person who impregnated her. That Appellant later spoke to her after Luciana had conversed with her and dropped her back home in his Motor cycle. PW2 testified that she knew the Appellant and that his family used to call upon PW1 to assist with the errands at his house.

In cross-examination she stated that she did not know of any conflicts between Esther and Howard and whether Esther was the girlfriend or wife to the DCIO. That Howard's wife did not speak to her and she only found out that Howard's wife had spoken to her daughter about a payment of Kshs. 3000/= when she returned home one day.

PW3 Sister Teresa Adhiambo Rieko the Complainant's head teacher testified that she learnt of the pregnancy after the Boarding Mistress requested her to see J.A.O on 17/10/2021 on a Sunday and she presented evidence of her pregnancy. That the Complainant later confided in her as mid-term was nearing on 7/11/2021 that it was Baba Audrey the Appellant herein and a police officer that had impregnated her. PW3 informed the OCS of Uriri Police Station who arrived the next day which was on 9/11/2021 to escort the Complainant to the police station and the hospital. She stated that she received a call from the sub county Director of education inquiring if there was a problem with

one of their students and she revealed the truth and later on 25/11/2022 they were summoned to record their statements.

PW4 Sister Quinter Doreen Atieno the Boarding Mistress at the Complainant's school testified that on 17/10/2021 at around 9-10 Am the matron told her that she suspected J.A.O was pregnant based on her appearance and observation and PW4 called and sent the Complainant to the clinician at St. Monica's Rapogi for a pregnancy test which turned out positive and 6 months. She stated that she spoke to the Complainant a little bit and the Complainant revealed that she was about 6 months pregnant but she appeared tensed so PW4 counselled her. She then informed the girl that they had to let the head teacher and her parents know of the same and the girl preferred to reveal the information to her mother and the head teacher. It was PW4's testimony that she accompanied the Complainant to Uriri Police Station on 9/11/2021 to record her statement at the instructions of the head teacher and later to the hospital for her examination. She stated that the Complainant later disclosed to her on 25/11/2021 after disclosing to the head teacher that Baba Audrey who is the Appellant herein was the one responsible. She identified St. Monica Rapogi Mission Health Card and the Ultra Sound Report Form as MFI 1 & 5.

PW5 John Osewe Oloo the Class teacher to the Complainant gave evidence that the minor was a student in his class admitted on 28/7/2021 and that she did not report back to school after half-term.

PW6 Justus Magati a Clinician from Migori County Referral Hospital examined and treated the Complainant on 9th November 2021 at around 11:30 Am and gave evidence that she was about 32 weeks pregnant and that her hymen was not there as it was already broken.

Upon Cross-examination he stated that the Complainant’s last menstruation was on 15/03/2022 and since the examination had been done months later, there was no evidence of defilement which is bruises and or lacerations on the vagina. He stated that he ordered an ultrasound to confirm the pregnancy and it revealed that the pregnancy was 32 weeks. In re-examination he confirmed that it was a case of possible defilement due to the pregnancy and the missing hymen. He produced the documents he had in respect to the Complainant as; Treatment Notes from Migori County Hospital and Another treatment note from St. Monica Rapogi Mission Hospital, P3 Form Dated 9/11/2021, Outpatient Booklet for Antenatal mothers, PRC Form and Ultra Sound Report.

PW7 Judith Oloo a Clinician at Migori Referral Hospital confirmed PW6’s statement and produced the P3 and PRC Forms as evidence and stated that she authored and signed both the documents.

PW8 PC Luciana Akoth Moses testified that she escorted PW1 in company of a Reverend Sister to the Gender office where she interrogated the complainant at the instructions of the OCS who revealed that it was the Appellant who impregnated her around April. That thereafter she escorted the minor to the hospital for examination and to the antenatal care unit for enrollment in the company of a colleague. She stated that she then recorded their statements and because the file involved a fellow officer the OCS instructed her to forward the file to the DCI at Uriri. On cross-examination she stated that she only did part of the investigations and forwarded the file after recording the minor’s statements.

PW9 Dominic Wambura a police officer at Uriri testified that on 25/11/2021 he was instructed by the Chief Inspector to start preliminary investigations into the defilement matter involving a police officer attached to Rapogi. That on 15/11/2021, he recorded the statements of 8 witnesses and his colleague detective Joshua Adenya recorded the minor's statement and the Appellant was arrested on 15/3/2022 and charged with the offence herein. On cross-examination, he stated that the Complainant recorded two statements; one with PC Luciana and another with Detective Joshua Adenya who was his colleague. He clarified that the initial statement was not necessary as it was recorded by a police officer attached to the same station with the Appellant and stated that any police officer could record a statement as there are joint investigations at times. He stated that the alleged defilement was discovered by the teachers in November when the Complainant was found to be pregnant and she mentioned the Appellant herein hence the charges against him.

The Accused was placed on his defense and he called 4 witnesses including himself to support his case.

DW1 Howard Omwoha the Appellant denied the offence herein. He testified that the case was a set up by a colleague at his work place and maintained that he resided at Uriri at the time the offence was committed and that he did not own any house at Rapogi by then. He denied being present at the place the offence was committed and denied having sexual intercourse with the Complainant. He also stated that the case was framed against him due to a squabble at his place of work with a female colleague, Esther who had threatened him and offered to get rid of the case if he paid her Kshs. 300,000/=.

DW2 Diana Auma Omwoha the Appellant's wife testified that it was impossible for the Complainant to have been defiled by the Appellant around March since they lived in Uriri by then and not in Rapogi. She stated that the Appellant was working at Rapogi and would commute daily to work from Uriri.

DW3 the Deputy County Commissioner's driver testified that he had known the Appellant for a year while he still resided at Uriri. He stated that on 5th of May 2021 the Appellant requested his help to relocate to Rapogi after the alleged time of the offence.

DW4 PC Emmanuel Ojiangu testified that he was a Police Officer attached at Rapogi and that on 5/5/2021 in the company of DW3 in the evening, he assisted to relocate the Appellant from Uriri to Rongo.

This Appeal was canvassed by way of written submissions.

The Appellant's submissions are undated and he Amended the grounds in the petition of Appeal as follows: -

1. **That the prosecution did not prove the offence beyond reasonable doubt.**
2. **That, there having been a complaint of pregnancy from the defilement, there should have been a DNA proof of the same.**
3. **That the Complainant's medical examination was of no value as it was done six-seven months after the alleged incident.**
4. **That the sentence meted was harsh, excessive and illegal in the circumstances.**

It was submitted that the prosecution ought to have proved the key ingredients of the offense of defilement namely; Age of the Complainant, Proof of penetration and Proof that the Appellant was the perpetrator of the offense as held by the Court of Appeal in **CRA 32 of 2017 G.O.A V Republic (2018).**

On Age of the Complainant the Appellant submitted that he did not contest the Complainant's Age as 16 since the same was confirmed through her mother and her Certificate of Birth marked MFI-7 as P Exhibit 7 as well as the Complainant's testimony.

On Proof of penetration, the Appellant recounted the evidence of PW6 and PW7 the Clinical doctor and Clinical officer as well as PW4 and argued that the medical reports by the doctors never indicated the cause of penetration or pregnancy. He stated that conception only happens through penile or modern fertilization and conception methods and the medical records and doctors' testimonies do not point to penile as the cause of penetration hence pregnancy and it was improper for the Trial Court to tie up the pregnancy to the Appellant in order to make a finding of the same. That the Trial Court ought to have taken into account all the evidence in its entirety.

On whether the Appellant was the perpetrator of the offense, it was submitted that the Appellant said he was living in Uriri and did not have a house in Rapogi when the Alleged offense took place in March. That the prosecution evidence on record cannot enable the Trial Court make an informed conclusion that the Appellant was the person who defiled the Complainant and caused the pregnancy. That the doctors' reports and medical records produced in court did not tie the Appellant

with the defilement that resulted into the pregnancy thus it was improper for the Trial Court to tie up the pregnancy to the Appellant.

That on Corroboration, the Trial Court relied on the case of **J.W.A v Republic (2014) EKLR** where the Court of Appeal observed that:

> **"We note that the appellant was charged with a sexual offence and the proviso to Section 124 of the Evidence Act clearly states that corroboration is not mandatory."**

The Appellant argued that in the said case of **J.W.A v Republic (Supra)** the medical examination was conducted immediately after the offense was committed and the victim was not pregnant and therefore it was not in dispute that the alleged offence was perpetrated by the Appellant. That unlike in the present case or appeal where the evidence is that the report to the police and the medical examination were made when the Complainant was pregnant and was useless for determining whether the Appellant was the one who penetrated the Complainant thus making the causal connection.

He further submitted that there was a child born of the alleged defilement but NO DNA testing was done and the victim delayed in reporting the alleged defilement for 6 months. He argued that Section 124 of the evidence act was not enacted to enable a sloppy approach to investigations or to lower the standard of proof which is beyond reasonable doubt. That PW9 PC Wambura never conducted investigations as required by visiting the premises of the purported scene of crime in Rapogi to establish whether indeed the Appellant lived there at the time of the alleged offense that the neighbors would have confirmed to the court. That the Investigating Officer did not interrogate DW2 on the same during Cross-examination.

The Appellant also submitted that the Complainant being the only eye witness, it was necessary to have a DNA test done to prove whether the he was the father of the child born out of the alleged defilement. He relied on the case of **Emmanuel Japala v Republic (2019) EKLR** where it was stated that: -

> **"The charges facing the appellant were very serious in nature: they attracted a sentence of life imprisonment, thus the prosecution had a mandate to carry out the DNA testing to establish the truth."**

It was also submitted that DW2 the Alibi raised by the Appellant ought to have shed more light on whether she called the Complainant into her house to attend to her child and go to the market. That the prosecution did not however raise any questions with regards to that to confirm the same yet they relied on evidence that DW2 called the Complainant for such purposes. That DW4 who was present at the station during the alleged time of the commission of the offense stood firm in court in his evidence.

The Appellant also Submitted that the P3 forms produced and relied upon in court were materially and procedurally defective to the effect that they were signed by PW& Judith Oloo who was on interdiction at the time of filling the P3 form. That being on interdiction, she lacked capacity to take part in a matter of such intensity.

It was also submitted that the statements recorded and relied upon were never really recorded in the presence of the Complainant and her mother. The Complainant mentioned that she only recorded one statement by PC Luciana and the statement recorded by Joshua Adenga has no evidence to back up that the same was recorded by or

on behalf of the Complainant. The Appellant also argued that the Charge sheet was defective in that it gave diverse dates of the commission of the offence but the Appellant was categorical that it was in the month of March.

On the sentence, it was submitted that the sentence of 15 years' imprisonment was harsh and excessive considering that the Appellant mitigated, and had been serving in the police service with no previous criminal or disciplinary records.

In conclusion, he submitted that the prosecution evidence did not prove the case beyond reasonable doubt and no DNA test was conducted or ordered by the Trial Court as requested by the Appellant during cross-examination of PW9. As such he urged the Court to quash the conviction, set aside the sentence and acquit him.

The Respondent's Submissions are dated 7th March 2025 and were filed on 19th March 2025.

On whether the offense of defilement was proven to the required standard thereby warranting a conviction, it was submitted that the three ingredients of the offense; Age of the Victim, Penetration and Identification of the perpetrator were all proven to the required standard.

On the ground that there was no DNA proof that the Appellant was the father of the Complainant's child it was submitted that the fact that a DNA test was not carried out to ascertain paternity of the child was not fatal to this case as the facts remain that the victim was defiled and there was sufficient evidence indicating that the Appellant was the perpetrator. That the Appellant also had an opportunity to request for a DNA test to be carried out but he did not and bringing up the Issue

on Appeal was an afterthought. The Respondent relied on the Court of Appeal case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** where it was stated:

> **"An essential ingredient in the offence of defilement is penetration not impregnation. In F O D - v -Republic [2014] eKLR, it was stated in order to secure a conviction for the offence of defilement under the Sexual Offences Act, the prosecution must establish that the person has committed an act which causes penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."**
>
> **The appellant asserts he is not the person who impregnated the complainant. Whether the victim of a sexual offence is impregnated or not is irrelevant to the ingredient of the offence of defilement. The appellant contends that no DNA was conducted to prove that he was responsible for impregnating the complainant. In Aml v Republic [2012] eKLR (Mombasa), this Court upheld the view that: "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."This was further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated: "… [The] absence of medical examination 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."**

Guided by the foregoing judicial decisions, we are satisfied that the ground that no DNA was conducted on the complainant has no merit in this appeal. We are further satisfied that the appellant was identified by way of recognition as the person who committed the offence as alleged. We find no error of law on the part of the learned judge in upholding the conviction of the appellant. Accordingly, we affirm and uphold the conviction of the appellant for the offence of defilement."

On whether or not the sentence meted on the Appellant by the Trial Court was harsh, the Respondent relied on the case of **Benard Gacheru v Republic [2002] eKLR** where the court stated that:

"**"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**

It was submitted that the sentence issued by the Trial Court was sufficient given the circumstances of the case.

In conclusion the Respondents submitted that the Appeal lacked merit as the prosecution proved their case beyond reasonable doubt and that the sentence imposed by the Trial Court was adequate given the circumstances of the case. This court was urged to dismiss the Appeal.

Analysis and Determination

In a first appeal, the duty of the court was stated in **Mark Oiruri Mose vs. R (2013) eKLR thus**;

> **"…. the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."**

Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issue for determination are: -

1. **Whether the prosecution proved the offense of defilement beyond reasonable doubt.**
2. **Whether a DNA test/proof was necessary to establish if the Appellant committed the offence of defilement and was therefore responsible for the pregnancy for which the Complainant bore a child.**

3. **Whether the Appellant's defence of alibi was considered and whether it could challenge the prosecution's evidence.**
4. **Whether the charge sheet and P3 form was defective**
5. **Whether or not the sentence meted out by the Trial Court was harsh in the Circumstances of the case.**

On whether the prosecution proved the offense of defilement beyond reasonable doubt and their evidence was consistent, Section 8(1) of the **Sexual Offence Act No. 3 of 2006** provides that:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

In this regard, the offence of defilement is anchored on three (3) main ingredients namely; (1) The Age of the victim, (2) Penetration, and (3) The Proper Identification of the Perpetrator as was established in **George Opondo Olunga v Republic [2016] eKLR.**

On proof of age the Court of Appeal in **Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR**) 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."**

Likewise, the Court of Appeal in **Edwin Nyambogo Onsongo vs Republic (2016) eKLR** stated as follows in respect of proving the age of a victim in cases of defilement:

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

PW1 the Complainant testified that she was 16 years old at the time of the incident and the same was confirmed by her mother PW2. The Complainant's Birth Certificate was produced in court as P Exhibit 7. The Age of the Complainant was thus proved to the required standard.

On proof of Penetration, Section 2 of the Sexual Offences Act defines penetration as-

> **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

This definition has been given judicial interpretation in the case of **Mark Oiruri Moses V R [2013] eKLR** when the Court of Appeal stated thus:

> **Many times the attacker does not fully complete the sexual act during commission of the sexual act. That is the reason why the law does not require that evidence of**

spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.

This position was fortified by the same court, differently constituted, in **Erick Onyango Ondeng v Republic [2014] eKLR** where it was held:-

In sexual offences, the slightest penetration of female sex organ is sufficient by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen is raptured.

PW1 gave evidence that on the material day at around 7pm the Appellant asked her to have sex with him but she refused and the Appellant led her by the hands to his bedroom where he undressed her and took his penis which he inserted into her vagina and after the act, gave her Kshs. 100/= to buy her silence. That she then went home and her mother arrived at around 8Pm but she did not disclose to her what had happened.

PW3 the Head Teacher at the school where the Complainant was a pupil testified that on 17th October 2021 the Boarding Mistress PW4 informed her that the Complainant was 5 to 6 months pregnant and the pregnancy results from the doctor were available. PW3 interrogated the Complainant as to who was responsible and she said it was a police officer. PW3 called the OCS Uriri and reported. PW4 said the Complainant told her it was baba Audrey who defiled her and gave his name as Howard.

PW6 a Clinical Officer at Migori County Referral Hospital attended to the Complainant on 9th November 2021 when she was taken by 2 police officers from Uriri on allegations of having been defiled in April 2021. He said that on examination he found the Complainant was about 7 months pregnant and that her hymen was broken although it was not freshly broken. He said that the P3 was filled by his colleague Judith who testified as PW7 and reiterated what PW6 said

Based on the foregoing, the evidence of PW1 was corroborated by that of PW6 and PW7 who examined and treated her and noted that it was a possible case of defilement and that the pregnancy was the best proof of penetration even though the examination was done several months later.

On Identification of the perpetrator it was well observed in **Stephen Kimari Gathano v Republic [2022] eKLR** where the court stated that:

> **"It bears repeating that the Appellant was a person known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was Mzee was Purity- She knew the accused as such."**

PW1 and PW2 testified that the Appellant was well known to their family and on occasion, the Appellant and his wife would request PW1 to assist them with either house chores or taking care of their baby and they knew and referred to the Appellant as "Baba Audrey". The Appellant disputed in his submissions that he was the father of the child born out of the alleged defilement and argued that a DNA test could prove the same and failure to conduct DNA was proof that he

was not the perpetrator of the offense herein. The Appellant raised the issue of the DNA test with the Trial Court during cross-examination of the prosecution witnesses particularly PW9. However, the Trial Magistrate in her judgment did not mention or consider whether or not it was necessary to conduct the test to ascertain the Appellant’s claim and neither did she give reasons for not considering the same.

The lack of a DNA test in a defilement case does not automatically lead to an acquittal, as DNA evidence is not a mandatory requirement for conviction. The prosecution can still prove its case using other credible and consistent evidence, such as the victim's testimony, medical reports, and positive identification of the accused.

It is trite that defilement can be proved not only by medical evidence but also by way of oral and circumstantial evidence. In Aml v Republic [2012] eKLR (Mombasa), the Court upheld the view that: “The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

This position was further affirmed in the case of **Kassim Ali v Republic Cr. App. No. 84 of 2005** (Mombasa) where the court stated:

> **“… [The] absence of medical examination 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.”**

As to whether the Appellant was the father of the child born out of the alleged defilement, the court in **Evans Wanjala Wanyonyi v R {2019} eKLR** stated thus:

> **“An essential ingredient in the offence of defilement is penetration and not impregnation.”**

Further in the case of **Williamson Sewa Mbwanga v R {2016} eKLR** the court stated:

> **“It is patiently clear to us that whilst paternity of PM’s child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not matter that the sexual offence has not been connected. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM’s child, which is a defilement question from whether the appellant had defiled PM.”**

DNA test was not done and the Trial Magistrate did not make any findings about it but there was evidence by the Complainant, PW6 and PW7 that the complainant was defiled and the Appellant identified as the perpetrator. The Trial Magistrate believed and rightly so that the offence of defilement had been proved beyond reasonable doubt.

The Appellant and his witnesses raised an alibi**,** claiming he was working at Rapogi and residing in Uriri from where he commuted daily and could not have defiled the Complainant.

It was submitted that PW9 PC Wambura never conducted investigations as required by visiting the premises of the purported scene of crime in Rapogi to establish whether indeed the Appellant

lived there at the time of the alleged offense that the neighbors would have confirmed to the court. That the Investigating Officer did not interrogate DW2 on the same during Cross-examination.

DW3 the Deputy County Commissioner's driver and DW4 PC Emmanuel Ojiangu testified that they had known the Appellant for a year while he still resided at Uriri and worked with him at Rapogi but that on 5th of May 2021 the Appellant requested them to help him relocate to Rapogi after the alleged time of the offence.

PW8 Luciana Akoth Moses initially investigated the offence but because she was a colleague to the Appellant the investigations were taken over by PW9 Dominic Wambura from DCI and detective Joshua Adenya recorded a second statement from the Complainant. The Appellant said that he was framed by a colleague known as Esther but the said Esther was not a witness and PW8 and PW9 were not cross examined concerning the said officer and alleged grudge between her and the Appellant.

PW8 was said to be a colleague of the Appellant at Rapogi and if it is true that he was commuting from Uriri to Rapogi for work during the period in question she could have been best placed to exonerate him.

DW2 Diana Auma Omwoha the Appellant's wife testified that it was impossible for the Complainant to have been defiled by the Appellant around March since they lived in Uriri by then and not in Rapogi. She stated that the Appellant was working at Rapogi and would commute daily to work from Uriri. She also denied knowing the Complainant. However, PW1 and PW2 said the Appellant and his wife were their neighbour and the Appellant was known to them as Baba Audrey, DW3 confirmed that in deed she is also known as Mama Audrey. PW1 and

PW2 said that Appellant and his wife could occasionally call the complainant and her siblings and could send them on errands and the complainant could take care of their baby sometimes. PW1 and PW2 said that after it was discovered that the complainant was pregnant DW2 approached the complainant and talked to her offering to pay Kshs. 3,000 per month to forestall the charging of the Appellant. There was no reason the Complainant could have identified the Appellant a police officer as the perpetrator if he was not the one who committed that offence. DW2 did not deny that she approached the Complainant with the offer that the Appellant wanted to pay Kshs. 3,000 per month and asked her whether her parents would accept the offer.

While PW8 was investigating the case the Appellant went to the Complainant's mother one morning at 6.00am and inquired about the Complainant and said he had information that the Complainant had mentioned his name as the one who had made her pregnant. That he informed her that she was required at Uriri Police Station and led her to a certain plot where Luciana PW8 came and they started talking after the Appellant was told to go outside. PW2 said that PW8 told her that they would go by her instructions as the mother of the Complainant in the investigations as the matter involved a school child and it was serious. PW2 said that when Luciana left she remained with the Appellant who talked to her for a while and took her back home on his bodaboda. If the Appellant was not residing in Rapogi at the time of the alleged offence then the question ought to have been raised with PW2 and PW8 and the Appellant ought to have explained where he came from that early in the morning when he went to PW2's house. Did he leave Uriri to go and summon PW2 that early over a report that

incriminated him? PW2 also said that she did not know if the Appellant and Esther had any differences and she had never been to Esther's house.

The fact that the Complainant was defiled was discovered while she was in school and PW3 the Head Teacher, PW4 the Boarding Mistress and PW5 the class teacher testified how the matter was reported to the police when the Complainant told them that she had been defiled by the Appellant. These witnesses did not know the Appellant and had no reason to have a grudge towards him.

In **Kiarie v Republic [1984] KLR 739**, the Court of Appeal held that an alibi, when raised late in the trial and unsupported by evidence, may not displace strong prosecution evidence. All along the Appellant did not raise the defense of alibi during investigations, when he appeared in court to take plea and even during cross examination of the prosecution witnesses.

While the burden of disproving an alibi defense rests with the prosecution, once evidence is adduced placing the accused at the scene, the alibi must fail.

On the issues of defective P3 form and defective charge sheet, Section 382 of the Criminal Procedure Code provides

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided

that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The Court of Appeal gave guidance on determining whether a defect in a charge is fatal in **Benard Ombuna v Republic [2019] eKLR** as follows:-

> **"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."**

The defect raised by the Appellant was to the effect that the P3 form produced and relied upon was materially defective as it was filled and signed by PW7 who was on interdiction and the Complainant was examined by Justus Mwindi PW6 in the presence of another CO Immaculate and not PW7. This court upon perusal of the proceedings in the trial court noted that the Complainant was recalled to identify treatment notes and Post Rape Care form issued and filled when she was initially examined and treated at Migori County Referral Hospital. PW7 testified and said she was with Justus Muindi PW6 when she examined the Complainant while Justus who was her colleague took notes and that by the time P3 was being filled Justus had left and she is the one who filled it. PW7 was back to work by the time of her testimony having been cleared of the issue for which she was

interdicted. This court does not find that there are any defects in the P3 and/ or charge sheet as alleged by the Appellant to warrant unsettling the finding of the trial court.

Whether the sentence meted out by the Trial Court was harsh in the Circumstances of the case, Section 8(1) & (3) of the Sexual Offences Act provides:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The Appellant was sentenced to serve 15 years imprisonment instead of the mandatory minimum sentence of 20 years imprisonment on account of the fact that he was a first offender. The Appellant faulted the penalty as being harsh because he did not show that he was not remorseful during trial and that the judgment and sentence was one sided and no single argument raised by the Appellant was considered. He said his mitigation was not considered. He said that the loss of his job as a police officer and the harsh punishment amounted to double punishment.

The trial Magistrate called for a pre-sentence report which was considered at length together with the Appellant's mitigation and considering that the Appellant was a 1st offender passed a sentence of 15 years instead of the mandatory minimum sentence of 20 years. Had the Respondent filed a notice to enhance sentence, this would have been a suitable case to review the sentence upwards. The sentence is therefore not harsh and excessive in consideration of the offence committed.

In conclusion this court finds that the appeal lacks merit and the same is dismissed. Right of appeal within 14 days duly explained.

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 27TH DAY OF NOVEMBER, 2025.

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HON. ANNE ONG'INJO
JUDGE