Yongo v Republic (Criminal Appeal 5 of 2022) [2024] KECA 633 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 633 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 5 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 7, 2024

BETWEEN

KATANA SHUNGU YONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (S. J. Chitembwe, J.) delivered on 13th February 2017 in HCCRA No. 13 of 2015)

JUDGMENT

1. This is a second appeal arising from the judgment of the Chief Magistrate's Court at Malindi (Hon. C. M. Nzibe, RM) delivered on 26th January 2015 in Sexual Offences Case No. 9 of 2013 in which the appellant was convicted and sentenced to life imprisonment for defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006 (the Act).

2. The conviction and sentence prompted the appellant's 1st appeal to the High Court of Kenya at Malindi in Criminal Appeal No. 13 of 2015 in which S. J. Chitembwe, J. delivered the impugned judgment on 13th February 2017 dismissing the appeal and upholding the appellant's conviction and sentence meted by the trial court.

3. We need to point out at the outset that the appellant had been charged with the offence aforesaid an erroneously sentenced under section 8(4) of the Act notwithstanding the fact that the victim was said to be one-and-a-half years of age at the time of the alleged offence. That explains the learned Judge's decision to invoke section 8(2) of the Act, which provides that "... a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life."

4. The particulars of the offence were that, on 3rd July 2013 in Malindi District, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MK, a child aged one-and-a-half years.

5. On its part, the prosecution called 6 witnesses, including EK, the complainant's mother (PW1), who testified that, at about 11:00 am on the date and place aforesaid, she was leaving her home to fetch water when the appellant arrived at her home carrying maize on his bicycle; that the appellant beckoned the complainant to follow him into his house to cook the maize; that the complainant and the appellant went into his house while PW1 proceeded to fetch water; that, on return home, the complainant was brought by another child, who told PW1 that the appellant had asked him to take MK home; that the complainant was crying and walking with difficulty; that, on inquiry, the complainant, pointing between her legs, informed her that "Babu Katana" had hurt her; that, on lifting the complainant's dress, she saw that her thighs were swollen; that she took her to her neighbours (PW3 and PW4), who also examined the complainant and confirmed that her private parts were torn; and that she took the complainant to Malindi General Hospital where she obtained treatment notes, a post-rape care form and a P3.

6. According to PW1, the complainant told her that the appellant had inserted his finger severally into the complainant's vagina after he was unable to insert his penis; and that he had lifted her thigh and ejaculated thereon.

7. With regard to her age, PW1 testified that the complainant was born on 25th April 2011 as evidence by her clinic attendance card, and that she was aged 2 years at the time of the offence. The complainant's father, KCNM (PW2) also testified to confirm PW1's testimony as to the complainant's age and the events that led to the appellant's charge. So did Rashid Chengo Tsuwi (PW3) and Kahindi Mkare Kalama (PW4), the neighbours who also examined the complainant and formed the opinion that she had been defiled.

8. Ibrahim Abdullahi (PW6), a clinician at Malindi District Hospital, examined the complainant on 7th July 2013 and found that her clothes were bloodstained, her labia swollen, her hymen broken, and her vagina swollen. According to PW6, it was highly likely that the complainant had been defiled. Confirming her age as 2 years, PW6 produced the duly completed treatment notes dated 3rd July 2013, the post-rape care form dated 3rd July 2013 and the P3 form dated 7th July 2013.

9. The investigating officer, PC Andrew Wekesa (PW5), testified that he received a complaint from PW1 on 3rd July 2013; that PW1 was accompanied by the complainant, a child aged 2 years; and that PW1 informed him that the child had been defiled by a neighbour called Katana (the appellant). PW5 narrated the events leading to the offence as told to him and testified by PW1, which we need not replicate here.

10. According to PW5, he interviewed the appellant, who admitted going into his house with the complainant, roasted some maize for her, but that he did not know how she left his home. In his testimony, PW5 narrated how he called PW1 to the station with the complainant when the appellant was arrested; that, on seeing the appellant, the complainant pulled away and did not want to go near the appellant; and that, on inquiry, PW5 established that they were good neighbours and had no grudge or other incident prior to the offence complained of.

11. The appellant denied the charge and gave an unsworn statement, but did not call any witnesses in his defence. According to him, he had a land dispute with PW1 on account of which he was framed; and that his neighbours did not want him to live near them.

12. In its judgment dated 6th January 2015, the trial court (C. M. Nzibe (RM)), found that the State had proved its case beyond reasonable doubt, and that the appellant was guilty of defilement and sentenced him to life imprisonment.

13. Aggrieved by the trial court's decision, the appellant appealed to the High Court of Kenya at Malindi in HC Criminal Appeal No. 13 of 2015 in which S. J. Chitembwe, J. dismissed the appeal and upheld his conviction and sentence.

14. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on 2nd appeal on 3 grounds set out in his undated memorandum of appeal and on his subsequent undated "amended grounds of appeal" containing an additional 5 grounds. In all, the 8 grounds of appeal are that:

> " 1. That the trial magistrate erred in law by not considering that the charge of defilement was not proved.
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> 2. That the learned high court judge erred in law by not considering that the sentence imposed was harsh and excessive.
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> 3. That the learned judge erred in law by not considering that there was no voire — dire examination.
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> 4. That the learned High Court Judge erred in law and or misdirected himself by upholding my conviction in reliance on the corroborated evidence of an intermediary (PW1) yet the procedure which was followed by the trial Court when recording her evidence ignored statutory provisions and or breached rules of procedure on how to record such evidence thereby rendering it unacceptable in law.
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> 5. That , the learned High Court Judge in law by upholding my conviction without properly considering that the source of the Prosecution case emerged from unsound allegations.
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> 6. That the learned High Court Judge erred in by upholding my conviction, yet the evidence of PW1 is at variance with the charge sheet hence defective.
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> 7. That , the learned High Court Judge in law erred in Law by upholding my conviction yet the medical evidence is scanty and insufficient.
>
> 8. That the learned High Court Judge erred in law by failing to adequately consider my defense."

15. In support of his 2nd appeal, the appellant filed undated written submissions contained in his "amended grounds of appeal" citing 3 judicial authorities, namely: John Kinyua Nathan vs. Republic [2017] eKLR; and MM vs. Republic [2014] eKLR, highlighting the statutory procedure for giving evidence by intermediaries in accordance with section 31(2) and 32 of the *Sexual Offences Act*, 2006; and Bukenya vs. Uganda (1972) EA 549, submitting that the prosecution is duty bound to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent with the case. He urged us to allow the appeal.

16. In opposition to the appeal, learned State counsel Mr. Mwangi Kamanu filed his written submissions dated 8th February 2024, which he did not wish to highlight. Citing no authorities, counsel submitted that the appellant was precluded from appealing on matters of factual evidence revaluated by the trial court and the High Court on first appeal, which upheld the conviction; that the age of the victim, who was one-and-a-half years at the time of the offence, was not challenged at the trial and, therefore, cannot be introduced on appeal to this Court; that the trial court observed that the victim, who did not testify, was of tender age and, therefore, could not testify in person; that the victim's mother testified

on her behalf; that, on the issue of penetration, the first appellate court found that there was sufficient circumstantial evidence pointing to the fact that the appellant defiled the victim to the exclusion of any other suspect; that it was right after the child was returned to her mother (PW1) that she noticed the presence of blood in her vaginal area; that the clinician who examined the victim made a finding, upon examination, that the hymen was missing, which could not have been possible for a child of that age; that the prosecution established penetration to the required standard; that the High Court rightly found that the appellant was the one who was left with the victim, and that it could not have been possible that the child who returned the victim to PW1 could have committed the defilement; that the prosecution established that the appellant was the perpetrator to the exclusion of any other suspect; and that the identification of the appellant was proper.

17. On the issue as to the severity of the sentence meted on the appellant, counsel submitted that the High Court was right in holding that the appellant could not benefit from the provision of section 179 of the Criminal Procedure Code (which empowers a court to convict an accused for a lesser offence as proved though not specifically charged) in place of the main offence whose particulars are not proved as charged; that the appellant could not benefit from a lesser sentence, the main offence of defilement having been proved as charged; that, in view of the victim's age, the appellant could not be sentenced under section 8(4) of the *Sexual Offences Act*, which relates to the sentence to be meted for defilement of a child between the age of 16 and 18 years; that the victim's age fell within the provision of section 8(1) and (2) (which relates to children below 11 years of age); that the trial court considered the appellant's mitigation; that the appellant denied the offence and was not remorseful; that the victim was a vulnerable child of below 2 years of age; and that she was likely to be affected by the ordeal. According to counsel, the sentence meted on the appellant was lawful and should be upheld.

18. As pointed out by the learned counsel, the trial court having considered the victim to be a vulnerable witness of tender age, it could not proceed to conduct a voir dire examination as claimed by the appellant; and that the appellant's lamentation that he was not accorded the opportunity to cross-examine the victim cannot stand. In view of the foregoing, counsel urged us to uphold both the conviction and sentence.

19. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law only by dint of section 361 of the Criminal Procedure Code. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

20. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on five main issues of law or of mixed law and fact (as the case may be), namely: (i) whether the appellant was convicted on a defective charge; (ii) whether PW1 testified as an intermediary or as a witness to the offence with which the appellant was charged; (iii) whether the appellant was convicted on the evidence of an intermediary (PW1), and whether his conviction was safe in the absence of a voire dire examination, and whether such evidence required corroboration; (iv) whether the prosecution had proved the charge against the appellant to the required standard; and (v) whether the appellant has shown sufficient cause why this Court should substitute the sentence meted by the trial court and upheld by the 1st appellate court for a lesser term of imprisonment.

21. The 1st issue as to whether the appellant was convicted on a defective charge arises from the fact that the appellant had been charged with the offence aforesaid and erroneously sentenced to life purportedly under section 8(4) of the Act notwithstanding the fact that the victim was said to be one- and-a-

half years of age at the time of the alleged offence. On noticing this apparent clerical error, when the matter was heard on appeal, the learned Judge correctly invoked section 8(2) of the Act, which provides that "... a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life." On this account, the learned Judge upheld the sentence meted by the trial court, which corresponds to a charge under section 8 (1) and (2) of the Act.

22. In his 6th ground of appeal, the appellant contends that the learned High Court Judge erred by "... upholding [his] conviction, yet the evidence of PW1 [was] at variance with the charge sheet hence defective". We understand the appellant to mean that, having been sentenced under section 8(4), the charged was defective on account of PW1's evidence that the complainant was below the age of 11 years in respect of which section 8(2) of the Act applied. And that is precisely the corrective measure taken by the learned Judge. It was not in contest that the complainant was one-and-a-half years of age and, at any rate, below 11 years of age. We fail to see what prejudice was occasioned by the corrective measure adopted by the learned Judge to reflect the correct subsection under which the mandatory sentence meted as imposed under the Act.

23. Be that as it may, neither at the trial nor on 1st appeal did the appellant challenge the propriety of the charge sheet on that score. Apart from the 6th ground of appeal as framed, we find nothing on the record to suggest that the appellant raised any issue as to the defect of the charge sheet at the trial. If that is the intention here, that issue is raised for the first time on 2nd appeal and cannot be the subject of our determination this late in the day and, even if it were, it is inconsequential and does not hold. That settles the 1st issue before us, save for the propriety of PW1's testimony, which has been called to question, and to which we now turn.

24. Turning to the 2nd issue, the question is whether PW1 (the complainant's mother) testified as her intermediary within the meaning of the *Sexual Offences Act*, 2006 or as a substantive witness within the meaning of the *Evidence Act* (Cap. 80), testifying by way of direct evidence of the incidents leading to the offence with which the appellant was charged.

25. In particular, the appellant questions the probative value of PW1's evidence, which he views as evidence of an intermediary, and relied on by the trial court allegedly in breach of the statutory procedure for the taking of such evidence as prescribed in sections 31 and 32 of the *Sexual Offences Act*, 2006 (the Act). Under the Act, the term "intermediary" means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness, and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker. The question is: was PW1 testifying in any of the capacities aforesaid? We think not.

26. This Court in MM v Republic [2014] eKLR as cited in the Court of Appeal case in Nahashon Otieno Odhiambo v Republic [2019] eKLR explained that:

> "The role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess. It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross- examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings. It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed

to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."

27. In practice, an intermediary may be an expert in a specified field or a person who, through experience, possesses special knowledge in an area, a social worker, a relative, a parent or a guardian of the witness. An intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from an unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration,; and to alert the trial court of any difficulties.

28. That was certainly not the role played by PW1. She was by no means an intermediary within the meaning of the Act. As we will shortly explain, her testimony constituted an eyewitness who provided direct evidence of the events leading to and following the complainant's defilement. As already observed, the appellant took the victim into his house in PW1's full view and with her consent. Shortly thereafter, the complainant was led from the appellant's house by another child, who was sent by the appellant to returned her (the complainant) to her mother (PW1), who observed that the complainant was in a physical and emotional state resulting from defilement with which the appellant was charged. And that is what PW1's testimony was about. She provided direct evidence of what transpired, and what she personally did and observed as also confirmed by PW3 and PW4.

29. In effect, PW1's oral evidence constituted direct evidence within the meaning of section 63(1) and (2) of the *Evidence Act* (Cap. 80), which reads:

63.

(1) Oral evidence must in all cases be direct evidence.

(2) 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;

30. Even though the complainant did not testify in person, that of itself did not constitute PW1 an intermediary within the meaning of sections 31 and 32 of the Act, which prescribes the procedure to be followed in cases where the complainant is a vulnerable person or a child of tender age as was the complainant. The very fact that the trial court declared the complainant a vulnerable child of tender age did not of itself constitute PW1 an intermediary in relation to the direct evidence of what she

personally witnessed. Neither did lack of voir dire evidence of the complainant render PW1's evidence worthless or of no probative value.

31. While a trial court should, in ordinary cases, undertake a voir dire examination of a child of tender age to ascertain her ability to tell the truth or to testify in a trial whether as a complainant or as a witness, failure to undertake such an examination does not erode the probative value of the direct evidence of other witnesses, including that of PW1, PW3 and PW4, who testified to the complainant's condition after the incident.

32. We form this view cognisant of the provision of section 31(1) and (2) of the Act, which empowers the trial court in criminal proceedings to declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness where such witness is the alleged victim in the proceedings pending before the court, or a child on account of his/her age. Upon such declaration, the vulnerable witness may testify through an intermediary, such as a parent or guardian, or a person in loco parentis. To our mind, that procedure was not strictly necessary to lend credibility to PW1's testimony, or to that of the other prosecution witnesses who testified to the complainant's medical condition.

33. That said, we also take to mind this Court's decision in M.M vs. Republic [2014] eKLR where the Court stated thus:

> "Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence, section 33 of the *Sexual Offences Act* allows the trial Court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), to give evidence through an intermediary or both.
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> In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant ....
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> Any requirement that insists on a child victim of defilement, irrespective of his or her age, to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. HC. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."

34. The same question may be asked of the complainant, who was one- and-a-half years of age. How fair would it have been to subject a child of such tender age to the solemnity of the court proceedings and cross-examination by the appellant under whose hand she endured an ordeal of such magnitude as to make her coil away in fright when she later came face-to-face with him at the police station? To hold otherwise would be tantamount to closing our minds to the special needs of vulnerable victims for whom this Court should have due regard.

35. Having come thus far, it is instructive that this challenge is also raised for the first time on 2nd appeal to this Court, and that no objection was raised in this regard before the trial court. Consequently, the challenge on this account amounts to no more than an afterthought that does not have the effect of turning back the wheels of justice in relation to evidential matters that do not fall within our remit to consider on second appeal.

36. In view of the foregoing, the appellant's appeal on, inter alia, the contention that the learned Judge failed to find that the procedure prescribed in sections 31 and 32 of the Act was not strictly followed does not stand. PW1 did not, strictly speaking, testify as the complainant's intermediary and, in any event, a procedural infraction of the nature complained of does not constitute a mistrial.

Our finding on this issue settles the 3rd and closely linked issue as to whether the appellant was convicted on the evidence of an intermediary (PW1); whether his conviction was safe in the absence of a voire dire examination; and whether such evidence required corroboration. The simple answer is that the appellant was not convicted on the evidence of an intermediary. As we will shortly see, his conviction was safe despite the fact that the complainant did not testify and, therefore, it was not necessary to conduct a voir dire examination. Neither did PW1's evidence or that of the other prosecution witnesses on which the appellant was convicted require corroboration beyond their consistent testimonies and the corroborative medical evidence in proof of the charge. The only decisive question remaining for our determination in this regard is whether the prosecution had proved the charge against the appellant to the required standard.

37. Turning to the 4th issue as to whether the prosecution had proved the charge against the appellant to the required standard, we hasten to point out right at the outset that the factual evidence led by the prosecution proved all the requisite ingredients of the charge of defilement beyond reasonable doubt. The three (3) ingredients of the offence of defilement, namely: the age of the victim; penetration; and the identity of the accused, were all proved in accordance with section 8(1) and (3) of the *Sexual Offences Act*, 2006. We make these findings on well-founded reasons after careful examination of the record as put to us, the evidential material from which points of law arise and, more importantly, cognisant of our mandate to pronounce ourselves on points of law only.

38. On the question of identity or recognition, it is indubitable that the appellant was a well-known neighbour to the complainant and her family. Accordingly, his identity or recognition was not in issue.

39. Addressing himself to the perennial and pivotal issue of identity or recognition of an accused, Madan JA. in Anjononi and Others vs. The Republic [1980] KLR 59 had this to say:

> "... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other." [Emphasis added]

40. In the same vein, this Court in Peter Musau Mwanza vs. Republic [2008] eKLR expressed itself thus:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he* had been in contact with the suspect before the incident in question." [Emphasis ours]

41. Likewise, the High Court of Kenya at Voi in AHM vs. Republic [2022] KEHC 12773 (KLR) correctly observed that:

> "... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before."

42. The appellant was PW1's neighbour, who was well known to her and to the complainant who, at the time, was not afraid of accompanying him to his house. PW1 had no reason to hesitate in allowing her child (the complainant) to accede to the appellant's invitation to accompany him to his house to

cook maize. The two apparently related freely with the appellant as a trusted neighbour. He was not a stranger to them. To our mind, his identity is a non-issue, and we need not say more.

43. As to the victim's age, which was first stated as one-and-a-half years at the time of the offence, it was subsequently confirmed as about 2 years by her clinic attendance card produced by her mother (PW1), and by PW6, who examined her and prepared the medical treatment notes, the Post-Rape Care Form and the P3 report. It is also not lost on us that the age of the victim, which is a matter of factual evidence, was never raised as an issue at the trial or otherwise contested. Accordingly, it cannot be introduced for consideration on a 2nd appeal before us.

44. Turning to the third ingredient of penetration, we hasten to observe that it was also proved by production by PW6 of the uncontested treatment notes, a duly completed post-rape care form and P3 form.

45. For the avoidance of doubt, the term "penetration" is defined in section 2 of the Act as "partial or complete insertion of the genital organs of a person into the genital organs of another person." That is precisely what the prosecution witnesses attested to as confirmed by the medical treatment notes, the post-rape care form dated 3rd July 2013 and the P3 form dated 7th July 2013, all of which confirmed penetration as her labia were swollen, her hymen broken and her vagina swollen. That the appellant was undoubtedly responsible is borne by the events as testified by PW1 and the complainant who returned home to PW1 in tears and, when asked what had happened to her, she pointed to the injuries between her legs and told her mother that it was "Babu Katana" who had done it.

46. We take to mind the decision of the High Court of Kenya at Bomet in Sigei vs. Republic [2022] KEHC 3161 (KLR) quoting the Supreme Court of Uganda in Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995. As the High Court correctly observed:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence." (Emphasis added)

47. To our mind, PW1's direct evidence as corroborated by the medical evidence and the circumstantial evidence in that regard proved beyond reasonable doubt that the appellant defiled the complainant.

48. Turning to the related question as to whether the evidence adduced against the appellant proved the statutory test and ingredients of defilement, or whether it was safe to sustain a conviction against him, we take to mind the grounds on which he comes to this Court on appeal, namely: that "... the source of the Prosecution case emerged from unsound allegations." Put differently, the appellant's challenge of the impugned judgment borders on a contention that, apart from the infant complainant who did not testify in person, there was no eye witness, or that the case against him was founded purely on circumstantial evidence, which is a matter of mixed law and fact to which we must pronounce ourselves.

49. Circumstantial evidence is so called where no eyewitnesses, if any, are called to testify in support of the prosecution or defence case but, rather, surrounding circumstances that point to proof beyond reasonable doubt that the accused is criminally liable for the offence as charged.

50. In the appellant's case, such evidence included, inter alia, the evidence of taking the complainant into his house in PW1's full view; and the physical condition in which the infant complainant came out of the house shortly thereafter, namely with bloodstained clothes, swollen labia, broken hymen, and swollen vagina. It matters not that the complainant did not testify in person, or that none of the prosecution witnesses saw first-hand, in the sense of an eyewitness standing by or viewing them

through the window or door, what the appellant did to the complainant in the confines of his house. Suffice it to say that the appellant was the only person who took the complainant into his house in PW1's view before she (the complainant) emerged soon thereafter in the condition in which she was as witnessed by PW1, PW3 and PW4. Indeed, the surrounding circumstances told more than tongue could tell to confirm PW1's testimony.

51. Addressing itself to the principles on which a trial court may convict an accused on circumstantial evidence, this Court in Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR had this to say:

> "... it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'

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

> "'It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.'"

53. Having carefully analysed and re-assessed the evidence on record, we reach the inescapable conclusion that the circumstantial evidence of what befell the complainant in the appellant's hands, coupled with the direct and corroborative PW1's eyewitness account on which the appellant was convicted satisfies the threefold test enunciated in the afore-cited case of Abanga alias Onyango v. Republic (ibid). To our mind, the circumstances from which the inference of the appellant's guilt was drawn was cogently and firmly established to the satisfaction of the trial court as upheld on appeal in the impugned judgment. We are equally satisfied that those circumstances, buttressed by PW1's direct evidence, point to his guilt, and that no- one but the appellant defiled the complainant as affirmed by PW1's eyewitness account. Accordingly, we find no reason to interfere with the decision of Chitembwe, J. and quash the conviction as urged by the appellant.

54. On the 5th issue as to whether the sentence meted by the trial court and upheld on appeal to the High Court was "harsh and excessive" is a question of fact with regard to which section 361(1) (a) of the Criminal Procedure Code sets boundaries as to how far we can go on 2nd appeal. In effect, this section expressly limits this Court's jurisdiction on a second appeal to issues of law only, and to the exclusion

of matters of fact. The section goes on to state that severity of sentence is a matter of fact, which is not open to our consideration on 2nd appeal.

55. We are cognisant of the limited circumstances under which this Court can interfere with concurrent findings of fact by the two lower courts. In Adan Muraguri Mungara vs. Republic [2010] eKLR, this Court set out the only circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court in the following terms:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." [Emphasis added]

56. Finally, we need to point out the fact that we do not have answers to the questions often raised, as did the appellant, in connection with mandatory sentences in cases not contemplated in the Supreme Court's sentencing guidelines in line with the celebrated case of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR. Having upheld the appellant's conviction, we find nothing on the record to justify interference with the life sentence meted on the appellant. Accordingly, the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) delivered on 13th February 2017 is hereby upheld.

57. The Judgment is signed under Rule 34(3) of the Court of Appeal

Rule (CAR),since Hon. Mr. Justice G.V Odunga , JA refuses to sign the judgment.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE 2024.

A.K MURGOR

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JUDGE OF APPEAL

DR. KI.LAIBUTA C.Arb,FCIArb

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JUDGE OF APPEAL

Icertify that this is a true copy ogf the original

Signed

DEPUTY REGISTRAR