

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT GATUNDU
S.O CASE NUMBER 2 OF 2018

REPUBLIC..... PROSECUTER

VERSUS

PAUL KIPKOECH ROTICH..... ACCUSED

JUDGEMENT

1. The accused person, Paul Kipkoech Rotich, was charged in the main charge with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006.
2. The particulars of the offence being that on the 13th day of January, 2018 at Gatundu police station block in Gatundu South sub-County within Kiambu County intentionally and unlawfully did an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of J.N.K a child aged 15 years old.
3. In the alternative to the main charge, the accused was charged with the offence of committing an indecent act contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the day and place particularized in the main charge, intentionally and unlawfully touched the buttocks and vagina of J.N.K a child aged 15 years with his penis.
4. In a ruling and/or directions delivered on 18th June, 2020, the Honorable L. Wachira, Mrs. (Chief Magistrate) recused herself from handling this matter for the reasons stated in the ruling and referred the matter to this Court. The Hon. Wachira had taken the prosecution case and the defence by the accused person.
5. On 24th August 2020, this Court informed the accused on his rights and procedure under Section 200 (c) of the Criminal Procedure Code Cap 75 Laws of Kenya. Thereafter, after taking submissions from Ms. Kabiu, State Counsel. Mr. Omondi, watching brief for the Independent Police Oversight Authority (IPOA) and Mr. Ojuku for the accused, in a ruling delivered on 31st August, 2020, I directed the trial to proceed from where it had reached for reasons stated in the said ruling.

PROSECUTION CASE.

6. The prosecution availed a total of eleven (11) witnesses. I deem it necessary to summarize the testimony of each witness. The Complainant (Pw1) gave sworn evidence after *voir dire* examination. She informed the Court that she was aged 15 years old. She testified that on 12th January 2017, she was in company of her cousin along a road and since her parents suspected that she was in a relationship with her cousin, they took them to Gatundu police station and they were placed in different cells. She stated that she spent the night at the police cell and in the following morning, on 13th January, 2017, the accused, who was a police officer based at the said station, asked her to come out and clean the report office.
7. Pw1 further stated that she did the work and before being taken back to the cells, the accused took her to the report office and asked her if she had done anything with her cousin which she denied. Thereafter, according to her testimony, the accused stood in front of her against the wall in the report office and she pushed her away only for the accused to ask her if they could have sex and she resisted the advance. Pw1 informed the Court that the accused grabbed her and blocked her mouth and forced her down on a box in the report office, removed his penis and had sex with her.
8. She further stated that there was someone who came into the office during the ordeal and she heard a voice saying like “go come with IP. She informed the Court that the accused continued to have sex with her and after the ordeal told her to take a bath but she did not and he took her back to the cells. She further informed the Court that she did not tell anyone and on the same day at 10pm she was taken to Gatundu Hospital where they wanted to confirm if she had sex with her cousin and she was interrogated but the test was not done and she was taken back to the station.
9. Pw1 further testified that the accused later came and asked her if an officer called Mary had asked anything and she answered no, Later, another officer asked her if she had any complaint and she told the officer what had happened. She stated that the said officer must have told the officer named Mary because Mary questioned her and thereafter, she was summoned to the OCS office and she informed the OCS what had transpired. Pw1 stated that on the Sunday 14th January 2017 she was taken to Gatundu Level 4 Hospital by police officers and she was released on the following day. She identified the treatment notes

(prosecution exhibit number 2), P3 form (exhibit number 3) and the Post Rape Care form (exhibit number 4). She identified the accused as the police officer who defiled her and stated the accused was the only male police officer she saw on the day she was arrested. She denied having an affair with her cousin. When recalled, Pw1 clarified that the incident occurred on 13th January, 2018 and not 13th January, 2017 as she had stated in her examination in chief and I find this cleared the confusion on the date of commission of the offence.

10. Pw2, PC Godfrey Letaya was based at the Gatundu police station at the material day of the offence. He informed the Court that on 14th January 2018 he was at the report office having taken over the duties from PC Rotich and PC Mutuma at about 06:00 hours. He stated that PC Mutuma handed over to him since PC Rotich had already left. He testified that he visited the cells to confirm the cleanliness and hear if there was any complaint. He further testified that in the female cell he found J.N, a juvenile who had been held as a child being in need of care and protection and the said J.N complained bitterly that on 13/1/2018 early in the morning she was called from the cells by an officer to clean the report office and the said officer forced her into sexual intercourse in the report office.
11. Pw2 further stated that the complainant told her that she had not reported earlier due to fear and she did not give the name of the officer but described him as a big man who she could identify on sight. Pw2 stated that he called the OCS and informed him and the OCS carried his own investigations. Pw2 stated that the officers who were on duty on 13/1/2018 were PC Mutuma and PC Rotich. He stated that PC Mutuma was of average size and the girl had described the perpetrator as a big man. Pw1 further stated that the complainant informed him that the act of defilement occurred at a corridor in the report office where there is a big metal box used to put prisoner's property. Pw2 also stated that the complainant told him that the act occurred on the wee hours of the morning while it was still dark since cleaning occurs at about 5:00am.
12. Pw2 further informed the Court that the cell sentry officer is the one who allocates duties to the prisoners and on the material night of the incident, the sentry officers were PC Mutuma and PC Rotich. Pw2 identified the accused before the Court as PC Rotich and stated that he had no differences with him.

- 13.Pw3 PC Andrew Mutuma was also a police officer based at the Gatundu Police Station on the material day of the offence. He informed the Court that on 12/1/2018, he reported to duty and found 11 suspects in the cells and during that night 10 suspects were arrested bringing the total suspects to 21, eighteen been male and three females. He stated that it was the norm for the prisoners to be assigned duties of cleaning supervised by police officers manning the report office.
- 14.Pw3 further stated that PC Paul Rotich was on duty at the report office and on the morning of 13/1/2018 he took J.N(Pw1) to clean the report office while he was left supervising cleaning in the cells. He informed the Court that the complainant cleaned the report office and she was brought back to the cells and he did not receive any complaint and he handed over the duties to PC Salim and PC Kwamboka.
- 15.Pw3 further testified that on 14/1/2018 at 9:00am he was summoned by the OCS, C.I Nyasimi and he went to the OCS office who informed him that J.N had reported that she had been defiled by the officer who was supervising her at the report office and the OCS asked him if he had received any complaint. Pw3 stated that he had not received any complaint and the OCS instructed him to do a report.
- 16.Pw3 stated that the complainant was among the three female prisoners and she had been detained as a child in need of care and protection. He testified that cleaning of the cells is done by a few men and takes about 30-40 minutes and the work must be complete by the time of handing over at 6:00pm. He further informed the Court that he was present when Paul Rotich picked the complainant to go and clean the report office and he was left supervising the other suspects. He stated that the report office had three stools and a big box used to store the prisoners' properties.
- 17.Pw4 PC(W) Beatrice Kwamboka was also based at the Gatundu police station during the material time of the offence. She informed the Court that on 14/1/2018, she was in her house when the OCS summoned her and told her that there was a girl who was alleging having been defiled by one of the police officers and she was directed to assist the Investigating Officer in taking the child to the hospital. She stated that the girl was taken to Gatundu Level 5 Hospital and they were told to pick the lab test results in the afternoon. She

informed the Court that the OCS informed her that the allegation was that PC Rotich had defiled the girl.

18. Pw5, Tabitha Wanjiku Kirangi is the mother to the Complainant (Pw1). She informed the Court that Pw1 was born on 14/7/2002 and was aged 15 years. It was her testimony that on 12/1/2018 on her way to the market she met Erick, a cousin to Pw1 and when she went back home, she did not find Pw1 at home. She stated that she went to her sister-in-law (One Margaret) home and asked her if she had seen Pw1 but her sister-in-law did not know her whereabouts but told her that Pw1 had been seen with Eric.
19. She further stated that as at 8:00 pm, Pw1 had not come back home yet and she went back and she went looking for her in company of her said sister-in-law and along the road found both Pw1 and Eric. She stated that they decided to take them to the police station and they explained at the report office what had transpired and they left the children at the station since they wanted them disciplined.
20. Pw5 informed the Court that she went back to the station on 15/1/2018 when she heard people generally talking and saying that a child of 15 years had been defiled. She stated that she went to the office of the OCS who confirmed that Pw1 had reported the defilement and the concerned officer had been arrested. When she interviewed her, Pw1 stated that she had been defiled by the officer who was at the report office. Pw1 told her that after cleaning the report office, the officer told her to lie down at a place where there was a big box and had sexual intercourse with her before wiping her with tissue and taking her back to the cells.
21. Pw5 stated that Pw1 was wearing a black trouser, a stripped top and a sweater on 12/1/2018 when they took her to the station. She identified the black trouser which was produced in Court as exhibit number 5 and a pant (exhibit 6). She stated that she gave the said exhibits to IPOA who had enquired and interviewed her on the case. She informed the Court that the officers from IPOA wanted the clothes examined for DNA profiling.
22. Pw6 C.I Mutisya Mutuku was the staff officer at Gatundu South Headquarters. He informed the Court that on 14/1/2018 he was at station when the OCS C.I Nyasimi called him and told him that the accused had defiled a minor and asked

him to apprehend him. Pw6 stated that he arrested the accused and placed him in the cell.

23. Pw7, Jane Ndusia is the Principal Investigation Officer working with IPOA based at Nairobi. She informed the Court that on 15/1/2018, the head of investigations IPOA informed her on the subject incident. She stated that on 16/1/2018 in company of Raphael Muhia, she went to the Gatundu Police Station and met the complainant at the Children's office and interviewed the minor and recorded her statement. Pw7 stated that in the course of the interview, the minor stated that the clothes she was wearing during the alleged defilement were still in her custody and had not been washed.

24. Pw7 further informed the Court that they requested the complainant and the mother to the complainant to keep the clothes safely. She stated that on 18/1/2018, accompanied by her colleagues, Raphael, Patrick and Lydiah, they came to Gatundu again and she was left at the Gatundu Children's office as her colleagues proceeded to the home of the complainant. She testified that her colleagues picked the clothes which included a pant and a pair of trousers which were taken to the IPOA laboratory.

25. Pw7 further stated that on 22/1/2018, the accused was escorted to the Government Chemist by Corporal Ekiru and other officers and samples for DNA profiling were taken from him on the same day. She also stated that samples were taken from the minor J.N and the clothes exhibits were also taken to the Government Chemist for analysis. She stated that Corporal Ekiru later informed her that the report of the government analyst had been obtained.

26. Pw8, Raphael Alango Nyina is a Principal Investigation Officer with IPOA since 2015. He informed the Court that on 15/1/2018 he was assigned this case by his in charge, one Pauline Njoroge. He stated that on 16/12018, in company of his colleagues, they went to Gatundu and were briefed on the ongoing investigations by the OCS. The investigations were being undertaken by the DCI and the accused had already been placed in custody. He stated that they had a brief from the Investigation officer, Corporal Ekiru and also met the minor and her mother at the station before interviewing them at the Children's office.

27. Pw8 stated that his colleague established that the pant and trouser that the minor was wearing was intact and they informed the minor's mother to keep the same safely. He further informed the Court that on 18/1/2018, in the company of his

colleagues, Jane Ndusia (Pw7), Patrick and Lydia Mapenzi, they met the victim and her parents in Gatundu town and Pw7 took the statement of the complainant's mother while Rono Patrick and Lydiah accompanied him to the minor's home led by the minor's father and the minor. He stated that the minor's father handed over to him a pant with animal prints and a black trouser and he placed the items in a brown envelope and sealed the same with a red tape. He stated that on the same day he delivered the exhibits to their IPOA laboratory for safe keeping.

28.Pw8 further testified that on 22/1/2018 together with Pw7 they came to Gatundu and in company of Corporal Ekiru they took him to the Government Chemist at Nairobi. He stated that he the accused at the Government chemist with Pw7 and Corporal Ekiru and collected the exhibits in the IPOA laboratory and took them to the Government Chemist. He stated that samples were taken from the accused and the minor and the report was given to DCI Gatundu.

29.Pw9, Corporal Ekiru Kimoni is based at the DCI Eldama Ravine. At the material time of the offence, he was based at the DCI Gatundu. He was the investigating officer in this case. He informed the Court that on 14/1/2018, he was instructed by the then DCIO, Charles Mwangi to investigate this case. He stated that in company of PC(W) Kwamboka, they visited the minor who was still in custody having been placed in cell as a child in need of care and protection. He stated that they interviewed the minor who stated that she had been defiled by an officer called Paul Rotich who had been working at the report office.

30.Pw9 further stated that they took the child for examination and treatment at the Gatundu Hospital. Later the minor's p3 form was filled by Dr. Kibathi. Pw9 further stated that IPOA joined the investigations and the clothes that the complainant was wearing at the time of the alleged offence were handed over to Pw8. Pw9 further stated that the accused was escorted to the Government Chemist and his swabs were taken.

31.Pw9 stated that he also obtained the duty roster which shows that the accused was on duty for the period 6th-13th January, 2018. Pw9 further informed the Court that the complainant described the offender as heavily built and not very dark and at some point, pointed at the accused person when he was still on duty and before his arrest. The Pw9 recorded the statements of the witnesses and after completion of investigations, charged the accused in Court on 23/1/2018.

32.PW10, Dr. Joseph Kagundo Kimani is a Government analyst based at the Government Chemist Department heading the forensic biology unit holding a degree in human genetics. He informed the Court that on 22/1/2018 the following items were received at the Government Chemist laboratory Nairobi from Raphael Nyina (Pw8);

- a) A black pair of trousers in a khaki envelop marked IPOA JN2
- b) Black/pink under pant with animal prints in a khaki envelop marked IPOA JN1

33.Pw10 stated that a buccal swab was obtained from one Paul Kipkoech Rotich and one J.K, the complainant and it was desired that they examine the items and ascertain the presence of biological evidential material. Pw10 informed the Court that after examination the following were the findings;

- a) The under pant marked IPOA JN1 was moderately stained with blood of human origin but no seminal stain was detected
- b) The pair of trousers IPOA JN2 had seminal stains but had no blood stains.
- c) The DNA profiles generated from the blood stains on the under pant and the seminal stains on the trouser and the buccal swabs from J.N. K and Paul Kipkoech Rotich were tabulated and an opinion was formed. The conclusion was that
 - I. The DNA profile generated from the blood on the under pant matched the DNA profile generated from the blood swab labelled J.N.K
 - II. The DNA profile generated from the seminal fraction of the stain on the trouser (IPOA JN2) matched the DNA profile generated from the buccal swab labelled Paul Kipkoech Rotich with a random probability of match of 1 in 1.85×10 raised to power 20.

34.Pw10 prepared a report on 26/2/2018 which he produced as exhibit number 9. He also identified the other exhibits which were forwarded to the government chemist through the exhibit memo forms.

35.Pw11, Dr Mary Gachagwe is based at the Gatundu Level 5 Hospital and testified in place of Dr. Kibathi who had examined the complainant and filled her p3

form. Dr Kibathi was said to have proceeded for post graduate studies and Dr Gachagwa confirmed to the Court that she was familiar with his writing and signature. He was allowed to testify by the Court.

36. Pw11 stated that the genitalia examination showed no injury to the labia majora and no bleeding. Pw1's hymen was found not intact and no discharge was noted. High vaginal swab revealed presence of epithelial cells but no spermatozoa was seen. She stated that the patient had wiped herself with tissue before the examination.

DEFENCE CASE

37. On 26th November, 2019, Hon L Wachira (CM) placed the accused to his defence. The accused elected to give sworn evidence. The accused testified at the *locus in quo* and stated that he is employed as a police officer based at the Gatundu police station where he had worked for one year in the rank of a police constable. In his defence, he stated that on 13/1/2018 he was at the report office while PC Mutuma was a cell centry. He informed the Court that he reported to work at 10:00pm with the shift ending at 6am.

38. The accused stated that on the material night, the complainant mother in company of about 5 people came with two minors. The complainant's mother reported that the complainant was disturbing her and was having an affair with a boy. He stated that he listened to the parents of the minors and booked the minors as children in need of care and protection. The accused stated that there was no female officer to search the complainant at the time and PC Mutuma took her to the cell.

39. The accused further testified the following day he handed over the duties before leaving. He stated that the cells doors were opened between 4:00am and 5:00am for cleaning and the complainant was the one who cleaned the cell and the report office alone. He further stated that he supervised the work while standing on the door to the report office while PC Mutuma was in the cell with the cell door open. At the scene, he accused was shown a wooden box in the report office and stated that the box was at the same point as the night of 13th-14th January 2018.

40. The accused defence is that after the complainant finished mopping, PC Mutuma took her back into the cells. He denied defiling the complainant and stated that at no point did the complainant seat on the box in the report office. He stated

that at all times the door to the report office remained open and at some point, there was a canteen contractor who asked the number of the suspects in the cells for purposes of tea and he spoke to him. He stated that on the following Monday a new OCPD reported who turned out to be his squad leader in 1998. He testified that the new OCPD asked him to prepare for a promotion board and some officers felt that he was taking their place and he missed the board.

41. The accused further informed the Court that his relationship with the OCS C.I Nyasimi was not good and they had quarreled four times. He stated that he had a relationship with PC Rose Achieng but the OCS had an interest in her. He testified that the charges against him are trumped up and he was framed due to the rank he was to be promoted to.

42. The accused had applied for summons to issue on the former OCS Gatundu police station, Joshua Nyasimi and PC Rose Ochieng formerly of Gatundu police station as defence witnesses. The said witnesses were duly summoned to Court and on 22/12/2020. ASP Joshua Nyasimi informed the Court that he was not comfortable to testify as a defence witness. He stated that at the time of the commission of the offence he was the OCS Gatundu police station and given the nature of the offence, he was not ready to testify. PC Rose Ochieng informed the Court that at the time of the commission of the offence, she was based at the Gatundu Police Station. She stated that she does not know anything about the offence. In a ruling delivered on the same day, I found that the said witnesses could not be compelled to testify as defence witnesses.

43. The accused prayed for time to avail another witness but failed to avail the witness despite being allowed sufficient time. He did not provide the names of the intended witness and therefore the Court could not compel the witness to attend Court. The accused defence was deemed closed on 26th January, 2021.

ISSUES FOR DETERMINATION

44. I have carefully considered and evaluated the evidence adduced by the prosecution. I bear in mind that the standard of proof in criminal cases is that of beyond reasonable doubt and the burden is always on the prosecution to prove the charge beyond reasonable doubt. At no time does the burden shift to the accused.

45. The main issue for determination is whether the prosecution has satisfied and proved the ingredients of the offence of defilement and in the alternative indecent act with a child. I will attempt to determine the following intertwined issues:

- a) *Whether the prosecution proved the age of the complainant*
- b) *Whether the ingredient of penetration was proved.*
- c) *Whether the accused committed the alleged act of defilement and in the alternative indecent act with a child.*

ANALYSIS AND DETERMINATION

46. I have already summarized the evidence adduced by the prosecution and in particular the testimony of the Pw1, the victim of the alleged sexual act. Summarized, the prosecution case is that on 12/1/2018, the complainant was detained from 10:00pm at the Gatundu police station being a child in need of care and protection. On the said night of 12th and 13th January, 2018, the Accused, PC Paul Kipkoech Rotich and PC Mutuma were on duty at the report office and cell sentry respectively.

47. It is the prosecution case that at about 5:00 am, the accused called the complainant from the cell to clean the report office while PC Mutuma supervised the cleaning of the police cells. It is further the prosecution case that after cleaning the report office, the accused grabbed the complainant and took her inside the report office while gagging her mouth and thereafter sat her on a box where he forced her into sexual intercourse.

48. In order to prove its case, it is incumbent on the prosecution to prove the age of the victim of the alleged offence. Pw1 informed the Court that she was a minor aged 15 years old. Pw5, the mother to the complainant referred to a birth certificate which was produced in Court by the investigating officer as prosecution exhibit number 1. The birth certificate entry number L1511504093 serial number 3897395 shows that the complainant, J.N was born on 14.07.2002 and therefore as at 13th January, 2018 she was aged 15 years and 6 months and therefore a minor in the bracket defined by section 8(3) of the Sexual Offences Act. I find that the prosecution had proved the age of the complainant.

49. The other key issue for determination is whether the accused defiled Pw1. The complainant, in her sworn evidence, explained how the incident occurred. I need not re-phrase the Complainant's testimony which I have already summarized in this judgment. What is apparent is that it is only the Complainant, the victim of the alleged unlawful sexual act, who identified the accused as the person who defiled her. The credibility and truthfulness of her testimony goes to the root of the prosecution case and which I shall endeavor to determine. I am alive of the proviso under section 124 of the evidence Act, applicable to minors, which provides as follows;

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (underlined for emphasis)

50. The complainant (Pw1) informed the court that she spent the night at the police cell and in the following morning, on 13th January, 2017, the accused, who was a police officer based at the said station, asked her to come out and clean the report office.

51. Pw1 further stated that she did the work and before being taken back to the cells, the accused took her to the report office and asked her if she had done anything with her cousin which she denied. Thereafter, according to her testimony, the accused stood in front of her against the wall in the report office and she pushed her away only for the accused to ask her if they could have sex and she resisted the advance. Pw1 informed the Court that the accused grabbed her and blocked her mouth and forced her down on a box in the report office, removed his penis and had sex with her.

52. Pw3, PC Mutuma stated that in the morning of 13.01.2018 PC Rotich took the complainant from the cell so that she could clean the report office. She stated that the complainant cleaned the office and was brought back to the cell and he did not receive any complaint.

53. The accused, in his defence, did not deny that the complainant was in the cell stating that at 10:00 pm he had booked her in cell as a child in need of care and protection. He did not also deny that he took the complainant from the cell and

supervised her as she cleaned the report office. In his defence, the accused stated that the doors to the cell and the report office were wide open and he did not defile the minor. He stated that it was Pw3 who took the minor back to the cell. Pw3, however, stated that it was the accused who took the minor back to the cell after she finished cleaning the report office.

54.Pw2 stated that he took over the duties from PC Rotich and PC Mutuma. He stated that he visited the cells to confirm the cleanliness and hear if there was any complaint. He further testified that in the female cell he found J.N, a juvenile who had been held as a child being in need of care and protection and the said J.N complained bitterly that on 13/1/2018 early in the morning she was called from the cells by an officer to clean the report office and the said officer forced her into sexual intercourse in the report office.

55.Pw2 further stated that the complainant told him that she had not reported earlier due to fear and she did not give the name of the officer but described him as a big man who she could identify on sight. Pw2 stated that he called the OCS and informed him and the OCS carried his own investigations. Pw2 stated that the officers who were on duty on 13/1/2018 were PC Mutuma and PC Rotich. He stated that PC Mutuma was of average size and the girl had described the perpetrator as a big man. Pw1 further stated that the complainant informed him that the act of defilement occurred at a corridor in the report office where there is a big metal box used to put prisoner's property.

56. There is undisputed evidence that the accused was with the complainant in the report office and the accused did not deny this during his defence. The complainant stated that the alleged act of defilement occurred at the report office on a big box placed in the said office. The Court visited the scene on two occasions. On the first occasion, the complainant, when cross examined, pointed at a box in the corner and also pointed at the adjacent cell where she had been held. When further cross examined on 17/9/2019, the complainant *inter-alia* stated;

“you held my shoulders then blocked me. You held my mouth and put me on the box. My zip was loose. You just pulled down my trouser. I was trying to push you away but I could not manage....”

57.Pw4 stated that that she accompanied the investigating officer in taking the complainant to hospital. I have considered the medical evidence adduced as

summarized above in the evidence of Pw11. In the p3 form filled by Dr. Kibathi on 17/1/2018, genitalia examination of the complainant revealed no injuries to labia and no vaginal bleeding. The hymen was not intact. High Vaginal Swab revealed presence of epithelial cells. No spermatozoa were seen. When cross examined, Pw11 opined that the p3 form confirmed that the hymen was not intact meaning that there was penetration.

58. Pw11 when further cross examined stated that there was corroborative history that there was defilement and despite the fact that no spermatozoa was seen, the explanation by the complainant that she had wiped herself with tissue after the incident could have interfered with the test results.
59. The complainant informed the Court that her under pant and trouser were handed over to officers. Her mother (Pw5) informed the Court that officers from IPOA interviewed them and handed over the clothes that the complainant was wearing on the material night. Pw7 and Pw8 are both Principal Investigation officers working with IPOA. Pw8 sought to corroborate the evidence of pw7 almost verbatim. He stated that on 15/1/2018 he was assigned this case by his in charge, one Pauline Njoroge. He stated that on 16/12018, in company of his colleagues, they went to Gatundu and were briefed on the ongoing investigations by the OCS. The investigations were being undertaken by the DCI and the accused had already been placed in custody. He stated that they had a brief from the Investigation officer, Corporal Ekiru and also met the minor and her mother at the station before interviewing them at the Children's office.
60. Pw8 stated that his colleague established that the pant and trouser that the minor was wearing was intact and they informed the minor and the minor's mother to keep the same safely. He further informed the Court that on 18/1/2018, in the company of his colleagues, Jane Ndusia (Pw7), Patrick and Lydia Mapenzi they met the victim and her parents in Gatundu town and Pw7 took the statement of the complainant's mother while Rono Patrick and Lydiah accompanied him to the minor's home led by the minor's father and the minor. He stated that the minor's father handed over to him a pant with animal prints and a black trouser and he placed the items in a brown envelope and sealed the same with a red tape. He stated that on the same day he delivered the exhibits to their IPOA laboratory for safe keeping before finally taking the exhibits to the Government Chemist.

61.Pw10 examined the items and made the following findings;

- a) The under pant marked IPOA JN1 was moderately stained with blood of human origin but no seminal stain was detected
- b) The pair of trousers IPOA JN2 had seminal stains but had no blood stains.
- c) The DNA profiles generated from the blood stains on the under pant and the seminal stains on the trouser and the buccal swabs from J.N. K and Paul Kipkoech Rotich were tabulated and an opinion was formed. The conclusion was that;
 - I. The DNA profile generated from the blood on the under pant matched the DNA profile generated from the blood swab labelled J.N.K
 - II. The DNA profile generated from the seminal fraction of the stain on the trouser (IPOA JN2) matched the DNA profile generated from the buccal swab labelled Paul Kipkoech Rotich with a random probability of match of 1 in 1.85×10 raised to power 20.

62.I have carefully considered the report of the Government Analyst dated 26/2/2018 and the attached tabulated DNA profiles. The accused DNA profiles matched the seminal fraction found in the trouser handed over by Pw8. Pw8 stated that he had obtained the trouser from the father to the complainant on 18/1/2018 and preserved the same at the IPOA laboratory. When cross examined, he stated that he was wearing hand gloves and secured the exhibits in a khaki enveloped which he sealed with a red tape. Pw10 confirmed that the exhibits were received through the exhibit memo forms produced and he identified the exhibits including the Khaki envelop and the red tape which had been used to seal the khaki envelop.

63.Pw5 stated that the complainant's black trouser had not been washed and that the IPOA officers had asked them to keep it dry and safe before it was stored safely. The said exhibits were collected a few days after the alleged offence and kept in IPOA laboratory. The collection, packaging, sealing, labeling, storage and preservation of the said exhibits was clearly explained ensuring that they were not contaminated. The evidence of Pw7 and Pw8 was well corroborated and not impeached during cross examination. I, therefore, find that the integrity of the exhibits remained intact.

64. The complainant was first treated at the Gatundu Hospital on 14/01/2018. In the P3 form it is indicated that the clothes were not available for assessment. The investigating officer had ignored this detail. However, the case was jointly investigated by the DCI and the IPOA and the officers of IPOA were able to get hold of the clothes that the complainant was wearing.

65. The medical examination revealed that no spermatozoa was seen after High Vaginal Swab. Section 2 of the Sexual Offences Act defines penetration as follows: -

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

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

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

67. In this case, there is overwhelming medical evidence that the seminal fraction found in the trouser that the complainant was wearing on the material night of the offence was examined and matched the DNA locus of the accused person. The only logical conclusion is that the accused, through the act of penetration ejaculated the seminal fluids and the stains were left on the trouser the complainant was wearing. This possibly happened when the accused wiped himself with a tissue after the act as explained by the complainant. This was proof, beyond peradventure, that the accused had engaged in sexual intercourse with the complainant.

68. There is no doubt that the complainant identified the accused as the man with a big physique who was at the report office. Pw9 stated that when he took over the investigations, and before the accused was arrested, the complainant was able to point to the accused as the police officer who defiled her. This was therefore a case of recognition and there is no possibility of error in the identification of the accused. The accused did not deny having interacted with the complainant on the material night of the offence.

69. In his defence, the accused stated that he was framed for the offence since his name was to be put in the promotion list. He also stated that he had an affair with an officer named Rose Achieng who the then OCS was also interested with. I have, however, independently evaluated the testimonies of the prosecution witnesses.

70. The complainant (Pw1) and her mother (Pw5) both stated that they did not know the accused before the incident. Pw5 only went to the station on 15/1/2018 and heard reports that a minor aged 15 years had been defiled. She had no opportunity to plan and frame the accused. Similarly, Pw2, Pw3 and Pw4, all police officers then based at the Gatundu police station, stated that they did not have any grudge or differences against the accused. The testimonies of Pw7 and Pw8 remained credible. The two officers work at the IPOA, an independent police oversight body with the statutory mandate of investigating complaints against police officers. The said officers had been instructed to follow-up and investigated the alleged case of defilement reported by the media. I find that there is no possibility that they conspired with any of the police officers at the Gatundu police station to frame the accused. I also find the report of the government analyst credible.

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

“Where available medical evidence arising from examination of the accused linking him to the defilement would be welcomed. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the victim was penetrated by the accused person.”

72. I find the evidence of the complainant well corroborated by the forensic evidence from the DNA profiling and also corroborated by the other witnesses. The complainant had been booked in the cell being a child in need of care and protection. The accused, on 13/1/2018 at about 5 am, summoned her from the cell to clean the report office. The duty roaster confirmed that the accused was

on duty on the said night. While Pw3 supervised the cleaning of the cells, the accused supervised the complainant and had the opportunity to commit the offence.

73. After cleaning the report office, the accused, who is a heavily built man, took advantage of the vulnerability of the complainant, grabbed her, gagged her mouth and locked her in the report office and then forced her to lie down on a big box in the report office before having sexual intercourse with her. The accused had the opportunity to perpetrate the heinous act against the minor who was in need of care and protection. The complainant gave a graphic narration of what transpired and taking all the circumstantial evidence as corroborated by the DNA report, I believe she was telling the truth as guided by the proviso under section 124 of the evidence Act CAP 80 of the Laws of Kenya.

74. I find that the prosecution has proved, beyond reasonable doubt, that the accused committed the offences he is charged with in the main charge.

75. I, accordingly, convict the accused under section 215 of the Criminal Procedure Code for the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006.

**JUDGMENT DATED AND DELIVERED AT GATUNDU THIS 2nd DAY OF
FEBRUARY 2021**



H.M. NG'ANG'A

PRINCIPAL MAGISTRATE

IN OPEN COURT IN THE PRESENCE OF:

PROSECUTOR: Ms Timoi, State Counsel

ACCUSED: Present

COURT ASSISTANT: MR. WILLY MWANGI

Cp: We have no previous records