NM v Republic (Criminal Appeal E042 of 2022)
[2023] KEHC 3641 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3641 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E042 OF 2022

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

NM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Kimilili Magistrate's Court Sexual Offences Case No 24 of 2019 with the offence of defilement of a girl contrary to what was described as Section '8(1)(3)' of the *Sexual Offences Act* No 3 of 2006.

2. Since there is no Section '(8(1)(3)' in the *Sexual Offences Act* No 3 of 2006, I presume that what should have been cited was Section 8(1) as read with Section 8(3) thereof.

3. On particulars, it was alleged that the Appellant on the February 9, 2019 in Bungoma North Sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of BNW, a girl child aged 14 years.

4. There was also the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the same date and same place as above, he intentionally caused his penis to come into contact with the vagina of the same RNS, a child aged 14 years.

5. The Appellant was represented by Mr Kassim Advocate.

Prosecution evidence

6. The prosecution called 5 witnesses.

7. PW1 was the alleged defiled girl's mother. She stated that she is a farmer and that the girl was her third child, that on February 9, 2019 around 9 am she was at home with the girl, she then sent the girl to go and borrow soap from her uncle, herself she went to fetch water, on her way back and just upon arriving back home her neighbour one D approached her and told her that her grandmother one DN was calling her, she went to DN's home and found DN and the girl amongst other children, DN told her that the girl had told her that somebody had defiled her, she started beating the girl and asking her why she had gone to that man, the girl said that it is the man who called her, the girl gave the man's name as N, N is their neighbour whom she knows well.

8. She added that the girl told her that N 'amenifanyia tabia mbaya', she then went to Nicholas' house with the girl, she found that N was taking a bath, she was angry so she started shouting and screaming, N lives about 200 metres away, she did not get any help, her sister J eventually came and assisted her, she called J who came and advised her to report to the chief, she went to the chief and was referred to the police, she went to the police and reported, 'Mukasa' (village elder) was also informed, because she was very angry the police took over from her, they said that she should not handle the matter, the girl goes to school at [name withheld] school and that she usually faints nonstop. At this point, she referred to and identified a letter from the girl's school and the girl's baptismal card showing that she was born on October 9, 2005.

9. She then reiterated that she knows N very well, they were neighbours for 4 years, they used to be good neighbours until this incident. She then identified the Appellant in Court as the said N. She added that the girl told her that the Appellant had promised her a watch.

10. In cross-examination by the Appellant's Lawyer, she reiterated that she was the girl's mother, she did not know the complainant's mental state, she took her to Naitiri hospital, she had not produced any hospital documents, herself she dropped out of school in Form 1, she could not remember the girl's date of birth, the girl was 15 years old and not 20, she was born at home, that she had not produced a birth certificate, it is true that she did not see the Appellant in the actual act of defilement, the complainant is the one who narrated to her, it is true that the Appellant has a wife, she sees them together, she is aware that they have a Mpesa and clothes shop.

11. She added that the Appellant's wife is her friend, she knows that they love each other very much, his wife will be lying to say that she was with her husband at the time of the incident, the Appellant was arrested on the same day of the incident, she did not see the Appellant's wife at the police station, she went to the AP post and not the police station, they told her that she should not go because she was very angry, it is not true that she demanded for Kshs 60,000/- from the Appellant's wife to settle the matter out of Court, she is aware that the Appellant was detained on February 9, 2019 up to February 14, 2019, he was in custody all this time, it was the OCS who ordered that the girl be examined, she was examined on February 14, 2029, she did not mention banana plantation when recording her statement.

12. She stated further that the Appellant lives around 1 km away from her home, she recorded a statement, the said DN refused to record a statement despite the fact she was the one who called her and informed her of the incident, Delvin also refused to record a statement, the girl was examined, DN called her and informed her of the incident, the girl also told her what had happened, DN did not mention the culprit, the girl however showed her Ns' house and said that the owner of the house had defiled her.

13. The next witness PW2, was the girl (the complainant). She gave her evidence on December 21, 2020. Before taking the stand, the Court had on July 30, 2019 directed she be taken for mental state assessment at the Kakamega County Hospital. This is because the Court was informed that she had mental deficiencies. The typed proceedings do not however show whether a Report was submitted to the Court after the mental assessment was concluded or what the Court stated about it. However, I

have gone through the lower Court file and have come across a Report from the Kakamega County Referral Hospital addressing the girl's mental state and authored by a Psychiatrist. The letter is dated February 18, 2002 and states as follows:

> ' The above named presented to our facility on the February 18, 2020 for mental assessment on suitability to be a witness in a trial.
>
> [Name withheld] could coherently explain the sequence of events leading to her attack: she is in a position to identify the alleged aggressor, though she has poor judgment.
>
> In view of the above it is my belief that she is in a position to be a witness'

14. I presume that it is this Report that the Court considered in allowing the child to give her evidence.

15. Be that as it may, she took the stand. She stated that she stays with her mother at home, she does not go to school at this time, she was aware that she was in a Court, she has a case against N, her mother had sent her to her uncle ES, she was to get soap and take home, she had just passed a mango tree when the Appellant called her by whistling at her, she went to his home, he asked her to hold on the table, he started from the back then he took her to the bedroom, he then inserted 'his thing' in hers. It is recorded that she pointed at her vagina.

16. She added that the Appellant lowered her pants before he started from behind, that he then brought a mattress from the bedroom and put her on it, she lay facing up, he put it there again, after that he promised to buy her a watch, one DN sent her grandchild to go call the girl's mother because N had done bad things to her, she left there running because she was bleeding from her vagina, N caused the bleeding, the Appellant was seated when she was bleeding, her mother did not find her at the scene.

17. In cross-examination, she stated that she goes to school at [name withheld] school, that she was in class 7, she knew the Appellant's name because he had told her, his name is N, she was going to ES's home to get soap, she was passing by a mango tree when N whistled at her, there was no banana plantation, the accused led her to his home, it was one room.

18. She added that he locked the door once they got in, he asked her to hold on to the table, the Appellant then entered her anus then brought a mattress, she lay facing up, he then inserted his thing in her urinating organ, he pulled her clothes, he removed his belt, he then asked her not to tell people, he was the first person to do that to her, her mother knew her date of birth, KDN is Ns' neighbour, their homes are 30 metres apart, DN saw her coming out of Nicholas' house, they went to the police to take the clothes that she was wearing when the incident happened, the Appellant was arrested, she was taken to hospital, they checked her whole body and said it was okay, it was at Naitiri.

19. In re-examination, she stated that she met DN in the morning, that she was from Ns' house at that time and that she met her on the road.

20. PW3 stated that she is a registered clinical officer having graduated from KMTC Kapkatet campus in the year 2010 with a diploma in clinical medicine and surgery, that she was working at Ndalo Health centre, she has been there from February 2016, she had treatment notes for the girl issued from their facility, she reviewed the girl on February 13, 2019, on vaginal examination the outer genitalia was normal, there was whitish discharge, the hymen membrane was broken, there were no lacerations or obvious bleeding, she examined the girl and filled the P3 Form.

21. She then stated that the girl had earlier on February 10, 2019 been treated at Tongaren, it was noted that that there was no laceration or tears on the vagina, on speculum investigation the vagina walls were looking old and there was no bleeding, she tested negative for pregnancy, VDRL was non-reactive,

high vaginal examination showed bloody mucus, epithelial cells and spermatozoa were seen, urine test showed red blood cells and epithelial cells, the patient was a known HIV positive client at the facility, sperm cells can last up to 72 hours, the P3 Form and treatment notes bore similar trends, the girl had a jingoist infection and that her findings revealed that the girl was defiled. She then produced the treatment notes from Naitiri and the P3 Form as exhibits.

22. In cross-examination, she stated that she was based at Naitiri, that she had her practicing licence with her, the same was issued in 2011, the girl was brought by the police, she reviewed her and filled the P3 Form, she filed the P3 Form 5 days after the incident, she did not do any tests, she relied on the Tongaren lab work, she generally examined the patient and filled the P3 Form, on high vaginal swab spermatozoa was seen, the hymen can be broken in a variety of ways including vigorous exercise and carrying heavy loads, she relied on the history and treatment notes to reach her findings, the girl was a known HIV positive patient, the notes from Tongaren indicated as much, no tears were seen on the hymen on February 10, 2019.

23. In re-examination, she confirmed reviewing the patient on February 13, 2019, by 'review' she meant that she generally examined the girl and took her history, she did not do lab work because she could have gotten different results.

24. PW4 stated that she worked at Tongaren model health centre, that she holds a degree in Bachelor of Science Nurse, she graduated in August 2020, she was the one who treated the girl, she had a treatment book, the girl came to hospital on February 10, 2019 complaining of having been sexually assaulted by a person known to her on the same day, she said that the person asked her into his home then defiled her, she examined the girl using a speculum, she saw white discharge on the opening, there were no lacerations or tear, there was bleeding on the vaginal bleedings, the hymen was absent, high vaginal swab was taken and other tests were conducted in the laboratory, the girl tested negative for syphilis and pregnancy but was a known HIV positive client, high vaginal swab results showed spermatozoa, blood cells and epithelial cells, urinalys showed presence of blood, there were no sperm cells in the urine but epithelial cells were seen, she made a diagnosis for sexual assault, she gave her medicine to prevent pregnancy, the presence of sperms confirmed that there was defilement on the day.

25. In cross-examination, she stated that she could not confirm whether the girl changed clothes, the hymen was absent, when hymen is broken there are injuries, the absence of tears on the vaginal wall showed that the hymen was broken long ago, the girl was on HIV drugs and that the age indicated was what was given by the relatives who brought her to hospital. Regarding high vaginal swabs, she stated that spermatozoa stays in someone's body for 24 hours, she examined the girl roughly 6 hours after the incident, she could not tell when spermatozoa was deposited, penetration took place because spermatozoa cells were seen.

26. In re-examination, she reiterated that the girl was HIV positive, she did not know how the girl acquired HIV, her age was indicated by the by the people who brought her.

27. The last prosecution witness, PW5 was a police officer who stated that she was attached to Nyange Police Station, that she was the investigation officer in the matter, when she was at Kiminini Police station on February 9, 2019 they received a report from a girl aged 14 years who complained of having been defiled, the girl told them that on the day at round 3 pm she was walking to his uncle to ask for soap, while on the way she passed close to the Appellant's house, the Appellant who was seated outside the house called her, when she went to him the Appellant promised to give her the sweetest thing, he then detained her in the house, the Appellant asked the girl to hold on to the table and lower her underwear, the Appellant lowered his own underwear, the girl bent down, the Appellant inserted his penis into the girl's vagina from the back, the Appellant then put a mattress on the table and asked her

to remove her underwear and lie on the mattress, the Appellant then defiled her for a second time, the girl informed her further that after the Appellant was done he picked a white piece of cloth and wiped her then asked her to leave, the Appellant asked the girl not report the incident and in return he would buy her a watch, the girl therefore left in high spirits, on her way home she passed by a neighbour's home where she met a woman and told her that the Appellant had promised to buy her a watch if she did not report the incident, the girl is epileptic and has some mental retardation, the lady instead reported the revelation to the girl's mother.

28. PW5 testified further that upon receiving the report, the girl's mother confronted the accused whom she found was still showering, the Appellant was asked but denied defiling the girl, the girl's mother sought assistance by calling her own sister since she had earlier suffered a stroke, the matter was then reported to the chief, the girl was later taken for treatment, the Appellant was arrested by the village elders and taken to the police at Kiminini where he was detained, PW5 took the girl to Naitiri health centre where the doctor confirmed that the girl had been defiled, the girl was 14 years, PW5 obtained her baptism card which showed that the girl was born on October 9, 2005, PW5 had a copy of the baptism card and a letter from the girl's school showing that the girl was a student there. PW5 then produced the baptism card and the letter from the school as exhibits.

29. In cross-examination, PW5 stated that she conducted investigations, that they did not get a birth certificate, the girl's mother separated with the father when the mother suffered the stroke, the Appellant was arrested on February 9, 2019, the girl was examined on the same date of the incident at Naitiri, she took the girl to Ndalu health centre, she did not ask the girl whether she had changed clothes, the girl was mentally retarded, she attends special needs school, she did not know the girl was HIV positive, the doctor was to confirm the findings, the girl was going to his uncle to seek for assistance, PW5 did not visit the scene, the girl explained what happened, she claimed that she was defiled twice and not once and that the incident happened at around 9.00 pm.

Defence evidence

30. At the close of the prosecution case, the Court made a finding that there was a case to answer and put the Appellant to his defence.

31. In his defence, the Appellant gave sworn testimony. He stated that he stays in Tongareni Naitiri, that he is a businessman, he owns a clothes shop and Mpesa, on February 9, 2019 he did not defile anyone, on that day he was at home with his wife, a certain lady came to the home at 9.00 am and started screaming, she was the girl's mother, the noise attracted neighbours who thronged the home, the mother came with the girl, he asked the mother what the issue was but she responded by shaking his neck and his t-shirt, she alleged that he had slept with the girl on the same day, the neighbours told the mother that it was not true because he was always with his wife, the girl and her mother then left the home, he and his wife went to Lukhuna AP post to report the incident, he was asked to provide money for fare to enable the police go and investigate the matter, they left and went to their shop, around 1 pm one David Wafula came to the shop and asked him to accompany him so that they could go and listen to the matters raised by the complainant.

32. He added that he went to Lukhuna AP post where he was arrested and handcuffed, he was kept there from 1 pm to 4 pm when he was taken to Kiminini police station with his wife, his wife then left to go and inform their relatives, he stayed in the cells from February 9, 2019 to February 13, 2019 when he was charged after his parents complained, on February 7, 2019 the complainant asked him for Kshs 1,000/- but he did not give her because he did not have the money, she promised that he would see, she later asked his wife for Kshs 60,000/- as compensation, the complainant's mother said that he had stayed with his wife for 9 years, on February 9, 2019 his wife was around and they were together on the

day, the girl is not 14 years old, she is an older woman, he wanted the case to be thrown out and he be acquitted. He also observed that none of the neighbours testified.

33. In cross-examination, he stated that the complainant came to his home on February 9, 2019, that he knew both the girl and her mother, they came to his home at 9 am, he did not sleep with the girl, the girl's mother tore his clothes, he did not know why the girl named him, he was arrested for no reason, he complained about the confrontation to the police but he was later arrested.

34. The Appellant then called his wife as DW2. When she took the stand she stated that she is a business-lady selling clothes and cosmetics, that the Appellant is her husband, they have stayed together for 10 years, the Appellant is accused that on February 9, 2019 he defiled PW1, the charges are not true, on that day they were together in the morning, she prepared for the Appellant tea and water for bathing, as she took water for the Appellant to take a bath, PW1's mother came over and complained that the Appellant had defiled her child, the mother started to scream drawing the attention of the neighbours who thronged the home, the Appellant finished bathing and came out, the girl's mother held him by the neck and tore his shirt, everyone was concerned because the Appellant is always with her (DW2).

35. She added that after the complainant and her mother left, DW2 and the Appellant went to Lukhuna AP post to report, that after a short while the village elder came, they all left for the AP post, on arrival the Appellant was arrested and cuffed, he stayed there for 3 hours before he was transferred to Kiminini to report the incident, she then went to the Appellant's father's home in Migori to inform him what had happened, the Appellant was charged on the 6th day after arrest, a few days before the incident the girl's mother had asked the Appellant for money and when he did not give her she did not take it well and promised him that she would do something, a few days later the incident happened, when the Appellant was in custody the girl's mother came to DW2 and asked for Kshs 60,000/- to terminate the matter, they operate the shop together, they have a two-roomed house, their home is not fenced.

36. In cross-examination, DW2 stated that the complainant's mother came to their home on February 19, 2019, that she is their neighbour, their home is about 200 metres away, their shop is in Lukhuna, they walked to the shop, they opened the shop on that day, they usually open between 9 am and 10 am, she does not know why the girl implicated the Appellant, they had never had an issue with the complainants, they reported the matter at the AP post.

Trial Court's verdict

37. After analyzing the evidence, on March 21, 2022 the trial Court found the Appellant guilty and convicted him for the charge of defilement of a child. The Appellant was then given an opportunity to mitigate which he did. A Report from the Probation Office was also submitted. On April 8, 2022 the sentence was read out whereof the Appellant was sentenced to 20 years imprisonment.

Grounds of Appeal

38. Being dissatisfied with the decision, the Appellant lodged this appeal on April 20, 2022. In the Petition filed by his lawyers, Messrs Kassim Sifuma & Associates, he has raised 12 grounds of Appeal as follows:

    i. That the Learned Magistrate erred in law and or fact when he held that the prosecution had proved its case beyond reasonable grounds.

    ii. That the Learned Magistrate erred in law and or fact when he believed the prosecution's evidence and discredited the defence evidence without plausible reasons.

    iii. That the Learned Magistrate erred in law and or fact when he totally overlooked the defence evidence which was never impeached during cross-examination.

iv. That the Learned Magistrate erred in law and or fact when he believed the prosecution evidence on age of the complainant without birth certificate.

v. That the Learned Magistrate erred in law and or fact when he failed to appreciate that the prosecution evidence on age of the complainant lacked credibility and corroboration and disbelieved it.

vi. That the Learned Magistrate erred in law and or fact when he totally failed to believe the formidable evidence of DW1, the wife of the Appellant.

vii. That the Learned Magistrate erred in law and or fact when he failed to take precaution and extreme care when taking evidence of a complainant who is insane.

viii. That the Learned Magistrate erred in law and or fact when he overlooked the evidence of the Clinical Officer that the complainant was a known HIV+ victim and hymen was broken long before the date of alleged offence a proof that the complainant was already sexually active at the time.

ix. That the Learned Magistrate erred in law and or fact when he convicted the Appellant on the basis of the very weak framed up charges of the prosecution without independent eye witness.

x. That the Learned Magistrate erred in law and fact when he sentenced the Appellant to 20 years.

xi. That the Learned Magistrate erred in law and or fact when he failed to record very crucial evidence of PW1 in cross-examination.

xii. That the Learned Magistrate erred in law and or fact when he failed to find that after carefully assessing the accused person vis-a-viz the defence evidence there is doubt as to whether the accused person committed the alleged offence and therefore grant the Accused/Appellant benefit of doubt and to acquit the Accused person under Section 215 of the Criminal Procedure Act Cap 75 Laws of Kenya.

39. Parties then filed written submissions in support of their arguments. The Appellant's Submissions were filed on November 25, 2022 while the Respondent's was filed on January 17, 2023 by Learned Senior Prosecution Counsel PJ Kibet.

Appellant's Submissions

40. In the Submissions, Counsel for the Appellant alludes that the prosecution did not prove the case, that the girl's evidence ought to have been much more scrutinized because she was said to be mentally retarded, key potential witnesses such as neighbours did not testify, that the medical expert witnesses stated that there was no laceration on the vaginal walls nor obvious bleeding, the girl stated that the sexual encounter with the Appellant was her first ever yet the medical expert witnesses found that her hymen was absent which meant that she had participated in sexual activities severally, the medical evidence presented did not include determination of the culprit, the medical evidence was not therefore of assistance since the Appellant was not subjected to any medical examination, it was established that the girl was a known HIV victim, the investigation officer's evidence should not have been taken seriously since she did not even visit the scene.

41. He added that the girl testified that the Appellant's house was one-roomed but that the reality was brought about by DW2 who testified that their house is two-roomed, that this kind of discrepancy would have been easily clarified had the investigating officer visited the scene, a key witness such as one DN Nanjala who allegedly saw the girl coming out of the Appellant's house and prominently referred

to by the girl and his mother were never called to testify, that the alleged blood stained clothes worn by the complainant were never produced, that there was no explanation why a DNA test was never conducted, the Appellant testified that a few days before the incident the girl's mother had asked him for money but he did not give her and that because of this the mother threatened that 'he will see'.

42. Further, the Appellant added that the Appellant's wife testified that she was with the Appellant that particular morning and that they were preparing together to go to work, that the Appellant's wife testified that after the Appellant had been arrested and put in police custody the girl's mother approached her and asked for Kshs 60,000/- to withdraw the case, the benefit of doubt arising from the above matters should be given to the Appellant, the charge sheet was defective. The decision of Hon Judge Chacha Mwita in *Gordon Omondi Ochieng v R, Kajiado Criminal Appeal No 42 of 2019 [2021] eKLR* was cited.

Respondent's Submissions

43. On his part, Counsel for the Respondent submits that all the elements of the charge of defilement, namely, age of the minor, penetration and identity of the perpetrator were all proved, that age of the complainant does not have to necessarily be proved by only a birth certificate, the trial Court had the benefit of seeing and hearing the witnesses and was best placed to determine their credibility and whether they were telling the truth, the trial Court believed the prosecution witnesses, an appellate should not easily interfere with sentences imposed by a trial Court.

44. Counsel submitted further that the evidence of the prosecution witnesses was consistent, that in defilement cases the Court is permitted to convict on the basis of the evidence of a single witness where such evidence of the single witness is believable, the testimony offered by the Appellant and his wife were evasive and general denials, simply because the girl was HIV positive does not mean that the Appellant could only be linked to the defilement if he too were tested and found to be also HIV.

Analysis and determination

45. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned Judgment.

46. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see *Okeno vs Republic [1972] EA 32*)

Issues for determination

47. In my view, the issues that arise for determination in this appeal are the following;

    i. Whether there was error in the Charge Sheet rendering the trial fatal.

    ii. Whether the prosecution proved its case beyond reasonable doubt.

    iii. Whether the sentence of 20 years imprisonment was lawful and proper.

48. I now proceed to analyse and answer the said issues.

    i. Whether there was an error in the Charge Sheet rendering the trial fatal

49. As aforesaid, the Appellant's Counsel has correctly pointed out that instead of stating that the Appellant was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, the Charge Sheet indicated that he had been charged under 'Section 8(1)(3)' of that Act. Of course, 'Section

8(1)(3)' does not exist under that Act. According to Counsel, the above mix-up rendered the entire trial, conviction and sentence fatal.

50. I refer to Section 134 of the Criminal Procedure Code which provides as follows:

> ' Every charge of information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.'

51. Section 8(1) of the *Sexual Offences Act* provides as follows:

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

52. Section 8(3) on the other hand provides as follows:

> ' 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.'

53. I observe that the Appellant's Counsel never raised this issue of the alleged defectiveness of the Charge Sheet during the trial, not even in his Submissions. However, the Magistrate on his own picked the issue which she then raised in his Judgment and handled this issue as follows:

> ' I have noted the charges presented here were defective in that the *Sexual Offences Act* does not have Section 8(1)(3). The proper way to charge is that the accused is charged under Section 8(1) as read with Section 8(3) of the. Thus, this defect to my view has not carried miscarriage of justice. The accused was represented by the Counsel who did not raise the issue. He further cross-examined all prosecution witness'

54. I now refer to the case of *Samuel Kilonzo Musau v Republic [2014] eKLR*, where the Court of Appeal, while considering an appeal on a similar ground, held as follows:

> ' As will be readily apparent, section 8(1) is the offence section; it creates the offence of defilement constituted by committing an act which causes penetration with a child. Section 8(2) is the punishment section and prescribes life imprisonment when the child defiled is aged eleven years or less. The charge would have been properly framed if it charged the appellant with defilement contrary to section (8) (1) as read with sections 8(2) because section 137 of the Criminal Procedure Code requires the statement of the offence to describe the offence in ordinary language and if the offence is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.
>
> In this case, the statement of offence, though lumping section 8(1) and (2) together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under section 382 of the Criminal Procedure Code. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice.'

55. I also point out Section 382 of the *Criminal Procedure Code* which provides as follows:

> ' 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.'

56. It is therefore clear from the foregoing that irregularities in a Charge Sheet are curable as long as they do not occasion 'a failure of justice'. In this Appeal, it has not been demonstrated how the mix-up in the Charge Sheet in any way prejudiced the Appellant or occasioned 'a failure of justice' to the Appellant. Besides simply generally pointing out the mix-up, no attempt whatsoever has been made to demonstrate the 'failure of justice' caused, if any. It has also not been denied that 'the objection could and should have been raised at an earlier stage in the proceedings' as required under Section 382 of the Criminal Procedure Code (supra).

57. In view thereof, this Court's view is that the charge sheet contained sufficient particulars to enable the Appellant understand the charges that he was facing and respond to them. Evidently, the Appellant knew the charge and defended himself accordingly. I therefore find that Section 134 of the Criminal Procedure Code was substantially complied with and the mix-up pointed out was a minor defect incapable, on its own, of nullifying the trial, conviction or sentence.

Whether the prosecution proved its case beyond reasonable doubt

Elements of the offence of defilement

58. As aforesaid, the appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provide as follows:

> ' 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> '8(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.

59. The specific elements of the offence of defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are the following:

    a. Age of the complainant.

    b. Proof of penetration.

    c. Identification of the perpetrator.

60. The above was reiterated in the case of *Charles Wamukoya Karani Vs Republic, Criminal Appeal No 72 of 2013* where it was stated as follows:

> ' The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.'

Age of the complainant

61. In a charge of defilement, the age of the victim is important for two reasons: (i) defilement is a sexual offence against a child; and (ii) age of the child is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence.

62. It is common ground that in this case no birth certificate was availed. However, a baptismal card dated December 25, 2005 was produced. The same indicates that the girl (PW2) was born on October 9, 2005. This therefore means that on February 9, 2019, the date when the act of defilement is alleged to have been committed, she was about 13 years and 3 months. Age is often rounded off to the nearest next full year, so in this case, 13 years and 3 months may well be rounded off to 14 years.

63. In the Charge Sheet dated February 14, 2019, her age was stated to be 14 years. PW2 herself testified that she was a Standard 7 pupil as at the time that she gave evidence, namely, December 21, 2020. This fact was confirmed by the letter from her school. I take judicial notice that in Kenya a child at standard 7 would generally be expected to be about 12-14 years. Her mother, (PW1), testified on September 17, 2019 and stated that as at that date PW1 was 15 years old.

64. On this question of age, I cite the case of *Fappyton Mutuku Ngui vs Republic [2012] eKLR* where it was held as follows:

'Conclusive' proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.'

65. From the foregoing, I am satisfied that the prosecution proved that the child was born in the year 2005. The stated age of 14 years was therefore proved. Even if I were to consider the age of 15 years alluded to by the mother, that age would still fall within the limits stipulated under Section 8(3) of the Act which refers to 'an offence of defilement with a child between the age of twelve and fifteen years'

Penetration

66. Section 2(1) of the *Sexual Offences Act* defines 'penetration' as:

> ' The partial or complete insertion of the genital organs of a person into the genital organ of another person.'

67. The girl, who was stated to be marginally mentally deranged to some extent, managed to state as follows:

> ' I had just passed by a mango tree when the accused N called me. He called me. He whistled. I saw and went to his home. He then asked that I hold on to the table, he started from the back. He then took me to his bedroom. He inserted his thing in mine. The minor points at her vagina. She then points at the vagina area of where the thing for accused is situated. He lowered my pants before he started from the behind. He brought a mattress from the bedroom and put me on it. I lay facing up. He put it there again. After that he promised to

buy me a watch. I one DN sent her grand child to go call my mother because N had done bad things to me. I left there running because I was bleeding from vagina. N caused the bleeding.'

68. In cross-examination, she reiterated the same in the following terms:

> 'The accused led me to his home. It is one room. He locked the door once we got in. He asked me to hold on the table. The accused entered my anus then brought a mattress. I then lay facing up. He then inserted his thing in my urinating organ. He pulled my clothes. He removed his belt. He then asked that I do not tell people. He was the first person to do that to me.'

69. On her part, PW1, the child's mother, testifying on what the child told her, stated the following:

> ' DN then told me [name withheld] had told her that somebody had defiled her. I started beating [name withheld] and asking her why she had gone to that man She said Nicholas amenifanyia tabia mbaya.'

70. On her part, PW3, the clinical officer from Ndalo Health centre testified as follows:

> ' On high vaginal examination showed bloody mucus. Epithelial cells and spermatozoa were seen. Sperm cells can last up to 72 hours. In the P3 Form and treatment notes bear similar trend. My findings revealed that the minor was defiled.'

71. PW4, the other medical expert witness from Tongaren model health centre who examined the girl on the same day of the alleged incident testified as follows:

> ' I made a diagnosis for sexual assault. I gave her medicine to prevent pregnancy. The presence of sperm conformed that there was defilement on the day.'

72. In re-examination, she stated as follows:

> ' spermatozoa stays in someone's body for 24 hours. I examined the patient roughly 6 hours after the incident. Penetration took place, spermatozoa cells were seen.'

73. I have carefully considered the above testimonies and find them to be consistent and believable. I find that the child, in spite of her stated mental challenges, gave a truthful, vivid and graphic account of the whole incident. It is not lost on me that she gave the same account to her mother, to the police, to the medical staff and also to the trial Court all on different occasions. I therefore find that the child's account on the issue of penetration was consistent with the testimonies of the other prosecution witnesses thus it was sufficiently corroborated. I therefore find that penetration was also proved.

74. In view of all the above, I agree with the trial Court that indeed penetration was proved.

Identification of the Appellant

75. The Appellant resides in the same locality and neighbourhood as the minor. The Appellant confirmed these descriptions He is therefore a person well-known to her. There was therefore no element of mistaken identity of the Appellant. Medical evidence has established that the defilement took place and the minor has consistently named the Appellant as the person who defiled her.

76. As already stated above, I have carefully considered the above testimonies and find them to be consistent and believable. I find that the child, in spite of her stated mental challenges, gave a truthful,

vivid and graphic account of the incident. I reiterate that it is not lost on me that she gave the same account to her mother, to the police, to the medical staff and also to the trial Court all on different occasions.

77. I therefore reiterate my finding that the child's account to the trial Court on the identity of the Appellant as the perpetrator was wholly consistent with the account that she gave to all the other prosecution witnesses.

78. Although the Appellant has claimed that the child's mother had a grudge against him because a few days before the alleged incident he refused or failed to give her money, in light of the child's clear and credible testimony, I am not persuaded by the Appellant's explanation. Even without the mother's testimony, the child's evidence was not shaken by the Appellant. Considering that she was said to be suffering from a mental illness, her consistency and her repeated vivid description of the events can only mean that she was very sure of what she was stating.

79. Although the Appellant's wife claims that the incident could not have happened because allegedly she was with the Appellant at the time when the incident is alleged to have occurred, I am not persuaded by her defence of the Appellant. She appeared to be a little suspiciously over-enthusiastic and determined to defend the Appellant at all costs. Her claim that 'she was always with the Appellant' sounds far-fetched and impractical. Her testimony also appeared evasive. Be that as it may, since the trial Court saw and heard the testimonies and also had the opportunity to observe their demenour, I choose not to interfere with the trial Court's decision to believe the child and not the Appellant and/or his wife.

80. Since I have already found that the testimonies of the prosecution witnesses were consistent, candid and credible, I find that the Appellant was positively identified as the perpetrator; there was no mistaken identity or error.

81. Even if it were to be argued that the evidence of the child was not sufficiently corroborated, I will still find refuge in Section 124 of *Evidence Act* which provides as follows:

> ' In a criminal case involving a sexual offence, where 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 if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'

82. The Appellant's Counsel argued that the medical evidence presented did not include determination of the culprit. I also understood to him be alluding that since it was established that the complainant was a known HIV positive patient, the medical evidence presented was not of assistance since the Appellant was not subjected to any medical examination to determine whether he contracted HIV in the process of the alleged sexual act. He also submitted that the alleged blood-stained clothes worn by the girl were never produced and that there was also no explanation why a DNA test was never conducted.

83. On this argument, I take judicial notice of the reality that merely engaging in a sexual intercourse with a HIV positive partner does not necessarily result into one being infected with the virus. The HIV test would not therefore have necessarily added much value to the determination of the defiler's identity.

84. Secondly, I refer to the case of *Dennis Osoro Obiri v Republic [2014] eKLR* where the Court of Appeal quoted its decision in *Geoffrey Kioji v Republic, Crim App No 270 of 2010* (Nyeri) where it held as follows:

> ' Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. 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 defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.'

85. On authority of the above holding therefore, even if the medical evidence were deemed to be insufficient, still that conclusion per se will not by itself be fatal to the trial Court's finding that the Appellant was the perpetrator. The law is that the trial Court could still safely convict if it was satisfied that the other prosecution evidence proved the case.

86. On its part, this Court is satisfied that even without the medical evidence, under the provisions of Section 124 of the *Evidence Act* there was still sufficient evidence to prove penetration since the evidence was credible.

Finding

87. In view of the foregoing, I find that the evidence by the prosecution left no doubt that the Appellant defiled the girl. The sexual act was clearly not forced on her but was procured by deception and by making promises to reward her after the act. She was easily lured and taken advantage of because of her age and perhaps also because of her stated mental deficiencies. In any event, in view of her minority age, she was incapable in the eyes of the Kenyan law to consent to the sexual act as she had not yet reached the legal age where she would have possessed the capacity to consent.

88. In the circumstances, I find that the elements of defilement, namely, penetration, minority of the victim's age, penetration and identity of the assailant were all proved. The conviction was therefore proper.

89. The Appellant's Counsel argued that since was there was indication that the child was mentally retarded to some extent, her evidence ought to have been treated with much more caution. On this point, I already stated that before taking the stand, the Court directed that the girl be taken for mental state assessment at the Kakamega County Hospital, that the typed proceedings do not however show whether a Report was submitted to the Court after the mental assessment was concluded or what the Court stated about it, that however I went through the lower Court file and came across a Report from the Kakamega County Referral Hospital addressing the complainant's mental state and authored by a Psychiatrist and that the letter states as follows:

> ' The above named presented to our facility on the February 18, 2020 for mental assessment on suitability to be a witness in a trial.
>
> [Name withheld] could coherently explain the sequence of events leading to her attack: she is in a position to identify the alleged aggressor, though she has poor judgment.
>
> In view of the above it is my belief that she is in a position to be a witness'

90. As earlier stated, I presume that it is this Report that the Court considered in allowing the girl to testify. In the circumstances, I am satisfied that the Court took the necessary steps before allowing the girl to give evidence, which in any event, turned out to be quite coherent and credible.

91. There was also the claim that the prosecution did not call critical witnesses such as the said DNN and that such failure should entitle the Court to make an adverse finding against the prosecution case. On this point, I am aware that Section 143 of the *Evidence Act* which provides as follows:

> ' No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact.'

92. I am also aware of the decision of the East African Court of Appeal in the case of *Bukenya & Others vs Uganda [1972] EA 549* which is the leading case on this issue. In the case, the Court held that the prosecution must make available all witnesses necessary to establish the truth even though their evidence may be inconsistent, that the Court has the right and the duty to call any person whose evidence appears essential to the just decision of the case and that where the evidence called is not or is barely adequate the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

93. However, in the same Bukenya case (supra), the Court was also categorical that the prosecution is not expected to call a superfluity of witnesses and that the adverse inference will only be inferred if the evidence by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be made where the evidence tendered is sufficient to prove the particular matter in issue or the entire case.

94. Since in my re-evaluation and analysis of the evidence in this case I have reached the finding that the evidence provided was adequate, the omission or failure to call the other potential witnesses is incapable of overturning the conviction.

95. The Appellant's Counsel also raised the issue that the child stated that the sexual encounter with the Appellant was her first ever yet the medical expert witnesses found that her hymen was absent which meant that the complainant had participated in sexual activities severally. I understood Counsel to be alluding that because of this, the minor had lied and was therefore not a credible witness.

96. On this point, I refer to PW3's testimony that the hymen can be broken through many other non-sexual activities such as vigorous exercise and carrying heavy loads. I also take judicial notice of the accepted reality that the hymen can also be perforated by insertion of objects into the vagina or lost through other means including trauma and also that not everyone is born with a hymen. Absence of the hymen is not therefore necessarily an indicator that a girl has engaged in sexual intercourse or is promiscuous.

97. Accordingly, I find that the prosecution proved its case beyond reasonable doubt and that the trial court did not err in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

Whether imposition of the sentence of 20 years imprisonment was lawful

98. In ground 10 of his grounds of Appeal, the Appellant simply stated that 'the Learned Magistrate erred in law and fact when he sentenced the Appellant to 20 years'. However, no explanation was offered on how exactly the Learned Magistrate erred.

99. In the Appellant's Submissions, there is totally no mention or reference to this ground.

100. I note that Section 8(3) of the *Sexual Offences Act* provides as follows:

> ' A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'

101. While therefore the Appellant could have been sentenced to life imprisonment under the said Section, the Magistrate exercised her discretion and imposed the lesser sentence of 20 years imprisonment. Since as aforesaid, no submission has been made before this Court to demonstrate how the Magistrate erred in imposing this sentence, I will not enter into speculation. In the circumstances, this Court will not interfere with the sentence.

Final Orders

102. In the end, I rule that this Appeal is not merited. The same is therefore dismissed. Accordingly, both the conviction and sentence are upheld.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA

JUDGE