Sitati v Republic (Criminal Appeal E065 of 2022)
[2023] KEHC 3924 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E065 OF 2022

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

MARTIN SITATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Bungoma Principal Magistrate's Court Sexual Offence Case No. E03 of 2020 with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. The particulars of the offence are that on 13/01/2022 at (particulars withheld) in Bungoma North sub-County of the Bungoma County, he intentionally caused his penis to penetrate the vagina of MNJ a child aged 13 years.

2. He was charged with the alternative offence of committing an indecent act with the child contrary to section 11(1) of the *Sexual Offences Act*.

3. The prosecution case was supported by evidence of 5 witnesses. On the part of the defence, the Appellant was the only witness.

Prosecution evidence

4. The hearing had commenced on 21/10/2020 when PW1, the complainant (alleged victim) and PW2, her sister gave evidence. The Court however observed that the Appellant did not appear mentally sound and directed that he first be taken for psychiatrist examination. Initially, the verdict from the examination was that the Appellant was not fit to stand trial. However, subsequent examination finally declared him fit. It was therefore on 23/11/2021, more than 1 year later, that trial resumed. It however commenced de novo and PW1 and PW2 returned and gave evidence afresh.

5. PW1 was the complainant (victim) Since she was a minor, she was taken through a voire dire examination after which the trial Court concluded that she understood the importance of telling the truth and the effect of making an oath. She was then duly sworn.

6. She stated that she lives with her father and mother and attends [name withheld] primary school, she was 14 years old but could not recall her date of birth, she had 4 siblings whom she named, on 13/1/2020 at night she was at the market with her mother then her mother sent her home to check whether the chicken had entered the house, she found her sister [name withheld] in the house, she went to pick a lamp from the kitchen which was separate from the main house, behind their kitchen there was a sugar cane plantation, as she was from the kitchen with a lamp which was yet to be lit when she had just stepped out of the kitchen someone grabbed and pulled her, the person held her left hand and pulled her to the sugarcane plantation.

7. She then stated that she was able to see the person who pulled her, it was a person she knew well, it was Martin the accused, there was full moon light and she could see him clearly, one could even think it was morning, one "could see like from here to beyond the wall", one could see even 10 metres away, Martin pulled her to the sugarcane plantation, he had seen Martin in the past, he had seen Martin for a long time because he used to sell water at the market and even at the police station, when they reached the sugarcane plantation he tore off her skirt and tore off her inner pant, she could not scream, he covered her mouth and told her 'if you scream I will kill you', he then lay on top of her, he removed his trouser and inner wear, when he lay on top of her he had wrestled her to the ground, she lay down while facing up, when he lay on top of her he did bad manners to her, he used his organ for urinating and inserted it into her organ for urinating, she struggled to scream.

8. She stated that her sister, PW2 came to the kitchen but did not find PW1, PW2 then saw PW1's skirt on the grass, she then found PW1 lying down helpless in the sugarcane behind the kitchen, she could not even stand on her own because she had sustained injuries on the hand, leg and back, she was feeling pain on her "thing for urinating" which was also bleeding, her sister assisted her to stand up and escorted her to the house, she then went to call her other father Abel Wanjala, Abel came and she told him what happened, she told Abel what Martin did to her.

9. She added that Abel called her father on phone, her father was then in Naitiri and so he only came the following morning, her mother was at the market and she only came back home at 9 pm., she also told her mother what happened, her mother also called his father on phone, she was then taken to Naitiri Sub-county Hospital on the following morning, it is her father who took her to hospital, she was examined by a doctor on her genitals, after treatment they reported the matter to Lunyu police post. At this point she identified the Appellant in Court as the person who did the act to her. She added that she had known the Appellant for 2 years.

10. In cross-examination, she stated that the act occurred on 13/01/2020 at 8 pm., the Appellant had a black shirt and white trouser, he left the scene running, the adjacent home was yet to be occupied so no one was in the adjacent home, they reported to the police, their home is in the midst of the sugarcane the other homes are far, she was stating the truth, there was bright moon light, he overpowered her, what she had said was not different from what she told the police, the Appellant was not examined at the hospital, the Appellant was lying by alleging that she went to hospital after 3 days, she did not go to school immediately after the incident, the Appellant threatened her with a knife, he left with that knife, she had not been coached and that she saw the Appellant.

11. The next witness was PW2, the complainant's sister. Since she too was a minor, she was also taken through a voire dire examination after which the trial Court concluded that she understood the importance of telling the truth and the effect of making an oath. She was then duly sworn.

12. She stated that she was 12 years old, she goes to [particulars withheld] primary school, she was in class 5, she is a resident of Lunyu Mbakalo, she lives with her parents, she has sisters and one brother, on 13/1/2020 they were at the market with PW1 then their mother sent them home to check on the chicken, it was around 7 pm heading to 8 pm, they went home then PW1 went to the kitchen, she (PW2) was in the main house to collect water for cooking, when she was collecting the water she saw someone passing behind the bathroom, she had D-light which enabled her to see the person, he was about 6 metres away, she saw the person, it was Martin Sitati, she had seen him before, he used to fetch water for police officers, he lives at the market, she had known him for around 1 year. At this point, she identified the Appellant as the person that she was referring to.

13. She further stated that when he passed, she heard her sister screaming and when she ran to check she saw Martin pulling her sister into the sugarcane plantation, she went to check and found Martin lying on top of her sister, where they were lying people had plucked sugarcane so it was an open field, they had D-light, she was holding it, she saw Martin, he was lying on top of PW1, when Martin was passing he had clothes on but when he was lying on top of PW1 he did not have a trouser, he had also removed PW1's skirt, PW1's skirt was red, it had been thrown aside, when he was done he escaped, she (PW2) went to tell her mother at the market.

14. She stated further that she left PW1 seated on the ground in the sugarcane plantation, PW1 sustained injuries on the knees, she also saw blood on the rear side of her skirt, the blood was coming out and flowing through her thighs, her father was away, she told her mother that she had seen Martin lying on top of PW1, her mother came and found PW1 lying in the sugarcane plantation and escorted her to the house, her mother then called her father on phone, her father came and took PW1 to hospital that night, she recorded a statement at the police station. At this point she again identified the Appellant in Court as the person that she was to referring to as Martin.

15. In cross-examination, she stated that she lives in Lunyu, she was in class 6, the incident occurred in 2020, it was at 7 pm heading to 8 pm, all she did was to call her mother, she was stating the truth, the Appellant had blue croaks, her father had not sent her to lie to the court, she was stating what she saw, she was testifying because she was the witness, the Appellant threatened to stab PW1 with a knife if she screamed, the Appellant escaped with the knife, she was stating the truth, PW1 was given medicine at the hospital, she bled, nobody was at home, she was not playing, she was at home, PW1 did not go to school immediately after the incident, it is their father who took PW1 to hospital, the Appellant left the scene running.

16. The next witness was PW3, PW1's father. He stated that he is a resident of Lunyu centre, he is a driver, on 13/1/2020 he was away from home, he was called on phone by his brother Abel Wanjala at around 8 pm. informing him that he had found Martin and PW1 at PW3's home having sex, when they saw him they got shocked, Abel told him that as Martin was trying to escape he arrested Martin, Abel told her that Martin asked for his forgiveness and he released Martin, when he availed myself at home the following day he reported the matter at Lunyu police station, he took PW1 to Naitiri Sub-county Hospital, he went back to the police station, they embarked on searching for Martin with the aim of having him arrested for defiling his daughter. At this point, he identified the Appellant in Court as the person that he was referring to as Martin.

17. He added that that PW1 informed her that it is Martin who defiled her, Martin used to frequent his home, he was a common water seller, he even used to sell water at their house so he was a well-known person, he had known Martin for over 30 years because they live in the same area, PW1 is 13 years old. At this point her identified PW1's birth certificate in Court.

18. In cross-examination he stated that he was 36 years old, he has 2 wives and 5 children, he is a driver, the incident occurred on 13/01/2020, the phone call came at 8 pm, he could not attend to the matter immediately because he was away at work, the phone call was from his brother, he attended to the child on the following day, he knows the offence that the Appellant committed, the child informed him what the Appellant did to her, he did not have any grudge with the Appellant, he did not have any land dispute with the Appellant.

19. He added that his brother Abel did not want to record a statement as he said that he did not want to involve himself with cases, he reported to the police on 14th, the Appellant was arrested on Friday, by the time that the Appellant was being arrested he (PW3) had taken the child to hospital, the doctor knew what happened to the child, the Appellant bought land from them but he does not owe them anything, the Appellant's family even sold the land to another person, he did not have any grudge with the Appellant, the Appellant asked for forgiveness and Abel released him, it is only the Appellant, Abel and PW1 who witnessed the incident, his brother found the Appellant, the Appellant was lying.

20. The next witness, PW4, described himself as a clinical officer working at Naitiri Sub-county hospital. He stated that he had a P3 form that was issued by the officer in charge Lunyu police station to PW1, she was brought to the hospital by the father, she alleged to have been defiled by a person well known to her, the patient was seen at Naitiri Sub-county hospital as an outpatient, the outpatient number was 3597, on examination it was found that she had changed clothes, the history was "defilement by a person well known to her", she was not under the influence of alcohol or drugs, on section B of the P3 form she complained of pain in the neck, chest and in both forearms, on the lower limbs there were no injuries, he saw the patient 4 days after the incident, at the time that he filled the P3 form the patient had been treated with painkillers and antibiotics.

21. On Section C of the P3 Form, he stated that the nature of the offence was defilement, the estimated age was 13 years, she had a broken hymen, she had blood-stained white discharge, tests were done and the results were that VDR was negative, HIV test was negative and on high vaginal swab there was no spermatozoa. He added that there was no infection and that he signed the P3 form on 17/1/2020. He then produced the P3 form, the HIV test card and a copy of the complainant's certificate of birth.

22. In cross-examination, he stated that he had trained at KMTC Mombasa and attained a Diploma in Clinical medicine and surgery, he also had a Higher National Diploma in Anaesthesia, he had 32 years experience and he was the chief clinical officer at Naitiri sub-county hospital. He stated further that PW1 had changed her clothes, PW1 stated that she was defiled by a person well known to her, he examined her after 4 days, by the time that he examined PW1, she had already been treated, he did not examine the Appellant, he had not stated that the Appellant was the perpetrator, HIV test was negative, PW1 was then aged 13 years, it was an estimate of her age, she was given pain killers and medicine to prevent infection and she filled the P3 form on 17/1/2020.

23. The next witness was PW5. He stated that he was a policewoman from Makunga Police patrol base under Mukuyuni station, on 16/1/2020 at around 9 am the complainant came in the company of her father, they reported that the complainant had been defiled by a person well known to them 3 days earlier, they booked the report in the occurrence book and advised him to take the complainant to hospital for examination and to return with their witnesses for purposes of recording their statements, she visited the scene with his colleague Corporal Kimeli, the scene was about 100 metres from their camp, they did not make any recoveries at the scene, they went to the camp, the complainant later came back with medicine and treatment notes, they recorded the statements of the complainant and the witnesses.

24. She stated further that the complainant and her father mentioned Abel, the brother to the complainant's father, as the only witness, he requested the complainant's father to avail the said Abel to record a statement because they stated that Abel was the one who saw the accused leaving the scene, the complainant's father stated that he was not at home and that he only learnt of the incident on arriving home, he told them that it is his brother Abel who called him on phone and told him that the complainant had been defiled, the complainant's father later told them that Abel had refused knowing anything about the case and he had stated that he would not avail himself at the police station for purposes of recording his statement, he then took action and went to look for Abel at his kiosk but Abel refused and said 'if my brother wants to do business let him do it alone and he should not involve me',

25. He added that he issued the complainant with a P3 form which was filled by a doctor at the Naitiri sub-county Hospital, the filled P3 form was returned, on the following day, they arrested the Appellant. At this point he identified the Appellant in Court and also produced a torn Ankara skirt that the complainant was stated to have been wearing at the time of the incident. He also produced a letter from the complainant's school.

26. In cross-examination, she stated that she had 4 years experience, the incident was reported on the 16th and it occurred on 13th, it occurred at around 8 pm, the complainant reported it on the 16th at 9 am, the OB number was 4, the Appellant was not taken to hospital for examination, they arrested the Appellant on 17/1/2020 at the Lunyu market, the girl identified the person who defiled her, the girl recognized the person who defiled her and it is the Appellant, there was no need for identification parade in the circumstances, she investigated the case, the Appellant was not been framed.

Defence evidence

27. At the close of the prosecution case, the trial Court ruled that the Appellant had a case to answer and put him to his defence.

28. In his defence, the Appellant gave unsworn evidence and stated that he resides at Lunyu, that he is a student and a businessman, he knew the charges facing him. At this point, it is recorded that the charge sheet was read over to the Appellant.

29. The Appellant stated that on 13/1/2020 at 8 pm he was just at home sleeping, after 5 days he went to the market and police officers just arrested him, he asked what offence he had committed, he was informed and he denied, he was brought to Court, he did not commit the offence, he did not even meet the child, he did not even know the child whom he is being claimed to have defiled, he responded that the case should be heard by the Court so that the Court could hear both sides and determine the case having known the truth, he wanted to tell the truth so that the truth could set him free, he was framed, he did not know anything about the case, he was still denying the charges, they tore the clothes by themselves and framed him, he was not even around on that day, he was far, the children of the complainant's father always roam at the market because he does not provide his children with food, the complainant's children are just street children, they roam the market from morning to evening, even as they speak that child is pregnant and is about to give birth.

30. In cross-examination, he stated that the name of his father's brother is Anthony Wanjala, PW3 is the complainant's father, he did not know the complainant, she had no reason to file the complaint against him, on 13/11/2019 he was attending a crusade in Nairobi, it was by international ministry preaching and healing church, it was led by pastor Abiud Makokha, that it was at Baba Dogo Sama, he had another case in court and it had been determined, he was convicted and sentenced to 5 years imprisonment, he did not know PW3, he saw him in court for the first time.

31. Upon concluding giving his evidence, the Appellant was allowed to give oral submissions. He submitted that although PW1 testified that she called him on phone, the phone number was not given, PW2 admitted that she was simply told that it was the Appellant who committed the offence, PW2 did not therefore see it happening, although PW2 stated that when she went to the Appellant's home his father responded that the Appellant be jailed, the Appellant did not have a father, the investigating officer did not witness the incident, it was him (Appellant) who took himself to the police station, on the date of the incident he was not at home, thereafter he was at home until he was arrested, that how come he was at home and it is alleged that he committed an offence? the doctor said nothing was found in the victim to show that she was defiled, he was having disagreements with the man who visited his mother.

Judgment of the trial Court

32. At the end of the trial, the magistrate found the charge of defilement proved, convicted the Appellant and sentenced him to serve 25 years imprisonment.

Petition of appeal

33. Being dissatisfied with the said decision, the Appellant filed the Petition of Appeal herein on 30/06/2022 containing 6 grounds, which I quote verbatim as follows.

    i. That the trial magistrate erred in law and fact in conducting proceedings that violated the right of the Appellant as per provisions of the law of Kenya hence null and void.

    ii. That the trial magistrate erred in law and fact in considering extraneous factors in the decision making.

    iii. That the trial magistrate erred in law and fact in acting bias by favouring the prosecution side while delivering the Judgment extraneous factors in the decision making.

    iv. That the trial magistrate erred in law and fact failing to consider the mitigation of the Appellant while writing the upshot of his Judgment.

    v. That the trial magistrate erred in law and fact by arriving at a decision basing on evidence that were full of contradictions and without analyzing the same.

    vi. That I wish to raise more grounds of mitigation in support of this Appeal when the same comes up for hearing.

34. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellant filed his Submissions on 13th January 2023 and the Respondent filed on 11/01/2023.

Appellant's submissions

35. The Appellant reiterated the arguments contained in his grounds of appeal and basically submitted that the prosecution failed to prove the case, the Magistrate did not warn himself on the matters to take into account when dealing with an accused person who was suffering from a psychiatric condition, the medical report from Webuye sub-county hospital was not competent, the Court considered extraneous matters, the evidence presented was fabricated, since the offence is alleged to have happened at around 8 pm at night, the evidence that the moonlight was bright enough to enable identification of the assailant and also identification of the colour of the clothes that the assailant was wearing was doubtful.

36. He submitted further that the trial Magistrate was biased against him, no medical evidence linked him to the offence, no forensic test was conducted on him, the prosecution witnesses were not credible, their evidence was contradictory and inconsistent, the complainant's clothes said to have been stained with blood were not taken through forensic examination and neither were they produced in evidence.

Respondent's submissions

37. On its part, the Respondent basically submitted that the Respondent's age of 13 years was proved, that penetration was also proved, the identity of the Appellant as the defiler was also proved since there was sufficient moonlight and there was also a solar lighting when the offence occurred, the assailant was a water vendor within the locality and well-known to the Appellant and PW2 (her sister) even before the offence.

38. It was further added that the complainant's evidence was corroborated by PW2 who also saw and recognized the Appellant, it was not difficult to recognize the Appellant since he used to walk with a distinctive limp, no malice or motive for framing the Appellant was established, the prosecution evidence was clear, concise and consistent, the Appellant did not give any plausible defence, the defence was a mere denial, although the *Sexual Offences Act* stipulated a minimum mandatory sentence of 20 years imprisonment, the Magistrate applied her discretion and imposed only 10 years.

Determination

39. From the foregoing, I find the following to be the issues that arise for determination in this Appeal:

    a. Whether the complainant's age was established.

    b. Whether defilement took place.

    c. Whether the identity of the Appellant as the person who defiled the complainant was established.

    d. Whether the sentence imposed was justified.

40. In determining issues (a), (b) and c) above, this Court will be concerned with the issue whether there is evidence proving the offence of defilement beyond reasonable doubt.

Age of the complainant

41. I find that the complainant's age has been proved beyond reasonable doubt. The production of a copy of her birth certificate as proof of her date of birth is sufficient evidence of her age. The birth certificate shows that she was born on 25/06/2006 and the offence occurred on 13/01/2020. This means that she was about 13 and ½ years old when the offence was committed. Apart from the birth certificate, PW1 herself stated that she was 14 years old. This age was also corroborated by the evidence of the other witnesses. I therefore find that the age of the complainant as 13 years was proved.

Penetration

42. PW4, the clinical officer, testified that he examined PW1 4 days after the date of the alleged defilement act and that upon examining her, he noted that she had a broken hymen and also blood-stained white discharge. Needless to state, a broken hymem per se and the presence of the discharge do not by themselves prove penetration. This Court takes judicial notice of the fact that a broken hymen and discharge from the vagina can result from many other non-sexual reasons.

43. I also note his statement that there was no spermatozoa, although this may not be very material noting that he examined the girl 4 days after the alleged incident. However, he did not expressly state or make a firm conclusion that PW1 had been defiled. PW4's testimony may not therefore, on its own, prove penetration.

44. However, I observe that PW1 graphically and in detail described how the assailant forcibly grabbed by her wrist, dragged her into the sugarcane plantation, violently threw her to the ground, tore her skirt and her inner pant, covered her mouth, lay on top of her, threatened her with death and put "his organ for urinating" into her "organ for urinating". She also described how the assailant ran away after the ordeal leaving her feeling pain on "her thing for urinating" and that she could not even stand. Her younger sister, PW2, corroborated this detail by testifying that after she heard PW1 screaming, she ran out to check, saw the assailant on top of PW1 and after the assailant ran away, she went to where PW1 was lying down and found her with blood flowing down her thighs.

45. I have no reason to doubt the foregoing accounts by PW1 and PW2 as they appear honest and believable. Accordingly, I find that penetration was proved.

Identity of the defiler

46. The one issue that now remains for determination is whether the appellant is the person who defiled PW1.

47. PW2 stated that she ran out when she heard PW1's screams and saw the appellant pulling PW1 into the sugar plantation and that when she approached, she saw the Appellant lying on top of PW1. She stated that the Appellant then ran away when he heard her approaching the scene. It is true the incident is alleged to have taken place at about 8.pm. at night However, both PW1 and PW2 insisted that the moonlight was very bright and illuminated the area well. PW2 also stated that she had some lighting with her which she described as Dlight. I believe she probably meant the brand name of a solar torch or lamp. PW2 also told the Court that she had seen the appellant a few minutes earlier hovering behind their kitchen. PW1 on her part even described what the Appellant was wearing, namely, a white shirt and black trouser.

48. More important for me is the fact that both PW1 and PW2 stated that the Appellant was a person well-known to them even before the incident since he was a water vendor within the locality. Their evidence was therefore that of recognition. They knew the appellant as "Martin. PW5, the policewoman confirmed that this was the same account that PW1 and PW2 had narrated at the police station

49. From the evidence it also came out that the appellant was a person who was well known within the neighbourhood. For instance, PW1's father who testified as PW3 stated that he had known the Appellant for over 30 years because they have lived in the same area. From the foregoing, I am satisfied that the circumstances for identifying the appellant were favourable and free from error.

50. In the case of *Anjononi & Others –vs- Republic* [1981] KLR 594, it was stated as follows:

> "recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

51. I am also guided by the principles that a Court ought to take into consideration when relying on visual identification to sustain a conviction. On this point, I refer to *Wamunga –vs- Republic* [1989] KLR 424 where the Court of Appeal stated as follows:

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

52. That the law requires corroboration of evidence by minors is clear from section 124 of the *Evidence Act*. However, there is a proviso to that section that there need not be corroboration if the Court believed that the minor told the truth and recorded its reasons. The section and the proviso provide as follows:

> " Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him."
>
> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

53. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. In this case, the trial Magistrate found that PW1 truthfully identified the appellant as the person who was responsible.

54. The appellant raised an alibi claiming that at the time alleged he was in his house sleeping. He did not however produce any evidence or witness to back the claim. He has also not raised any motive or plausible reason why all the witnesses would gang up against him and frame him for such a heinous act.

55. The Appellant also raised the ground that he was not medically tested to confirm that he was the one who committed the offence. On this point, Section 36 (1) of the *Sexual Offences Act*, 2006 provides as follows:

> " Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

56. The wording of section 36 (1) above is couched in discretionary, rather than mandatory terms. The above provision was a subject of discussion by the Court of Appeal in the case of *Robert Mutingi Mumbi -vs- Republic*, Criminal Appeal No. 52 of 2014 (Malindi) where the Court stated as follows:

> " Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in

mandatory terms. .....DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved."

57. Further, in *Williamson Sowa Mbwanga –vs- Republic* [2016] eKLR, the Court of Appeal again stated the following:

> " .....As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured.....It is partly for this reason that Section 36 (1) of the SOA is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing."

58. From the above, it is clear that medical examination on the appellant was not mandatory but discretionary as there are ways other than forensic evidence to prove the commission of the sexual offence.

59. The Appellant also raised the ground that he was a psychiatrist patient and for this reason the Magistrate should have warned herself on how to treat him.

60. Regarding this issue, I had already stated that the hearing had commenced on 21/10/2020 when PW1 and PW2 gave evidence, that the Court however observed that the Appellant did not appear mentally sound and directed that he first be taken for psychiatrist examination before the trial could resume and that the initial verdict from the examination was that the Appellant was not fit to stand trial. For this reason, the trial did not proceed immediately.

61. It was only after subsequent examination finally declared the Appellant fit to stand trial that the same resumed on 23/11/2021, more than 1 year later. The trial commenced de novo and PW1 and PW2 returned and gave evidence afresh.

62. In the circumstances, I am satisfied that the trial Court properly and sufficiently handled the issue of the Appellant's mental condition and ensured that his rights were fully observed.

63. In the circumstances, this Court finds that PW1's evidence on identity of the Appellant as the defiler was properly corroborated and agrees with the trial Magistrate's findings on this point.

Finding

64. This Court therefore finds that all the 3 ingredients of the charge of defilement were established against the Appellant. The conviction was therefore proper.

Sentence

65. I now consider whether to revise the sentence of 10 years imprisonment imposed herein. In doing so, I have to determine whether the sentence was lawful or harsh and excessive. In *Macharia-vs- Republic*, (2003) 2 EA 559, the Court of Appeal expressed itself as follows:

> " The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1964 in the case of Ogola s/o Owour-vs- Republic (1954) EACA 270 wherein the predecessor of this Court stated:

> "The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James -vs- Republic (1950) 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factors. To this we should also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case. See R-vs- Shershawsky (1912) CCA 28 TLR 263"

66. Having referred to the principles applicable, I now turn to Section 8(3) of the *Sexual Offences Act* which provides as follows:

> (3) A person who commits am 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."

67. In this case I have taken into account the circumstances of the offence, the fact that there was use of force and violence on the victim, the age of the victim, the sentencing guiding principles, the authorities cited and the minimum sentence of 20 years provided in the Act. I have also taken into account the Appellant's mitigation before the trial Court and also the emerging jurisprudence encouraging Courts to exercise judicial discretion even where mandatory and minimum sentences are stipulated. Having done so, I am not persuaded to alter the sentence. I hereby uphold the 10 years prison sentence imposed by the trial Court.

Final Orders

68. In the end, I uphold both the conviction and the sentence. Accordingly, I find that the Appeal is not merited and the same is hereby dismissed.

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

.....

JOHN R. ANURO WANANDA

JUDGE