Sokisi v Republic (Criminal Appeal 85 of 2017)
[2023] KEHC 3925 (KLR) (28 April 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 85 OF 2017

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

ASS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Bungoma Chief Magistrate's Court Criminal Case No. 2812 of 2014.
2. In Count I, he was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that the Appellant on the night of 17th and 18th November 2014 within Bungoma intentionally and unlawfully caused his penis to penetrate the vagina of RNS, a child aged 8 years.
3. He was also charged with an 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 8 years.
4. In Count II, the Appellant was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. It is alleged that on the same night as above and on the same date, he unlawfully assaulted the same RNS thereby occasioning her actual bodily harm.

Prosecution evidence

5. The prosecution called 4 witnesses. The trial began before Hon. K.T. Kimutai (SRM) but was later taken over by Hon. E. N. Mwenda (SRM).

6. PW1 was the alleged child complainant. She was taken through a voire dire examination after which the Magistrate recorded that although she did not understand the effect of taking an oath, she nevertheless possessed sufficient intelligence to appreciate the difference between the truth and falsehood and the importance of telling the truth. Under such circumstances, the Magistrate directed that PW1 would give unsworn evidence which she proceeded to do.

7. PW1 stated that she was a Standard 4 pupil at [particulars withheld]. She then stated that on 17/11/2014 she was in the house with other children, her mother was at a neighbour's home because her father had chased the mother away, she was the eldest child, they cooked, ate and slept, their father was not around by the time she cooked and went to bed, the father later arrived, she opened the door for him and went back to bed, they (the children) slept on the sofas, their parents have their own bedroom, when she fell sleep, her father came and took her to his bedroom, he lay her on the bed and removed her panties, he then inserted his "thing" in her "thing" (it is recorded that she pointed at the space between her legs), she screamed and in turn the father hit her on the mouth, he then "peed/urinated on her" and then gave her a piece of cloth to wipe herself with, after that she went back to where the other children were sleeping, she felt pain between the legs (it is again recorded that she pointed at the same spot).

8. She then stated that the next morning she washed the dishes after which the father ordered them to go to where the mother was, they went to the mother at the neighbours' home, she told the mother what the father had done to her, the mother took her to Webuye hospital where she was treated and discharged. At this point, she identified the Appellant in Court.

9. In cross-examination by the Appellant, she insisted that the Appellant assaulted her at night, the house that they live in is rented, there are neighbours around but that no one came to her rescue when she cried during the ordeal. In Re-examination, she insisted that the Appellant hit her on the mouth and the mouth swelled.

10. PW2 was the child's mother. She stated that she is a casual labourer, on 17/11/2014 around 5 pm her husband chased her away, she left her children behind, she took refuge at a neighbour's house, she left behind her 4 children including PW1 who was the eldest, the eldest (PW1) was 8 years and the youngest was 5 years, the children came to her at the neighbour's home, she noticed that PW1's lips were swollen, she had scratch marks on her left cheek, her left elbow was swollen and she was in pain, PW1 informed her that her father had taken her to his bed, removed her panties, lay on her and "urinated" on her, upon checking the child's private parts between her legs she noted that she was "dirty/soiled" between her legs on her vagina, that she took the child to Webuye hospital where she was examined, treated and discharged.

11. PW2 further stated that PW1 was issued with a document (P3 Form) at the hospital, she reported the incident at Nzoia Police Station on 18/11/2014, she was told to go back on 19/11/2014, when she went back, she was given some police officers to accompany her to go and identify the suspect, when she went back home, she did not find the Appellant (her husband) since he had already been arrested, she did not have a birth certificate for the child but an age assessment test was conducted on her and she was found to have been 8 years old. At this point she identified the Appellant in Court as her husband whom she was referring to. She also disclosed that PW1 was not the Appellant's biological father since she had already given birth to her before she met the Appellant.

12. In cross-examination, she insisted that the Appellant chased her away, she took refuge at one Mama Sungu's, the children came to her at Mama Sugus in the morning, PW1 was not walking properly, she did not walk as she usually did, PW1 told her that it is the Appellant who defiled her, she could also see blood stains on PW1's private parts, the clothes that PW1 was wearing on that occasion were not in Court but that the doctor examined PW1, she gave birth to PW1 before she met the Appellant, when

she met the Appellant he told her to leave PW1 at her parents' home, some neighbours told her that they had heard the child crying and screaming on the night of the incident, however none of those neighbours recorded a statement, the Appellant was drunk when he chased her away, it was not the Appellant's first time to drink and it was also not his first time to chase her away.

13. In re-examination, she stated that she washed the clothes that PW1 was wearing since they were stained.

14. It is after this point that the trial was taken over by Hon. E.N. Mwenda (SRM) in place of Hon. K. T. Kimutai (SRM). It is recorded that the Court explained to the Appellant his rights under Section 200(3) of the Criminal Procedure Code, namely, the right to seek the recalling of witnesses.

15. It is recorded that having been so informed, the Appellant insisted that both PW1 and PW2 be recalled. This request was opposed by the Prosecution. In the circumstances, the Court deliberated on the matter and a few days later delivered a Ruling whereof it declined to recall PW1 but allowed the request to recall PW2.

16. Upon being recalled, PW2 gave more or less the same evidence as before, only adding that PW1 was born in the year 2006.

17. In cross-examination, she again gave more or less the same account and added that she began living with the Appellant in the year 2006, in August 2014 the Appellant had gone to Migori, when he came back he found her just alone with the children, she had never brought another man to the house, after a few months the Appellant chased her away, there was no way she could bring a man to the house when she had children in the same house, the Appellant used to chase her away whenever he was drunk, she left him with her daughters, she could not leave with the children because the Appellant would beat her, there was no other eye-witness.

18. At this point, it is recorded that the Appellant repeated his request that PW1 be also recalled and that he wanted the case to restart afresh. He protested the Court's refusal to recall PW1 and asked that the matter be taken over by another Magistrate. The Prosecution opposed the Application.

19. After hearing the parties, the Court delivered its Ruling upholding its earlier direction that PW1 would not be recalled. The Court also refused to recuse itself from the trial.

20. The hearing therefore proceeded with PW3 taking the stand. He stated that he is a doctor at Bungoma District Hospital, that he had worked for 6 years, the P3 Form was filled by another doctor (Dr Dennis Muli) with whom they were working together and whose signature and handwriting he was familiar with, PW1 was brought to the hospital on 19/11/2014, she had been sent from Nzoia Police Station with a complaint of defilement and physical assault by a person known to her, the state of her clothing was "torn and dirty", the girl looked sickly, Dr. Muli found bruises on her head, neck, upper lip and cheek, the upper limb was tender, the thorax and abdomen were normal 36 hours old injury, it looked like they were caused by both blunt and sharp objects, treatment was "counselling, antibiotics and painkillers", degree of injury was "harm", further examination revealed that there was defilement, estimated age of the child was 8 years, physical state of genitalia was that the hymen was broken, there was discharge, venereal infection and oozing, that swabs were taken from the vagina for analysis in the laboratory. He then produced the P3 Form and the Age Assessment Report.

21. He then referred to a second P3 Report relating to the Appellant citing allegations of defilement and stated that upon examination, the Appellant's genitalia was found to be normal and there was no other injury. He produced the Report and Treatment Notes for the Appellant. He stated that the records described the Appellant as a 31-year-old male, that the Appellant was brought on suspicion of defiling a minor, he was to undergo investigations and that he was put through tests for syphilis and urinalysis.

On being taken through a health systemic examination he was found to be normal, syphilis was negative and there were no venereal diseases.

22. In cross-examination, he reiterated the matters already stated and added that the child's clothing was dusty and torn, her state of walking was not recorded in the P3 Form, there were no photos, they did not need x-rays for sexual defilement, there was discharge from the child's private parts, hymen is normally intact for children of 8 years but for PW1 it was broken, the girl knew the Appellant by name, there was discharge coming from her vagina, discharge is not normal for a child of that age, the fluid was oozing from vaginal mucus and it was not identified but it was not normal

23. The next witness was PW4, the Investigating officer. He stated that he works at Nzoia Police Station, that he was the investigating officer in the case herein, the initial investigating officer was away on medical leave, on 18/11/2024 PW1 was brought to the station by her mother on a case of assault and defilement, from PW1's demenour she was having visible injury, bruises on her mouth and cheeks, she complained of pain on both hands, she then wrote a report, they were referred to hospital, she had already been treated at Webuye and Bukembe dispensary, they advised the mother to come early on the following morning, he was still in the office when the Appellant was brought into the office by AP officers from Bukembe on the morning of 19/11/2014, P3 Forms were filled for both of them, they went with them to Bungoma District Hospital where they were treated and P3 Forms filled, they then recorded statements. It is recorded that at this point he identified the Appellant in Court as the suspect he was referring to.

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

Defence evidence

25. In his defence, the Appellant gave sworn testimony. He stated that he understood the charges against him, that sometime in February 2014 he informed his wife (PW2) that he was going to work since he is a conductor, he went to Migori where he stayed for 6 months and came back in August, he came late about 10 pm, he had a paper bag and a phone on the hands, he knocked for some time but there was no response, the wife finally answered and asked who it was, he identified himself, she asked him to hold on, he waited for about 5 minutes then when the door was finally opened, a stranger shot out running and in the process knocked the Appellant down injuring him, he gave chase for about 200 metres, he did not know the person,

26. He added that there was darkness in the house, he called out his wife but there was no response, he decided to go a neighbour's to borrow light, when he put on the light he noticed that there was no one there, not his wife nor the children, he informed his father-in-law who lived nearby and who promised to come in the morning to resolve the issue but that he did not come as promised.

27. He further stated that in October he received a report that his wife had come back and that she had stated that she would do something bad to him, on 17/11/2014 in the evening he was coming from work going home when he spotted his son who informed him that they were with the mother inside the AP camp, he carried the boy and went inside the AP camp where he found his wife and his father-in-law, his wife identified the Appellant to the police, he was duly arrested, after 2 hours he was taken to Nzoia Police Station where he stayed for 4 days, he was brought to Court on 20/11/2014 where the charges were read to him.

Judgment of the trial Court

28. After analyzing the evidence, on 29/11/2016 the trial Court found the Appellant guilty and convicted him on both the counts. The Appellant was then given an opportunity to mitigate but he chose not to so mitigate. A pre-sentence Report was later prepared and submitted.

29. On 16/12/2016, the trial Court sentenced the Appellant to serve life imprisonment for the charge of defilement. In imposing the sentence, the Magistrate stated that Section 8(2) of the *Sexual Offences Act* provided for life imprisonment as the only sentence upon conviction. According to the Magistrate therefore, his hands were tied and he had no discretion in sentencing.

30. For the charge of assault, the Appellant was sentenced to serve 2 years imprisonment to run concurrently with the first sentence.

Grounds of Appeal

31. Being dissatisfied with the decision, the Appellant lodged this appeal on 16/10/2017, almost 1 year after conclusion of the case, obviously out of time. I have not seen evidence that leave to Appeal out of time was granted by the Court but since the Respondent has not raised a challenge, I presume that perhaps such leave was indeed sought and granted. I will therefore not belabour that point.

32. As aforesaid, the Appeal was filed on 16th October 2017 by way of a Petition of Appeal. The Petition contained 6 Grounds of Appeal. However, subsequently on 19th December 2022, the Appellant filed Amended Grounds of Appeal containing 7 grounds as follows:

    i. That the Court be pleased to consider that the sentence imposed was mandatory in nature.

    ii. That the Court be pleased to consider that the circumstances that surrounded the veracity of the offence were in immense doubt.

    iii. That the trial Court failed to consider the "Alibi" statement which was cogent and thus not shaken by the prosecution.

    iv. That the Court be pleased to consider that there was a misunderstanding between me and PW2 which primarily culminated into the offence herein.

    v. That the Court be pleased to consider that I was a first offender who came into conflict with the law for the very first time.

    vi. That the Court be pleased to consider that my fundamental rights were infringed as per the provisions of Sec. 200(3) of the CPC.

    vii. That the Court be pleased to consider that the provisions of Sec. 333(2) of the CPC.

33. Parties filed written submissions in support of their arguments. The Appellant's Submissions were filed on 19th December 2022 in the same document containing the Amended Grounds of Appeal. On its part, the Respondent filed its Submissions filed on 16/01/2023 by Learned Senior Prosecution Counsel P.J. Kiptanui.

Appellant's Submissions

34. The Appellant submitted that the mandatory sentence of life imprisonment was unlawful, that under the provisions of Section 200(3) of the Criminal Procedure Code, his right to request for recalling of witnesses when the new Magistrate took over the part-heard matter was violated, the elements required

to prove the offence of defilement were not proved, there was no way the offence could have been committed when there were other children in the house, there was no independent witnesses, the Court failed to consider that there was a grudge between the Appellant and his wife. On sentencing he argued that he was a first offender, he was a young man who came into conflict with the law for the very first time and that he has been reintegrated and reformed.

Respondent's Submissions

35. On his part, Counsel for the Respondent submits that all the elements of the charge of defilement were proved, that the Appellant was given adequate time to cross-examine the witnesses, the testimony of the witnesses was sufficient and believable, there were no inconsistencies or contradictions in the testimonies of the witnesses or in the contents of the exhibits produced and the sentence of life imprisonment was proper and lawful.

Analysis and determination

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

37. I note that the Appellant has said nothing regarding his conviction for the charge of assault causing bodily harm, Count II. In any case, having been sentenced on 16/12/2016, the Appellant has already fully served the 2 years sentence for Count II. I will not therefore deal with the conviction for Count II.

38. 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] E.A 32)

Issues for determination

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

    i. Whether the Appellant's right to demand recall of a witness under Section 200(3) of the Criminal Procedure Code were violated.

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

    iii. Whether the imposition of life imprisonment as the mandatory sentence was lawful.

    iv. In the event that the sentence herein is reviewed, whether the period that the Appellant had spent in custody prior to the sentence should be taken into account.

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

i. Whether the Appellant's rights to demand for recall a witness under Section 200(3) of the Criminal Procedure Code were violated

41. Section 200(1) and (3) of the Criminal Procedure Code provide as follows:

> " 200.
>
> (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) .....

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

42. On this issue, in the case of Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others [2015] eKLR, Hon. Justice Makau, stated as follows:

> "Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanour of the witnesses to enable the Court make a just decision.
>
> It should be noted Section 200(3) of C.P.C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for the succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted that it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain to the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.
>
> Section 200(3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50(1) of *the Constitution* of Kenya 2010.
>
> In the case of Ndegwa v Republic [1985] KLR at 534, the Court of Appeal stated:
>
> "Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial."

43. I had already stated that the trial herein began before Hon. K.T. Kimutai (SRM) but was later taken over by Hon. E. N. Mwenda (SRM) after 2 witnesses had already testified. I had also stated that the record reflects that the succeeding Court explained to the Appellant his rights under Section 200(3) of the Criminal Procedure Code, namely, the right to seek the recalling of witnesses.

44. Although the record does not state the exact words that were explained to the Appellant, I have no reason to doubt that the proper explanation was given. I say so because, as already stated, immediately after the explanation is recorded to have been given, the Appellant demanded that PW1 and PW2 be

recalled. There is no doubt that this request was made in direct response to the explanation given to the Appellant by the Court.

45. In exercising that right, the Appellant demanded that both PW1 and PW2 be recalled. This request was opposed by the Prosecution and in the circumstances, the Court deliberated on the matter and a few days later delivered a Ruling whereof it declined to recall PW1 but allowed the request to recall PW2.

46. After PW2 was recalled and after she concluded giving her fresh evidence, the Appellant repeated his request that PW1 be also recalled and that he wanted the case to restart afresh. He protested the Court's refusal to recall PW1 and asked that the matter be taken over by another Magistrate. The Prosecution again opposed the Application.

47. After hearing the parties, the Court delivered its Ruling upholding its earlier directions that PW1 would not be recalled. The Court also refused to recuse itself from the trial.

48. As stated in the case of Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others [2015] eKLR (supra), although it is mandatory for the Court to explain to the accused his right to ask for the recall of witnesses, it is not mandatory for the Court to accept such request.

49. In this case, the Court agreed to recall PW2 but declined to recall PW1 for the reason that, inter alia, PW1 being an 8-year-old child, it would be unjust and prejudicial to her to put her yet again through the ordeal of once again recounting the ordeal that she went through in the hands of the defiler and that in any case, the Appellant had already cross-examined her. The Appellant did not Appeal against that Ruling and the trial proceeded to its logical conclusion.

50. I therefore find that the Appellant's right under Section 200(3) of the Criminal Procedure Code was explained to him upon which he duly exercised that right by demanding for recall of the witnesses. Although that demand was only partly allowed by the Court, there was compliance with the provision. I therefore hold that there was no violation of the Appellant's rights under that Section.

ii. Whether the prosecution proved its case beyond reasonable doubt

Elements of the offence of defilement

51. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

> "8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(2) 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."

52. 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 assailant.

53. 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."

a. Age of the complainant

54. 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.

55. PW1 testified that she was a Standard 4 pupil as at the time that she gave evidence, namely, 10/12/2016, This means that she must have been in Standard 2 or thereabouts at the time when the act of defilement was alleged to have been committed against her, namely, 17/11/2014. PW2, her mother, testified that although she did not have a birth certificate, PW1 was approximately 8 years old and that she was born in the year 2006. PW3, the doctor, also produced the Age Assessment Report which similarly estimated PW1's age at 8 years. This age of 8 years was also not challenged by the Appellant.

56. 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."

57. From the foregoing, I am satisfied that the child's age of 8 years old was proved.

b. Penetration

58. 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."

Production of P3 Forms by doctor who was not the maker

59. The Appellant has submitted that the evidence of the doctor who testified should not have been accepted because he was not the one who examined the child. As aforesaid, PW3, one Dr. Raymond Damba stated that he was a doctor at the Bungoma District Hospital and that the P3 Forms were filled by another doctor (Dr Dennis Muli) with whom they were working together and whose signature and handwriting he was familiar with. He then proceeded to give evidence of the contents of the P3 Forms and produced them as Exhibits. He testified, inter alia, as follows:

> " ..... further examination, there was defilement. Estimated age was 8 years. Physical state of genitalia: the hymen was broken, discharge and venereal infection. There was oozing ...."

60. In cross-examination, he testified as follows:

> " ..... there was discharge from her private parts. The hymen is intact for virgins of 8 years old. Her hymen was broken .... There was discharge coming from her vagina ....."

61. The above piece of evidence formed part of the grounds under which the trial Magistrate reached the finding that penetration had been proved.

62. On this point, I refer to Section 77 of the *Evidence Act* which provides as follows:

> "77. Reports by Government analysts and geologists
>
> 1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> 2. The Court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> 3. When any report is so used the Court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

63. Under Section 33 (b) of the *Evidence Act*, if the maker is not available, the Court may still allow another person to produce the document in evidence on the maker's behalf. The section provided as follows:

> "33. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable, are themselves admissible in the following cases—
>
> a. ....;
>
> b. made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"

64. In Chaol Rotil Angela -vs- Republic [2001] eKLR the Court of Appeal held as follows:

> "A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a post-mortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing post-mortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a post-mortem examination report is a document made in the discharge of a professional duty and would be covered by Section 33(b) of the *Evidence Act*. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs

(a) to (h)may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are:

"Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases....."

65. It is therefore clear that under Section 33 of the *Evidence Act* as read with Section 77(1) of the same Act, evidence touching on expert opinion should be tendered by experts but that in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar filed of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence. It is also however clear that the condition precedent to the operation of Section 77 as provided under Section 33, a basis has to be laid before a witness other than the matter of a documents can competently tender the evidence.

66. In James Bari Munyoris v Republic [2010] eKLR, Justice Sergon stated as follows;

> " It is not enough for a witness to state that he was familiar with the handwriting of a particular witness. The prosecution must show that it took due diligence on their part to secure the attendance of the maker of the document. It must be shown that the witness was absent for reasons beyond prosecution's control. The record shows that Dr. Mburu had been transferred to Kenyatta National Hospital. There was no evidence to show that the police attempted and failed to secure Dr. Mburu's attendance in court....."

67. In the instant case the prosecution made no attempts to lay any basis why Dr. Muli, the maker of the P3 forms could not be availed. It was not sufficient for Dr. Raymond Banda to simply state that he was familiar with the handwriting of Dr. Muli. That was not the only basis required to be laid under the law. Section 33 demands that basis for non-availability of the author/maker of any opinion be laid before another expert familiar with the handwriting of the expert can be allowed to tender the evidence. This Court therefore agrees with the Appellant that the production of the P3 Reports by PW3 was improper.

68. The question that arises however is whether this finding alone is sufficient to overturn the finding of guilt on the Appellant. I will return to the issue shortly hereinbelow.

Evidence of the child and the mother

69. The complainant, PW1, stated as follows:

> " ... I am the eldest child. I cooked and we slept. My father was not around by the time I cooked and when we went to bed. Later my father arrived. I opened the main door for him and went back to bed, ..., ... [names withheld] and myself sleep on the sofas. My parents have their own bedroom. When I fell sleep, my father came and took me to my parent's bedroom. He lay me on the bed and removed my panties. He then inserted his "thing" in my "thing" (she points at the space between her legs). I screamed he hit me on the mouth. He peed/urinated on me and then gave me a piece of cloth to wipe myself with. After that I went back to where ..... and ..... [names withheld] were sleeping, I felt pain between the legs she points there) ....."

70. On her part, PW2, the child's mother, testifying on what the child told her, stated the following:

> "..... [name withheld] had injuries on her mouth and hands .... [name withheld] told me that Alex Simiyu assaulted her. She said Baba had assaulted her. I asked why she was beaten. She told me her father took her from her bed and carried her to our bedroom. .....[name withheld] told me that he slept on her and that he moved on her and that he urinated on her. She told me that because she was crying she was beaten. I looked at [name withheld] in her private parts. I saw some whitish residue and some blood. I took her to the dispensary in Bukembe ....."

71. I have carefully considered the above testimonies and find them to be consistent and believable. I find that the child, in all her innocence, gave a truthful, vivid and graphic account of the ordeal that she went through. It is not lost on me that she gave the same account to her mother, to the police and also to the trial Court all on different occasions. I therefore find that the child's account was perfectly consistent with her mother's testimony As for the mother, even after she was recalled to give her evidence afresh, her testimony was the same as before.

Finding

72. In light of the above holding, the question that now arises is whether the bungled production of expert evidence because of the failure to lay proper basis for testimony by a non-maker is sufficient to overturn the conviction. In answering this question, I refer to 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."

73. I also 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."

74. On authority of the above holding therefore, even if the medical evidence of PW3 were to be excluded for any irregularity, still that action per se will not be fatal to the prosecution case. The law is that the Court could still safely convict if it was satisfied that the other prosecution evidence proved, beyond reasonable doubt, that the appellant committed an act which caused penetration with the child.

75. The evidence of the child and the mother, in my view, even after excluding the medical evidence whose production was improper, this Court is satisfied that under the provisions of Section 124 of the *Evidence Act*, there was still sufficient evidence to reach a finding of guilt against the Appellant since the

evidence against him was credible and overwhelming. I find that there was sufficient separate material, apart from the now discounted medical evidence, to justify the Magistrate's finding and conclusion that penetration of the child was proved.

76. In view of all the above, I agree with the State Counsel that penetration was proved.

c. Identification of the Appellant

77. The Appellant is the child's father, though not biological, and is the mother's husband. He is therefore a person known to them. The Appellant confirmed these descriptions. There was therefore no element of mistaken identity of the Appellant. It has been established that the defilement took place deep at night in the house where the Appellant was the only male adult and after the Appellant had chased away the child's mother.

78. The Appellant has not denied that indeed he spent the night in the same house. The child was 8 years old and was the eldest among the children who were in the house on that night. It is therefore possible that the other children, being much younger, may have been deep asleep and oblivious of what was happening. Even if they heard PW1 crying in the father's bedroom, it is very possible that considering their tender ages, they may not have understood the nature of what was taking place.

79. Although the Appellant has claimed that PW2, his wife, had a grudge against him because of their matrimonial problems and that PW2 therefore framed him, 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.

80. Since I had already found that the testimonies of PW1 and PW2 were consistent, candid and credible, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error

Finding

81. In view of the foregoing, I find that the evidence by the prosecution left no doubt that the Appellant defiled the child. Accordingly, I find that the elements of defilement, namely, minority of the victim's age, penetration and identity of the assailant were all proved. The conviction was therefore proper.

82. 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.

iii. Whether the imposition of life imprisonment as the mandatory sentence was lawful

83. 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."

84. While imposing the sentence, the Magistrate stated as follows:

> "I have considered the mitigation by the accused person as well as the pre-sentence report. Unfortunately, Section 8(2) of the *Sexual Offences Act* provides only one sentence where the accused is convicted under the said Section. Consequently, I sentence the convict to life imprisonment for the offence of defiling a child contrary to Section 8(2) of the *Sexual Offences Act* ....."

85. In the case Shadrack Kipkoech Kogo v R, Eldoret Criminal Appeal No. 253 of 2003, the Court of Appeal stated as follows:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."

86. One cannot discuss the issue of mandatory sentences in Kenya without mentioning the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR (commonly referred to as Muruatetu 1). It had been interpreted by many that the decision was authority to the effect that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

87. However, in Francis Kariuki Muruatetu & Another v Republic: Katiba Institute & 5 Others (Amicus Curiae) [2021] Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola SSJJ) (otherwise referred to as Muruatetu 2), the Supreme Court has now clarified that its directions given in Muruatetu (1) regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and do not necessarily extend to sexual offences (see also Juma Abdalla v Republic, Court of Appeal Criminal Appeal No. 44 of 2018 [2022] KECA 1054 (KLR) (7 October 2022).

88. It is however also true that emerging jurisprudence is to the effect that in spite of mandatory sentences having been stipulated by some statutes, including the *Sexual Offences Act*, nevertheless the Courts are free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained by to impose the provided sentences if the circumstances do not demand it.

89. For the above proposition, I refer to the recent Court of Appeal decision in Joshua Gichuki Mwangi Mwangi v R, Criminal Appeal No. 84 of 2015, Nyeri, delivered on 7th October 2022 in which the Court quoted its earlier decision in Dismas Wafula Kilwake v Republic [2019] eKLR where the following was stated:

> "..... Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing .....)"

90. In light of the above, I feel justified to interfere with the sentence of life imprisonment imposed by the trial Court.

91. In this case I take into account the circumstances of the offence which was heinous to say the least, that there was use of force or violence on an innocent child of only 8 years, the sentencing guiding principles

and the authorities cited. I however believe that having spent about 7 years in custody, the Appellant has now learnt his lesson. In the circumstances, I am persuaded to alter the sentence downwards. I therefore hereby reduce the life imprisonment sentence to 35 years imprisonment.

iii. Whether the time spent in custody should be factored in sentence

92. Section 333(2) of the Criminal Procedure Code provides as follows:

> " Subject to the provisions of section 38 of the Penal code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

93. In Ahamad Abolfathi Mohammed & Another v Republic, [2018] eKLR, the Court of Appeal stated as follows:

> " By dint of section 333 (2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. .... We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

94. From the record, it appears that the appellant remained in custody throughout the trial. Since section 333(2) of the Criminal Procedure Code is couched in mandatory terms and since this Court has now set aside the life imprisonment and substituted it with a sentence of 35 years imprisonment, the period spent in custody must be factored in the sentence.

95. From the Charge Sheet, I note that the Appellant was arrested 19/11/2014. Although he was granted bail, it seems that he remained in custody throughout the trial as it appears that he was unable to raise the bail. He was then convicted and the sentence was delivered on 16/11/2016. The period between arrest and sentence is therefore about 24 months. This period ought to be therefore factored and reduced from the 35 years prison sentence that this Court has now imposed.

Final Orders

96. In the end, I issue the following orders:

i. The conviction is upheld.

ii. On sentence, I hereby set aside the sentence of life imprisonment imposed by the trial Court and substitute it with a sentence of 35 years imprisonment.

iii. The 35 years prison sentence shall be computed as from the date of the Appellant's arrest as appears in the Charge Sheet, namely, 19/11/2014.

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

.....

JOHN R. ANURO WANANDA

JUDGE