



REPUBLIC OF KENYA



KENYA LAW
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**VWN v Republic (Criminal Appeal E064 of 2022)
[2023] KEHC 3668 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E064 OF 2022
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

VWN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement of a girl contrary to what was described as Section 8(1)(2) of the *Sexual Offences Act* No 3 of 2006. It was alleged that the appellant on February 2, 2018 at [Particulars Withheld] in Kimilili sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of MWN, a child aged 10 years.
2. He was also charged with 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 touched the vagina of the same MWN, a child aged 10 years with his penis.

Prosecution evidence

3. The prosecution called 7 witnesses.
4. PW1 was the alleged child victim (complainant). It is recorded that upon seeing the accused in Court, she broke down in tears. Upon stabilizing, she was taken through a voire dire examination after which the Magistrate recorded that PW1 did not understand the effect of taking an oath but that she was intelligent and understood the importance of telling the truth. Under such circumstances, the Magistrate directed that PW1 would give unsworn evidence which she proceeded to do.
5. PW1 stated that she was a Grade 2 pupil at [Particulars Withheld]. She identified a letter from the school confirming that indeed she was a pupil there. She then narrated that on February 2, 2022 she



- was in their house having returned from school, that she did not go back to school after lunch, she was with uncle 'Kevo' (PW3) and 'Rasta', Rasta is 'Pato' (PW4), her mother had gone to church, she then went behind the house and 'Wanjala' (Appellant) followed her. It is recorded that at this point, she pointed out the Appellant, identified him as her assailant and again broke down weeping.
6. She then stated that she knew the Appellant, the Appellant used to frequent their home, he was a relative, he was the son to her aunt, she had gone behind the house when the Appellant followed her, the Appellant held her right wrist and dragged her to her brother's cottage, her brother's name was KW, there was nobody else in KW's cottage as KW was at school, inside KW's house, the Appellant removed her clothes and made her to lie on the bed, she had a dress and inner pant, the Appellant removed her inner pant and threw it on the floor, he lifted her dress up, he then made her to lie on the bed while facing up, the Appellant squeezed her neck and sexually penetrated her. The exact words that PW1 is recorded to have uttered were that 'he then put his thing for urinating into my thing for urinating. He then hit my elbow against the wall as he did that act to me. I do not know why he was injuring me. I wept because I was feeling pain in my thing for urinating. I cried loudly and uncle UK heard, uncle UK called people. Grandmother EM and many other people came to my rescue'.
 7. She stated that the Appellant had locked the door of the cottage from inside, after some time people came, pushed the door and managed to get into the house, she was then rushed to the police station then to hospital, she told the police what the Appellant had done to her, she was brought to Kimilili hospital where the doctor examined her, she was 10 years of age, the people beat up the Appellant for the act that he committed. At this point she is recorded to have again identified the Appellant by pointing at him. She further stated that she knew the Appellant when she was in baby class, he used to frequent their home to spend time there. In cross-examination by the Appellant, she insisted that she was telling the truth, that one 'UK' saw the Appellant doing the act to her and that it was a Wednesday.
 8. PW2 was PW1's mother. She stated that on February 2, 2022, she left home at 2 pm and left PW1 doing personal studies because she did not go back to school that afternoon, PW1 was 10 years old, PW1 was alone in the house when she left, she went to attend a church meeting, she returned home at 4 pm. and found many people at her home, she found the Appellant in the cottage of her son (KW), by then members of public had beaten up the Appellant, the Appellant was the son to PW1's aunt, when she got into the house she found PW1 weeping bitterly, she checked PW1's genitals and saw blood coming from her genitals, she did not find PW1 with inner pants, the neighbours who were at her home informed her that the Appellant had defiled PW1, she asked the people whether they had called the village elder and the sub-chief, they answered in the affirmative, all this time PW1 was weeping bitterly, she decided to take the Appellant and PW1 to the police station on her motorcycle, upon reaching there she was given a letter, she brought PW1 to the Kimilili sub-county hospital where the doctor examined her and confirmed that she was defiled, she was given a P3 form by the police and the doctor filled it, PW1 was born on December 3, 2011, she later recorded her statement, the Appellant lived with his grandmother within the same village, PW2 even used to prepare food for him, the Appellant's mother was the sister to PW2's husband, PW1 knew the Appellant well and even used to serve him food.
 9. PW3 stated that he does catering work, on February 2, 2022 she was at the house of PW1's mother with whom he worked, it was around 4 pm., he was waiting for PW1's mother, at the material time he was seated at the house of PW1's mother with PW4, they had found PW1 at the house, the Appellant came and sat with them in the house, the Appellant asked PW1 to give him food, PW1 got out of the house and got the Appellant food (a plate of bananas) which he ate, PW3 then asked PW1 for drinking water, PW1 left the house to fetch the water but it took long before she returned, since PW3 was thirsty, he went out of the house to look for PW1, when PW1 had walked out of the house to fetch water, the Appellant had also walked out of the house a few minutes after PW1, PW3 got out of the



house and started calling out PW1's name loudly, he heard the sound of a radio as well as the sound of a person screaming, it appeared like the sound of a girl who was struggling to scream, the sounds were emanating from the cottage of PW1's brother, he moved to the cottage with a view to find out what was happening, the house had been parked with a metal, he inserted his hand and pushed the metal then the door opened, the radio was full volume, he heard PW1 screaming in the house, the house is one roomed, he found PW1 lying on the bed, the Appellant was lying on top of her, both were naked on the lower parts of the body, the Appellant was having sex with PW1, he was inserting his penis in PW1's vagina, he knew both the Appellant and PW1 before, he had by then known the Appellant for 1 year, on the Appellant seeing PW3, he beckoned at PW3, PW3 did not listen and just got out of the house and locked the door of the cottage from outside and called PW4.

10. He testified further that PW4 advised him to wait so that the neighbours could come and witness what was happening, PW4 rushed to the home of a neighbor by the name EM, PW4 also alerted other neighbours all of whom came, the neighbours opened the door and found PW1 weeping, the Appellant became furious and people beat him up, the Appellant's uncles came, quarreled him and then started beating him up, the uncles called the police and the sub-chief but the police did not come, it is therefore the neighbours who took the Appellant to the police station alongside PW1 and her mother. At this point, he identified the Appellant by pointing at him on the screen. In cross-examination by the Appellant, PW3 reiterated that he found the Appellant inside the cottage.
11. PW4 stated that he too is in the catering business, that on February 2, 2022 he was at the home of PW1's mother waiting for a report from her, it was at 4 pm., he was with PW3 with whom they were to do some outside catering job, they found PW1 in the house who told them that her mother had gone to church but was coming back, after a while the Appellant came, the Appellant was a neighbor whom he had known for 4 to 5 years. At this point he identified the Appellant by pointing at him on the screen. He added that the Appellant came and sat with them, the Appellant stated that he was looking for a fundi, the Appellant was given a plate of bananas and ate, the Appellant then told PW1 to take the plate and return it, PW1 left with the plate, PW4 asked PW1 to bring for him drinking water when returning, he waited for the water but PW1 did not come back, when PW1 was leaving with the plates the Appellant had followed her, PW4 went outside to check and called out PW1 but there was no response, he came back and told PW3 that PW1 was nowhere to be seen, PW3 also went outside and heard the voice of a radio which was at full volume, PW3 heard someone screaming and upon checking, saw PW1 being defiled, he called PW4 to go and witness what was happening, PW3 locked the door of the cottage from outside, the Appellant was struggling to pull the door from inside as if he wanted to break it, PW1 was crying inside the house, PW1 stated that the Appellant had 'done bad manners' to her, he ran to call the neighbors to witness what had happened, the next neighbor was mama E who asked PW1 what was wrong, PW1 responded that the Appellant had 'done bad manners' to her, the Appellant 'had put his bad snake inside' her, the door was opened for E who then checked PW1 and confirmed that indeed PW1 had been defiled, the crowd started beating Wanjala, the sub-chief was called, when he arrived, he directed that the Appellant be taken to the AP camp, the Appellant and PW1 were taken to the police station, PW1 was later taken to hospital, the Appellant was also taken to hospital because he sustained injuries to the head. At this point, he too identified the Appellant by pointing at him. In cross-examination by the Appellant, PW4 maintained that they caught the Appellant inside the cottage and that the Appellant tried to break out of the house.
12. PW5 stated that she was a clinical officer working at Kimilili sub-county hospital, she referred to PW1's P3 describing PW1 as a girl aged 10 years. She stated that PW1 came to the hospital on February 3, 2022 accompanied by her mother, her history was that she had been sexually defiled by a person known to her on February 2, 2022, the P3 form was filled on February 3, 2022, PW1 stated that she was defiled on February 2, 2022 at around 3 pm, the assailant had pulled her to a nearby cottage (simba) in the



homestead where she was defiled, she complained of painful private parts and painful elbow of the right hand, PW5 then referred to Section B of the P3 Form and stated that she examined the site of injury on PW1's upper limbs and elbow and found a bruise on the right elbow which was tender on palpation, the approximate age of injuries was 20 hours, the probable type of weapon causing the injury was defilement and a blunt object, the treatment she received on February 2, 2022 was antibiotics and the investigations were done on the same day.

13. She then referred to section C of the P3 Form and stated that the nature of the offence was defilement, the estimate age of the person examined was 10 years, PW1's genitalia had no pubic hair, there were bruises on the labia minor, the hymen was torn, it was freshly torn, there was discharge from her vagina, lab investigations were done on that February 2, 2022, the VDRL was non-reactive, HIV test was not done because the test kits were out of stock, high vaginal swab revealed pus cells and epithelial cells, there were additional cuts, PW1 was a 10 years old child with history of having been defiled by a known person whom she said was a cousin who had penetrative sex with her without protection, she lost her virginity, she had sexually transmitted infection and soft tissue injury because of the assault and defilement. Finally, she testified that she started PW1 on post exposure prophylaxis antibiotics and counseling and signed the P3 form on February 3, 2022. She produced PW1's birth notification and stated that PW1 was born at Kimilili District Hospital on December 3, 2011. She then produced the P3 form and PW1's Treatment Notes.
14. PW6 was a police corporal attached to Kamukuywa police station, Maeni police patrol base. He stated that on February 2, 2022 at around 5.30 pm, he was at the patrol base when members of public brought in a suspect (the Appellant) accompanied by the victim (PW1) and the victim's mother (PW2), the report he received was that the Appellant had defiled the girl (PW1) who was aged 10 years, he then rearrested the Appellant, the Appellant had been injured by members of the public and was bleeding from the head, he rushed the Appellant to Kimilili Sub-county Hospital where he was treated and discharged, he later escorted him to Kamukuywa police station where he was charged. He then produced the Appellant's treatment notes and identified the Appellant by pointing at him.
15. PW7 was a Police Inspector attached at Kamukuywa police station performing general duties and crime investigations. He stated that he was the investigating officer in this defilement case, on February 2, 2022 he was at the station when a suspect (Appellant) was brought to the station by his colleagues from Maeni police post and also members of the public, they had escorted the Appellant and the complainant (PW1) a minor, the Appellant was alleged to have defiled the minor on the same day, members of the public including PW3 and PW4 had caught the Appellant in the act, he was received at the police station and booked in the cells, the police officers informed him that after the Appellant was caught, he was attacked and injured by members of the public including his relatives, his colleagues had already taken the Appellant to Kimilili Sub-county hospital for treatment, the case was minuted to him to investigate, he interrogated the minor - a girl aged 10 years, a pupil at [Particulars Withheld] primary school -, the minor informed him that the Appellant was her blood cousin who had gone to her parent's home at lunch hour, PW1 was at home but her parent was away attending a merry go round within the village.
16. He added that through his investigations, he established that PW3 and PW4 were friends of PW1's mother who worked with the mother in a merry go round and had come to that home for arrangements and meeting PW1's mother, while they were at the home, the Appellant came in and requested the minor to serve him with lunch but the minor continued failing and the suspect collected the food and partook it in the sitting room, after eating, the Appellant moved out of the house pretending to have gone back home, PW3 then sent the minor to bring for him drinking water from the kitchen, it is during this time that the Appellant lured the minor to a single room located just about 5 metres from



the main house, the single room was a cottage of PW1's brother, the Appellant defiled PW1 forcefully in the house, inside the single room there was a radio which was on, the Appellant had increased the volume of the radio to make it difficult to hear PW1's screams, PW3 went to check why the minor was taking long to bring the drinking water, this is when he heard noises from the cottage, he moved closer and found that the Appellant had locked himself in the house with PW1, PW3 called PW4 and both moved to the house, they pushed the door and PW3 was able to clearly see the minor being defiled by the suspect, the Appellant had lifted PW1's dress and removed her inner pant, they raised an alarm and rescued PW1, they locked the Appellant inside the room, members of the public including relatives of the accused who answered to the alarm stormed the house and arrested the accused.

17. He testified further that he also received treatment notes from Kimilili sub-county hospital, he interrogated PW1's mother and then engaged a police woman who examined PW1 and concluded that indeed she had been defiled, PW1's birth notification was availed as well as a letter from the school where she was a pupil, he escorted PW1 and her mother to Kimilili Sub-county Hospital where a P3 form was filled by the clinical officer Kimilili, on the same day he personally visited the scene, he interrogated the neighbours who confirmed that the Appellant had defiled PW1, he took photographs of PW1's mother's house and also the house where PW1 was defiled, he later recorded the witnesses' statements, PW1's statement was recorded by PC woman Wambua, he collected the pant and the dress the complainant was wearing during the incident and which were handed over to the police, PW1 was taken to the police station on the same day. Finally, he stated that he collected enough evidence to link the suspect with the offence. He then produced a letter from PW1's school showing that indeed PW1 was a pupil there. He produced the letter and the two photographs referred to above, he stated that PW1's clothes were torn in the course of the struggle, he produced the dress and the pant which had creamish stains and identified the Appellant by pointing at him.
18. 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.

Defence evidence

19. In his defence, the Appellant gave sworn evidence. He stated that he was a farmer, he knew the charges that he was facing. It is recorded that at this point, the Charge sheet was read over and explained to him. He then added that at around 3 pm on the date in question, he went to take lunch, he found two young men at the house of his uncle, the two young men were taking alcohol, he took a plate and went to the kitchen to serve lunch, the two men followed him to the kitchen and started beating him up, he lost consciousness, he was taken to Maeni police post, he later found himself at Kimilili District Hospital where the injuries were stitched, he was then taken to Kamukuywa police station, he was shocked by the charges that were brought against him, he knew nothing about the offence that he is alleged to have committed.

Judgment of the trial Court

20. After analyzing the evidence, the trial Court found the Appellant guilty, convicted him on the main charge and on June 28, 2022 sentenced him to serve life imprisonment.

Grounds of Appeal

21. Being dissatisfied with the Judgment, the Appellant lodged this appeal on grounds which, quoted verbatim, were as follows:
 - i. That the trial Magistrate erred in law and fact in convicting the Appellant on contradictory and uncorroborated evidence which meant that the witnesses were not credible.



- ii. That the Appellant was not accorded Article 50(7) of the Constitution of Kenya 2010 thus all what took place in Court the Appellant was aware that he was handling a serious matter.
 - iii. That the Appellant is a first offender who is illiterate who does not know how to read and write and the Court never bothered to make him informed him of the gravity of the matter
 - iv. That the trial Court contravened Article 50(4) of the Constitution of Kenya by serving the Appellant with the statement which can't be read.
 - v. That I will produce more grounds after having furnished with certified copy of proceedings.
22. Parties then filed written submissions in support of their arguments. The Appellant filed undated hand-written submissions on December 6, 2022 and the Respondent filed its Submissions on January 16, 2023 through Learned Senior Prosecution Counsel PJ Kibet.

Appellant's Submissions

23. The Appellant argued that the prosecution evidence was speculative, inconsistent, fabricated and that the witnesses were not credible. He pointed out that for instance, PW1, PW3 and PW4 contradicted each other on the circumstances under which PW1 went out to fetch water, he wondered whether PW1 was sent by PW3 or by the Appellant or whether she went out on her own volition, he also pointed out that the fact that PW1 did not raise any alarm when he allegedly dragged her into the cottage raised doubts about the witness' testimony, he wondered what PW3 and PW4 were doing in PW1's home when PW1's mother was away, according to him this was all a trap, he alleged that the trap may have been set and he was framed simply because as confirmed by PW1, he used to frequent the home and PW1's mother was not happy with his frequenting the home for food. He reiterated that he did not understand what was taking place in Court, that he was illiterate and was not aware that he was facing a serious charge, the Court did not accord him an intermediary to assist in communication, this explained why he did not cross-examine the witnesses, because of the gravity of the offence, the trial Court should have assigned him an Advocate at the State's expense, he was not informed of his rights under Article 50 of the Constitution and the witness statements supplied to him by the prosecution were illegible.
24. He then referred to Section 36 of the Sexual Offences Act and submitted that the prosecution did not comply with it. The said Section 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.'
25. He further submitted that the medical evidence produced did not link him to the offence since it was not established where the blood found on PW1 came from and that the fact that PW1 was not stitched raised doubt. His argument seems to be that considering PW1's tender age, penetration by an adult would have torn her vagina and thus necessitated stitching. He also argued that the medical evidence did not link him to the act since he was not subjected to any medical investigations to give corresponding results, forensic tests ought to have been conducted both on him and on PW1 and that the Clinical Officer who gave evidence did not give her qualifications or expertise or even produce evidence that she was a qualified medical practitioner.



Respondent's Submissions

26. On his part, Counsel for the Respondent submitted that the witnesses sufficiently corroborated each other on all material issues including on the Appellant's identity and recognition.
27. On proof of age, Counsel submitted that in spite of the absence of a birth certificate, other sufficient evidence including birth notification and the mother's testimony were on record. He cited the Ugandan decision of *Francis Omuroni –vs- Uganda, Criminal appeal No 2 of 2000*, where it was observed as follows:

' In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.'
28. On the issue of penetration, Counsel submits that the same was proved by the child's own evidence, by PW3 who caught the Appellant in the act, by the clinical officer who found that there was a whitish discharge on the child's vagina, bruises on the labia minora, a freshly torn hymen, sexually transmitted infection, soft tissue injuries and the high vaginal swab which revealed pus cells and epithelial cells.
29. On the Appellant's contention that forensic ought to have been conducted, he cited the case of [Mark Oiruri Mose v R \[2013\] eKLR](#) where the following was explained:

' The law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep.'
30. On identity of the perpetrator, Counsel submits that the Appellant was well known to PW1 and therefore there was no mistaken identity.
31. On understanding of the proceedings, Counsel submitted that the Appellant fully understood the same. He cites the fact that the record reflects that the Appellant pleaded not guilty to the charge, that the charge was read to him in the Kiswahili language, the Appellant having understood what had happened was put to his defence, that section 211 of the [Criminal Procedure Code](#) was explained to him, the explanation was made in the Kiswahili language, having understood, the Appellant stated that he would give sworn evidence and that he will not be calling any witnesses, a date for defence hearing was set wherein he testified and the charges were again explained to him in the Kiswahili language.
32. Regarding proof of the prosecution case, Counsel submitted that the evidence of the prosecution witnesses proved the case, none of the witnesses contradicted each other and that their accounts were consistent. He cited the case of *Twebangane Alfred vs Uganda Criminal Appeal No 139 of 2001 (2003) UGCA 6* where it was stated that 'it is not every contradiction that warrants rejection of evidence'.
33. Counsel submits that although the Appellant alleges that there were inconsistencies in the prosecution evidence, he has not clearly stipulated the same. He therefore prays that the Appeal be dismissed.

Analysis and determination

34. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment. 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.).

35. Before I proceed further, I notice that the appellant was charged with the offence of defilement contrary to what was described as Section 8(1)(2) of the *Sexual Offences Act*. Needless to state, the said Act has no Section 8(1)(2) but only Section 8(1) which provides as follows:

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

36. There is then Section 8(2) which is a penalty provision and which stipulates as follows:

8(3) '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.'

37. In the circumstances and since the complainant is alleged to have been 10 years old, I will presume that although the provision appearing in the Charge Sheet is the non-existent Section 8(1)(2), what I believe was intended to be stated was 'Section 8(1) as read with Section 8(2)' of the Act. I presume that the error was inadvertent and simply an honest mix-up. I do not believe that the Appellant suffered any prejudice as a result of the error

38. My above finding is buttressed by the fact that no challenge was raised over the error.

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

- i. Whether the Appellant's rights to a fair trial under Article 50 of the *Constitution* were contravened
- ii. Whether the prosecution proved its case to the desired threshold;

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

- i. Whether the Appellant's rights to a fair trial under Article 50 of the *Constitution* were contravened

41. As aforesaid, the Appellant has raised the grievance that the trial Court failed to ensure that some of his rights to a fair hearing under Article 50 of the *Constitution* were observed and that as such, he was prejudiced. In ground (iv) of his Petition, he has cited Article 50(4) and states that he was served with witness statements that were illegible. However, since Article 50(4) is about prohibiting the admission of evidence obtained in a manner that violates the Bill of Rights, which is not what the Appellant has raised, I believe that the Appellant meant Article 50(2)(j) which is the one that deals with the accused person's right to be supplied with the evidence that the prosecution intends to rely on.

42. Regarding supply of such evidence to the Appellant, the record before me reflects that prior to the commencement of the trial, the Appellant is on February 7, 2022 recorded to have expressly confirmed to the trial Magistrate that indeed he had been supplied with the witness statements. I note that the prosecution case went on for a number of days yet at no time is the Appellant recorded to have raised any issue that the statements supplied to him were illegible. The Appellant even cross-examined some of the prosecution witnesses on the contents of the same documents. This ground therefore appears to be an afterthought and I reject it. I therefore find that there was compliance with Article 50(2)(j) of the *Constitution*.



43. In ground (ii) of the Petition, the Appellant claims that he was not accorded the rights under Article 50(7) of the Constitution of Kenya under which the Court is empowered to allow an intermediary to assist a complainant or an accused person to communicate with the Court.
44. According to section 2 of the Sexual Offences Act, an intermediary is defined to mean inter alia, 'a person who gives evidence on behalf of a vulnerable witness'.
45. The Appellant has not explained why he required such intermediary. He does not allege that he was under any incapacity, mental or physical nor does he disclose the nature of his 'vulnerability' to warrant an intermediary to assist him.
46. If what he means is that he required a language interpreter, then again, the record before me reflects that the witnesses testified in Kiswahili which language he has not alleged to be foreign to him and for those who testified in English, their evidence was interpreted to Kiswahili. Once again, I note that the trial went on for a number of days yet at no time is the Appellant recorded to have raised the issue that he could not understand the language. That he even cross-examined some of the witnesses is sufficient proof that he fully understood the language. This ground too appears to be an afterthought and it is also rejected.
47. The other ground cited by the appellant is that he should have been assigned an Advocate at the expense of the State.
48. Article 50(2)(g) and (h) provide as follows:
- ' 50(2). Every person has the right to a fair trial which includes the right.
- (g) To choose and be represented by an advocate, and to be informed of this right promptly.
- (h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.'
49. It is therefore not in doubt that the right to legal representation in general and legal representation at the state's expense, where an injustice will otherwise result, is a fundamental human right and essential to the realization of a fair trial. This is particularly true where an accused person is facing a capital offence or where, as herein, he is facing a charge of defilement with a possible sentence of life imprisonment. However, it is also true that the right to be assigned an Advocate at the State's expense is not absolute and does not apply to all types of offences or all accused persons.
50. Although the record herein does not reflect that the Appellant was informed of this right, looking at the case in totality, I do not think that this omission, per se, on its own, prejudiced the Appellant substantially. There is no indication that at any time during the trial, the Appellant raised the issue of representation or made any request for the same or that the trial Court ignored or rejected such request. Of course, this finding is confined to this particular case owing to its specific facts and circumstances. In deserving cases, omission of this duty to inform the accused person of this right should swiftly result into a declaration that the entire trial is a nullity.
51. In the end, I make the finding that the Appellant has failed to demonstrate that there was violation of his rights to a fair trial as enshrined under Article 50 of the Constitution. In the alternative, if indeed there was such violation, then he has failed to demonstrate that the same prejudiced him in a substantial manner to warrant nullification of the trial Court proceedings.



- ii. Whether the prosecution proved its case to the desired threshold

Elements of the offence of defilement

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:

- i. Age of the complainant;
- ii. Proof of penetration.
- iii. 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 that:

' 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

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; thus the younger the child the more severe the sentence.

55. PW1 testified that she was a Grade 2 pupil at [Particulars Withheld] primary school, her mother (PW2) testified that PW1 was aged 10 years old. PW5, a clinical officer produced a birth notification showing that PW1 was born on December 3, 2011. On this question of age, I am content to cite the case of *Fappyton Mutuku Ngui vs Republic [2012] eKLR* where it was held that:

'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.

56. I therefore find that the victim's age of 10 years was proved.

Penetration

57. 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.'

58. Regarding the Appellant's contention that his body samples ought to have been taken for forensic test before he could be linked to the offence, I refer to the case of *Mark Oiruri Mose v R [2013] eKLR* where the Court of Appeal stated that:

' Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.'

59. I agree with the State Counsel that penetration was proved by the child's (PW1) own evidence and by the clinical officer (PW5) who found that there was a whitish discharge on the child's vagina, bruises



on the labia minora, a freshly torn hymen, sexually transmitted infection, soft tissue injuries and the high vaginal swab which revealed pus cells and epithelial cells. On the authority of *Mark Oiruri Mose v R* [2013] eKLR (supra), therefore, the submission by the Appellant that there were no samples taken for forensic test or DNA to link him with the said defilement case may not yield much for purposes of proof of penetration.

60. The Appellant's has also submitted that the clinical officer (PW5) qualifications were not verified by the trial Court before she was allowed her to testify. On this point, I take notice of the legal requirements under Section 48 of the *Evidence Act* which provides as follows:

'When the court has to form an opinion upon a point of science or art, opinions upon that point are admissible if made by persons specially skilled in science or art'

61. I note that PW5 stated that she is a clinical officer working at Kimilili sub-county hospital and that she is the one who personally examined PW1 when PW1 was presented to the hospital by the police. To my mind, this was sufficient basis laid to allow her to testify. I am also guided by judicial authorities on this issue such as the case of *Francis Ndichu Kuria v Republic* [2015] eKLR the where the court stated that:

' My understanding of the person referred to therein is that person who is trained in medicine such as a clinical officer or a practicing doctor and any of them is competent to fill a P3 form. Regard must be given to the fact that not all medical facilities in our Republic are equipped with practicing medical doctors and where the medical doctors can be found may be far out of reach for most people. In those instances, P3 forms are competently filled by clinical officers.'

62. Accordingly, I find that there was no irregularity in the manner in which PW5 was allowed to testify. The fact that she was a clinical officer working at a government hospital was never challenged. The fact that she is the person who examined the child at the hospital was also not controverted.

63. I therefore find that the medical evidence that PW5 presented supports the conclusion that there was penetration of the child.

64. 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.'

65. On authority of the above holding therefore, even if the medical evidence of PW5 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 PW1.



Identification of the Appellant

66. The Appellant was a person known to the complainant and also to PW3 and PW4 who were present at the scene of crime. Both PW1 and PW2 stated that the Appellant was the son to PW1's aunt and thus a close relative well known to them. It was also stated that the Appellant used to frequent the home for lunch. The Appellant did not deny these descriptions. There was therefore no element of mistaken identity of the Appellant as the person who penetrated PW1's genitalia. The incident also occurred during the day, the Appellant was caught in the act and was arrested by the neighbours right at the scene and while locked inside the house with PW1. He was also found naked as was PW1. On this point, contrary to the Appellant's contention, the testimonies by PW1, PW2, PW3 and PW4 were consistent and credible.
67. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error

Finding

68. Apart from alleging that there were contradictions and inconsistencies in the Prosecution evidence, the Appellant failed to sufficiently point out such contradictions or inconsistencies. The few that he attempted to point out are, in my view, trivial and excusable and can be described as ordinary lapses and forgetfulness that can result from normal memory loss and challenges in accurately vividly recalling events that occurred a considerable time back.
69. The appellant also alluded that the charges and evidence submitted against him were fabricated and that he was framed. On the motive for so doing, he claims that he was framed because he used to go to the complainant's mother's house to look for food and that the mother was not happy with that habit. This Court is not at all convinced that such reason would, by itself, support a plausible motive for fabricating such serious charges against the Appellant. This kind of defence appears to be an afterthought.
70. In view of the foregoing, 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 evidence produced by the prosecution left no doubt that the Appellant defiled the minor. Accordingly, I find that the conviction was proper. The prosecution proved its case beyond reasonable doubt and the trial court did not err in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

Sentence

71. As aforesaid, the Appellant was sentenced to life imprisonment. Both in his Petition and Submissions, he did not expressly challenge the sentence imposed as being harsh or excessive or illegal or not being valid in law. He did not ask this Court to interfere, he only asked the Court to set aside the sentence on the basis that the conviction was improper.
72. In the circumstances, I will not delve into the issue save to mention that the trial Court applied Section 8(2) of the [Sexual Offences Act](#) which, as already stated, 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.'



73. The sentence imposed is therefore the maximum sentence under the said provision. If moved accordingly, the Court will have the occasion to determine the legality of the sentence. For now, I will let the issue rest since the Appellant has not called upon the Court to do so.

Final Orders

74. Upon evaluating the totality of the evidence, the circumstances of this case, the prosecution evidence and the defence offered by the Appellant, I am persuaded that there is no basis to fault the trial magistrate for his findings. The defence offered by the Appellant is in my view improbable and does not dislodge the prosecution evidence nor does it cast reasonable doubt on the prosecution case. The conviction was therefore merited.

75. The upshot of the above is that this appeal is hereby dismissed.

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

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JOHN R. ANURO WANANDA
JUDGE

