PC v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 18518 (KLR) (29 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18518 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E043 OF 2022

RE ABURILI, J

MAY 29, 2023

BETWEEN

PC ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction & sentence by the Hon. C.N. Oruo on the 19.8.2022 in the Senior Principal Magistrate's Court at Winam in Sexual Offence Case No. E020 of 2022)

JUDGMENT

Introduction

1. The appellant herein PC is an Italian Citizen. He was in Kenya visiting his wife in Kisumu City although the two had been separated for a while, when he was arrested and charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *sexual Offences Act* No.3 of 2006. The particulars of the charge are that on the 15th day of February 2022 in Kisumu East sub-county within Kisumu County, the appellant herein intentionally caused his penis to penetrate the anus of TJ a child aged three (3) years old. The appellant also faced the alternative charge of committing an indecent act with the same complainant child as per the main charge of defilement, contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to the charge and the case proceeded to full hearing where the prosecution called five (5) witnesses who established a prima facie case against the appellant who was found with a case to answer and was placed on his defence.

3. The appellant testified on oath and called one witness, his sister. The appellant maintained his innocence. At the conclusion of the hearing, the trial magistrate, Hon. C.N. Oruo, found that the prosecution had proved its case against the appellant beyond reasonable doubt, convicted him and

after the mitigation, sentenced the appellant to serve life imprisonment as stipulated in section 8(2) of the *Sexual Offences Act*.

4. Aggrieved by the conviction and sentence imposed on him, the appellant filed his petition of appeal dated 25th August 2022 on the 26th August 2022, raising the following grounds of appeal:

   i. The learned magistrate erred in law by invoking Section 31 of the *Sexual Offences Act* as the basis for accepting the oral evidence of PW1 as being testimony on behalf of the complainant and by then accepting the said evidence as aforesaid.

   ii. The learned magistrate erred in law by failing to appreciate that the oral evidence of PW1 was her own testimony and there was therefore no testimony for or on behalf of the complainant who was not called to give evidence.

   iii. The learned magistrate erred in fact by his finding that the rebuttal evidence on identification in DW2's observations and the text messages to her from PW1, was from a year before the alleged incident occurred when the complainant was two years old, when in fact, the observations were from as recently as one month prior to the occurrence of the alleged incident and after the complainant was already three years old and the text message was in the same month of the alleged incident.

   iv. The learned magistrate erred in law to reject the defence evidence on identification and in failing to find that there was reasonable doubt that the child's repeated use of the word 'P' was meant to identify the accused.

   v. The learned magistrate erred in law by disregarding the statutory imperative to consider evidence adduced by the defence and defence submissions of surrounding circumstances under section 33 (a) (i) of the *Sexual Offences Act* proving that a sexual offence involving the accused is not likely to have been committed.

   vi. The learned magistrate erred in law by failing to consider the glaring anomalies of fact in the timelines of events and placement of persons on the day of the alleged incident, disruptive of the cumulative chain of circumstances, putting into question the credibility of prosecution witnesses PW1 and PW2 and the veracity of their testimonies and raising reasonable doubts as to the guilt of the appellant.

   vii. The learned magistrate erred in law by accepting, in the absence of direct evidence from the complainant, the hearsay testimony of the history taken from the complainant in both oral evidence by PW5 and as recorded in the medical reports produced as exhibits.

   viii. The learned magistrate erred by failing to consider the evidence and defense submissions on the concessions by PW5 of the medical possibility that the trauma noted on the complainant could have been caused by non-sexual contact.

   ix. The learned magistrate erred by failing to appreciate that there was no medical evidence connecting the accused to what was found upon examination of the complainant.

   x. The imposition of life sentence upon the appellant's conviction was contrary to the established principles of certainty and with no regard to any mitigating circumstances.

5. The appeal was canvassed by way of written submissions with brief oral highlights.

The Appellant's Submissions

6. The appellant through his Counsel Mr. Isaac Okero submitted that the learned magistrate erred in law by invoking section 31 of the *Sexual Offences Act* as the basis for accepting the oral evidence of PW1 as being testimony on behalf of the complainant and by then accepting the said evidence as aforesaid whereas Section 31 only empowered a court to declare a witness vulnerable and then to appoint an intermediary through which the said vulnerable witness could communicate and not a means by which the oral evidence of the intermediary would be deemed to be the testimony of the minor. The Court of Appeal in the case of John Kinyua Nathan v Republic [2017] e KLR was cited by the appellant's counsel in support of this argument.

7. It was further submitted that the learned magistrate erred in fact by his finding on identification of the appellant as there was no basis in fact or in law for the learned magistrate to have held that the child's mental faculties were sufficiently developed to enable him to have communicated clearly and effectively the identification of the appellant as his assailant as there was reasonable doubt as to whether the complainant did identify the appellant as his assailant thus rendering the finding of identification of the appellant unsafe.

8. The appellant submitted that the trial court erred by failing to consider the defence that he had put in as well as their submissions and further that the trial court failed to consider the contradictions in PW1's testimony. It was submitted that evidence of surrounding circumstances under Section 33 of the *Sexual Offences Act* showed that PW1's conduct after she came to know of the alleged offence was inconsistent with her pronouncement of the appellant as the monster who sexually assaulted her toddler child and not behaviour typical of a distressed mother seeking to shield her traumatized child from contact with the person she claims had sexually assaulted him.

9. The appellant thus urged the court to find that the evidence of the surrounding circumstances under Section 33 of the *Sexual Offences Act* created co-existing circumstances that destroyed the inference of the appellant's guilt arising from the circumstantial evidence and gave rise to a rational inference of circumstances providing a reasonable possibility of his innocence.

10. The appellant submitted that the learned magistrate erred in law by accepting, in the absence of direct evidence from the complainant, the hearsay testimony of the history taken from the complainant in both the oral evidence by PW5 and as recorded in the medical reports produced as exhibits.

11. It was submitted that PW5's concession that the trauma noted on the child could have been caused by non-sexual contact could not be ignored and must be assessed for what it is, potentially exculpatory evidence raising reasonable doubt that the injury was caused by the appellant's insertion of his penis unto the TJ's anus and thus this reasonable doubt would render the conviction unsafe

12. It was submitted that there was no medical evidence linking the appellant to the offence and that the failure of the complainant to testify rendered the history contained in both Exhibit P1 and Exhibit P2 as hearsay making it inadmissible thus the learned magistrate fell into error by accepting and relying on it.

13. The appellant submitted that the sentencing of the appellant to a term of life imprisonment was contrary to emerging principles of certainty as pronounced in the case of Hezron Kipkemoi Mutai v Republic [2022] eKLR.

The Respondent's Submissions

14. The respondent submitted that all the ingredients of defilement were proven beyond reasonable doubt. On the age of the complainant it was submitted that that the age of the complainant at the time he was defiled was 3 years as per the birth certificate produced in court and as per the P3 form and Post Rape Care Form produced and further that the court had an opportunity of seeing the minor and came to a conclusion that she was of tender age as further corroborated by the evidence of PW1, the mother to the minor.

15. The respondent submitted that penetration was proved by medical evidence.

16. On the identity of the appellant, it was submitted that the appellant was well known to PW1 and the minor and that when PW1 took the minor and asked him as to what was wrong with him, the child uttered the word "P", the appellant's name.

17. [The respondent's counsel then submitted on irrelevant facts not material to this case to the effect that the DNA result showed that the appellant was the biological father of the baby bore by the complainant. It was further submitted that the report was produced by the Investigations Officer and the appellant had no objection to its production, which DNA report showed that the appellant and complainant were the parents of the baby.]

18. Regarding the appellant's defence of alibi, which again was an irrelevant submission, the respondent's counsel relied on the Court of Appeal case of Karanja v R [1983] KLR 501 and submitted that the appellant's alibi was an afterthought and therefore it was properly dismissed by the trial court. [submissions Not applicable to this case.]

19. On the sentence imposed on the appellant, it was submitted that the sentence meted was apposite and germane to the offence committed.

Role of the first appellate Court

20. I have considered the Appellant's petition of appeal and submissions by counsel for both parties. Before I make my determination on the merits of this appeal, I must first outline the role of this court as a first appellate court and in doing so, I must first subject the entire evidence adduced before the trial court to a fresh evaluation and analysis, bearing in mind that I had no opportunity to see and hear the witnesses as they testified and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the often cited case of Okeno v Republic [1972] E.A. 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters v Sunday Post, (1958) E.A. 434)"

Evidence before the trial Court

21. Revisiting the evidence adduced before the trial court, PW1 OBLA, the minor's mother testified on behalf of the minor as an intermediary following the ruling delivered on 7th June, 2022 resulting from vehement objections raised by the defence counsel against the prosecution calling PW1 to testify as an intermediary for the complainant.

22. The testimony by PW1 as an intermediary was therefore admitted pursuant to section 31 of the *Sexual Offences Act*. It was her testimony that the accused was her husband since 2009 and that they held a civil marriage in court in Italy. She stated that he complainant TJ was her adopted son and was aged 3 years and 4 months who was born on 3/1/2019 but that the birth certificate showed that he was born on 2nd January 2019.

23. It PW1's testimony that on the fateful day, the 15th February 2022, at her apartment in Manyatta, the appellant had visited her. In her house, they were together with the minor and one V. She testified that at 3pm, she took the minor for a nap while she and V went to the balcony as the appellant stayed in the house watching television.

24. PW1 testified that at about 3.30 pm, she saw the child emerge after opening the kitchen door while appearing worn out and crying without a sound, appearing very tired and that when the baby approached PW1, at the balcony, where PW1 was with V, PW1 asked the child as to what was wrong. She stated that at first the child said nothing and leaned towards PW1 then she held him on her laps asking him what had happened then he mentioned the word P. She asked the child in Kiswahili what about P before she went to the living room to ask P as to why the Child was awake. She stated that the appellant herein asked her as to how would he know. PW1 Became angry and started quarreling with the appellant concerning the child mentioning his name. According to PW1, she argued with the appellant for close to 30 minutes upon which the appellant threatened to leave the house for a hotel if PW1continued asking him the same thing over and over.

25. It was then that PW1 went to the corridor, removed the child's diaper to check on him that she saw black tiny particles so she decided to check on his anus which she found to be red and the black particles were also in the child complainant's anal orifice oozing a bad smell.

26. PW1 testified that she lied to the appellant that she was going to see a friend then together with her friend Vanessa, they took the minor to Jalaram Hospital but they were refereed to Jaramogi Oginga Odinga Teaching and Referral Hospital (Jootrh) where the minor was examined in her presence and she was informed not to bathe him. It was her testimony that the following day, they went back to Jootrh where the minor was further examined and that she reported the matter to the police on the 21st February 2022 at Kondele Police Station. She identified and was later recalled to produce the birth certificate for the child complainant.

27. In cross-examination, PW1 stated that she had been married to the appellant since 2009 but that they separated in 2019 once she had the minor, although she later stated that she could not remember the exact dates when they separated in late 2018. She testified that from 15.2.2022 – 25.2.2022 the appellant had been living with them in her house but that he had since moved out. She also stated that the appellant was supporting her. She clarified that although she had adopted the complainant child, she was his biological mother. She confirmed that although they were separated, she had been visiting the appellant in Italy. Further, that the appellant was still giving her financial support

28. PW2, VLO and PW1's friend testified that on the material day, (though recorded by the trial magistrate as 1/2/2020) she went to the house of PW1 at 10.00am and stayed with PW1 at the balcony while the

appellant relaxed on the coach as the child was watching cartoons. That the child went to the balcony while crying and PW1 asked him what was wrong. That when PW1 removed his diapers, PW2 saw that the child's anus was red so she advised PW1 to take the child to hospital and they took the child to Jalaram Hospital but were directed to take him to a public hospital so they took him to Jaramogi Oginga Odinga Teaching and Referral Hospital. They were later in the evening at 7.00pm joined by PW1's mother. She stated that she met the appellant for the first time on the 14th February 2022.

29. In cross examination, PW2 stated that a week after the incident, she went to PW1's house and found the appellant therein. She admitted that after that incident, her, PW1 and one, Sylvia, did have dinner at a restaurant but that they never discussed the issue.

30. PW3, who is also PW1's mother testified that on the 15.2.2022 at around 7.30 pm, she received a phone call while at work from PW1 who was crying and while at JOOTRH where PW3 went and found PW1 with the minor and PW2 too was present. She testified that the minor was being examined and that his anus was reddish and dark. She testified that they were advised to go to the Gender Department.

31. PW3 testified that the following day, she took the minor to the Gender Department where the child was examined and blood samples taken with results expected after 3 days and that the nurses advised her to report the matter to the police. It was her testimony that she called the appellant through the nurses to go and be tested and have his samples taken but the appellant refused. She stated that on 21/2/2022, she went and reported to the police and she was given a P3 form for the child, which she identified in court.

32. In cross-examination, PW3 stated that the minor did not have a bowel movement on the evening of 15th – 16th February 2022 and that on the 16th February 2022 the minor could not have been putting on the same diaper as from the date of the incident. She admitted that she was aware that PW1 continued meeting the appellant after the incident and even visited him at the police station and took to him a jacket but was not aware if PW1 during her visit of the appellant was with the child.

33. PW4 CPL Elkano Mungale the investigating officer testified that on 25.2.2022 two females reported an incident of defilement at Kondele Police Station. It was his testimony that the two ladies had a duly filled P3 form and Post Rape Care form. He testified that they then proceeded to the home of the minor's mother where they found the appellant and arrested him. That they then went to Court at Winam and obtained custody orders to hold the appellant for five days to enable the police complete investigations. PW4 testified that they intended to take a swab and samples from the appellant but they could not as the appellant was advised by his advocate not to give out the samples.

34. In cross-examination, PW4 testified that the victim's mother told him that the perpetrator was her former husband. He further testified that no statement was taken from the appellant as the defence counsel made it impossible.

35. PW5 Dr. Lucy Ombok testified that she filled the minor's P3 form on the 22.2.2022 for the minor complainant herein who was taken to hospital after he had his clothes changed. It was her testimony that on physical examination she found the minor to be fearful, afraid and cried a lot. She testified that there were no injuries to the child's body. PW5 testified that prior to examination, the minor was on drugs to prevent an STI and that the offence was classified as sodomy. That the history taken from the child was that while at home, a man called Paolo placed his penis –'dudu' in the mouth of the child's mouth and in the anus and covered the child's mouth when the child started crying.

36. PW5 testified that on genital examination, it was found that there were normal external genitalia and on examination of the anus, she found that there was pain around the anus with no presence of discharge in the region.

37. PW5 further testified on the results of the PRC form where on examination of the genitalia it was found that the anus was red with black matter around the area. She testified that the minor was given PEP for HIV/AIDS and drugs for STI. She further testified that there were numerous epithelial cells in the anal area, which cells show that someone had an injury.

38. In cross-examination, PW5 stated that she examined the minor in the presence of the mother and also interviewed him and further that the mother never assisted her in communicating with the child.

39. She further stated that at the time of filing the P3 form, there were no marks seen in the anus as the form was filled on 22/2/2022, 7 days after the incident. It was her testimony that the epithelial cells seen in the anus were a sign of the presence of an injury. She also answered that it was possible that a finger could cause the injury. In re-examination, PW5 stated that the finger did not cause the presence of epithelial cells and she made reference to the PRC form. She stated that she took the history from the patient-child herein.

40. Placed on his defence, the appellant gave a sworn detailed testimony denying the charges. The appellant testified that him and PW1 were married and that from 2008, they lived in Italy and would visit Kenya. He further testified that after 5-6 years into their marriage, PW1 left him for another German man but that she later returned to live with the appellant in Italy. He further stated that both he and PW1 were unhappy in the marriage and so they agreed to separate with the appellant agreeing to maintain PW1 by sending her 400 Euros per month.

41. The appellant further testified that he learnt that PW1 had adopted the minor in 2019 and that he was fine with it and that when he visited PW1, they slept on the same bed with the minor sleeping on the farthest end of the bed, with PW1 between him and the minor. He further testified that he treated the minor as his own child and was very attached to him.

42. It was the appellant's testimony that on the material day, the minor had been watching cartoons as he was in the balcony lounge and that the child was put to bed at around 3pm. He stated that at between 6.00pm to 6.30 pm V and L started smoking cannabis in the balcony while he sat on the balcony so he moved into the lounge and that after sometime V and PW1 went into the bedroom and came out with PW1 carrying the minor who was awake and tranquil and they left with him saying that PW1's mother had been involved in an accident and that although he asked that the baby be left behind, they went with him. He stated that even in Italy he had never been left alone with the child and that the child loved him.

43. He further testified that the following day, the 16.2.2022 at mid-day, PW1's mother visited them and started accusing him of sexual assault and that is when he learnt of the accusations. He testified that on the 18.2.2022, he contacted the Italian embassy and was assigned an advocate and that he was subsequently arrested on the 25.2.2022. He further testified that while in the police cells, PW1 and the minor visited him.

44. In cross-examination, the appellant testified that he meets PW1 often and gives her money the latest being 10 days prior to the time that he was testifying in court. He further stated that he did not submit for the DNA test as he insisted on seeing the medical report in the company of his advocate. He reiterated his statement on the happenings of the 15.2.2022 and further told the court that he was heterosexual.

45. DW2, FC, the appellant's sister, testified that she was aware that her brother was arrested and the charges he was facing. She further testified that she knew the minor and first saw him when he went to visit the appellant in Italy in 2021. It was her testimony that the minor would refer to everyone and anything as P.

46. In cross-examination, DW2 stated that she learnt about the incident from Paolo who sent her a text on the 18.2.2022. In re-examination, she reiterated that she had never visited Kisumu and that she learnt of the incident from her brother, the appellant.

Analysis and Determination

47. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions and the applicable law in this appeal. I find the main issues for determination to be:

    a. Whether the intermediary was properly appointed

    b. Whether the prosecution's case was proven beyond reasonable doubt and

    c. Whether the appellant's sentence was excessive and harsh.

48. There are also ancillary questions which I will resolve as I determine the above main issues which cover the grounds of appeal.

Whether the Intermediary was properly appointed

49. The appellant pleaded and submitted that the trial magistrate erred in law by invoking section 31 of the *Sexual Offences Act* as the basis for accepting the oral evidence of PW1, the minor's mother, and deemed the said evidence to be hearsay that was inadmissible. In essence, the appellant faulted the trial court for allowing PW1 to act as an intermediary for the minor, lamenting that she was not an independent intermediary. The appellant's counsel submitted that the complainant's mother could not be appointed as an intermediary since she was a witness in the case and that an independent intermediary should have been appointed. Further, that the evidence of PW1 should not have been taken to be the evidence of the child who did not testify.

50. Section 31 of the *Sexual Offences Act* provides that:

> "(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -
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> (a) the alleged victim in the proceedings pending before the court;
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> (b) a child; or
>
> (c) a person with mental disabilities.
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> (2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable Distribution of a substance by juristic person. Cultural and religious offences. Non-disclosure of conviction of sexual offences. Vulnerable witnesses. 20 No. 3 of 2006 *Sexual Offences Act* Rev. 2009] witness if in the court's opinion he or she is likely to be vulnerable on account of-
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> (a) age;
>
> (b) intellectual, psychological or physical impairment;
>
> (c) trauma;

(d) cultural differences;

(e) the possibility of intimidation;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an intermediary;

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the Rev. 2009] *Sexual Offences Act* No. 3 of 2006 21 court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

(a) convey the general purport of any question to the relevant witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary."

51. From the above provision of the law which is quite elaborate on intermediary, it is clear that invoking of Section 31 of the *Sexual Offences Act* is discretionary, but it is a critical provision in circumstances where, amongst other things, a witness is a child and the justice of the case demands that an intermediary be appointed to assist the child in giving testimony in a case where the child is either a witness or the victim of the offence. Section 31 (2) of the *Sexual Offences Act* empowers the court to invoke the provision even on its own initiative. In so doing, it may note witness vulnerability based on:

i. the age of the witness. (Section 31 (2) (a))

ii. the trauma facing the witness. (Section 31 (2) (c))

iii. the possibility of intimidation. (Section 31 (2) (e))

iv. the relationship of the witness to any party (e.g. the accused) to the proceedings. (Section 31 (2) (i))

v. any other factor the court considers relevant.

52. The proceedings before the trial court in this case show that on 7th June, 2022 the prosecution had applied and obtained an order for PW1 to act as an intermediary on behalf of her son TJ. The prosecution had noted that the minor, a child of 4 years at the time, did not have a good speech and as

such, the court would have not understood the same. The trial court after hearing the prosecution and objections from the defence counsel, allowed the application by the prosecution for PW1 to testify as an intermediary for the complainant.

53. In my view, where there appears to be serious trauma, fear or intimidation because of the person who is allegedly the offender, it is imperative for the prosecution to apply for the child to be declared a vulnerable witness, and for a trusted intermediary to give evidence on her behalf. Where the prosecution does not take up this role, then the court may initiate the declaration process itself. The court should nevertheless be cautious not appear to be entering into the arena.

54. The Court of Appeal in the case of MM v Republic [2014] eKLR had this to say with regard to intermediaries:

> " The role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.
>
> It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings.
>
> It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.
>
> It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness..... (Emphasis added)

55. The Court of Appeal in the above case went further to describe the role of an intermediary as follows:

> " We have seen that in Article 50 (7) of *the Constitution* an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.

The key word in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence.

"If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may;

a) convey the general purport of any question to the relevant witness.

b) inform the court at any time that the witness is fatigued or stressed; and

c) request the court for a recess." (Emphasis supplied)

The word through is used also in subsection 4 (b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained and communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

As a general rule of evidence embodied in section 125 of the *Evidence Act*, no person is precluded from giving evidence, except to the extent the court may determine. Section 125 provides that:

"125. (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them." (Emphasis added)

56. Finally, the Court in the above case indicated the critical importance of an intermediary when it stated that:

> " Because of the reality that a child of tender years, or an extremely old person, or a person affected by disease of the body or mind or even a lunatic may have difficulties relating to the trial court events in a crime, the role of an intermediary in such situations is imperative. Indeed, in jurisdictions such as South Africa, England and Wales, intermediaries are professionals whose services are sourced by the court when the need arises. Perhaps that is what the framers of section 2 of our *Sexual Offences Act* had in mind when they included experts, psychologists, counselors and social workers in the definition of 'intermediaries'.
>
> The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness." (Emphasis added)

57. Section 2 of the *Sexual Offences Act*, defines an intermediary to mean:

> " ...A person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."

58. On who a vulnerable person is, Section 2 aforesaid provides that when a person is a child, a person with mental disabilities or elderly person, then they are considered to be vulnerable. By dint of section 31 of the *Sexual Offences Act*, a court in a case involving alleged commission of a sexual offence may,

on its own motion or on request, declare a witness (but not the accused person) in the proceedings, a vulnerable witness if that witness is himself or herself the alleged victim of a sexual offence, a child or a person with mental disability. In making the declaration, the court will be guided, as shown above, by the age, intellectual, psychological or physical impairment of the witness, trauma, cultural differences, the possibility of intimidation, race, religion, language, the relationship to any party, the nature of the subject matter of the evidence and any other factor that the court may consider relevant. Appointment of an intermediary is therefore one of the measures of witness protection.

59. A was stated in the MM Case which the appellant's counsel relied on extensively in the lower court, the use of an intermediary in evidence is a unique and novel phenomenon in our jurisprudence, introduced upon the enactment of the *Sexual Offences Act*, 2006 and few years later, reproduced in Article 50 (7) of *Constitution of Kenya, 2010*. The role of an intermediary is provided for in subsection 7 of section 31 of the SOA namely: to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.

60. Therefore, an intermediary plays a very important role in criminal proceedings where appropriate and especially in sexual offences case where, as was in this case, the child complainant was said to be aged 3 years old and a victim of a sexual attack and who cannot publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. It follows that the framers of Section 31 of the *sexual Offences Act* intended that these traumatic effects on a child in criminal proceedings be moderated by allowing an intermediary to testify in aid of a child who is vulnerable. (see the MM Case).

61. From sections 31 (2) and 32 of the *Sexual Offences Act*, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before the court can appoint an intermediary. In addition, the court, as i have stated above, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. However, the application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.

62. In the instant case, the child did not give any evidence in court. After the prosecutor applied for the mother of the child to be appointed as the child's intermediary, the defence counsel Mr. Okero readily conceded that the child, according to the charge sheet, was aged 3 years old and that by virtue of that age alone, he was a vulnerable witness. The defence counsel was, however, opposed, on behalf of his client, for the mother of the child to be an intermediary because she was also a witness in the case. Counsel for the appellant urged the court to summon an intermediary, an independent person who was not a witness in the case, to advise the court of the vulnerability of the child and to act in the interest of the court and of the child.

63. The prosecutor maintained that section 31 of the SOA does not mandate that an intermediary be an independent witness and that his interactions with the child showed that the child only knew the (child) (sic) and her sibling-the sister.

64. It is clear from what i have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness.

65. On the question of whether an intermediary is the mouth piece of the vulnerable witness or the witness, section 2 of the *Sexual Offences Act* as reproduced above defines an intermediary to mean among other things, a person who gives evidence on behalf of a vulnerable witness.

66. I am in agreement with Ochieng J (as he then was) in Kennedy Chimwani Mulokoto v Republic, Eldoret High Court Criminal Appeal No. 51 of 2011, (cited by the Court of Appeal in the MM case) where the learned Judge found, in an appeal, whose facts are in pari materia with this appeal on the question of appointment of an intermediary, that the trial magistrate properly appointed as an intermediary the mother of a 3 year old girl, a victim of defilement who was unable to testify, due to her tender years. The learned Judge stated that:

> " When the mother of the little girl gave her evidence, she was deemed to be giving evidence on behalf of that little girl...Therefore, for all intents and purposes, when the mother of the little girl gave evidence, she did so as a legally recognized intermediary, for and on behalf of the little girl. Such evidence was admissible." (Emphasis added).

67. In the same vein, I find and hold that when PW1, the mother of the complainant, a 3- year old was allowed to testify as the child's intermediary, she gave evidence as a legally recognized intermediary, for an on behalf of the child complainant herein and that such evidence was not hearsay. It was admissible. In so holding, this court is alive to the general rule of evidence embodied in section 125 of the *Evidence Act* that no person is precluded from giving evidence, except to the extent that the court may determine. Section 125 of the *Evidence Act* provides that:

> " 125.
>
> (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.
>
> (2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."

68. Elsewhere, in the Article titled "Intermediary services for child witnesses testifying in South African criminal courts" by Gert Jonker and Rika Swanzen,[1] the authors persuasively observe that:

> " According to Coughlan and Jarman,[2] the purpose of intermediary services to the child witness is to reduce the trauma experienced by the child. However, efforts to reduce the trauma in an adversarial court system are complicated by the arguments that the prosecution of sexual abuse cannot take place in disregard of the rights of the alleged perpetrator. South Africa made international legal (and human rights) history with the promulgation of Section 170A of Criminal Procedures Act 51 of 1977 which was introduced through the Criminal Law Amendment Act 135 of 1991. This provides for the appointment of an

1 International Journal of human Rights

2 1. Coughlan & R. Jarman, "Can the intermediary system work for child victims of sexual abuse?", Families in Society, vol.83, issue 5/6, New York, Alliance for Children & Family, Sep-Dec 2002, p. 541.

intermediary for children in cases of sexual abuse for reasons of youthfulness or emotional vulnerability."

69. The two authors further gave a practical description of the intermediary process and its necessity and stated as follows:

> " In South Africa, an intermediary system is attempting to reduce the trauma and secondary abuse often experienced by child witnesses in court cases involving [sexual] abuse. By separating the child from the formal courtroom and allowing an intermediary to relay questions and answers to the child via closed circuit television, it was hoped that the stress of the experience for these children would be reduced while retaining the rights of the accused to cross-examine witnesses and to a fair trial [...] Protecting the rights of children is a universally accepted principle that influences the development of policy and practice. Where these rights have been violated – such as in sexual abuse, it is imperative that the response from societal institutions (such as justice and welfare) not only seek to protect children from further abuse of their rights but also seek to actively redress some of the violations that have taken place. It is thus essential that when possible, children giving evidence in criminal cases of sexual abuse be protected from further harm. The intermediary system for child witnesses is one such effort.[3]
>
> Coughlan and Jarman[4] also confirm that a significant body of literature has shown that the experience of giving evidence is emotionally traumatic and sometimes developmentally and cognitively impossible for children as they struggle to remember details over extended periods of time, to cope with the abstract language, and to be exposed to processes and standards that are often meaningless to them. Müller[5] states that cross-examination is not only traumatic for children, but also results in inaccurate evidence. The child is questioned in a hostile environment, often about very intimate and emotionally-laden events. The defence is obliged to attack the child's credibility in an attempt to highlight inconsistencies and discredit the child's evidence. In light of this, the questioning of a child witness is a very specialized task, and the prosecutors and defence counsel are not trained in these methods."

70. In this case, albeit the child was not asked any questions, owing to his very tender age, in my view, asking such a child questions in court would have subjected him to trauma. In my humble view, with the enactment of sections 31 and 32 of the *Sexual Offences Act* and subsequently Article 50(7) of *the Constitution*, the whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and especially, to promote the welfare of a child or a vulnerable witness.

71. I further reiterate that the victim did not himself testify due to his very tender age. In such a case, where the victim is too young to give evidence, section 33 of the *Sexual Offences Act* also allows the trial Court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), to give evidence through an intermediary or both.

72. In the absence of the complainant's testimony, the minor's mother was appointed as an intermediary and gave her testimony on exactly what she saw and heard on that material day and what followed

3 ibid

4 ibid

5 7. K. Müller, "A question of confusion: cross-examination and the child witness" in K. Müller, The judicial officer and the child witness, © Berne Convention, 2002, p. 170.

thereafter. Those are the surrounding circumstances of the case which I will revert thereto later. It cannot therefore be said that PW1 merely gave hearsay evidence which could not be relied on or admitted as evidence to support the prosecution's case. The steps leading to such appointment through an application by the prosecutor who had interacted with the child prior to the application were in my view duly followed and thus it was sufficient to rely on PW1's evidence as that of an intermediary for the child complainant.

73. I therefore find and hold that PW1 was properly appointed as an intermediary for the complainant child aged 3 years and that no prejudice was occasioned to the appellant. I hasten to add that albeit the child was not subjected to voire dire examination by the trial court, Article 159(2) (d) of *the Constitution* abhors procedural technicalities at the expense of substantive justice. To support this finding, I am fortified by the Court of Appeal had this to say concerning voire dire examination of a minor aged 5 years old in the case of D W M v Republic [2016] eKLR.

> " In Patrick Kathurima versus Republic Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed thus:
>
> "It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Compell (Times) December 20, 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."
>
> 13. On account of the above observation this court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety.
>
> 14. There was however no hard and fast rule laid down by this Court in the Kathurima case (supra) that in all cases where voir dire procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:
>
> > "It is best though not mandatory in our context that the question put and the answers given by the child during the voir dire examination be recorded..."
>
> The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt. (Emphasis added)

74. The justice of this case was that an intermediary, a person who was well acquainted with the complainant minor of very tender age be appointed to testify on his behalf. I find no fault in the appointment of PW1 as the child's intermediary and I further find and hold that the evidence pf PW1 was not hearsay evidence. It was admissible evidence.

Whether the prosecution proved its case beyond reasonable doubt

75. Having found that PW1 was properly appointed as an intermediary for the complainant child, the next issue is whether the prosecution proved its case against the appellant beyond reasonable doubt.

Here, the court will have to examine whether all the essential elements of the offence of defilement as stated in section 8 (1) of the *Sexual Offences Act* were proved beyond reasonable doubt to warrant the appellant being convicted as charged.

76. The appellant faulted the trial court for his conviction on the ground that the circumstantial facts considered in the instant case, as provided for under section 33 of the *Sexual Offences Act*, were not sufficient to uphold his conviction. He further pleaded and submitted that the medical evidence did not link the appellant to the offence.

77. It is true that there was no eye witness to the offence with which the appellant was charged. It is also true that the evidence relied on by the prosecution was of the surrounding circumstances. The question therefore is whether all the elements of the offence of defilement were proved against the appellant beyond reasonable doubt.

78. 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 that:

> " 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."

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

1. Age of the complainant;
2. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
3. Positive identification of the perpetrator.

80. The age of the minor in this case was not in doubt. It was proven by the testimony of PW1 who stated that the minor was born on the 3rd day of January 2019, but later stated that according to his birth certificate produced an exhibit, the minor was born on 2nd February, 2019.

81. At this point, it is worth noting that although the child's mother contradicted herself on the date of birth of the minor, she nonetheless corrected herself by referring to the birth certificate which showed that the minor was born on 2nd January2019. I find that contradiction to be minor and not fatal to the prosecution's case. In the case of Fappyton Mutuku Ngui v Republic [2012] eKLR it was held that:

> " ... 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."

82. Thus, whereas a birth certificate may not necessarily proof age, as the court can receive other evidence proving age of the complainant, however, in this case, there was no doubt and there was no contrary evidence that the child was aged 3 years and 4 months at the time of the alleged offence hence proof of age was beyond reasonable doubt.

83. Still on the alleged contradictions in the testimony of PW1, the appellant submitted that the trial court erred by failing to consider the defence that he had put in as well as their submissions and further that the trial court failed to consider the contradictions in PW1's testimony. It was submitted that evidence of surrounding circumstances under Section 33 of the *Sexual Offences Act* showed that PW1's

conduct after she came to know of the alleged offence was inconsistent with her pronouncement of the appellant as the monster who sexually assaulted her toddler child and not behaviour typical of a distressed mother seeking to shield her traumatized child from contact with the person she claims had sexually assaulted him.

84. I have examined the testimony of PW1 and as stated above, I find no material contradictions that would vitiate the conviction of the appellant. On the alleged inconsistency in the evidence of PW1, the trial court record indeed shows that upon discovery of what she considered to have been a sexual violation of her child, she decided to play it calm and not to confront the appellant immediately upon discovery. She stated in her evidence in chief that she lied to the appellant that she was going to see a friend. This court observes that PW1 had initially confronted the appellant on why the child was awake and the child calling out his name 'Paolo' and the two had had a heated exchange for about thirty minutes with the appellant threatening to leave PW1's house for a hotel. What followed thereafter is the discovery by PW1 of the suspected sexual violation of the child. She then played safe and proceeded to hospital with the child. This witness was never cross examined on this aspect of her evidence to get answers as to why she behaved the way she did. My own appreciation of that evidence is that the PW1 wanted to get to the root of the matter. She wanted a confirmation from a medical expert as to whether her child had indeed been sexually violated. In my view, the conduct of PW1 was a mother's instinctive behaviour typical of a distressed mother seeking to shield her traumatized child from contact with the person she suspected to have sexually molested the child, knowing they were sleeping under the same roof. This, in my view, explains why she called her mother while in tears and allowed the child to go and stay with her mother that very day of discovery until the child had been fully examined and a P3 form filled. That conduct before and after discovery in my view, does not in any way, exonerate the appellant from culpability. The inconsistency, in my view, is not fatal to the conviction of the appellant.

85. As was observed in Twehangane Alfred v Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> "With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

86. Similarly, in Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held that:

> "In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

87. Thus, as was observed by Odunga J (as he then was), in Julius Kamitu Alex v Republic (Through) ODPP [2020] eKLR, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (Nyakisia v. R. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal).

88. Having evaluated the entire evidence on record, Iam unable to find that PW1's evidence was unreliable owing to her conduct before and after discovery of the sexual violation of her child.

89. On whether penetration was proved beyond reasonable doubt, 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."

90. The appellant submitted that the evidence by PW1, PW2, PW3 and PW5 was hearsay and that the evidence of PW1 contradictory.PW1 testified that she was married to the appellant in 2009 and that in 2019 or late 2018, dates she could not recall with precision, they separated. I find no material contradiction here. She further testified on how the child who had been placed to sleep walked to her while crying but the sound could not be heard, he looked exhausted and on examination of the minor who was in his diapers, she found his anus to be reddish with black particles which particles were also in the diaper that the minor wore. This evidence was corroborated by the testimony of PW2, Vanessa Lynn Otiyo, the friend to PW1, who was also present with PW1 when the minor woke up from his sleep went to where the two were at the balcony, while the appellant was in the Lounge.

91. On the part of the appellant, it was submitted that there was no evidence proving penetration and that the evidence adduced by Dr. Lucy Ombok was that the alleged injury could have been caused by a finger.

92. The evidence adduced by PW5, Dr. Lucy Ombok was that she attended to the child, who told her that a man called Paolo put his 'dudu'-penis in the mouth and anus of the child and that he covered the child's mouth when the child started crying. That the child patient was teary, afraid and cried a lot when the name Paolo was mentioned. On anal examination by PW5, the child felt pain around the anus and that PW5 was satisfied that the child was sodomised. She stated that there were numerous epithelial cells to show that he had an injury.

93. PW5 also produced a Post Rape Care Form filled by Effie Awuor which revealed that around the anal opening was red with black particles around the external anal area. Dr. Ombok testified that this was a sign that the minor had been sodomised and answered to a question posed by the defence counsel that its possible that fingers could cause an injury but in reexamination, she stated that the finger did not cause the presence of epithelial cells.

94. The appellant's counsel maintained in his submissions that there was no corroborative evidence of penetration in view of the suggestive answer by PW5 that a finger could have caused the injury.

95. It is worth noting that the appellant faced a very serious charge which, upon conviction, carried up to life imprisonment. Although there was no adult eye witness to the incident, rarely do sexual offenders commit offences in the full view of witnesses who would expose them. They do so with the hope that no one will ever identify them or tell others about them.

96. I will at this stage venture briefly into the available research findings on why people commit sexual offences against children, especially. In 1984, psychologist David Finklehor[6] developed a model (called the Preconditions model), which breaks down the process someone goes through in order to commit a sexual offence. Finkelhor argues that four preconditions must be present in order for a sexual offence to occur. The model is based on a cognitive behavioural approach; examining the link between thoughts, feelings and behaviour. The preconditions are:

> "Step 1: Motivation

[6] Director of Crimes against Children Research Centre, Co-Director of the Family Research Laboratory, Professor of Sociology, and University Professor, at the University of New Hampshire.

There are many more reasons why people may sexually offend against a child more than the 'obvious' one of sexual interest, some of which include:

Feeling rejected

Feeling abandoned

Sexual gratification

Sex addiction

Substance abuse

Own experiences of abuse

Inability to relate to people/relationship problems

Low self-esteem

Depression

Loneliness

Decreased or no sex life

Excitement

Comfort

Stress

Some people who sexually offend, or have sexual thoughts about children, state that they are mainly sexually attracted to adults. Others say that they are attracted to both adults and children; while others acknowledge that they are exclusively sexually attracted to younger, pre-pubescent children. They have no sexual interest in adults at all and may never have had an adult sexual relationship.

It is often a combination of factors.

To sum up: people's sexual interests vary, and so do their motivations for sexually offending.

Step 2: Overcoming internal inhibitors (justifying offending and making excuses)

Most people who commit sexual offences know that sex offending is harmful or wrong in some way.

To commit a sexual offence, the offender must 'silence' the thoughts pulling them away from offending. This part of the process is referred to as overcoming internal inhibitors (or conscience). Here are some examples of things people say to convince themselves their behaviour is not 'that bad':

'children enjoy sex'

's/he wants it to happen'

'children are not harmed by sexual contact'

'the age of consent is wrong'

'other people do it, so it can't be that bad' (normalisation).

Step 3: Overcoming external constraints

> The third stage requires creating the opportunity to commit the offence. The offender has to create the opportunity by making sure that his partner, parents or other family members and friends do not know what he is doing and that he is able to gain access to the child. Sexual abuse thrives on secrecy. David Finklehor calls this the removal of external constraints.
>
> Step 4: Overcoming victim resistance
>
> The final stage of the model involves making the child comply with the behaviour. This may involve the child victim being groomed in a variety of ways in order for the offence to be committed – they are not willing participants. This might involve a child being offered gifts or rewards for engaging in the behaviour, or being emotionally manipulated by being told that all children do it, or that this is how to show their love or care for the person committing the offence."[7]

97. From the psychologist's point of view, any of the above factors could have been responsible for the offence being committed against the minor. The testimony by PW1 and PW2 that when the child emerged from where he had been put to sleep while crying and that he appeared exhausted and on being asked as to what was wrong he initially said nothing but fell into the arms of PW1 then said 'P' and that on checking his diapers, they found his anus red with black particles, which redness was corroborated by medical evidence in the P3 form filled and produced by PW5 to whom the child stated that 'P' put his 'dudu'-penis in the child's anus and mouth, as well as the PRC form, with presence of epithelial cells in the said anal area, was in my view, sufficient evidence proving penetration.

98. I find that the suggestion by the defence counsel that the finger could have caused the injury was nothing but a suggestion and the answer given by PW5 was in my view, not an answer to the effect that in this particular case, the injury was caused by the finger, considering that the same witness who is a doctor had made a finding of sodomy and clarified in reexamination that the finger was not the cause of the injury.

99. On corroboration in sexual offences, Section 124 of the *Evidence Act* Laws of Kenya provides that:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where 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 person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

100. From a reading of section 124 of the *Evidence Act*, it is clear that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and the trial court records the reasons for that belief. (See George Kioyi v Republic Cr. App. No. 270/2012 (Nyeri). In the instant case, the trial court convicted the appellant after believing the testimony of PW1, who was the minor's intermediary and PW5 the doctor who examined the child and discounted the defence put forth by the appellant. In addition, despite the provisions of section 124 of the *Evidence Act*, the evidence by PW1 remained unchallenged and was corroborated by PW2 and PW3 as well as Dr. Ombok PW5 who examined the minor at the hospital at Jaramogi Oginga

[7] See https://www.stopitnow.org.uk

Odinga Teaching and Referral Hospital. I thus find that the prosecution proved penetration beyond reasonable doubt, and that the alleged concession by PW5 Dr. Ombok that the trauma on the child was non-sexual was a statement made up by the defence and not the testimony of PW5 since nowhere in the evidence of PW5 did she say that the trauma on the child who was her patient was non sexual, having concluded, upon examination of the child's anus that the child had been sodomised.

101. On the proof of the element of identification of the perpetrator, the appellant put up a spirited defence that the minor referred to everything and everyone as 'P'. This was the testimony of DW2, the appellant's sister who testified that she saw the minor in the year 2021 on the latter's visit to Italy. The appellant's counsel also faulted the trial magistrate for stating that the messages between DW2 and PW1 were old messages yet the said messages were as new as 10 days prior to the testimony of DW2 being taken in court.

102. The prosecution adduced evidence by PW1 and corroborated by PW2 that when asked by PW1 as to what was wrong, the minor told PW1, his mother- 'Paolo.' This was after PW1 had observed that the child was appearing so exhausted and although he was crying, his sound could not come out. Dr. Ombok similarly testified that when examining the minor, she inquired from him as to what had happened to him and the minor replied 'P.' That the child mentioned that P had placed his 'dudu'- penis in the anus and in the mouth of the child and that when the child started crying, the appellant placed his hand over the child's mouth.

103. DW2 on the other hand, testified that she knew the child, PW1 and the appellant and that when she met the child in 2021, in Italy, the child could mention 'P' every time. In her messages with the child's mother after the occurrence of the offence subject of these proceedings, she did remind PW1 that the child called almost everything as 'P' hence it was not possible that P defiled him. PW1 maintained that she had no reason to fabricate the case against the appellant who was maintaining her financially.

104. From the trial court record, it is evident that the appellant was well known to the minor. Further, the evidence adduced by PW1 and PW2 shows that only the appellant was in the house when the minor was sleeping as PW1 and PW2 were both outside on the balcony. It is also not in doubt that the only 'Paolo' in the house was the appellant herein.

105. I find that it was the appellant who was the one referred to by the minor as P. The appellant's defence was therefore rightly dismissed on the allegation by DW2 that the child in 2021 referred to anything including a passing truck as 'P.'

106. The appellant also claimed in his grounds of appeal that there was no medical evidence linking him to the offence hence his conviction was not sound and safe.

107. In criminal cases, a court of law is expected to determine the case based on the strengths of the prosecution case and not the weaknesses in the defence case. In addition, Article 50(2) of *the Constitution* guarantees every accused person rights. Those rights include the right to remain silent, to adduce and challenge evidence tendered against him or her by the prosecution and the right not to give self-incriminating evidence. It follows that in this case, as testified by PW1 and PW3, although the appellant was requested to undergo forensic examination to rule out his involvement in the commission of the offence against the minor, which request he turned down, his refusal was indeed, his constitutionally guaranteed right not to give self-incriminating evidence as stipulated in Article 50(2) (l) of *the Constitution*.

108. For the above legal reasons, no court of law should have expected the appellant to exonerate himself from the crime or to prove his innocence since every accused person is presumed innocent until the contrary is proved. See Article 50(2) (a) of *the Constitution*. Thus, in the absence of any samples from

the appellant, which he declined to be taken, in exercise of his constitutional right, to be compared with the samples from the child complainant, there is no way there could be medical evidence from him, evidence linking him to the offence. It follows therefore that the appellant cannot blame the trial court or the prosecution for the absence of medical evidence linking him to the offence. Furthermore, subjecting an accused person to medical examination in sexual offences is not a mandatory requirement under the law. Iam fortified on this point by the Court of Appeal decision in the case of Martin Nyongesa Wanyonyi v Republic [2015] eKLR where the Court of Appeal (Maraga, stated as follows, and I have no reason to differ that:

> " Turning to the question that the appellant was not subjected to a medical examination contrary to the provisions of section 26 of the *Sexual Offences Act*, in Kassim Ali v Republic Cr. App. No 84 of 2005 (Mombasa) this Court stated:
>
> "[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."
>
> In Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010, this Court found no reason why the same principle should not be applied in the case of defilement, and stated thus,
>
> "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 the 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."
>
> As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded."

109. Accordingly, I find that despite the absence of the medical evidence linking the appellant herein to the offence, the prosecution could still have proved beyond reasonable doubt, the person who defiled the minor, using other evidence surrounding the commission of the offence.

110. The appellant submitted that the circumstantial evidence was not sufficient to establish his guilt beyond reasonable doubt, as stipulated in section 33 of the *Sexual Offences Act*. What then is that other surrounding evidence establishing the guilt of the appellant herein beyond reasonable doubt? and was that other evidence sufficient to sustain the conviction of the appellant of such a heinous offence that carries life imprisonment? Before I answer this question, it is important to appreciate what circumstantial evidence is all about, in judicial and statutory terms.

111. In the case of Charles Muriuki Wamae v Republic [2016] e KLR it was stated that:

> " Section 164 of the *Evidence Act*, Cap. 80 appears to make reference to this sort of evidence where proof is sought of any particular fact; it states as follows:
>
> 164. Circumstantial questions to confirm evidence
>
> When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances,

if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies."

112. Thus, if there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence. That notwithstanding, circumstantial evidence must be narrowly examined before drawing any inference and coming to any conclusion. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person.

113. The leading decisions on this issue are Republic vs Kipkering Arap Koske & Another (1949) XVI EACA 135 and Simon Musoke versus Republic (1958) EA 715 where the Court of Appeal for Eastern Africa quoted Wills on Circumstantial Evidence and held that:

> "In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

114. In the Simoni Musoke v Republic [1958] EA 715 case, this principle was extended when the Court of Appeal for Eastern Africa cited with approval a passage from the decision of the Privy Council in Teper v Republic [1952] AC 480 where it was held at page 489 that:

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

115. The evidence of PW1 and PW2 was that they sat at the balcony while the appellant was in the lounge and that the child then emerged while crying with no sound while appearing very exhausted and when the mother, PW1 held him and asked him what was wrong, the child just said 'P.' At that time, the two witnesses had not confirmed if anything wrong had happened to the child. PW1 nonetheless asked the appellant as to what had happened to the child and he answered as to how he would be knowing. It was not until PW1 removed the child's diapers to check on the child that she saw redness in his anus and black matter in the anal area site and on the diapers that it occurred to her that something wrong had happened to the child. She did not confront the appellant at that time to tell him that she had discovered something terribly bad. She took the child to hospital and called her mother who joined her in hospital and they both witnessed the medical examination on the child and the doctor's findings. for examination. The appellant in his testimony confirmed that he was in the lounge as the child slept, having moved out of the balcony because PW1 and Vanessa were smoking cannabis. PW2 also confirmed that the child was asleep as they were at the balcony while the appellant was in the lounge.

116. Although PW1 did not confront the appellant immediately upon discovery that the child could have been violated sexually, my view is that PW1 was wise enough to instead take the child to hospital for examination and treatment as confronting the appellant would not have helped anything at that time since he had already told PW1 as to why he would be expected to know what had happened to the child.

117. Upon the child reaching the doctor, the doctor explained in her testimony and P3form that he was teary and afraid even as he told her that it was P who put his 'dudu' in the child's anus as well as in his mouth and that when he cried, the appellant covered the mouth of the child with his hand.

118. The findings of the examination by Dr. Lucy Ombok revealed sodomy of the child complainant. Could that evidence by the Doctor upon examination be false? and why would the doctor claim that the child was defiled when he was not? The doctor was cross examined and there was no evidence that his findings were influenced by other factors other than the factual findings upon examining the child. This court is also aware that defilement as defined in section 2 of the *Sexual Offences Act* is only achieved if the genital organ of the accused and of the complainant meet and not where for example, the genital organ of the accused is used but placed in the mouth of the victim or a finger of the accused is used and placed into the genital organ of the victim. In the latter case, only the offence of sexual assault would be disclosed. It is for that reason that, in my view, the defence counsel put to the Doctor the question of whether the injury that was manifested on the child victim could also be caused by a finger and the witness readily answered in the affirmative, but in reexamination, she made it clear that the epithelial cells, which are evidence of an injury, were not caused by a finger. the question itself was not recorded and it is not expected that questions would be recorded in court proceedings. However, I do not find the answer that was given by the doctor to have been answering the question of: whether the injury found on the child, upon examination was caused by a finger. It is not unusual in criminal proceedings, or even in civil proceedings, especially accident claims involving personal injuries, to find a victim or the doctor being asked questions such as whether a particular type of injury can or could have been occasioned by an accidental fall, and the witness saying yes, it is possible. That in itself cannot be taken to mean that the answer given means that the injury in the specific case before court was occasioned by a fall. It simply means that there are instances where such injury could be caused by a fall. That in my view is the situation herein.

119. Therefore, with regard to the positive identification of the appellant as perpetrator, Iam persuaded that even in the absence any direct evidence that the appellant was seen defiling the child, the surrounding circumstances point to the appellants the person who defiled the child. Iam in agreement with the following finding by the learned Judge in the case of D W M v Republic [2016] e KLR which the Court of Appeal Waki, Nambuye & Kiage JJA agreed with and reproduced in the second appeal thus:

> "There was no evidence to suggest that there was any other male person in the house at the time of the incident other than the appellant in this case. Indeed, he confirmed in his defence that his wife had left him at home with the complainant. The appellant therefore had the opportunity to commit the offence during the absence of his wife and although mere opportunity to commit an offence does not in itself amount to corroboration, the opportunity may be of such a character that taken together with other circumstances may in themselves amount to corroboration."

120. The Court of Appeal in the above case went further and stated that:

> "Consistent with Malonza" versus Republic [1986] KLR 426, the judge made findings that the appellant's admission in his defence that he was the only male person in that house and therefore the only person who had an opportunity to commit the offence, coupled with the fact that the complainant was found defiled the next morning after she had been left under the care of the appellant; offered sufficient corroborative evidence to that of H.W. The appellant was thus placed at the scene of the offence and his allegation that he had been convicted on uncorroborated evidence stood displaced."

121. Similarly, in the instant appeal, there was evidence that indeed, the appellant was the only male person present in the house at the time that the child was found to have been defiled, after he had been placed to sleep. Although the appellant's sister in her evidence and in the translated messages between her and PW1 tended to say that the appellant could not have committed such an offence, especially because in 2021 the child used to call everyone as P even on the passing of a truck, in this case, it is my finding, based on my assessment of the evidence adduced as a whole that even if the child who was of very tender years was unable to speak, the circumstantial evidence irresistibly pointed at the appellant as the only person and not any other person, who could have defiled the child.

122. In addition, albeit there was evidence from PW1 and the appellant that the two though married had differences which led to their separation although they remained close and even lived together at times by PW1 visiting the appellant in Italy in the company of the child as was the case herein when the appellant had visited PW1 in Kenya, I find no evidence that PW1 as well as her mother, PW3 or even PW2 could have fabricated the case against the appellant to put him in trouble. PW1 was categorical in her messages with DW2 that although she indeed lived on financial support by the appellant, the issue was about the child and nothing else. That all she wanted was justice for the child. I find that PW1, knowing that the only financial support she had was from the appellant, could easily have retracted her evidence or even chosen not to report the appellant to the police after finding that the child had been defiled, in favour of continuous monetary support by the appellant since she does not work. The fact that PW1 figured out that justice for the child was the greater good than financial gain from the appellant is an indication that she was ready to lose the monetary support in favour of justice for the child who had been defiled. I find no malice on her part. This is further coupled by the fact that PW1, oblivious of the right of the accused person not to give self-incriminating evidence, called upon him to subject himself to medical examination so that it could be ruled out that he did anything to the child. In my view, all that PW1 wanted was the truth to come out and not to punish the appellant.

123. Accordingly, I reiterate my findings and hold that although no person found the appellant in the act of defiling the child, the surrounding circumstances favourably and without any doubt, linked the appellant to the offence of defilement of the minor child.

124. The appellant further pleaded and submitted that the trial court erred by failing to consider his defence and submissions. I have considered the very detailed defence tendered by the appellant and the submissions made by his counsel and note that the trial court considered the defence and submissions by the appellant but found them wanting when weighed against the prosecution's case. I therefore find no merit in that assertion.

125. On alleged failure to take into account submissions, the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] KLR stated as follows regarding the weight to be placed on submissions:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

126. The Court of Appeal further in Avenue Car Hire & Another v Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence as set out under

Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in Muchami Mugeni v Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

127. Accordingly, the appellant cannot expect the trial court or this court to come to a judgement based on his submissions filed in the lower court. On appeal, yes, submissions are important as they prosecute the appeal. Submissions in the trial court of first instance are a marketing strategy, persuading the court to either accept or disregard the evidence adduced. They do not take the place of evidence.

128. The upshot of the above is that I find and hold that even if the submissions by the appellant were not considered in the judgment in the court below, the failure by the trial court to consider the appellant's submissions could not be fatal to the conviction of the appellant. The ground of appeal and complaint accordingly fails.

129. In the end, I find and hold that the prosecution proved the case against the appellant beyond reasonable doubt and that the trial court did not err when it returned a guilty verdict against the appellant herein. I find this appeal against conviction not merited. It is hereby dismissed and the conviction of the appellant for the offence of defilement of the minor aged 3 years, which I find safe and sound, is hereby upheld.

Whether the sentence imposed on the appellant was harsh and excessive

130. The appellant pleaded and submitted that the life imprisonment imposed on him was contrary to emerging principles of certainty as pronounced in the case of Hezron Kipkemoi Mutai v Republic [2022] eKLR. Section 8(2) of the *Sexual Offences Act* prescribes the sentence of life imprisonment upon conviction of an accused person where the age of the victim of the victim is below 11 years. Although the Act does not expressly state, but the manner the penalties are prescribed under the *Sexual Offences Act* show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider amongst other factors in sentencing.

131. In this case, the complainant was aged three (3) years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides that:

> " 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."

132. In the case of Gedion Kenga Maita v Republic Criminal Appeal No. 35 of 1997 (unreported) the Court of Appeal stated as follows:

> '...We are not saying that a court has no power to impose a sentence of life: a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was committed, the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature.'

133. Sentencing is thus the exercise of judicial discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo v R. and Wilson Waitegei v Republic [2021] eKLR)

134. In the instant case, the appellant took an unfair advantage to satisfy his sexual desires on a child only 3 years old yet he was living with its mother who was legally married to him. This court, just like the trial court, considers the offence committed against such a child of tender years to be quite egregious as it was committed against a baby. It bears repeating that the penalties enacted in the *Sexual Offences Act* reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.

135. As appreciated in Tito Kariuki Ngugi vs. Republic [2008] e KLR that:

> " The Appellant...caused her trauma which she will have to live with for the rest of her life."

136. This Court, like any other court of law does not condone offences against minors and vulnerable persons. As stated by Madan, J (as he then was) in Yasmin v Mohamed [1973] EA 370:

> " The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

136. Whereas the Courts have now relaxed the spirit of the legislature by holding that mandatory sentences limit the discretion of the courts in sentencing, following the Francis Muruatetu & another v Republic[2017]e KLR as has been applied by the Court of Appeal and followed by the High Court in various other decisions, such as the case of Jared Injiri Koita v Republic [2019] e KLR the Courts nonetheless, have held severally that seriousness of the offence is a relevant factor in sentencing and in sexual offences, generally, it is worth noting that, the offence leaves the innocent victim with eternal and time-explosive dent on the integrity and dignity of the person as a human being. The aggravating factors weigh heavy and play an important role in sentencing, against any mitigating factors of a convict.

137. In the circumstances of this case, it is clear that the appellant was a care giver and provider for the baby complainant and its mother, PW1. The appellant was and appears to be in an on and off family marital relationship with the complainant's mother and that even when the appellant was held in custody, from the evidence on record, PW1 went visiting him in the company of the child victim of the offence.

138. Therefore, as to whether I should interfere with the sentence imposed by the trial court, I have considered the circumstances under which the offence was committed, the age of the minor and the age of the appellant-50 years old and who is a first offender. From the trial court record, the trial court never took into account the mitigations that the appellant was a first offender and such failure has been held to affect the sentence imposed on the appellant. See the case of Chigongo Dziye v Republic CRA 31 of 2022 CoA at Malindi [2023]e KLR Gatembu, Lesiit and Odunga JJA delivered on 14th April, 2023 where the trial magistrate stated in the sentencing remarks that the offence was serious and that the law prescribed a minimum sentence for the same, in the case where the minor was 9 years old and proceeded to sentence the accused to serve life imprisonment without considering his mitigation that he was first offender, the Court of Appeal set aside the life imprisonment imposed on the appellant and substituted it with a prison term of thirty (30) years.

139. In this case, the trial court did not take into account the fact that the appellant was a first offender as no evidence was adduced by the prosecution to show that he had a previous conviction. For that reason, I find that the sentence of life imprisonment imposed on the appellant was harsh and excessive. It is

hereby set aside and substituted with a prison term of thirty (30) years imprisonment, to be calculated taking into account any period the appellant was held in custody, before he was released on bond.

140. In the end, I find this appeal against conviction devoid of merit. I dismiss it and uphold the conviction of the appellant for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offenders Act. The appeal against sentence succeeds to the extent stated above.

141. This file is closed.

142. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF MAY, 2023

R.E. ABURILI

JUDGE