Sikoyo v Republic (Criminal Appeal E051 of 2021)
[2023] KEHC 18170 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18170 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E051 OF 2021

RE ABURILI, J

MAY 24, 2023

BETWEEN

BENSON WECHULI SIKOYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction & sentence by the Hon. S.L. Telewa on the 27.10.2019 in the Chief Magistrate's Court at Kisumu in Sexual Offence Case No. 10 of 2019)

JUDGMENT

Introduction

1. The appellant herein Benson Wechuli Sikoyo was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the charge are that on 7th October 2018 at Nyalenda within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of QA a child aged 14 years. The appellant also faced the alternative charge of committing an indecent act with a child 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 trial where the prosecution called four (4) witnesses. Placed on his defence, the appellant gave sworn testimony maintaining his innocence.

3. In his judgement, the trial magistrate found that the appellant's defence amounted to a mere denial and that the prosecution had proved its case against the appellant beyond reasonable doubt. She convicted the appellant of the main charge of defilement and sentenced him to serve twenty (20) years' imprisonment.

4. Aggrieved by the conviction and sentence imposed, the appellant filed a petition of appeal on the 15th November 2021 raising the following grounds of appeal:

    1. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.

    2. That the trial court failed to consider that my fundamental constitutional rights was/were violated and thus no ample time was the appellant given to defend herself.

    3. That the trial court did consider that the investigation tendered was shoddy.

    4. That the trial court failed to consider that the subject was based on fabrication and afterthought.

    5. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in Article 50 (2) (p) of the *constitution*.

    6. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

5. The appellant subsequently filed a supplementary memorandum of appeal dated 17th January 2022 and filed on the 17th March 2022 in which he raised the following grounds:

    1. That the learned trial magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.

    2. That the learned trial magistrate erred in law and in fact by convicting the appellant in reliance on dock identification which is generally worthless and must always be preceded by a properly conducted identification parade which was not done.

    3. The learned trial magistrate made a crucial error when maliciously based the conviction on the purported evidence tendered in court by the prosecution witness without considering the fact that the weight of the evidence was below the standard required for the proof of the offence.

    4. That the learned trial magistrate erred in points of law and fact by failing to consider the appellant's plausible defence without considering the provisions of law in section 169 (1) of the *CPC* yet the same was remarkably comprehensive in casting doubts to the strength of the prosecution case.

    5. The first appellate court failed to take into account, appreciate and raise issues with the prosecution's failure to call material, competent and compellable witnesses without ascribing any reason or explanation to the same.

6. The appeal was admitted to hearing on 6/12/2022 and directions were given for the disposal of the appeal by way of written submissions, with each party complying with the directions. The appellant filed his written submissions on 8/3/2023 while the respondent filed its submissions on 16/3/2023.

The Appellant's Submissions

7. The appellant submitted that the trial magistrate erred by convicting him based on dock identification that was worthless and that has been held not be relied on by courts unless preceded by a proper identification parade. It was further submitted that the complainant's evidence had no probative value and thus it was impossible to know whether the complainant was being truthful in her identification of the appellant or not.

8. The appellant further submitted that the prosecution witnesses contradicted each other in material aspects and specifically the complainant whose testimony was used to convict the appellant and thus one could decipher that she must have been coached. Reliance was placed on the case of Ndungu Kimanyi v Republic [1979] KLR 283 where it was held interalia that a witness in a criminal case whose evidence is to be relied on should not create an impression in the court's mind that he is not straightforward or raise suspicion to his trustworthiness.

9. On penetration, the appellant submitted that the trial court erred in relying on a medical report that was inconsistent. It was further submitted that the absence of hymen was not proof of penetration as was held in the case of *ION v Republic* [2021] eKLR.

10. The appellant further submitted that there was enough time to undertake a DNA test in line with Section 36 (1) of the *Sexual Offences Act* but the same was not done and that though the complainant stated that the appellant did 'tabia mbaya' to her, the trial court erred by failing to ascertain what it meant considering that the complainant was 14 years and ought to have been in a position to describe the ordeal as was held in the ION supra case.

11. The appellant submitted that the court erred by failing to take into account that the prosecution failed to call material, competent and compellable witnesses without giving reason or explanation for the same as was stated in the cases of *Bukenya & Others v Uganda* [1972] EA 549 and *Keter v Republic* [2007] 1 EA 135.

12. It was submitted that there was nothing connecting the appellant to the offence of defilement and thus the conviction should be quashed and the sentence set aside.

The Respondent's Submissions

13. The respondent submitted that all the ingredients of the offence of defilement were proven. On the age of the complainant it was submitted that the complainant was born on 13/06/2002 as corroborated by the evidence of PW2, the father and that the offence occurred on the 7/10/2018 when the minor was aged 16 years old.

14. On penetration, it was submitted that the same was proven by medical evidence and corroborated by the evidence of the complainant and the case of *Charles Wamukoya v R* Criminal Appeal No. 72 of 2013 was relied on.

15. As to whether the perpetrator was positively identified, the respondent submitted that from the complainant's testimony, the appellant was a person well known to her and whom she could positively identify. It was further submitted that the complainant also pointed the appellant out as the perpetrator thus ensuring that the appellant was positively identified.

16. On the 20-year sentence meted out to the appellant, it was submitted that the same is the minimum sentence provided for in section 8 (2) of the *Sexual Offences Act* and that in this case, the same was lawful and that the court should be alive to the seriousness of the offence and the circumstances herein.

Analysis

17. I have carefully considered the Appellant's grounds of appeal as amended, his written submissions and the submissions by the Respondent as filed.

18. This being a first appellate court, I must first subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses as they testified hence I cannot comment on their demeanour. I am guided by the Court of Appeal case of *Okeno v R*. [1972] EA 32 where the Court set out the duties of a first appellate court thus:

> " 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] EA (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] EA 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] EA 434)"

Evidence before the Trial Court

19. The evidence before the trial court was that on the 7th October 2018, PW1, the complainant had gone to visit a friend prompting her Dad to call the pastor to find out where she was as she was expected to have gone to church and returned home. It was a Sunday, but she was not in church. PW1 testified that at 6pm on her way home, the appellant (whom she pointed out in court), who was in the company of another person, forced her into another house and did 'Tabia Mbaya' to her. She testified that the two men did it the next day and that she left for school. She further testified that the head teacher called her father to take her to the police station and that her father went and she told him what had happened.

20. PW1 testified that she was taken to Russia hospital for treatment. The complainant testified that she had seen the accused person complainant previously as he used to pass near the complainant's home. PW1 described the room where she was taken and defiled as one with a bed, with lights on and a jerrican. It was her testimony that she was 15 years old as she was born on the 6th of March 2002.She testified that one of her attackers was in court.

21. In cross-examination, PW1 reiterated that she knew the appellant who was called Benson and that he defiled her at Baisi in July 2018 though she could not tell whether it was his house. She further stated that it was a mud house and there were 2 houses. She further stated that it was at 3pm and that there was no light. She stated that there were people still walking and that it was on the road and that nobody witnessed the incident. It was her testimony in cross-examination that people were not there though there were other houses. She stated that she took the chief to the house where she was defiled but they did not find those people. She further testified that she knew the appellant on the day of the incidence.

22. In re-examination, PW1 restated that the appellant before court and another man were the ones who raped her. She testified that she was taken to the hospital on the 7th.

23. PW2, the complainant's father testified that on the Sunday of 7th October 2018, the complainant left for church and did not come back so he slept worried and called the pastor who told him that he had

not seen her. The following day he went and reported at her school, Kasagam and also called the area chief and village elder.

24. He testified that he received a call from the complainant's teacher who informed him that the child was at school and on arrival at school, he found a man having been locked in the office with the head teacher questioning him. It was his testimony that the appellant claimed that he found the complainant on the street.

25. PW2 testified that he took the complainant to the hospital then returned to the police station. He testified that the doctor informed him that the complainant had been defiled. He further stated that the appellant was arrested while taking the complainant to school. He further testified that his daughter was 14 years old having been born in 2002. He further stated that he did not know the accused prior to the incident.

26. In cross-examination, PW2 restated that the appellant was arrested at school and that the appellant had told the child to tell the teachers that he picked her on the street. In re-examination, PW2 stated that he took the child to hospital where the doctor confirmed that she had been defiled.

27. PW3, Dr. Eugene Ochieng, testified on behalf of his colleague who examined the complainant and filled the P3 and PRC form on the 8/10/2018. He testified that from the report, it was a case of defilement where the complainant was attacked and put in a house and defiled by two people without protection. He testified that the P3 was filed after 2 days and the complainant put under medication to prevent pregnancy and STDs. It was his testimony that the female genitalia were normal with bruises in the vaginal and anal area. He testified that the information in the P3 and PRC were the same.

28. In cross-examination, PW3 stated that there was no DNA report as no DNA was done and further that a DNA would only be undertaken if a pregnancy were reported. He further testified that there were no spermatozoa found on the test conducted on the 8th of October whereas the incident happened on the 6th October. PW4 Sergeant Angelica Kwamboka testified on behalf of the investigating officer who she stated, had since died and she produced the minor's birth certificate as exhibit 3.

29. Placed on his defence, the appellant gave a sworn testimony and stated that on the 13/3/2019 at 8 am while heading to work, he met a small student who was nose bleeding and in a bad state. He testified that he took her to another hospital. He further stated that the shopkeeper advised him to return her to school which he did and explained to the teacher who asked him to leave.

30. The appellant testified that when he reached the school gate, he was turned back and the minor's parent called then he was taken to Central Police Station. He stated that he could not leave the child. He further testified that at the police station, the complainant's father gave a different story and that he only learned that the case against him was one of defilement while in court.

31. In cross-examination, the appellant stated that he met the minor at 8am sleeping besides the road bleeding from the nose. He testified that the minor was alone. The appellant stated that he was a shopkeeper. He stated that it was near the school and that he decided to take the complainant to school. The appellant stated that he was in a rush to get to work and that he did not have enough money to pay at the hospital and further that it was proper to take her to hospital.

32. The appellant further stated in cross-examination that he did not know the child's parents and that's why he took her to school. He denied telling the teacher that the child was an orphan and further denied speaking to the child. He stated that he was arrested after the people had a committee meeting and that he was innocent.

Determination

33. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court for the prosecution and the defence proffered by the appellant on oath as well as the submissions and the applicable law in this appeal. The issues for determination are as follows

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

    b. Whether the trial court complied with Section 169 (1) of the *CPC* and

    c. whether the sentence imposed on the appellant was lawful or excessive

34. There are other ancillary questions arising from the grounds of appeal and the submissions which this court will answer

Whether the prosecution proved its case beyond reasonable doubt

35. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic* [2016] eKLR, where it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim. The prosecution was under a duty to prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses.

36. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

37. The complainant testified that she was 15 years having been born on the 6th of March 2002. PW2, the complainant's father testified that his daughter was 14 years old having been born in 2002. Despite this inconsistency in the testimony of the complainant and her father, PW4 produced the minor's birth certificate as exhibit 3 that showed that the complainant was born on the 13th June 2002. Thus at the time of the incident, the complainant was 16 years old.

38. It must be noted that a birth certificate is conclusive evidence of proof of age. The *Sexual Offences Act* promulgated rules towards the achievement of its objectives which came into force on 11th July 2014 under Legal Notice No.101. By dint of Rule 4 of the *Sexual Offences (Rules of Court)* 2014, it is provided that:

> "When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

39. Thus, examining the Birth Certificate produced as Exhibit 3 by the prosecution, the complainant was 16 years old at the time of the incident giving rise to the charge of defilement against the appellant herein.

40. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

41. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

42. Section 124 of the *Evidence Act*, Cap 80 provides that:

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

43. In the present case, the victim testified that the Appellant and another not before court grabbed her on her way home and did 'Tabia Mbaya' to her. She testified that her assailants also did it the next day and that she left for school. PW2, the complainant's father testified that on the Sunday of 7th October 2018, the complainant left for church and did not come back so he slept worried and the following day he went and reported at her school, Kasagam and also called the area Chief and village elder. PW3, Dr. Eugene Ochieng, testified that the P3 form for the complainant was filled after 2 days and that the complainant was put under medication to prevent pregnancy and STDs. It was his testimony that the female genitalia was normal but with bruises in the vaginal and anal area.

44. In his defence, the appellant denied committing the offence and drew attention to what he termed as inconsistencies in the complainant's testimony. The appellant further submitted that the complainant was not pressed to state what she meant by "tabia mbaya".

45. In the instant case, the complainant maintained in her testimony that the appellant did "tabia mbaya" to her on the 7th October 2018. In cross-examination the complainant reiterated that it was the appellant who defiled her. The complainant's testimony was corroborated by the medical evidence adduced by PW3 which was filled 2 days after the incident but still showed that the complainant had bruises in the vaginal and anal area.

46. Section 124 of the *Evidence Act* is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a court can convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth.

47. In this case the complainant narrated how the ordeal unfolded, she was firm and resolute in her testimony on the details of her abduction by the appellant and his colleague on her way back from visiting her friend and subsequent defilement till the next day. Her statement was corroborated by the medical evidence adduced by PW3 as well as by her father who testified that the complainant went missing on the evening of 7th October only for him to be notified that she was at school where he went and found the appellant detained by the head teacher. Further, the clear narration by the complainant described a male-female genital sexual intercourse.

48. On the use of the term 'tabia mbaya', the appellant claimed that it was not the same as being defiled as stated by the complainant. The Court of Appeal discussed the meaning and purport of the phrase "Tabia mbaya" by minor children in the case *Muganya Chilegi Saha v Republic* [2019] eKLR held that such phrase meaning bad manners in connotes English. Sexual conduct or intercourse that a minor of tender years has no other language to explain to the act. See also *JE v Republic* [2017] eKLR where again the phrase "tabia mbaya" (bad manners) was construed to mean sexual intercourse or conduct.

49. It is thus common knowledge in this country and the court may thus take judicial notice that the words "Tabia Mbaya" i.e. bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as "Tabia Mbaya" perhaps due to shyness or they may not know what description to give to such act.

50. Suffice to hold that "Tabia Mbaya" is euphemism for sexual intercourse in sexual offences. The evidence by the complainant (PW1) and the clinical officer (PW2) was sufficient, corroborative and credible enough to establish the offence of defilement.

51. The learned trial magistrate was therefore correct in his finding that penetration as defined by the *Sexual Offences Act* was proved. (see *Daniel Arasa v Republic* [2014] eKLR).

52. The appellant further submitted that he was not subjected to a DNA test to ascertain whether it was he who defiled the complainant.

53. I do note that it is not mandatory that DNA test be conducted whenever there is absence of spermatozoa. Defilement is committed whether the penetration is partial or full. One need not release his sperms for defilement to be proved. At times the defilers use condoms. Sometimes they do not eject their sperms.

54. The provisions of Section 36 of *Sexual Offence Act* No. 3 of 2006 states as follows with regard to the "Evidence of medical forensic and scientific nature.

> "(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

55. There is therefore sufficient evidence on record to prove that the complainant's vagina was penetrated by a penis since the then status of the complainant having bruises in her genitals cannot reasonably be explained otherwise in the face of the evidence. I find and hold that penetration was proved.

56. On whether the appellant was positively identified as the perpetrator, the complainant testified that the appellant and another person not in court were the ones who defiled her.

57. PW2 testified that when called to the complainant's school upon the complainant being found, he found the appellant detained there and that the appellant had told the complainant to tell the teachers that he found her on the streets. The complainant testified that it was the appellant who held her by the neck and told her that he would deal with her if she screamed and that she knew him as she had seen him before passing near their house. In cross-examination, the complainant reiterated that he knew the appellant as Benson. She further testified that she knew the appellant on that day

58. In response, the appellant dismissed the complainant's testimony as having no probative value, contradictory and stated that he should have been subjected to an identification parade.

59. I note that there are some inconsistencies in the complainant's testimony when she states that she had previously seen the appellant passing by their home and then states that she knew him on the day of the defilement. In my view, and taking into consideration the totality of the prosecution evidence, I find the said inconsistencies minor and incapable of vitiating the conviction of the appellant. This is so because the evidence of the complainant was well corroborated by the other witnesses. There is also no evidence that the minor was couched to say what she said in court or to frame the appellant herein and no such ground for her or her father tending to frame was apparent. In addition, there was nothing in the complainant's evidence to demonstrate that she could not be believed as to who defiled her. I therefore find that the evidence adduced by the prosecution sufficiently and without any reasonable doubt established that the Appellant is the one who forced the complainant to spend in the house at Baisi, that he held her neck and threatened her not scream after which he proceeded to defile her.

60. In arriving at this conclusion, I have also considered the defence. The appellant told the trial court that he found the complainant on the streets and advised by the shopkeeper to take her to school. This evidence is not credible as the evidence of the minor's father was that the complainant had left for church and not living on the street. The appellant's claim that he took the complainant to hospital and returned with her as he did not have money is in my view, made up testimony to escape justice considering that if at all the complainant was in the state described by the appellant, the hospital would have carried out some emergency treatment on her. Further the alleged injuries would have been evident to the teachers at the complainant's school or to PW2 who went to pick the complainant from school or even in the P3 form produced as PEx1.

61. The trial court addressed its mind so well in regard to the appellant's defence finding that the same amounted to a mere denial. I concur with the analysis of the trial court on the defence. The defence was not a holding one and is hereby dismissed.

62. I thus find that the appellant was properly identified by the complainant as the one who defiled her. This element of identification of the perpetrator was thus proven beyond reasonable doubt.

63. On to other issues raised by the appellant in his appeal, the appellant also raised the issue that the prosecution failed to call crucial witnesses to prove their case specifically. In the case of *Bukenya v R* [UGC 1952], the court addressed itself thus: -

> " (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

64. This Court is, however, alive to the fact that there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides that:

> " 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

65. In the case of *Donald Majiwa Achilwa and 2 other v R* [2009] eKLR the Court stated as follows:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v Uganda* [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

66. In the case of *Keter v Republic* [2007] 1 EA 135 the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

67. It is my considered view that in the instant case, the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court could not determine which witnesses are sufficient to prove the prosecution case. The failure to call the head teacher who was the first person who was in contact with the complainant is not fatal as he was not an eye witness to the ordeal, there being no contrary evidence that the appellant was arrested when he took the complainant to school that morning, the complainant's father called and the area Chief too informed of the incident which case was handed over to the police for investigations before a decision to charge the appellant was arrived at. Accordingly, I find and hold that this ground of appeal fails.

68. The upshot of all the above is that I find that the prosecution proved their case against the appellant beyond reasonable doubt.

Whether section 169 (1) of the CPC was complied with and if not the consequences of such non-compliance if any

69. The appellant pleaded in his supplementary grounds of appeal that the trial court erred in law for the judgment did not comply with Section 169(1) of the *Criminal Procedure Code*. Section 169 of the *CPC* provides as follows:

> " Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

70. The Court of appeal in the case of *Hawaga Joseph Ansanga Ondiasa v Criminal* Appeal No. 84 of 2001 held as follows:

> "It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated."

71. And in the case of *Samwiri Senyange v R* [1953] 20 EACA it was stated that:

> "Where there had not been a strict compliance with the provisions of Sections 168 and 169 of the Criminal Procedure Code that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties."

72. From the foregoing, failure to comply with Section 169 (1) does not render the judgment a nullity as a technical failure of this nature does not vitiate the trial particularly because the evidence on record is sufficient to support the conviction for the offence defilement the appellant was charged with.

73. Further, in my perusal of the judgement delivered by the trial magistrate, find that it complied with the provisions of section 169 of the *Criminal Procedure Code*.

Whether the sentence imposed on the appellant was lawful or excessive

74. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. From the evidence adduced by the prosecution in the form of a birth certificate for the complainant minor, she was 16 years old at the time of the incident. It follows that the charge against the appellant falls as one of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*, 2006.

75. Though the appellant was charged with the offence of defilement under section 8 (1) (3) of the *Sexual Offences Act* 2006, this court has the power to convict him for any other proven sexual offence. In this regard, Section 186 of the *Criminal Procedure Code* provides that:

> "When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it."

76. In that regard, Section 8(1) and 8(4) of the *Sexual Offences Act*, 2006 provides that:

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

> 4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

77. Accordingly, I find and hold that the appellant should have been sentenced to 15 years' imprisonment which is the minimum and not 20 years imprisonment as no reasons were given by the trial court for the enhanced sentences.

78. The upshot of the above is that the trial court's sentence of 20 years is set aside and I I resentence the appellant Benson Wechuli Sikoyo under section 8(1) as read with section 8(4) of the *Sexual Offences Act* and exercise discretion and substitute the twenty years prison term with ten (10) years imprisonment.

79. Accordingly, the appeal against conviction is found to be devoid of merit. It is dismissed. The appeal against sentence succeeds. The twenty years imprisonment imposed on the appellant is hereby set aside and substituted with a prison term of ten years to be calculated taking into account any period that the appellant spent in custody following his arrest on 20/3/2019 before he was released on bond pending trial and sentencing.

80. This file is now closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF MAY, 2023

R.E. ABURILI

JUDGE