Achoki v Republic (Criminal Appeal E011 of 2022) [2023] KEHC 20744 (KLR) (27 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E011 OF 2022

WA OKWANY, J

JULY 27, 2023

BETWEEN

JOHN MARUBE ACHOKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment and Conviction in Criminal Case No. 48 of 2015 in the Chief Magistrate's Court at Nyamira by Hon. M.O. Wambani, Chief Magistrate on 1st September 2021)

JUDGMENT

1. The Appellant herein, John Marube Achoki, was charged with the offence of defilement contrary to Section 8 (1) of the *Sexual Offences Act*, No. 3 of 2006 as read with Section 8 (3) of the said Act. The particulars of the charge were that on the 16th day of January 2015 in Nyamira South District within Nyamira County, intentionally and unlawfully caused his penis to penetrate the vagina of NNO (particulars withheld), a child aged 12 years.

2. 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* No. 3 of 2006. The particulars were that on the 16th day of January 2015 in Nyamira South District within Nyamira County intentionally and unlawfully touched the vagina of NNO (particulars withheld), a child aged 12 years with his penis.

3. The Appellant pleaded 'not guilty' to both counts and the matter proceeded to full trial where the Prosecution presented the evidence of 6 witnesses in support of their case.

The Prosecution's Case

4. PW1 was NOO the complainant. She testified that she was on 16th January 2015 at around 4pm looking for firewood in the company of her younger brother, VO (particulars withheld) when the

Appellant found them and chased them. She stated that she fell into a ditch and the Appellant got hold of her, covered her mouth, carried her into the tea bushes, removed her clothes including pants and defiled her for about 12 minutes before taking off. She testified that she later went home in pain and informed her mother, DKO (PW3) who took her to the hospital at Tinga and then to Nyamira District Hospital. It was her testimony that the Appellant was later arrested on that Sunday and taken to hospital for examination.

5. PW2, VO, the complainant's younger confirmed that they had gone to look for firewood near the river when the Appellant chased them before getting hold of the complainant who later informed him that the Appellant had done bad things to her.

6. PW3, DKM, the victim's mother, testified that her two children had on the material day gone to look for firewood and that when she returned home from the market, she found her daughter bleeding from her private parts. She testified that PW1 informed her that the Appellant had defiled her. She stated that she took PW1 to Nyamira Hospital for treatment and examination as her husband (PW4) and PW2 went to report the matter at Nyamira police station where they were issued with a P3 Form.

7. She stated that the following day on Sunday, they were informed that a suspect had been arrested by a village elder alongside other village youth and that PW1 was able to identify the Appellant as the one who had defiled her.

8. PW4, ROO, the victim's father testified that his daughter (PW1) informed him that she had stomach pain and that he could see blood dripping down her legs. He stated that his younger daughter one Doreen informed him that PW1 had been defiled. PW4 testified that he called his wife (PW3) and they took the victim to the hospital then they reported to the police. It was his testimony that the victim stated that she could identify the person who had defiled after which they proceeded to the village where PW1 picked out the accused from a group of village youth.

9. PW5 was Protus Omondi Makori, the Clinical Officer at Nyamira District Hospital. He testified that he filled out the victim's P3 Form on 16th January 2015 and on examination, found that there was evidence of penetration because the victim's hymen was broken and bleeding. He testified that the victim was put on Post Exposure Prophylaxis (PEP), analgesics and antibiotics. He produced the P3 Form (P.Exh1) and laboratory result slip (P.Exh2).

10. PW5 also testified that he examined the Appellant on 19th January 2015 and found that the HIV test was negative and there were no abnormalities on his genitalia as he was examined 3 days after the offence was allegedly committed. He also produced the Appellant's P3 Form (P.Exh 3).

11. PW6 was No. 66155 Sgt. Jerida Nyatichi, the Investigating Officer who testified that a report was made by the complainant in the company of her mother on 16th January 2015. She stated that the complainant was treated and examined at the Nyamira Referral Hospital where she was issued with a P3 Form. She also recorded the witness statements. She produced the complainant's torn blue pant (P.Exh4) and testified that she got the victim's church dedication card (P.Exh5) which indicated her date of birth. It was her testimony that the initial investigating officer collaborated with the nyumba kumi officials to have the Appellant arrested and charged.

12. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer and placed him on his defence in accordance with section 211 of the Criminal Procedure Code. The Appellant elected to give sworn testimony and did not call any witnesses.

The Defence/Appellant's Case

13. The Appellant testified that he on the material woke up in the morning and went to Nyamira, in the company of a colleague, to dig a toilet after which he got back home at 5.00 p.m. He testified that the following, Saturday at 4.00 pm, he was called by his cousin's child who told him that some people were looking for him for defiling one Diana. It was his testimony that he went to his uncle who contacted the said people so that they could talk but they never turned up. It was his further testimony that he was summoned to Nyamira Police Station and arrested but that the complainant did not incriminate him as her defiler.

14. At the close of the defence case, the trial court rendered a judgment in which it convicted the Appellant on the main count of defilement and sentenced him to serve 15 years imprisonment.

15. Dissatisfied with the decision of the trial court, the Appellant instituted the present Appeal wherein he listed 25 grounds of appeal as follows:-

    1. The learned trial magistrate erred in law and fact by convicting the Appellant on the basis of circumstantial evidence that did not meet the required legal standards.
    2. The learned trial magistrate erred in law and fact by convicting the Appellant on the basis of suspicion without cogent evidence.
    3. The learned trial magistrate erred in law and fact by convicting the Appellant on the basis of evidence of identification that was not free from error.
    4. The learned trial magistrate erred in law and fact by failing to resolve the material contradictions and inconsistencies in favour of the Appellant.
    5. The Prosecution did not prove their case beyond reasonable doubt as required by law.
    6. The learned trial magistrate erred in law by shifting the burden of proof to the Appellant contrary to the law.
    7. The trial Magistrate erred in law by admitting evidence contrary to the law.
    8. The learned trial magistrate erred in law and fact by convicting the Appellant notwithstanding the material contradictions in evidence.
    9. The trial magistrate erred in law by failing to take into account the plausible defence given by the Appellant.
    10. The trial court misapprehended the facts and applied the wrong legal principles to the prejudice of the Appellant.
    11. The trial court erred in law by convicting the Appellant on the basis of single identifying evidence.
    12. The learned trial magistrate erred in law by failing to resolve the material contradiction and inconsistency in favour of the Appellant.
    13. The trial court erred in law and fact by convicting the Appellant on the basis of a defective charge sheet.

14. The charges were never proved to the required legal standards.

15. The Prosecution failed to call critical witnesses to corroborate the charges.

16. The trial court misapprehended the facts and applied wrong principles to the prejudice of the Appellant.

17. The trial court erred by ignoring the plausible alibi defence given by the Appellant.

18. The trial court failed to appreciate that the evidence that required corroboration could not corroborate.

19. The principles of fair trial under Article 25 (c), as read with Article 50 (2) (a-p), were violated to the prejudice of the Appellant.

20. The trial court erred in law and fact by believing the testimony of PW1 yet the court never observed her demeanor and her evidence was not credible.

21. The trial court failed to appreciate that there were material contradictions and inconsistencies which ought to have been resolved in favour of the Appellant.

22. The trial court erred in law by failing to appreciate that evidence of recognition was mistaken.

23. The trial court erred in law and fact by re-opening the Prosecution's case to counter the alibi defence to the prejudice of the Appellant.

24. The circumstantial evidence left gaps in the Prosecution's case which ought to have been resolved in favour of the Appellant.

25. The trial court erred in law by shifting the burden of proof to the Appellant.

16. The Appellant thereafter filed a Supplementary Petition of Appeal raising two further grounds as follows:-

    1. The trial court erred in law by taking evidence of PW1 and PW2 without administering the voidance (sic) oath.

    2. The trial court erred by concluding that PW2 and PW3 corroborated PW1. Evidence that requires corroboration cannot corroborate.

17. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

18. The Appellant submitted that the charge was not proved to the required standards because the victim only testified that bad things had been done to her while PW2 did not witness the alleged defilement. It was submitted that the age of the complainant was not established as her birth certificate was not produced. It was further submitted that the alleged identification parade before the village elder was not properly conducted and that there were material contradictions on the time when the offence occurred.

19. It was also submitted that the Appellant's right to a fair trial was violated particularly because he was not represented by Counsel and further, the trial court did not comply with Section 200 of the Criminal

Procedure Code (CPC). It was the Appellant's case that he was denied a chance to interrogate the Prosecution witnesses and that the trial court failed to consider the Appellant's plausible defence.

20. The Appellant argued that the trial court relied on the evidence of a single eyewitness and that the evidence of PW6 required corroboration and ought not to have been used to corroborate the evidence of PW1, PW2 and PW3. The Appellant added that the court misdirected itself when it relied on the evidence of PW2 yet he was categorical that he did not see what the Appellant did to the victim. It was the Appellant's case that the court erred in convicting him and that the sentence was manifestly excessive.

The Respondent's Submissions

21. The Respondent summarized the Appellant's grounds of appeal into five main issues, namely; whether identification was proper, whether there were material contradictions, whether there was corroboration, whether the defence was considered and whether the trial court complied with Section 200 of the Criminal Procedure Code.

22. On identification, it was submitted that the victim recognized the Accused as the offence was committed at 400 p.m. when the environmental factors made positive identification possible. It was the Respondent's submission that the Appellant was also identified by PW2 as the person who chased them before PW1 fell in a ditch. It was the Respondent's position that identification was not disputed because the Appellant was well known to the minor since they lived in the same location.

23. The Respondent submitted that the Appellant did not spell out the alleged material contradictions in the prosecution's case and that the trial court weighed the evidence against the ingredients of the offence and the Appellant's testimony in arriving at a conviction. It was further, the Respondent's case that Section 124 of the *Evidence Act* allowed the court to convict on the sole testimony of the complainant.

24. On corroboration, the Respondent submitted that the victim's testimony that she was chased by the Appellant was corroborated by the testimony of PW2 and the medical evidence which showed that her hymen was freshly broken. It was also submitted that the trial court considered the Appellant's defence which did not impeach the Prosecution's case.

25. Regarding compliance with Section 200 of the CPC, it was submitted that trial Lower Court Record indicated that once the first trial magistrate was transferred and the second magistrate took over on 30th November 2017 and issued directions in a Ruling delivered on 29th January 2018 that the case proceeds from where it had reached.

26. The duty of a first appellate court was succinctly espoused by the Court of Appeal in the case David Njuguna Wairimu v Republic [2010] eKLR thus: -

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

27. I have considered the Record of Appeal and the submissions of the parties. The issues for my determination are as follows: -

i. Whether the charge of defilement was proved to the required standard.

ii. Whether there was compliance with Section 200 of the Criminal Procedure Code.

iii. Whether the sentence meted was just and appropriate.

i. Proof of defilement

28. The offence of defilement is premised on Section 8 of the *Sexual Offences Act* No. 3 of 2006. It states as follows:

8. Defilement

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

(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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

29. What emerges from the above provisions is that the ingredients of the offence of defilement are proof of age, proof of penetration and positive identification of the perpetrator. (See George Opondo Olunga v Republic [2016] eKLR). In order for a charge of defilement to stand, each of the above ingredients must be proved beyond reasonable doubt and the burden of proof rests on the Prosecution. This was aptly stated in Miller v Minister of Pensions 1942 A C. where it was held that:-

> " It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

Age

30. In Edwin Nyambogo Onsongo v Republic [2016] eKLR the Court of Appeal 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).

31. In this case, PW6 the Investigating Officer, testified that the victim's mother gave her the victim's church dedication card which indicated that she was born on 8th November 2002 and was therefore 12 years old on 16th January 2015 when the offence was committed. She produced the dedication card as (P.Exh5). I have, however, not found the said card in the trial file for my examination. I will therefore consider other evidence on record in this regard.

32. It was the Appellant's case that failure to provide a birth certificate was fatal to the Prosecution's case. As already established, age can be established in several ways. In this case, the evidence of the victim's mother was pertinent. She stated, during cross-examination, that the victim had turned 13 years old in January 2013. I find that her testimony is credible as she is the person best placed to know the victim's age as her mother. To anchor this position, I refer to the Court of Appeal decision in the case of Richard Wahome Chege vs. R. Criminal Appeal No. 61 of 2014 where it was held thus: -

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself." (Emphasis added)

33. I therefore find that the victim's age was adequately established through the dedication card and the mother's testimony. This Court finds that she was either 12 or 13 years old at the time of the offence and therefore a minor at law. This first ingredient was sufficiently established by the Prosecution's evidence.

Penetration

34. Section 2 of the *Sexual Offences Act* defines penetration as follows: -

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

35. Penetration can under, Section 124 of the *Evidence Act*, be proved through a victim's sole testimony or be established through the victim's testimony and corroborated by medical evidence. In this case, the Prosecution presented the evidence of PW1, PW3, PW4 and PW5 in proving the ingredient of penetration. PW1 testified that the Appellant caught up with her when she fell into a ditch while trying to run away from him and defiled her. She stated as follows:

> " Marube got hold of me and held my mouth. He carried me into the tea bushes....He removed my clothes. I had a kitenge dress. He left me naked after removing my pant. He did bad things to me. He penetrated my 'embere' (vagina) using his 'emboro' (penis). He had removed his trousers and pant.....He did it for about 12 minutes..."

36. PW3 the victim's mother testified that she found her daughter bleeding from her private parts and upon inquiry, the victim told her that she had been defiled by a man who was chasing them. Her husband PW4 also testified that he saw blood dripping down his daughter's legs when she came home.

37. PW5 corroborated the evidence of PW1's through the medical report tendered into evidence. PW5 noted, on examination, that the victim had blood oozing from the vagina, her hymen was freshly

broken, there were lacerations on her labia minora and majora, and there was blood discharge and blood in her urine. He testified that the high vaginal swab indicated numerous red blood cells and he concluded that the victim had been penetrated. He produced the P3 Form (P.Exh1) in support.

38. My finding is that the above evidence proved, beyond reasonable doubt, that the complainant was defiled as there was penetration. I find that the complainant provided a clear and compelling account of the sexual assault and how she felt pain after the ordeal. The blood that oozed from her private parts was evidently a result of the forceful penetration by her assailant and the medical evidence adduced supported the complainant's testimony. I am satisfied that the Prosecution evidence proved penetration to the required standard.

Identification

39. PW1 testified that the Appellant chased her and her brother when they went to fetch firewood. She also testified that the ordeal lasted for about 12 minutes.

40. PW2 testified that the Appellant chased them near the river. He identified at the Appellant in court and confirmed that he knew him prior to the incident. He also stated that he knew the Appellant's home. He testified as follows:

> " ...We were at the river when the man over there (points to accused) chased us. I know him as John Marube..."

41. PW1 testified as follows regarding the defilement incident: -

> " I do recall on 16/01/15 a Friday. I and my brother were looking for firewood at my grandmother's place. It was around 4pm. A young man by the name John Marube chased us. We tried to run but I fell into a ditch. He got hold of me and held my mouth. He carried me into the tea bushes. The tea bushes belong to my uncle. He removed my clothes. I had a kitenge dress. He left me naked after removing my pant. He did bad things to me. He penetrated my (Embere) vagina using his "Emboro" (penis). He had removed his trousers and pant....... I can see John Marube over there. I knew him before. He used to come to my aunt."

42. In the present case, I note that it was alleged that an informal identification parade was conducted at the village elder's home in which the complainant was purportedly picked out by the complainant. I find that such an identification parade was not necessary and was therefore of no consequence as the perpetrator of the offence was well known to the victim and her brother who identified him by his name, John Marube, and indicated that he would come to see his aunt. The complainant further stated as follows on cross examination: -

> " I can see Marube over there (points at the accused). I knew Marube. I know their home. It is at Kenyambi".

43. My finding is that the Appellant is a person who was well known to the complainant who stated that she recognized him when she saw him at the river, even before he began chasing them. To my mind, the evidence of identification presented before the court was one of recognition.

44. It is a well-established principle that evidence of recognition is more cogent than merely identifying an unknown person, courts have been called upon to exercise caution in circumstances where a victim

claims to recognize someone they are already familiar with because mistakes may still be made. In R v Turnbull and others [1979]3 All ER 549, it was held thus: -

> " ....Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

45. In the present case, I have taken into account the fact that the offence was stated to have happened at 4.00 p.m. It is the view of this Court that the circumstances and environment under which the complainant was sexually assaulted were conducive for positive identification. The complainant also testified that the ordeal lasted for about 12 minutes. This means that the complainant had ample time to properly see and identify her assailant. The trial court, in its judgment, made the following remarks regarding identification: -

> " The victim's testimony remained consistent and restrictedly incriminated the Appellant as the person who defiled her".

46. It is my finding that the Appellant was positively identified by both PW1 and PW2 as the person who chased them from the river and was recognized by PW1 as the person who grabbed her from the ditch where she had fallen and defiled her. I find that the third ingredient of defilement was also proved to the required standards.

47. I will now turn to consider defence evidence tendered by the Appellant before the trial court. The Appellant denied charges and testified that he was, on the material day, away in Nyamira where he had gone to do some work. In dismissing the defence case, the trial court found that the Appellant's testimony was an afterthought and amounted to mere denial.

48. I note that the Appellant's alibi defence only came up at the defence stage. The Appellant did not call any of the people he was allegedly with on the material day to corroborate his testimony. It is trite that alibi defence ought to be raised early enough to enable the Prosecution to look into its veracity and avoid subjecting the wrong person to an arduous criminal trial. The Court of Appeal sitting in Kisumu in the case of Erick Otieno Meda v Republic [2019] eKLR outlined the principles for considering alibi evidence thus: -

> " In considering an alibi, we observe that:
>
> a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)." (Emphasis added).

49. I have re-examined the Appellant's testimony and I find that it did not displace or cast doubt on the Prosecution's case. I note that even though the Appellant claimed that he was, on the material day,

working in Nyamira in the company of a colleague, he did not call the said colleague to corroborate his story. I find that the Appellant's alibi evidence was an afterthought that was not supported by any other material evidence. I find that the prosecution presented compelling evidence to prove that the Appellant defiled the complainant which evidence was not dislodged by the mere claim that the Appellant was not at the scene of crime.

50. I have also considered the Appellant's argument that there were inconsistencies in the Prosecution evidence that ought to have been resolved in his favour. The alleged inconsistencies are with respect to the discrepancy in the testimony of PW1 and PW5 over the time that the victim went to fetch firewood. While PW5 testified that PW1 was defiled at around 4.30 p.m. the other witnesses testified that the incident took place at 4.00 p.m.

51. My finding is that the 30 minutes difference in time is inconsequential and does not imply untruthfulness on the complainant's account of the events or the undisputed fact that she was defiled. It is my finding that the slight difference in time does not in any way affect the substance of the Prosecution's case. I am guided by the decision in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6 where it was held:-

> "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." (Emphasis added)

52. It is my finding that the Prosecution discharged its legal burden of proof and proved the offence of defilement to the required standards.

ii. Compliance with Section 200 of the Criminal Procedure Code.

53. Section 200 of the Criminal Procedure provides as follows:

> (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -
>
> (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.
>
> (2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.
>
> (3)) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

54. The above provision serves to protect the rights of an accused person during a trial where a trial magistrate ceases to have jurisdiction over a matter or where there are changes in the trial magistrate trying a case when the case has not been concluded. In John Bell Kinengeni vs. Republic [2015] eKLR, the Court of Appeal held that: -

> " The duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate."

55. A trial court is therefore mandatorily required to inform an Accused person of his rights under Section 200 of the CPC whether or not he is represented by legal counsel. It is however not automatic that an accused will be granted an opportunity to have the trial commence de novo should they elect to do so as each case will be determined based on certain factors. This was the guidance provided by the Court of Appeal in Joseph Kamara Maro v Republic [2014] eKLR where it was held that: -

> " Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code."

56. Similarly, in Joseph Kamau Gichuki v Republic [2013] eKLR the Court of Appeal stated that:

> " This Court has previously held that Section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking Section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused." (Emphasis added)

57. In the instant case, I note that the matter was first heard before Hon. J.W. Onchuru before being placed before Hon. E.K. Nyutu and later, Hon. Wambani who heard it to its conclusion. The record shows that during the first change in the trial magistrate hearing the case, the new trial magistrate complied with Section 200 by enquiring, from the Appellant, if he desired to start the case de novo or to proceed

with it from where it had reached. In this instance, the Appellant himself elected to proceed with the case from where it had reached.

58. Similarly, when the matter was brought up before Hon. Wambani, Section 200 of the CPC was once again explained to the Appellant and even though he elected to commence de novo on account of panic during the previous hearings, the trial court rendered a Ruling on 29th January 2018 where it held that the case would proceed from where it had reached on account of the age of the case and the difficulty that would be experienced in tracing some of the witnesses who had already testified. My finding is that the Appellant could have appealed against this ruling by the trial court if he was not satisfied with it.

59. Having regard to the above narration of facts surrounding compliance with Section 200 of the CPC, I find that the trial court correctly interpreted and complied with the said section during the trial and was justified in deciding, as it did, in both instances. It is my further finding that no prejudice was occasioned to the Appellant following the transfer of the trial magistrates. I find that the Appellant's rights, as an accused, were upheld and safeguarded throughout the trial.

iii. Sentence

60. The offence of defilement under Section 8 (3) of the *Sexual Offences Act* attracts a minimum sentence of 20 years. In this case, the trial court sentenced the Appellant to 15 years imprisonment. The trial court considered the Appellant's mitigation and previous criminal record, the age of the victim and the nature of the offence.

61. Sentencing is at the discretion of the trial court and must not be arbitrarily interfered with. In S. v Nchunu & Another (AR 24/11) [2012] ZAKZPHC6, the Kwa Zulu Natal High Court stated: -

> " It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be."

62. The objectives of sentencing are set out in the Judiciary Sentencing Policy Guidelines, 2016 at page 15, paragraph 4.1. as follows: -

   i. Retribution: To punish the offender for his/her criminal conduct in a just manner.

   ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

   iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

   iv. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

   v. Community protection: To protect the community by incapacitating the offender.

   vi. Denunciation: To communicate the community's condemnation of the criminal conduct.

63. The above objectives were also laid out in the case of S v Scott-Crossley 2008 (1) SACR 223 (SCA) at para 35, as follows: -

> “ Plainly, any sentence imposed must have deterrent and retributive force. But off course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. ....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”

64. It is trite that sentencing is at the court’s discretion. Such discretion must however be exercised judiciously and meet the objectives set out in the above sentencing Guidelines. In the present case, the Appellant argued that the sentence passed by the trial court was manifestly excessive.

65. I have considered the trial record and established that the appellant was given an opportunity to mitigate before sentence and he stated that he was remorseful and that the case was a fabrication. The trial court considered the mitigation and sentenced him to serve fifteen years imprisonment. I note that the sentence is far below the mandatory minimum of twenty years as provided for under Section 8(3) of the *Sexual Offences Act*, which stipulates that person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. It was established that the victim in this case was aged 12 years at the time of the offence and I find that the trial court undoubtedly imposed a sentence that was way below the minimum mandatory sentence. The sentence cannot therefore, in the circumstances of this case be said to be excessive. The appeal on the ground of sentence therefore fails and is dismissed.

66. I hasten to add that this court would not have hesitated to enhance the sentence had the prosecution filed a cross appeal or a Notice of enhancement of the sentence imposed on the appellant.

67. In J.J.W. v Republic [2013] eKLR the Court of Appeal held as follows on enhancement of a sentence by the High Court;

> “ It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an

68. The jurisdiction of the first appellate court on enhancement of sentence was also discussed by the Court of Appeal in Sammy Omboke & Another v Republic [2019] eKLR as follows: -

> “ In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the

sentence meted upon then (sic) could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence."

69. In light of the above decisions, it is clear that although Section 354(3) of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of a sentence imposed by a trial court, such enhancement can only be done after giving the appellant prior notice of the enhancement of sentence depending on the outcome of an appeal.

70. In EGK v Republic, [2018] eKLR the Court of Appeal sitting at Kisumu observed that:

> " ...we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the *Sexual Offences Act* is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant".

71. In the instant appeal, I note that there was no Notice of Enhancement of sentence. The appellant was therefore not afforded an opportunity to make an informed choice on the course of action to take or even of the consequences of the notice of enhancement of sentence. For the above reasons, this court will not interfere with the sentence of 15 years meted out on the appellant by the trial court which noted that it had taken the appellant's mitigation into account.

72. This 15 years sentence shall take into account the period that the Appellant spent in remand custody while awaiting his trial in line with Section 333 (2) of the Criminal Procedure Code.

73. In the end, I find that this appeal lacks merit and it is hereby dismissed.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE