



REPUBLIC OF KENYA



**JKL v Republic (Criminal Appeal E055 of 2022)  
[2023] KEHC 22872 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22872 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E055 OF 2022**

**RL KORIR, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**JKL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the Conviction and Sentence in Sexual Offence Case Number  
E045 of 2022 by Hon. Omwange J. in the Magistrate's Court at Sotik))*

**JUDGMENT**

1. The Appellant herein was convicted by Hon. J. Omwange, Senior Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 27<sup>th</sup> August 2022 in Sotik Sub County, within Bomet County, he intentionally caused his penis to penetrate the vagina of A.C, a child aged 11 years.
2. The Appellant faced an alternative Charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the charge were that on 27<sup>th</sup> August 2022 in Sotik Sub County, within Bomet County, he intentionally touched the vagina of A.C, a child aged 11 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case.
4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.
5. At the conclusion of the trial, he was convicted on the charge of defilement and sentenced to serve twenty (20) years in prison.



6. Being dissatisfied with the Judgment dated 17th November 2022, JKL appealed to this court on grounds reproduced verbatim as follows:-
- i. That, I pleaded not guilty at the trial and still maintain the same.
  - ii. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.
  - iii. That the learned trial magistrate erred in law and in fact by relying on evidence adduced by the prosecution side which was inconsistent and full of irregularities.
  - iv. That the trial magistrate erred in law and in fact by failing to analyse that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing the Appellant.
  - v. That the learned trial magistrate erred in law and fact by failing to analyze the entire evidence adduced by the Prosecution, hence I was medically examined and DNA was done as stipulated in section 36(1) of the *Sexual Offences Act* No. 3 of 2006 and there was no positive evidence to link me to the said offence.
  - vi. That the learned trial magistrate erred in both law and fact by not considering that the case emanated from family conflict.
  - vii. That the learned trial magistrate erred in both law and fact by not considering that I had a grudge with the mother to the complainant.
  - viii. That the learned trial magistrate erred in both law and fact by rejecting my plausible defence without any further explanation of it.
  - ix. That I pray to be present during the hearing of this Appeal.
7. The Appellant further filed Amended Grounds of Appeal on 20th February 2023 and relied on the grounds reproduced verbatim as follows:-
- i. That the trial Magistrate erred in the law and fact by failing to realise that the charge as indicated on the charge sheet was erroneously drafted, not cured in the *Evidence Act*.
  - ii. That the charge ought to have been “Defilement contrary to Section 8(1) ARW Section 8(3) of the S.O.A Act No. 3 of 2006” but not “Defilement contrary to Section 8(1) ARW Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 as indicated in the charge sheet.
  - iii. That the Prosecution case was not proved to the required lawful standard beyond reasonable doubt.
  - iv. That PW1 is incredible and untrustworthy witness and that the age of the complainant, identity of the perpetrator and penetration were not proved which are the main ingredients of defilement. Hence PW2, the clinical officer examined the Appellant and found nothing positive, nothing to link the Appellant to the present offence.
  - v. That the trial Magistrate failed in both the law and facts by convicting me the Appellant on the Prosecution’s witnesses evidence full of contradictions and consistencies.
  - vi. That the trial Magistrate erred in both law and facts by failing to consider that the P3 form, PRC form and treatment notes in relation to PW1 had doubtful authenticity.



- vii. That the trial Magistrate erred in both law and facts by convicting me without considering the investigation in the instant case was shoddy.
  - viii. That the trial Magistrate erred in both law and facts by failing to warn himself against the danger of convicting the Appellant on uncorroborated evidence of the complainant.
  - ix. That the Prosecution failed to produce the exhibit mentioned by the complainant and the clinical officer which on allegation that they were blood stained.
  - x. That the trial Magistrate erred in both law and facts by convicting me the Appellant without any government analysts report brought to court as exhibit on allegation of red blood cells in the alleged blood and blood stains on missing clothes, neither belonged to the Appellant nor to the victim.
  - xi. That I was not provided with all material evidence or documents that the Prosecution relied on in their case hence violation of my right to a fair trial under Article 50(2) of *the Constitution*.
  - xii. That the Prosecution case was marred with contradictions, inconsistencies, discrepancies and glaring gaps.
  - xiii. That vital witnesses were not brought to court to testify and the sentence was executed against the law and in violation of Article 25(a) of *the Constitution*.
  - xiv. That I was not medically examined as required by the law and *Sexual Offences Act* No. 3 of 2006.
  - xv. That my alibi defense was wrongly dismissed.
8. My reading of the numerous grounds above disclose only two main grounds being that the elements of the offence were not proven to the required legal standard and that the Appellant's defence was not considered.
9. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in the case of *Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR* held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

#### **The Prosecution's Case.**

- 10. It was the Prosecution's case that the Appellant defiled A.C (PW3) on 27th August 2022. A.C testified that on the material day while herding cattle, the Appellant grabbed her by her hand and pulled her towards the shrubs where he undressed and defiled her.
- 11. Doris Cherotich (PW2) who was the clinical officer testified that she examined the minor (PW3) on the material day and found that her hymen was freshly broken and had lacerations on the labia minora. It was her testimony that there was evidence of vaginal penetration.

#### **The Appellant's Case.**

- 12. The Appellant, JKL gave unsworn testimony and stated that on the material day, he woke up and went to have a drink. That when he came back at around 3 p.m., he met the victim (PW3) and her sister



playing between their house and his house. He further testified that he asked them for his phone which he had lost the previous day while drunk.

13. It was the Appellant's testimony that the girls asked him for a reward and he asked them to go home with him to get the reward. That when he entered the house, the girls entered the kitchen where his wife Tecla was. It was the Appellant's further testimony that later as he went for more drinks, the girls whistled him and informed him that they had found his phone. That he sat on the footpath and waited for them to bring the phone and he eventually fell asleep on the footpath.
14. The Appellant stated that he was woken up by a loud cry and he saw RCS (PW4) caning the victim (PW3). That he went to his house where he stayed for some time before Solomon came in the company of some young boys and they told him to go with them. The Appellant further testified that they took a motor bike which took them to the police station where he was put in the cells.
15. It was the Appellant's testimony that he did not commit the offence.
16. On 22nd February 2023, I directed that this appeal be dispensed off by way of written submissions.

### **The Prosecution's/Respondent's Submissions.**

17. The Respondent submitted that the complainant was born on 15th February 2010 and that when the offence was committed, she was 12 years old. That a copy of the birth certificate (P.Exh 1) was produced to confirm her age and further that her age was corroborated by PW1 who was her mother, PW2 and PW6. The Respondent further submitted that the Appellant did not challenge the age of the complainant.
18. It was the Respondent's submission that the Appellant defiled A.C and she started to scream. That when PW4 went to look for the complainant, she heard her screaming and when she moved closer, she found the Appellant on top of the complainant and that they were both naked. It was the Respondent's further submission that she took the complainant and informed her mother (PW1) what had transpired.
19. The Respondent submitted that PW4's evidence was corroborated by the complainant's mother who stated that the complainant came home while limping and crying and when she asked her what had happened, she stated that the Appellant had defiled her.
20. It was the Respondent's submission that the clinical officer (PW2) told the trial court that upon examination of the complainant, she found that she had a freshly broken hymen with lacerations on the labia minora and that the injuries were a few hours old. That there was an indication of penetration.
21. The Respondent submitted that the complainant informed the trial court that the Appellant defiled her on the material day at around 2 p.m. which was in broad daylight. That they knew each other before the offence occurred hence the complainant was able to identify the Appellant. That in his evidence, the Appellant confirmed that he knew the complainant. The Respondent further submitted that the PW4 found the Appellant naked on top of the complainant defiling her.
22. It was the Respondent's submission that PW4 informed the trial court that the Appellant was her neighbour and uncle and that she could not mistake him with another person. That the complainant's mother and grandmother knew the Appellant well and identified him in court. It was the Respondent's submission that the Appellant did not deny that he was around the scene of the offence on the material date and time.



23. The Respondent submitted that the Appellant gave unsworn testimony and did not call any witnesses to corroborate his evidence and thus he was unable to challenge the overwhelming evidence of the Prosecution's witnesses.
24. On sentence, it was the Respondent's submission that the 20 year sentence was the minimum sentence as provided for by the [Sexual Offences Act](#) for a person who defiled a child aged between 12 and 15 years. It was their further submission that the Appeal lacked merit and ought to be dismissed.

### **The Appellant's Submissions.**

25. It was the Appellant's submission that the Charge Sheet was defective as what he was charged with was very different from what he was convicted of. That the Charge Sheet was not amended as required by the law and the same was not curable by the [Evidence Act](#).
26. The Appellant submitted that the Charge Sheet indicated that the age of the victim as 11 years. That this was not true as the actual age of the victim according to the birth certificate was 12 years old. The Appellant further submitted that the only way to establish the age of the victim was through an age assessment test which was not done. He relied on *Kaingu Kasomo vs Republic* (2016) eKLR on the importance of proving age in sexual offences.
27. It was the Appellant's submission that the age of the victim was not proved and that such failure was enough to affect his conviction.
28. The Appellant submitted that penetration was not proved. That PW2 examined the victim and found no spermatozoa and no active bleeding. The Appellant further submitted that PW2 did not produce any report as an exhibit from the government chemist to prove the allegation of the presence of red blood cells.
29. It was the Appellant's submission that the P3 Form, PRC Form and treatment notes exonerated him from the offence as they did not corroborate each other and that they did not single him out as the perpetrator of the offence. That it was an error by the trial Magistrate to deduce a conclusion that PW5 examined the victim's genital organ and proved penetration.
30. The Appellant submitted that his identification was in doubt as he was not found or seen in the act. That he was not positively identified by any Prosecution witness except for dock identification which was misleading and had to be treated with lots of care. He opined that failure to prove this ingredient meant the case was not proved.
31. It was the Appellant's submission that the victim (PW3) was not a credible witness as her citing the case of *Ndungu Kimanyi vs Republic* (1979) KLR 283, contention that she was penetrated was not supported by medical evidence. He contended that her evidence should not be relied on
32. The Appellant submitted that a missing hymen was not proof of defilement as the same could be broken by other factors such as use of tampons, and insertion of any object into the vagina. He relied on *P.K.W vs Republic* (2012) eKLR.
33. It was the Appellant's submission that his alibi defence was not considered and that the trial court remained silent on that issue. That any doubts that arise in a criminal trial must go to the benefit of the Accused. He relied on *Kiilu and Another vs Republic* (2005) eKLR.
34. The Appellant submitted that his right to a fair trial under Article 50(2) (j) of [the Constitution](#) was infringed as he was not furnished with crucial documents being the Investigation Diary and Exhibit Memo. He relied on *Juma vs Republic* (2007) EA 461.



35. It was the Appellant’s submission that the Prosecution did not prove its case beyond reasonable doubt. That the PRC form and treatment notes did not indicate whether the complainant’s hymen was freshly broken and they did not indicate whether lacerations were found. He further submitted that there was no test done to establish the presence of spermatozoa on himself or the complainant and therefore it could not link him to the offence.
36. The Appellant submitted that his drunkenness should not be used to support his guilt and that his unsworn testimony cannot be used to shift the burden of proof to him. He opined that an unsworn statement did not mean guilt.
37. It was the Appellant’s submission that this honourable court should interfere with the sentence by either setting him at liberty, reducing the sentence or order a retrial.
38. I have gone through and given due consideration to the trial court’s proceedings, the Petition of Appeal filed on 28th November 2022, the Amended Grounds of Appeal and Appellant’s Written Submissions both filed on 20th February 2023, the Respondent’s Written Submissions dated 21st March 2023 and the following issues arise for my determination:-
  - i. Whether there were procedural issues affecting a fair trial.
  - ii. Whether the Prosecution proved its case beyond reasonable doubt.
  - iii. Whether the Defence places doubt on the Prosecution case.
  - iv. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

### **Procedural Issues affecting fair trial**

#### **i. Whether the Charge Sheet was defective.**

39. The Appellant contends that the Charge Sheet relied on by the trial court to convict him was defective. The substantive law on defective Charge Sheets is Section 134 of the Criminal Procedure Code which provides as follows:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

40. In expounding Section 134 of the Criminal Procedure Code, the Court of Appeal in the case of Isaac Omambia vs Republic, (1995) eKLR, stated as follows:-

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

41. Further the Court of Appeal in Sigilani vs Republic (2004) 2 KLR, 480 held as follows:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and



unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

42. Similarly in *Peter Ngure Mwangi vs Republic* (2014) eKLR, the Court of Appeal held that:-

“On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.....”

43. The Appellant contends that the defectiveness of the Charge Sheet was that it stated that he was charged under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* as opposed to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. He further contended that the victim (PW3) was aged 12 years old and therefore the proper section that should be indicated in the Charge Sheet would be Section 8(3) of the *Sexual Offences Act*. I shall consider this ground of Appeal in relation to the provisions of Section 134 of the Criminal Procedure Code in the succeeding paragraphs.

44. The Charge Sheet contained the particulars of the offence. The defilement was alleged to have been committed on 27th August 2022 in Sotik Sub County within Bomet County. It was plain from the Charge Sheet what charge the Appellant was supposed to meet. There was no ambiguity at all.

45. The question then became whether the Appellant understood the charge he faced and if the error on the victim’s age as indicated on the Charge Sheet occasioned him prejudice thereby causing a failure of justice. The Court of Appeal in the *Peter Ngure Mwangi* case (supra) quoted the case of *Peter Sabem Leitu vs R*, Cr. App No. 482 of 2007 (UR) where it was held that:-

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

46. Similarly in *Benard Ombuna vs Republic* (2019) eKLR, the Court of Appeal addressed the issue of a defective charge sheet in the following terms:-

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

47. In the present case, the substance of the Charge and its particulars were read out to the Appellant in a language he understood and he pleaded not guilty. The Appellant was present during the trial and cross examined all the Prosecution’s witnesses. He thereafter presented his defence. This demonstrated that the Appellant fully understood the Charge he faced. It is my finding therefore that the error contained in the Charge Sheet of the victim’s (PW3) age did not cause the Appellant any prejudice at all. In my view, the error that was curable under Section 382 of the Criminal Procedure Code.



48. Section 382 of the Criminal Procedure Code provides that: -

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

49. I am guided by the Court of Appeal in Maxwell Kimani Njuguna vs Republic(2003) eKLR where it stated that:-

“We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him.....”

50. Based on the foregoing, the several grounds of appeal touching on the charge sheet are dismissed. The court would render sentence in accordance with the aged proved.

**a. Whether the Appellant’s right to a fair trial under Article 50(2)(j) of the Constitution was infringed upon**

51. Article 50 (2)(j) of the Constitution provides that:-

Every Accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

52. The Appellant submitted that he was not furnished with an Investigation Diary and an Exhibit Memo thereby occasioning him an unfair trial. I dismiss this ground of appeal because there was evidence on record that the Prosecution supplied the witness statements, a copy of the Charge Sheet, the Accused’s Examination Notes, a Birth Certificate, a P3 form and treatment notes to the Appellant. The trial court record showed that the documents were supplied to the Appellant on 29th August 2022 and the Appellant received them. The Appellant then proceeded with his trial and even cross examined the Prosecution’s witnesses.

**ii. Whether the Prosecution proved its case beyond reasonable doubt.**

53. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved.

54. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in Kaingu



Elias Kasomo vs Republic Criminal Case No. 504 of 2010 as cited in NNC vs Republic (2018) eKLR when it had this to say:-

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

55. Similarly in Kenneth Mutege Kilonzo vs Republic (2021) eKLR, the court held that:-

“Proof of a victim’s age is a key ingredient to prove an offence of defilement given that the penalty is heavy depending on the complainant’s age.....”

56. The age of the victim may be proved through the production of a birth certificate or a parent’s testimony. In the case of Francis Omuroni vs Uganda, Criminal Appeal No. 2 of 2000, the Ugandan Court of Appeal held that:-

“Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense ....”

57. Rule 4 of the Sexual Offences Rules of Court 2014 provides 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.

58. In this case JCS (PW1) produced a Birth Certificate and the same was marked P.Exh 1. The Birth Certificate indicated that A.C (PW3) was born on 15th February 2010. The authenticity of the Birth Certificate or its production was not challenged during the trial. I find the Birth Certificate admissible and based on its contents it is my further finding that the time of the commission of the alleged offence, A.C was aged 12 years.

59. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs Republic(1989)eKLR expressed itself as follows:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.....”

60. In Mungania & 2 others v Republic & 2 others (Criminal Appeal 21 of 2020 & E003 & E068 of 2021 (Consolidated)) [2022] KEHC 167 (KLR) (4 March 2022) (Judgment), Mativo J. (as he then was) held:-

“The fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent. Is important to bear in mind the types of identification evidence. The common law recognized several categories of identification evidence because the potential dangers of identification evidence differ between the categories. One is Positive Identification Evidence which is evidence by a witness identifying a previously unknown person as someone he or she saw on a prior relevant occasion. Such evidence may be used as direct or circumstantial proof of an offence.....”



.....The second category is Recognition Evidence, which is evidence from a witness that he or she recognizes a person or object as the person or object that he or she saw, heard or perceived on a relevant occasion.....”

61. The victim (PW3) testified that the Appellant was the one who defiled her in the shrubs. Upon cross examination, she again stated that it was the Appellant who penetrated her.
62. PW3’s testimony was corroborated by Ruth Chepkemoi (PW4) who testified that on the material day, she heard screams while at the field and she found PW3 naked and that the Appellant was on top of PW3. PW4 further testified that when the Appellant saw her, he ran away while zipping his trousers.
63. JCS (PW1) who was PW3’s mother stated that she knew the Appellant as he was a relative. RC (PW4) testified that the Appellant was her neighbour and uncle. PW1, PW3, PW4 and EC (PW5) who was the victim’s grandmother all identified the Appellant in the dock. In the case of *Muiruri & Others vs Republic* (2002) KLR 274, the court held that:-

“.....We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

64. Flowing from the above, there is no doubt in my mind that the Appellant was well known to PW3 and her family as he was their relative. I am also satisfied that the Appellant was positively identified as the perpetrator of the offence as he was placed in the scene by the victim and RC (PW4) who was an eye witness.
65. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of *Bassita vs Uganda S. C Criminal Appeal Number 35 of 1995*, the Supreme Court held that:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence.....”

66. 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.
67. A.C (PW3) testified that on the material day at around 2 p.m., the Appellant pulled her towards the shrubs where he undressed her and inserted his male organ into her female organ and warned her not to scream.
68. Doris Cherotich (PW2) who was the clinical officer at Ndanai Sub County Hospital testified that when she examined PW3, she found that the hymen was freshly broken and that she had lacerations on the labia minora. PW2 further stated that there was evidence of vaginal penetration.
69. PW2 produced P3 and PRC Forms that were marked as P.Exh 2 and 3 respectively. The P3 Form (P.Exh.2) indicated that at the time of examination, PW3’s injuries were about 21 hours old. The findings on the P3 Form were that that PW3 had a freshly torn hymen and had fresh bruises on her labia minora. The PRC Form (P.Exh. 3) indicated that PW3 was examined on 1st September 2022, which was approximately 4 days after the commission of the offence. The findings on the PRC Form



were that PW3 had a freshly broken hymen, bruises on her labia minora and that her vaginal wall was tender and had reddened.

70. The above findings upon medical examination of PW3 corroborated the evidence tendered by the clinical officer (PW2). I am satisfied based on the testimonies of PW2 and PW3 and the contents of the P3 and PRC forms that A.C (PW3) was penetrated on the material day.

71. The Appellant stated that he was not linked to the offence as he was not medical examined as stipulated under Section 36(1) of the Sexual Offences Act. Section 36(1) of the Sexual Offences Act provides that: -

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.

72. In expounding Section 36(1) of the Sexual Offences Act, the Court of Appeal in the case of Robert Mutungi Mumbi vs Republic (2015) eKLR, held that: -

“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

73. It was not therefore not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove in the charge of defilement was among others, penetration, which they have.

74. Furthermore, the law does not require the presence of spermatozoa as proof of penetration. The Court of Appeal in the case of Mark Ouiruri vs Republic (2013)eKLR, expressed itself on this matter as follows:-

“..... and the effect that the medical examination was carried out on her on 16th November 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl’s organ....”

75. It is my finding that the Prosecution evidence was sufficient as they were able to establish the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

### **iii. Whether the Defence places doubt on the Prosecution case.**

76. I have considered the Appellant’s defence which was comprehensively captured earlier on in this Judgment. The Appellant’s version of events of that material day was that he was drunk and that he



engaged PW3 and her sister on the whereabouts of his lost phone. That PW3 and her sister lied to him about his lost phone, and he fell asleep on the footpath and was woken up by the loud cry of PW3 who was being caned by Ruth Chepkemoi (PW4).

77. The Appellant did nothing to place himself out of the crime scene where he was placed in by PW3 and PW4. He simply denied committing the offence and in my view, his defence and mere denial. I have also not found evidence to back up the Appellant's claim that this case arose out of a family dispute or a grudge.
78. It was a ground of the appeal that the trial court did not consider the Appellant's alibi defence. The Black's Law Dictionary, 10th Edition defines alibi as:-
- A defense based on physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of crime at the relevant time.
79. For this defence to be viable, the Appellant would have to demonstrate that he was not at the scene of crime on the material day and at the stated time. The most common way would be to produce a witness who would corroborate his testimony of being in a different place other than the scene of crime on the material day and at the stated time.
80. I dismiss this ground of appeal as I have gone through the Appellant's defence and his testimony did not raise an alibi defence. In fact, he stated that he was with PW3 (victim) and her sister on the material day and this placed him with the victim on the material day.
81. In totality, I find that the Appellant's defence did not raise or place a doubt on the Prosecution's case.

**iv. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.**

82. It is a principle of law that an appellate court does not interfere with the discretion of a trial judge unless it was shown that the trial judge exercised discretion whimsically. In *Ogolla s/o Owuor vs. Republic*, (1954) EACA 270, the court of Appeal as follows:-
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
83. The penal section for a defilement case for a child of 12 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that:-
- 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.
84. The Appellant was sentenced to 20 years, a sentence which I find to be proper and fair. In my view, the Appellant does not deserve the mercy of this court because by virtue of his age and his familial relations to the victim, he should have known better other than to prey on A.C who was young enough to be his daughter. He should have taken on a role of being a protector and not a tormentor.
85. In the end, the Accused's Appeal is not merited and the same is dismissed. The Appellant has 14 days right of appeal to the court of appeal.
86. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023.**



.....

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of the Appellant virtually present at Kericho Main Prison Mr. Njeru for the Respondent and Siele (Court Assistant)

