



**SON v Republic (Criminal Appeal E039 of 2022)
[2023] KEHC 24851 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E039 OF 2022
FR OLEL, J
OCTOBER 30, 2023**

BETWEEN

SON APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Introduction

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offence Act no.3 of 2006. The particulars of the offence were on diverse dates at Bondeni Estate in Gilgil sub County within Nakuru County intentionally penetrated the vagina of NM aged seven (7) years with his penis, who was to his knowledge his daughter.
2. On count two, the appellant was charged with having an indecent Act with a child contrary to Section 11(1) of the *Sexual Offence Act* No.3 of 2006. The particulars of the charge were that on diverse dates at Bondeni Estate in Gilgil Sub County of Nakuru County intentionally touched the vagina of NM a child aged 7 years with his penis.
3. The appellant denied committing the offence he was charged with and during trial the prosecution called ten (10) witnesses. The appellant was placed on his defence and gave unsworn evidence, further he called two witnesses who testified on his behalf. Upon considering the evidence tendered the trial magistrate did find the appellant guilty of the offence of incest and proceeded to sentence his to serve life imprisonment.
4. Being wholly aggrieved by the said conviction and sentence the appellant did file his petition of appeal and later amended the same raising the following grounds of appeal.



- a. The learned trial magistrate erred in law and in fact by awarding a conviction on a prosecution case that was marred with uncorroborated evidence.
- b. That the learned trial magistrate erred in law and fact by NOT finding that the ingredients of the offence were not conclusively proven beyond reasonable doubt.
- c. That the learned trial magistrate erred in law and fact by awarding a sentence that is not only excessive but also harsh in the circumstances of the offence leading to unfair hearing.
- d. That, the learned trial magistrate erred in law and fact by failing to inform the appellant his right to have an advocate assigned to the appellant by the state and at state expense if substantial injustice would otherwise result.
- e. That the learned trial magistrate erred in law and fact by failing to find that the prosecution did not call a crucial witness who could shed light of this case.
- f. That the learned trial magistrate erred in law and fact by admitting unlawfully acquired evidence during the trial. The appellant thus prayed that his appeal be allowed, conviction quashed, sentence set aside and he be set free or in alternative the matter be referred back for retrial.

b.Evidence at Trial

5. PW1 NM underwent voire dire examination. The court did determine that though she was intelligent and able express herself, the court allowed her to give unsworn evidence. She stated that she resided in Gilgil with her parents and they were seven (7) siblings. On an unspecified day, her father (the appellant) did bad manners ‘tabia mbaya’ on her once, while their mother was away. She reiterated that the appellant did bad manners her my private part (she said so while pointing at her private part – vagina). She went on to describe how the appellant removed her clothes and his clothes, placed her on the mattress and proceeded to do bad manners which act was painful and she cried.
6. After the incident, the appellant warned PW1 not to tell anybody and thus she did not tell her mother. Later other women came and took her to hospital. PW1 identified the appellant as her father and pointed at him as the perpetrator. In cross examination, PW1 stated that the incident happened at their residential house and it was the appellant and another person she called “Hasarikuki” who were the perpetrators. At this point the witness was stood down as she looked terrified and the court directed that she be taken for counselling. On 26.07.2018 when the matter resumed the investigating officer Inspector Rita Warekaya did inform the court that the child (PW1) was in a safe house and during investigation had mentioned both the appellant and her uncle as being the persons who had defiled her and after being counselled, she did record her statement indicating that it was the father who defiled her.
7. PW2 Zainabu Saida Abdala testified that she worked as a volunteer at life broom society and it was their work to assist/work together with the children’s office Gilgil to help vulnerable children. She was called by PW1 neighbor who reported to her that there was a child who had been sexually assaulted. She met the informant on 05.02.2018 at Bondeni Estate. They proceeded to Mama Hussein Hotel where she met the victim (PW1) who was alone. She bought PW1 lunch after which she examined her private parts and saw that she had a ‘whitish discharge’. The victim (PW1) informed her that she had been defiled by her uncle. She informed the children officer one ‘Sakina’ and another child welfare officer about the incident, but since it was at night, there was nothing much they could do. She released the child (PW1) to go home and on the following day went and picked her up and took her to Gilgil Police station and later to Gilgil sub county hospital.



8. While at the hotel PW1 told her that she had been defiled and sexually abused by her uncle severally and despite reporting to her mother, who usually came home very drunk, no action was taken. This confession was made in the presence of one Mama Hussein. Later PW1 parents and a third party were arrested and only the appellant was charged. PW2 reiterated that PW1 had been defiled by her step father who was the appellant. She identified the various treatment notes/medical forms filled at the hospital. In cross examination she stated that she was called and informed of this incident by a neighbor who did not want to be a witness before the court.
9. PW3 Esther Wanjiru Wangechi testified that she was a volunteer with an organization called Hope, which dealt with commercial sex workers and orphan and vulnerable children (OVC). On 6.2.2018, PW2 called her and informed her of a child who had been sexually abused at Bondeni Estate. She proceeded to the said estate and found PW1 who informed them that she had been defiled by her uncle. She examined PW1 private parts and noticed that she had whitish/yellow discharge with a foul smell. They took her to Gilgil Sub County hospital for treatment. PW1 would mention her daddy as the perpetrator but frequently mention her uncle. She later took PW1 to a safe house and confirmed that she did not know the appellant. In cross examination PW3 stated that the child never mentioned the name of the perpetrator.
10. PW4 Ruth Gathoni. She testified that on 06.02.2018, she was called by PW2 who informed her that there is a child who had been defiled and requested her to come and meet them at Mama Mwangi's hotel. They went looking for the victim (PW1) but did not find her at their house. PW1 was later brought by a neighbor and upon examining her she noticed that she had vaginal infection and a smelly discharge. The victim (PW1) told them that she had been sexually abused by her uncle. They took PW1 to hospital for treatment. Later she met PW1 mum and described her as alcohol addict who kept begging for financial assistance.
11. PW5 Dr. David Kurio Samason testified that he worked with Dr Mariga who examined PW1 and was familiar with his handwriting and signature. The said Dr. Mariga had gone on a two-year study leave and the court allowed him to produce the medical treatment documents filed by the said Dr. Mariga.
12. PW1 was examined on 06.02.2018. She was 7 years old and had a history of being defiled by a person known to her on several occasions/diverse dates. She had features of sexual assault. Her hymen was broken and she had greenish discharge from her genitalia. She had contracted STD Syphilis, though the results of HIV and Hepatitis B were negative. PW5 did produce the P3 form, PRC form and laboratory request forms as exhibits 1-3. Further there was laboratory request forms for the appellant who was aged 35 years and the laboratory tests confirmed that he too was infected with Syphilis, urinalysis also confirmed that he had pus cells. The laboratory results were produced as exhibits 4. The appellant did not have any questions for the witness.
13. PW6 MAO also confirmed that on 06.02.2018 she was with PW4 when she was called by PW2 and informed of a defilement case. She went with PW4 to Mama Mwangi stall and met PW2 before them proceeding to look for PW1. Initially they did not find her, but later got her examined and due to the vaginal infection observed, she decided to report the matter to the police and also took PW1 to hospital where it was confirmed that she had an STD infection. PW7 Alice Muthoni also confirmed being called by PW2 and together with PW3, 4 and 6 examined PW1 at a Mpesa shop and noticed that she had vaginal infection. They decided to take her to the police station and then to Gilgil sub county hospital. After treatment the child was taken to a safe house. She stated that she did not know the appellant.
14. PW8 Simon Kinyanjui stated that sometime in February 2018 he was going home at about 4pm when he met a lady shouting and pointing at a man she alleged had defiled her daughter. He advised her to report the matter to the police. He asked the gentleman if the allegations were true and he denied the



- same. The gentleman he saw on the said date was the appellant. The lady who was shouting was with a second lady and the victim (PW1). He was familiar with the appellant and the lady who was shouting as they were beggars along the way and would claim they were from Maralal and needed fare back.
15. PW9 Sakina Wanjiru Saidi testified that she was a volunteer children officer and in February 2018 was called by PW2 and informed of an incident where a child had been repeatedly defiled by her uncle. She advised them to report the matter to the police and told them she would follow up and find them at Gilgil Sub county hospital. When she met them, she interrogated the child and she confirmed that she had been defiled by her uncle. Further after long interrogation, she changed her story and said she had been defiled by her father, but he told her to say it was her uncle. PW1 was examined and indeed it was confirmed that she had been defiled and had STD infection. She rescued the child and took her to St. Mary's hospital. She later met PW1 brother who was also a vulnerable child in need of care. He had a fractured right hand and fractures on the rib. She had him treated and placed him at Saidia Children's home. She knew PW1 parents prior to the incident. In cross examination PW9 stated that the appellant had told PW1 to say that she was defiled by her uncle.
 16. PW10 Inspector Rita Wariekaya stated that she was the investigating officer and on 06.02.2018 she was in the office when a report of defilement was made. The victim (PW1) informed her that she had been defiled by her uncle whom they live with. She called PW9 (Sakina Saidi) to interrogate the child further and later PW1 and PW9 came and she recorded her statement where she stated that she had been defiled by her father who told her in case she is asked she should say that the perpetrator was her uncle. PW1 was taken to hospital and examined and it was confirmed that she had been defiled. She confirmed that the child was seven (7) years old and that information was given to her by the victim's mother.
 17. The appellant was placed on his defence. He did testify that he was a night guard. On 10.02.2018, he was arrested by 2 police officers and the following day he was taken to hospital and then charged with the offence before court, which he denied he did not commit and stated that he was innocent. Two of his children had been taken away from him and he had been fixed with this case to lose his children. DW2 MN stated that the appellant was her son, who lived in Gilgil and worked as a night guard. The appellant had a dispute with his wife and she took the children away to Olkalau where her brother resided. She went to look for the grandchildren and their uncle whom they were staying with told her to pick her grandchildren and she should take them to hospital. She picked PW1 and returned her to her parents. Later she learned that the appellant had been arrested and charged with rape. To her knowledge, the culprit was 'my son's wife brother' PW1 contracted the alleged infection while at her maternal uncle's place.
 18. In cross examination she confirmed that she lives in Rumuruti while her son stays in Gilgil but he would visit home monthly or every two months. The appellant and his wife had marital differences due to the fact that his wife was a drunkard and they would disgrace over her bad drinking habits. In September 2017, the appellant's wife ran away with the children to Olkalau and PW1 lived with his maternal uncle for two months. When she visited her grandchildren, the maternal uncle told her to take PW1 to her mother as she was unwell but left her other grandchild (the boy) at the uncle's place. She did not know of the infection PW1 had or if it was similar to the infection the appellant had.
 19. DW3 HL stated that the appellant was his relative and he too was a night guard in Gilgil. In their community (Samburu) they did not engage in such like offences. He and the appellant stayed in the same compound and he too had children. The children officer (Saidi) took away the appellant children after he failed to enroll them to school. In cross examination the witness stated that the appellant's wife would at times run away with her children and after she came back the defilement case was filed. The appellant used to drink alcohol but stopped and it was not true that PW1 was defiled.



b. Appellant's Submissions

20. The appellant did file his submissions on 21st December 2022 and raised the point that the prosecution evidence was marred with contradiction and uncorroborated evidence that could not guarantee a conviction. PW1 had stated that 'my father did to me tabia mbaya once', while the investigating officer IP Rita Warekeya stated that 'during investigations the victim was mentioning her uncle and father'. PW2 also stated that while she was with PW1 at the hotel she did state that 'during investigations the victim mentioned her uncle and father' as the persons who defiled her and later stated that her uncle had defiled her several times. This fact was also confirmed by PW3 who also affirmed that PW1 has stated that she was defiled by her uncle. The appellant did submit that these contradictions were major and it was unsafe to base his conviction on the same.
21. On the second ground, the appellant submitted that the ingredient of the offence were not conclusively proved. It was necessary for the prosecution to prove beyond reasonable doubt that the perpetrator had sexual intercourse with the victim and that there was penetration. Secondly the prosecution had to prove the identification of the perpetrator and age of victim and lastly the relationship between the complainant and the perpetrator must have been established.
22. It was the appellants contention that this relationship (between father and daughter) was not established by the evidence adduced and it is only investigating officer who alluded to the same but her evidence was hearsay being that she relied on information of the child's mother who was not called to testify. PW2 also testified that he was the step father of the child but did not prove the same. Further the age of the child too was not established and the trial magistrate erred and misdirected herself by relying on the investigating officer's statement that the victim mother had ascertained and told her that he minor was 7 years old. PW4 the doctor evidence too could not be relied on as no age assessment was undertaken. The appellant stated that he was the prejudiced as age is a critical element for consideration especially when it comes to sentencing.
23. PW1 had also testified that it was her uncle who had defiled her severally and she was defiled by her father on only one occasion. The trial magistrate misdirected herself when she relied on the PRC form which had indicated that the victim had been sexually assaulted by a person known to her on several occasions and had contracted on (STD) infection. The appellant relied on the citation of Julius Kioko Kivuva (supra) where the court did find that medical evidence could not prove penetration especially where the victim had told court she had sex with a different man. The same principle was applicable in this matter.
24. The final line of submission raised by the appellant was that the trial magistrate misdirected herself and conducted a trial which was unfair and went against the dictates of Article 31, 50(1),(i) and 50 (2) (g), (h) , (p), (q) of the *Constitution* of Kenya 2010, provision of Section 122 A- D of the *Penal Code* and Section 36 of the *Sexual Offence Act*. This was more so as the sentence melted out was manifestly excessive and made without considering the appellants mitigation. The magistrate also fell into further error by sentencing the appellant without seeking for a pre-sentence report, which would have guided her on a suitable sentence to award.
25. The magistrate was also faulted for failing to exercise her discretion in an appropriate manner and failed to consider other sentences other than the life sentence melted out. Sentencing was part of the fair trial process which was a non-derogable right which the magistrate failed to note as Article 50(2)(q) gave the court power to award the appellant the least severe sentence which under Section 20(1) of the *Sexual offences Act* was 10 years imprisonment.



26. Under provision of Article 50 (g) (h) of the *Constitution* of Kenya an accused person had a right to have an advocate by himself or to be assigned one and paid for by the state if it is clear an injustice was likely to occur. The appellant was a poor uneducated man with no legal knowledge background and was disadvantaged during the entire trial. The court failed to inform the accused promptly of his right to be given an advocate by the state and given the seriousness of the charges the appellant faced this constituted a breach of his rights to a fair trial.
27. The appellant also faulted the manner in which his samples were collected in Gilgil sub county hospital to ascertain whether he was suffering from sexually transmitted disease (STD). The process was undertaken without his consent nor was there a court order allowing the same to be procured as required in law. This process was thus in violation of both Article 31 (a) – (c) and Article 50 (2) (i) of the *Constitution*. Reliance was placed in *Republic v Timothy Mwenda Gichuru and 2 others* (2017) and *Republic v Godfrey Kipkemoi Kangogo* (2018)eKLR where the courts held that samples collected to be used in evidence against the accused person without their consent or court orders such evidence was inadmissible.
28. The final issue raised by the appellant was that the prosecution was weakened by their failure to call the complainants mother to testify. She would have shed light into the appellant’s age and given the appellant a chance to cross examine her. Her absence made the prosecution case weak. The appellant did pray that his appeal should be allowed and both his sentence and conviction be quashed.

b. Respondent’s Submissions

29. The respondent did file their submission on 14th December 2022 and stated the prosecution did prove their case beyond reasonable doubt and the conclusion of the trial magistrate that the appellant was guilty was the only rational inference that could be drawn from the evidence offered even after considering the appellants evidence. No explanation was given by the appellant which could exonerate him from the offence he was charged with. The prosecution had proved that the relationship between the appellant and PW1 was that of father and daughter. The appellant penetrated the vagina of the victim using his penis.
30. The appellant was positively identified as the person responsible. The medical evidence also gave conclusive proof that PW1 hymen was broken and she had STD infection (syphilis) for which the appellant too when examined and also tested positive for syphilis infection. After considering all the oral evidence of the witnesses and documentary evidence adduced, the same lead to conclusive proof that indeed the appellant was guilty of the offence as charged and thus was rightly convicted.
31. As regards sentence, the circumstances of the case called for a sentence which was not lenient as the crime committed was heinous and demeaning against a child who was seven (7) years old. Under Section 20 (1) of the *Sexual Offences Act*, the minimum sentence provided was ten (10) years but if circumstances required upto life imprisonment could be passed where the victim was below eighteen (18) years of age. The sentence as passed was perfect in order and should not be disturbed. Reliance was placed on *MMM v Republic* (2017) eKLR.
32. The Respondent did pray that this instinct appeal be dismissed and both conviction and sentence be upheld.

b. Determination

33. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have



the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of *Okeno v Republic* (1972) EA 32 where it was stated as follows: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

34. Also in *Peter’s v Sunday Post*(1958) EA 424 it was said that it is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.
35. In the case of *Republic v Edward Kirui* (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & another v State by Prosecutor, Tamil Nadu & another* (2008) INSC 1688 where the case of *Bhagwan Singh v State of M. P.* (2002)4 SCC 85 was cited as follows:-

“The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not.”

36. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:
- a. Whether the offence of incest was proven to the required standard thereby warranting a conviction. (Ground 1, 2, 5 & 6 of the Grounds of Appeal)
 - b. Whether the trial Magistrate misdirected himself and conducted a trial which was unfair against Article 31, 50(1), (2) of the *Constitution* of Kenya 2010. (Ground 4 of the Ground of Appeal.)
 - c. Whether the sentenced passed was Harsh and excessive. (Ground 3 of the Grounds of Appeal)

A. Whether the offence of defilement was proven to the required standard thereby warranting a conviction.

37. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions* (1947) 2 All ER, 372 stated as follows;

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as 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 beyond reasonable doubt, but nothing short of that will suffice.”

38. That enormous task of proof beyond reasonable doubt by way of direct or circumstantial evidence rests with the prosecution and the fact the accused is put on his defence does not shift that burden and standard of proof in any way.

39. The offence of incest is defined under Section 20(1) of the *Sexual Offences Act* as:

“(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years, provided that if it is alleged in the information or charge that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

40. Thus the ingredients for the offence of incest are:

- i. Proof that the offender is a relative of the victim.
- ii. Proof of penetration or indecent Act.
- iii. Identification of the perpetrator.
- iv. Proof of the age of the victim.

41. It is not disputed that the Appellant and the Complainant are relatives, in that the appellant is the step father of PW1. This was confirmed by PW1 in her evidence in chief. DW2 and DW3 also confirmed that indeed PW1 was the appellant daughter. What is in dispute is the issue of proof of penetration, the age of the perpetrator and identity of the perpetrator.

42. On the issue of penetration, in *EE v Republic*¹ the court expressed itself on the question of penetration as follows:-

“Penetration is defined in section 2 of the *Sexual Offences Act* as

“‘Penetration’ means the partial or complete insertion of the genital organ of a person in the genital organ of another person. The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement.

43. In *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court stated,

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

¹ (content missing)



44. PW1 did state that they resided together with the appellant and her other siblings. On an unknown date, the appellant did bad manners “tibia Mbaya” to her on her once. The incident happened where they resided, while her mum was away. Her evidence verbatim was that;

“He did bad manners on my private part, (court noted that child points at her private part -vagina).

“He removed my cloths i.e. long trouser. He did bad manners on my part I use to urinate. He placed me on the mattress, he removed his cloths i.e long trousers. It was painful I cried. When I cried he stopped doing it. He told me not to say what happened. I did not tell mum..... My father is the perpetrator. He is now in court (child points at accused person in the dock) I am seven years old. I have not gone to school. He did it once.

45. The appellant was examined by Dr Mariga of Gilgil Sub county Hospital and the P3 form, PRC form, medical treatment notes and laboratory results were produced by PW6 Dr David Kuria as Exhibit P1 to P4. The medical examination did confirm that PW1 hymen was broken and she had greenish discharge from her genitalia. It was confirmed that she a STD infection- syphilis. The doctor confirmed that actual penetration did take place and it was indicated as much in the medical documents produced. Penetration was thus proved.

46. As regards age of the minor, PW1 stated that she was 7 years old and had not started school. PW2 – PW10 all interacted with the Minor PW1 and all of them in their evidence referred to PW1 as a child. PW5 Dr David Koros & PW 10 Inp Rita Wanekaya specifically also testified that the child was 7 years old, though no medical age assessment was done , birth certificate produced nor was there any other evidence adduced to prove age.

47. 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).

48. In the case of *Francis omuroni v Uganda*, court of Appeal Criminal Appeal No 2 of 2000, it was held thus

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense

49. While it is true that the age of PW1 was not determined conclusively by documentary/ medical evidence, specifically with regard to the facts in this case, I do find that PW1, was intelligent enough to know her age. Secondly nine adult witnesses, confirmed that she was a child. DW2 her grandmother too, confirmed that she was a child. Section 20(1) of the *Sexual Offences Act* talks of any female below 18 years of age. Obviously PW1 was well below the said 18 years. I do conclude that by observation of all the witnesses (10 prosecution witnesses and one defence witness), it can be safely concluded that PW1 was a minor aged 7 years or was a minor in that age set of 7 to 10 years old.



50. The other issue which had to be proved was whether it was the appellant who defiled the minor and/or if it was her uncle whom she referred to as “Hesarikuki” who defiled her. In her evidence in chief PW1 was categorical that the appellant had defiled her on one occasion. In cross examination she brought up the issue of being defiled by “Hesarikuki”. At that point she was stood down by the prosecutor and never came back for further cross examination.
51. PW2-PW4, PW6 and PW7 are the social workers who rescued the child and took her to hospital. PW1 told them that she had been defiled by her uncle. PW9 – Sakina Wanjiru Saidi, the children officer and PW10 IP Rita Wanekaya, who was the investigating officer on the other hand testified that PW1 had told them that it was the appellant who had defiled her and told her to say that it was her uncle who had done so. They fortified this by stating that both the minor and the appellant had both tested positive for syphilis, thus drawing a nexus to the said defilement.
52. First and foremost , the medical samples taken from the appellant, which resulted to the Laboratory report being produced as Exhibit P4, was specimen illegally taken from the appellant , without his consent and in contravention to section 36 of the *Sexual Offence Act* No 3 of 2006 , section 122 (a) to (d) of the *Penal Code* and his right to privacy as enshrined under Article 31 of the *Constitution* of Kenya 2010.see *Republic v Timothy Mwenda Gichuru and 2 others* (2017) and *Republic v Godfrey Kipkemoi Kangogo* (2018) eKLR.
53. The appellant was well known to PW1, the Minor and in her evidence was categorical that the appellant had defiled her once. This was her step father, a person well known to her and even though her cross examination was not complete, she did restate the fact, that the appellant defiled her in partial cross examination. It was evident that she was of sufficient intelligence to know exactly what the appellant did to her and was explicit that he only defiled her on one occasion. There is no basis of disputing the said evidence as the identity of the assailant was known to her. Identification too was thus proved.

B. Whether the trial Magistrate misdirected himself and conducted a trial which was unfair against Article 31, 50(1), (2) of the constitution of Kenya 2010.

54. It was the appellants contention that the court failed to consider fair hearing principles as enshrined under the constitution. The court had failed to assign him, an advocate despite knowing that he was from a poor and uneducated background and this breached Article 50(2)(g)(h) of the *Constitution* of Kenya 2010.He was not promptly informed of his right to counsel ,of the seriousness of the offence and the likely penalty if convicted. These procedural technicalities made the trial void.
55. The charge sheet and every element thereof was explained to the appellant in Kiswahili language, when plea was taken. He pleaded guilty and stated “Ni Kweli”. The prosecution proceeded and read out the facts of the case (in Kiswahili), to which the appellant did reply that the facts stated were not correct. The court proceeded to enter a plea of not guilty. Before trial -commenced the appellant was supplied with the pre-trial bundle and the same was confirmed on 03.08.2023. The trial proceeded in a language the appellant understood (all the witnesses testified in Kiswahili language) a fact confirmed from the proceedings. The appellant had the opportunity to question all the witnesses and during defence was allowed to call two (2) witnesses to testify on his behalf.
56. It is clear that the appellant’s right to fair trial was observed at all times and he was not prejudiced in any manner. This court affirms that under Article 50(g)(h), the appellant had a right to counsel appointed by himself and/or paid for by the state. During trial he did not ask for any assistance from court (legal Aid) and at no time did he encounter any hurdle, which could be interpreted to have disadvantaged him in a major way. Further since he did not raise this issue at trial, and raised it for the first time on



appeal. No determination on the same was made and the courts hands on appeal are tied and is unable to reopen a widow on that basis.

C. Whether the sentenced passed was Harsh and excessive.

57. The appellant did contend that the trial magistrate did err in sentencing him to life imprisonment and failed to use her discretion to sentence him to the least severe sentence, which was 10 years under section 20(1) of the *Sexual Offences Act*. It was also an error on the part of the court to sentence him without considering the provisions of paragraph 4.1 of the *Sentencing Policy Guidelines*. As a result, his rights as guaranteed under provisions of Article 27, 31, 50(2) (p)&(q) of the *Constitution* of Kenya 2010 were infringed upon. Finally, the court had failed to consider provisions of section 333(2) of the *Criminal Procedure Act*, which allows for the period spent in custody to be considered as part of the sentence handed down.

58. On sentencing and whether it should be reduced, this Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

59. The same court in the case of *Dismas Wafulu Kilwake v Republic* [2019] eKLR stated as follows;

“Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

60. In *Mainigi & 5 others v Director of Public Prosecution & another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17th May, 2022 did find that –

“to the extent that the *exual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such



sentence fall foul of Article 28 of the Constitution. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences.”

61. Base on the above citations, this court does find that the provision of section 20(1) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of the Constitution of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of the *Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases . See *Christopher Ochieng v Republic* Kisumu CA Criminal Appeal No 202 of 2011 and *Jared Koita Injiri v Republic* Kisumu CA Criminal Appeal No 92 of 2104.
62. It was an error for the trial magistrate to sentence the appellant, without considering a pre bail report and also failed to consider the unique circumstances of this case thus wrongly sentenced the appellant to life imprisonment. During trial it was obvious that the appellant family had a lot of problems. The wife was a drunkard and they were unable to take care of their children resulting to PW1 and her brother being taken to a foster home. The evidence of PW8 was also poignant in that he stated that the appellant and his wife were common street beggars within Gilgil town. The appellant should have benefited from a rehabilitate sentence more than a punitive sentence.
63. Further the appellant was arrested on 10.02.2018 and was arraigned in court on 12.02.2018. During the entire trial period the appellant was in custody until 04.07.2019 when he was sentenced to life imprisonment. This is a period of about two year and five months. The trial court did not consider this period the appellant spent in custody as required under section 333(2) of the *Criminal Procedure Code* and the judiciary sentencing policy, which too was a misdirection.
64. This court does appreciate the gravity and nature of the offence committed and does not condone offences against minors and vulnerable persons. This was appreciated by Madan J as he was then in *Yasmin v Mohammed* (1973) EA 370 –

“The High Court is specially endowed with jurisdiction to safeguard interest of infants, as the court is the parent of all infants. The welfare of the infant is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infant in Kenya of whatever community tribe, sect fall within the ambit of guardianship of Infant Act and the court is charged with the sacred duty to ensure that their interest remain paramount and can duly preserve.”

65. In the case *R v Scott* (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –

“There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purposes of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender.”

b. Disposition

66. Having considered all evidence presented before the trial court, the appellants petition of appeal and submissions filed by both parties, and having independently reviewed the same, I do find that the appellant partially succeeds in his appeal and order as follows;



- a. The appeal against conviction lacks merit and is dismissed.
- b. The court finds merit and do issue an order quashing the sentence of life imprisonment melted out by Honourable E.Kimilu {P.M} dated 4th July 2019 in Naivasha CMCR (S.O) No 11 of 2018 and re sentence the appellant to serve Ten (10) years imprisonment .
- c. The sentence shall run from 10th February 2018 when he was arrested in line with provisions of section 333(2) of the [Criminal procedure Code](#).
- d. It is so ordered.
- e. Right of Appeal 14 days

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 30TH DAY OF OCTOBER, 2023.

In the presence of;

.....Appellant

.....ODPP

.....Court Assistant

