REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. E019 OF 2021

LEONARD OTIENO OMULO..APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence passed by Hon S.W. Mathenge, Resident Magistrate in Bondo Principal Magistrate's Court on 3rd August 2021 in SO Case No. 54 of 2020)

JUDGMENT

1. The appellant **LEONARD OTIENO OMULO** was the accused person in Bondo Principal Magistrate's Court Sexual Offence Case No 54 of 2020. He was charged, tried and convicted of the offence of defilement contrary to section 8(1) as read with subsection (2) of the Sexual Offences Act. The particulars of the offence were that on the 2nd July 2020 at about 10.0 hours, in [particulars withheld] village in Bondo sub-county within Siaya County he unlawfully and intentionally caused his penis to penetrate the vagina of JA [name withheld for legal reasons], a child of 10 years. The appellant also faced an alternative charge of committing an indecent act to a child contrary to section 11 (a).

2. The appellant pleaded not guilty to both the main charge and the alternative charge. Upon conviction, the appellant was sentenced to serve life imprisonment. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal dated 2nd August 2021 on the 3rd August 2021 setting out the following grounds:

> **a. The learned trial magistrate erred in law and in act in failing to determine the case in its own merits, circumstance and in view of full facts.**
>
> **b. The learned**
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> **c. That the trial magistrate erred in law and in fact when he found against the weight of evidence that the prosecution had proved its case beyond measurable doubt.**
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> **d. That the learned trial magistrate erred in law in fact by relying on evidence which was not corroborated and lacked probative value.**

3. On the 3rd November 2021, the appellant filed further grounds of appeal as follows:

> **a. That the learned trial magistrate erred in law and facts by failing to observe that the prosecution had failed to prove their case to the required standard of cogent proof beyond reasonable doubt.**
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> **b. That the pundit magistrate misdirected himself by basing a conviction on insufficient evidence, which evidence adduced was wanting to convict hence led to a misjudgment.**
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> **c. That the trial magistrate erred in law and facts when he found a conviction on me against the weight of evidence that the prosecution had proved its case beyond reasonable doubt not withstanding that there occurred no independent evidence of corroboration then the evidence lacked probative value leading to an injustice.**
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> **d. That the trial magistrate erred in law and facts by relying and misapprehending the evidence of PW2 and the others which evidence was based on speculation and conjecture alone hence led to my fundamental prejudicial.**

e. That the magistrate erred in law and facts by failure to observe that as the P3 form has no object either blunt or sharp that caused harm hence misguided.

f. That the trial magistrate erred in law and facts by failure to observe that there was nexus connection or linkage to the said crime as no medical evidence linked me and no DNA test was carried out as per section 36 (1) of the Sexual Offences Act leading the case of judgement a mistrial.

g. That the trial magistrate erred in law and facts by failure to observed that, I was arrested by the family of the victims, tried on a rope, tortured requiring from me a confession which failure to observe such led to an injustice and fundamentally prejudiced.

h. That the trial magistrate erred in law and facts by failing to order for age assessment report after appearing several contradictions about age 9, 10 and 13 years occasioning reasonable doubt.

i. That the trial magistrate erred in law and facts by failure to exhaustively evaluate my cogent sworn alibi defense as the prosecution failed to comply with section 212 of the CPC to call for rebuttal evidence hence shifted the burden of proof on me hence prejudiced.

4. The matter proceeded to hearing where the prosecution called 5 witnesses to establish a prima facie case against the appellant who on being placed on his defence, testified on oath and maintained his innocence. He also called two witnesses, his mother and his wife.

5. The appeal was canvassed by way of written submissions with only the appellant submitting.

The Appellant's Submissions

6. The appellant submitted that the prosecution did not prove their case against the appellant beyond reasonable doubt as the evidence adduced was so meagre, insufficient and distorted. The appellant submitted that the evidence attested by the various witnesses was inappropriate and insufficient and had no probative value. Reliance was placed on the cases of **Busiku Thomus v Uganda CRA No. 33 of 2011 (2015) UGSC 3** and that of **John Chindia v Republic (2010) eKLR.**

7. The appellant further submitted that there was a variance in the age of the victim as the charge sheet stated she was 10 years old while the victim herself testifying as PW2 stated she was 9 years old while her grandmother, PW3 testified that she was 13 years old. The appellant submitted that failure to adduce an age assessment report was fatal to the case herein as was held in the case of Abdi **Saran Abdi v Republic CRA No. 82 of 2008.**

8. It was submitted that a broken hymen does not prove defilement on the part of the accused person as was held in the case of **Kisii HCCRA No. 126 of 2013 Josephat Machoka Nyabwabu v Republic.**

9. The appellant further submitted that there was no nexus connecting him to the alleged crime as there was no specimen or spermatozoa found and further that no DNA test was carried out as provided for in section 36 (1) of the Sexual Offences Act.

10. It was submitted that PW2 failed to describe the mode of attire worn by her assailants and as such failed to identify him. He further submitted that despite the prescription that this was a case of recognition, PW2 failed to give the 2 full names of the assailant and for how long there was a report to the authority. The appellant cited the case of **Tekerali s/o Korongozi & Others v Republic (1952) EACA**

11. It was submitted that the prosecution failed to prove their case beyond reasonable doubt and the evidence adduced was wanting to warrant conviction. The appellant cited the case of **Jon Cardon Wagner & 2 Others v Republic (2011) eKLR.**

12. The appellant submitted that his arrest was done by PW3, the victim's grandfather, who coerced him into giving his confession and that the said confession was not done in accordance with the law.

13. It was submitted that the prosecution failed to summon vital witnesses to testify like one Emma who was told of the defilement and then told PW2's grandmother, or the grandmother as well as the arresting officer who would have shed more light on the reason for arrest. The appellant cited the case of **Bukenya & Anor v Uganda (1972) EA 549.**

14. It was submitted that the trial magistrate failed to exhaustively evaluate the evidence as a whole against the defence and hence arrived at a misguided judgement. Reliance was placed on the case of **R v University of Cambridge (1923) EA 698** where the King's Bench held that even Adam was not sentenced until when he was called upon to make his defence. The appellant submitted that his alibi defence was not shaken by the prosecution and as such he was prejudiced by the trial court's judgement. He cited the case of **Tomaso Bruno v The State of Up – CRA No. 142 of 2015.**

Analysis & Determination

15. I have considered the grounds of appeal as initially filed and as amended together with the submissions made by the appellant, the trial court record as well as the applicable law in this appeal. This being a first appellate Court, the Court is under a duty to re-evaluate and reassess the evidence adduced before the trial court and arrive at its own independent conclusion taking into account that it neither saw or heard the witnesses. This is the principal espoused in **Okeno v Republic [1973] EA 32** and reiterated by the Court of Appeal in **David Njuguna Wairimu v Republic (2010) eKLR.**

16. Revisiting the evidence adduced before the trial court, PW1 Jared Obiero a Clinical Officer at Bondo Sub County Hospital testified and produced a P3 form for the complainant J.A aged 10 years old who was taken to the hospital on allegations that she had been defiled on 2.7.2020 by a person known to her at about 1020hrs. The Clinical Officer examined the complainant and found her hymen broken, bruises on her vulva and an inflamed *labia minora.* He took a sample of her urine. Pregnancy was negative, VDRL was negative. High vaginal swab showed pus cells and he concluded that the minor was defiled. He produced the P3 form as Exhibit and her treatment notes as well as her outpatient notes as Exhibits 2. In cross examination, PW1 stated that no clothing was presented to him, that he did not examine the appellant's semen, he did not test the appellant and that he had not linked the appellant with the injuries sustained by the minor.

17. PW2 a minor J.A. was taken through *voire dire* examination by the court and found to understand the nature of an oath and telling the truth. She gave sworn testimony and stated that she was 9 years old and a student at St. E. Primary School. [full name of school withheld].

18. The complainant recalled the day her grandmother sent her to go and sell mandazi in people's houses at about 8am.She recognized the appellant as Leonard, the person she went to sell mandazi to and found him milking a cow so he instructed her to enter his house and sit and wait for him. The appellant then followed her inside his house and closed the door and asked her to give him mandazi for Kshs 20/ upon which he removed her pants and removed his too and he took out his penis and put it into her vagina and told her not to say a word. The two were alone in the house.

19. According to the complainant, after the appellant was done defiling her, he released her to go away upon which she saw blood and after some weeks, she started experiencing headaches so she confided in Emma that she was having headaches and that she had pain in her private parts. Emma went and disclosed to PW2's grandmother who interrogated the minor who admitted to being defiled by the appellant and that is when her grandmother told her grandfather who went to the appellant's home and arrested the appellant, took him to her home and interrogated and she was escorted to hospital on a motor cycle.

20. In cross examination, PW2 reiterated her testimony in chief and stated that she was able to stand after being defiled by the appellant. She denied being caned to frame the appellant with the offence. She however stated that she revealed that upon being threatened to be caned is when she revealed that it was the appellant who defiled her and that she did not disclose what had happened to her immediately upon being defiled because the appellant had warned her not to say a word. She vehemently denied that she was told to say that the appellant was the perpetrator. She stated that sometimes she found her mother in the appellant's place and that she knew exactly where the appellant lived in [particulars withheld]. She also stated that the appellant lived in N not L.

21. PW3 JO a resident of [particulars withheld]. testified that he was the minor's grandfather. He stated that the minor was aged 13 years old but that he could not recall when she was born. He recalled that on 5/7/2020 at about 2 pm, he was from Church when he found the minor lying down with fever so he bought her medicines for malaria and monitored her but she was not improving. That his other granddaughter Emmaculate told him that the minor had told her that she was feeling pain when urinating so he asked Emmaculate to interrogate the minor and Emma told him that the minor had been defiled by the appellant herein so he went to the appellant's home and brought him to PW3's home and the minor confirmed that it was the appellant who had defiled her. That he also interrogated the appellant in the presence of his parents and that the appellant accepted to have defiled the minor. He then notified the minor's mother who reported the matter to the Police and the minor was escorted to Bondo Sub County Hospital. He identified the appellant in court saying that they were village mates.

22. In cross examination, PW3 denied forcing the minor to say that it was the appellant who had defiled her. He admitted to tying the appellant up because the appellant wanted to escape. He denied forcing the appellant to confess to anything. He stated that the appellant lives in Ndiwo and that he defiled the complainant in Ndiwo.

23. PW4 Elizabeth Achieng a resident of Sakwa and the mother to PW1 testified and produced a birth Certificate of the complainant as PEX4 saying that she was aged 9 years as she was born on 10th November, 2009. PW4 stated how she received a telephone call to the effect that the complainant was ailing so she went to her home and was told by Dorcas that the minor had informed Dorcas that she had been defiled by the appellant herein. She therefore travelled from Nairobi and went and reported the incident to Bondo Police Station but she was referred to Usenge Police Station where was accompanied by officers to her home where they found the complainant's father who was interrogated and the appellant was arrested in her presence.

24. On being cross-examined, PW4 stated that the complainant narrated to her how the appellant defiled her. She stated that she believed the complainant who never lied and that she was unable to recover the clothing that the minor wore on the day when she was defiled.

25. PW5 CPL Jeconiah Okello based at Usenge Police station was the investigating Officer in the case. He recalled that on 15/7/2020, he was at the station at about 9.30am when he perused the Occurrence Book and found that he had been minuted to investigate a defilement case involving the minor and the suspect who is the appellant herein and that the appellant was already in police cells. The witness escorted both the appellant and the complainant to Bondo Sub County Hospital where the appellant was checked and the complainant was treated. He issued her with a P3 form and recorded witness statement upon which he charged the appellant with defilement of the minor who was aged 10 years old as per her birth certificate produced as an exhibit.

26. In cross examination, the witness denied arresting the appellant. He stated that he investigated the case after the appellant was arrested.

27. Placed on his defence, the appellant gave sworn testimony and stated that he lived in [particulars withheld]. and was a fisherman. He recalled that on 9/7/2020, Mzee Odipo, PW3 with his two sons went to the appellant's home, found the appellant's mother and asked her if she knew the complainant to which she denied and that they told her that the appellant had defiled the complainant. That they called the appellant and told him the same but he denied and that he accompanied them to the girl's home and he saw her walking. Her family refused to allow him to interrogate her but that when they spoke to the girl, she denied being defiled that is when they tied him and forced him to admit that he had defiled her. Neighbours intervened and that his parents told the minor's relatives to take the two to hospital. The minor's mother reported the incident to the police station and he was arrested a week later, released and rearrested. Further, that PW3 quarreled his daughter for reporting the matter to the police before consulting him.

28. In cross examination, he stated that he did not know whether the minor sold mandazi. He denied being in his house on the date of alleged defilement of the complainant saying he had gone to the lake. He stated that he met Jack Odero, Otieno Midiwo and others.

29. The appellant also called his mother SN who testified as DW1 and stated that on 7/7/2020, she went to the complainant's home to buy tomatoes and on 9/7/2020, her grandfather and his two sons went to the home of DW1 claiming that the appellant had defiled the minor and that upon asking the minor to confirm, she only cried and that DW1 examined the minor's genitals but saw swollen private parts but were normal swellings as those found in the armpits She stated that the appellant was arrested on 18/7/2020. In cross examination she stated that her family and that of the complainant had no grudges

30. DW2 Janet Atieno Otieno testified that she was a wife to the appellant and stated that on 9/7/2020 the grandfather to the complainant went to her home and left with the appellant and that she also went with them and on arrival, the complainant stated that the appellant had defiled her and that the complainant was crying so it was decided that the child complainant be taken to hospital. She stated that on the date when it was alleged that the appellant had defiled the minor, DW2's husband had gone to the lake at 6.30am.

Determination

31. Having considered the above evidence afresh, the grounds of appeal and the submissions filed by the appellant which are in detail, in my humble view, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant a conviction by the trial court. There are other ancillary questions arising from the submissions which this court will endeavor to resolve.

32. On whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant a conviction, there are three elements in the offence of defilement that must be proved by the prosecution beyond reasonable doubt these elements are: proof of age of the complainant; that there was penetration of the complainant's genitalia; and that the perpetrator of the offence of defilement was positively identified.

33. On the age of the complainant in this case, the appellant claimed that there was no age assessment of the complainant and that there was contradiction on her age as it was not clear if she was aged 9 years, 10 years or 13 years. The birth certificate produced by the mother of the complainant showed that the minor was born on 10/11/2009. The offence was allegedly committed on 2/7/2020 hence the child was 10 years and 8 months old. For that reason, it cannot be true as claimed by the appellant in this appeal that there was contradiction on the age of the complainant and that her actual age was not proved, on account of lack of an age assessment report. The grandfather of the minor was clear that he did not know when the minor was born. The birth Certificate as produced in evidence is conclusive prove of the actual age of the complainant. There was no evidence that the birth certificate was made up for this case as the same was issued on 6th September 2019 and her birth was duly registered on 23/7/2019. Accordingly, the prosecution proved beyond reasonable doubt that the complainant was aged 10 years old which places her under section 8(1) and 8(2) of the Sexual Offences Act.

34. On whether there was prove of penetration of the minor's genitalia, the Child complainant testified that the appellant took her pants down and removed his pants as well and inserted his penis into her vagina. At the time she was taken to hospital for examination, her genitalia was swollen. According to PW1 the Clinical Officer who examined her, he found her hymen broken and she had bruises on her vulva and an inflamed *labia minora.*

35. The appellant laments in this appeal that the evidence by the minor was not corroborated. He further complains that the evidence of PW2 was speculative and conjecture and that the P3 form did not indicate whether the weapon used to harm the complainant was blunt or sharp. Further, that the prosecution failed to call crucial witnesses.

36. I have examined the evidence adduced by the minor, the Clinical Officer and the minor's grandfather and her mother. I find that the minor's evidence was never shaken even in cross examination. She remained firm and denied being forced to implicate the appellant herein with the offence. The evidence was well corroborated by the testimony of PW1 who produced the P3 form showing the extent of the injuries sustained by the minor. It therefore matters not that the type of weapon used, whether sharp or blunt was not stated in the P3 form. The trial court believed the complainant that it was the appellant's penis that caused the injury of penetration as demonstrated by the bruises and swellings and inflammation of her genitalia and the broken hymen. The witness for the appellant, DW1 also confirmed that the complainant's private parts were swollen although she qualified the swelling by saying that it was like that in the armpits. There is no medical evidence that armpits get similar swellings as those that were found to be present in the genitals of a young girl of the complainant's age. In addition, there is no legal requirement that the P3 form in defilement cases states what weapon was used or how sharp or blunt it was, in the commission of the offence of defilement.

37. The appellant also complains that there was no corroboration of the evidence of the complainant and that no DNA test was carried out to establish the link between the appellant and the complainant on alleged defilement. I however must clarify that the requirement for corroboration in sexual offences is not mandatory. Under Section 124 of the Evidence Act, the Court can convict an accused person solely on the evidence of a child so long as the Court believes that a child was speaking the truth and records the reasons for such belief

38. The Court of Appeal in **Arthur Mshila Manga v Republic Criminal Appeal No. 24 Of 2014 [2016] eKLR** stated:

> **"It is trite that under the proviso to *section 124 of the Evidence Act,* a trial court can convict on the evidence of the victim of a sexual offence alone. (See MOHAMED V. REPUBLIC [2008] KLR (G&F), 1175 and *JACOB ODHIAMBO OMUOMBO V. REPUBLIC (supra)*. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."**

39. In the present case, the trial magistrate who had the opportunity of seeing and hearing the complainant testify believed that the complainant was telling the truth. I have no reason to differ with that factual finding. I find the contention that the evidence of the minor was

speculative not well founded as it was corroborated by the evidence of PW1 the Clinical officer who examined her.

40. On allegations that the trial magistrate erred in law and fact by failure to observe that there was nexus connection or linkage to the said crime as no medical evidence linked the appellant and no DNA test was carried out as per section 36 (1) of the Sexual Offences Act leading the case of judgement a mistrial, as earlier stated, section 124 of the Sexual Offences Act does not mandate that the evidence of a child in sexual offences must be corroborated.

41. It is now well a established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. In **AML v Republic [2012] eKLR** the Court of Appeal held that:

> **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

42. Further, in **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) the Court** affirmed the ***AML case*** decision and stated that:

> **"… [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

43. Further, Section 36 of the Sexual Offences Act, is not mandatory as it is couched in permissive terms. A similar argument as the one raised by the appellant herein arose in **Williamson Sowa Mbwanga v Republic [2016] eKLR, and the C**ourt of Appeal pronounced itself thus:

> **"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001)."**
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> **It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."**
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> 35. Guided by the above authority, I find and hold that it was not necessary in this case for the trial court to order for a DNA test as the same was not necessary to prove penetration, the appellant having been well identified by the victim as the offence took place in daylight and the appellant was well known to the victim. The Appellant's contention in this regard therefore fails.

44. On the allegation that a crucial witness was not called, the minor was clear that it was her and the appellant who were in his house when he defiled her. No other person was with the two. There is no crucial witness whose evidence this court finds relevant to this case which, had it been tendered, would have been adverse to the prosecution's case. The complainant simply confided to other people including 'Emma' and Dorcas who informed her grandfather who is the person in authority over her and who took the decision to inform her mother to escalate the complaint on her behalf. Further, I do not find that failure to call the minor's grandmother to testify was fatal as her evidence was not crucial noting that the minor confided to Emma who in turn notified the grandmother who in turn notified the grandfather. Furthermore, section 143 of the Evidence Act is clear that **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

45. All that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case. In other words, the prosecution has the discretion to call the witnesses that it finds relevant and not a particular number of witnesses. In the instant case, the prosecution needed to call witnesses to prove all the essential elements of defilement beyond reasonable doubt. I have evaluated the evidence of the prosecution witnesses and I find no gap that would have been filled by any other witness who, had he or she been called, could have given evidence that was adverse to the prosecution's case.

46. On the allegation that the appellant was tortured to confess to the offence, I have examined the evidence adduced by the appellant in his defence and the evidence of his two witnesses. The appellant never posed any question to the witnesses whom he alleges in his defence that they tied him and forced him to confess to committing the offence. He stated in his defence that he was forced to confess to the offence. However, the appellant and his witnesses were clear that the appellant never confessed to defiling the minor. More so, there is no evidence on record to show that the trial court convicted the appellant on the basis of his alleged confession to committing the offence. The appellant, from the judgment of the trial court, was convicted on the basis of credible and sufficient evidence adduced against him that placed him at the scene of the crime.

47. The appellant also claimed that the trial court did not consider his alibi. In **Kiarie vs Republic [1984] KLR 739**, the Court of Appeal stated as follows, concerning an alibi defence:

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."**

48. Further, in the case of **Uganda vs Sebyala & Otherss [1969] EA 204**, it was stated that:

"I must also bear in mind, as was pointed out in Tanzania Criminal Appeal 12 d 68 … by GEORGES, CJ:

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin and alibi which is not particularly strong may very well raise doubts."

49. The onus of disproving an alibi lies with the prosecution. It follows that the appellant was under no duty to prove his alibi defence. Neither was the appellant under any obligation to adduce or challenge the prosecution's evidence adduced against him.

50. I have examined the defence proffered by the appellant. In that defence, he stated how on 9/7/2020 at about 7.00am Mzee Odipo and his two sons went to the appellant's home and told the appellant's mother that the appellant had defiled the complainant and that the appellant told them that it was not true. They then went with him to the home of the girl where they found her walking on errands and they forced the girl to say that it was the appellant who defiled her but she declined. That they took the girl to Hospital and he was arrested a week later. On being cross examined on where he was on 2/7/20202 at about 10.am, he stated that he had gone to the Lake. DW1 the mother to the appellant stated that when the girl was asked about defilement, she was just crying. She did not say anything. The appellant's witness DW2 who was his wife gave evidence similar to what the appellant stated on what happened on 9/7/2020 but differed with the appellant and stated that when they went to the home of the complainant, the complainant was called and she stated that it was the appellant who defiled her and that the complainant was just crying so it was decided that she be taken to hospital. The witness stated that on the date of alleged offence, her husband had gone to the Lake at 6.30am.

51. In my examination of that evidence by the appellant and his witnesses, although the appellant claimed in cross examination that he was away fishing at the lake when the alleged offence took place, the evidence of the minor in her narration that she was defiled at around 10.30am when she had gone to sell ground nuts to the home of the appellant whom she found milking and how he instructed her to enter his house before he followed her and defiled her leaves no doubt that it was the appellant and not any other person who defiled the complainant. The minor was categorical that she knew the appellant very well and even stated that he had worked for them. She also described where he lived despite the appellant trying to shift her attention in cross examination. The minor also denied quite intelligently that she was told to frame the appellant with the offence. She explained very well why she could not disclose to anyone what had happened to her, as the appellant had warned her not to do so. Furthermore, the appellant in the presentence report claimed that the grandfather of the minor was revenging against him for asking for his unpaid wages after working for him as a farm hand, which matter he did not raise during cross examination of the complainant's grandfather. On being questioned, he denied that the child's family had any grudge with him or his family. The trial magistrate stated in her judgment that the complainant appeared firm and truthful and she had no reason to doubt her testimony.

52. In view of the above, I find the alibi defence which was brought in during cross examination and only stated by the appellant's witnesses that he had gone to the lake an afterthought and a sham in view of the uncontroverted consistent evidence adduced by the complainant, and which evidence the trial magistrate found, as a matter of fact, to be truthful.

53. In the end, I find and hold that the conviction of the appellant was sound. I uphold it. I dismiss the appeal against conviction.

54. On sentence imposed, the appellant did not challenge sentence imposed in any of his grounds of appeal. He however urged this court to quash his conviction and set aside the sentence imposed on him. I have examined the provisions of section 8(2) of the Sexual Offences Act. the section provides that upon conviction under section 8(1) of the Sexual Offences Act, the offender shall be sentenced to serve life imprisonment. The sentence imposed was after the appellant was given the opportunity to mitigate. He mitigated saying he prayed for forgiveness as he did not know that would happen. The trial court then called for a presentencing report which she took into account while sentencing, bearing in mind the provisions of section 8(2) of the Sexual Offences Act.

55. The sentence imposed is lawful. The guidelines given by the Supreme Court in the **Francis Muruatetu & another v Republic [2017] e KLR** are equally clear that the question of the unconstitutionality of mandatory sentences only applied to murder cases under section 204 of the Penal Code and therefore the decision was not for general application to all other cases where mandatory sentences are provided for in law and applied by the courts. No special circumstances are disclose din this case to warrant declaration of lawful sentence to be unconstitutional.

56. Although the probation officer proposed a probationary sentence, I find that proposal unwarranted. There is absolutely no reason why a whole married man aged 34 years and has two children, a girl and a boy who are aged 6 years and 3 years old and an offender who claims he was framed, against such overwhelming evidence should be given probation when the Act provides for life sentence as a mandatory sentence.

57. The probation officer did not even make efforts to interview the victim of the offence and only claimed that due to stigmatization and that the academic calendar was in session. The probation officer also contradicted himself by stating in summary that the appellant takes responsibility for the offence committed yet the appellant denied the offence and when interviewed he alleged being framed.

58. It is also disturbing that the probation officer also recommended for psychosocial support to help the accused resettle as well as counselling and guidance towards behavior change in sexual issues and reformation but made no reference to the young victim of the offence and on how she should be helped to deal with trauma of being defiled at that age of 10 years by a 34-year-old man.

59. Accordingly, I find and hold that there is no reason advanced to warrant this court interfere with lawful sentence imposed by the trial court. I uphold the life imprisonment meted out on the appellant.

60. On the whole, this appeal against conviction and sentence is hereby found to be devoid of merit and is dismissed. The judgment, conviction and life imprisonment imposed on the appellant by the trial court is hereby upheld.

61. I so order.

62. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF JANUARY, 2022

R.E ABURILI

JUDGE