KENYA LAW
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Okoko v Republic (Criminal Appeal E002 of 2022) [2022] KEHC 10494 (KLR) (22 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10494 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E002 OF 2022

RE ABURILI, J

JUNE 22, 2022

BETWEEN

GEORGE OUMA OKOKO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the judgement, conviction and sentence by the Hon. S.W. Mathenge on 7.1.2022 in the Principal Magistrate's Court in Bondo Sexual Offence Case No. 17 of 2020)

Standard and burden of proof in defilement cases

The appeal was against the conviction and sentence of the appellant for the offence of defilement. The court highlighted the ingredients of the offence of defilement. The court further held that the prosecution was under a duty to establish all the elements of defilement beyond reasonable doubt. That duty or burden of proof did not shift to the accused person who was under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The court also held that the evidence of the investigating officer and the arresting officer could only have been crucial in the case if the evidence adduced was barely adequate to establish the elements of the offence of defilement.

Reported by Kakai Toili

Criminal Law *– sexual offences – defilement - what were the ingredients of the offence of defilement – Sexual Offences Act (cap 63A) sections 8(1) and (3).*

Evidence Law *– standard and burden of proof - standard and burden of proof in sexual offences cases - standard and burden of proof in defilement cases - whether it was mandatory for the evidence of the investigating officer and the arresting officer to be adduced in court in a case of defilement - Sexual Offences Act (cap 63A) sections 8(1) and (3).*

Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The appellant pleaded not guilty to both the main and the alternative charge. The trial court found that the prosecution had proved its case beyond reasonable

doubt against the accused person and convicted the appellant and after considering his mitigation, the court sentenced him to serve 20 years imprisonment. Aggrieved by the trial court's verdict, conviction and sentence imposed, the appellant filed the instant appeal on among other grounds; that the prosecution did not prove the case against the appellant beyond reasonable doubt.

Issues

i. What were the ingredients of the offence of defilement?

ii. What was the standard of proof and who bore the burden of proof for the offence of defilement?

iii. Whether it was mandatory for the evidence of the investigating officer and the arresting officer to be adduced in court in a case of defilement.

Held

1. The role of the appellate court on a first appeal was well settled. The court was duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter while always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
2. The ingredients of the offence of defilement were;
    1. identification or recognition of the offender;
    2. penetration; and
    3. the age of the victim.
3. The prosecution was under a duty to establish all the elements of defilement beyond reasonable doubt. That duty or burden of proof did not shift to the accused person who was under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The appellant was identified beyond reasonable doubt.
4. The birth certificate provided the date of registration of birth as May 7, 2018, meaning that the complainant's birth had been registered two years earlier but the birth certificate was never issued in time. No prejudice was occasioned to the appellant. In the circumstance, the birth certificate as produced had no issue and it proved beyond reasonable doubt the complainant's birth date and thus her age. The prosecution proved that element of age of the complainant to be 15 years beyond reasonable doubt.
5. Penetration was defined under section 2 of the Sexual Offences Act to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. The evidence of the complainant on the fact of her being defiled was corroborated by that of the clinical officer (PW3) who testified that there was penetration of the child's *genitalia*, and that fact was noted in the P3 form and post rape care reports produced as exhibits, which also confirmed that. The broken hymen was evidence of penetration. There was no contrary evidence. That evidence proved beyond reasonable doubt that there was penetration as contemplated by the Act.
6. The prosecution proved all the elements of the offence of defilement as there was no inordinate delay in reporting the occurrence of the offence against the minor who stated that she feared informing her aunt. Most children who were defiled were scared and embarrassed of the act and feared disclosing what was done to them.
7. Naturally, children who were victims of sexual abuse were likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people. The reporting after 8 days after the incident was not prejudicial to the appellant and neither was it fatal to the prosecution's case.
8. The court was alive to the fact that there was no legal requirement in law on the number of witnesses to prove a fact. The evidence of the investigating officer and the arresting officer could only have been crucial in the case if the evidence adduced was barely adequate to establish the elements of the offence of defilement. The instant case was not one where the trial court and the instant court could have or

should make an adverse inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution and that that was the reason it was not called.

9. From the trial court record, the minor's and the clinical officer's evidence was largely uncontroverted. The witnesses who were said not to have been called were to give the same evidence already presented. It had not been shown that the evidence on record had gaps which needed further clarification. Furthermore, it was established law that a conviction in sexual offences cases could be based on the testimony of a single credible witness, a position that was ably captured in section 124 of the Evidence Act. Accordingly, there was no reason to make adverse inference in the circumstances of the case.
10. The prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act and the conviction of the appellant was sound and safe. There was no reason to interfere with it.
11. Section 8(3) of the Sexual Offences Act provided that upon conviction the offender shall be imprisoned for a term of not less than twenty years. Previously, the principle laid down by the Supreme Court *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, was that, provisions of law which excluded or fettered discretion of a court of law in sentencing were inconsistent with the Constitution. Taking into consideration the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR, the mandatory sentence provided in section 8(3) of the Sexual Offences Act was lawful unless otherwise challenged through a constitutional petition and upheld by a court superior to this court.

Appeal dismissed.

Orders

i. *The conviction of the appellant and the sentence imposed on him by the trial court was upheld. However, in accordance with section 333(2) of the Criminal Procedure Code, the sentence imposed shall take into account any period spent by the appellant in remand custody during the trial, before he was released on bond.*

Citations

Cases

1. *BW v Republic* Criminal Appeal No 313 of 2010; [2019] KLR) — (Explained)
2. *Injiri, Jared Koita v Republic* Criminal Appeal 93 of 2019; [2018] KECA 78 (KLR) — Mentioned
3. *Keter v Republic* Criminal Appeal 250 of 2005; [2007] KECA 390 (KLR) — (Explained)
4. *Mbuvi, Pius Mutua v Republic* Criminal Appeal 88 of 2019; [2021] KEHC 9695 (KLR) — (Followed)
5. *Mose, Mark Oiruri v Republic* Criminal Appeal 295 of 2012; [2013] KECA 67 (KLR) — Mentioned
6. *Munyoki, Waita v Republic* Criminal Appeal No 242 of 2014; [2018] eKLR) — Applied
7. *Muruatetu & another v Republic* Petition 15 & 16 of 2015; [2017] KESC 2 (KLR) — Mentioned
8. *Muruatetu & another v Republic* Petition 15 & 16 of 2015; [2017] KESC 2 (KLR) — Applied
9. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) — Applied
10. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) — Mentioned
11. *Ochieng, Christopher v Republic* Criminal Appeal 202 of 2011; [2018] KECA 59 (KLR) — Mentioned
12. *Okomba, Mohammed Chebii v Republic* Criminal Appeal E008 of 2020; [2021] KEHC 2751 (KLR) — (Mentioned)
13. *Olunga, George Opondo v Republic* Criminal Appeal 37 of 2015 — (Applied)
14. *Oluoch v Republic* [1985] KLR 549 — (Explained)
15. *Republic v Cliff Macharia Njeri* Criminal Case 67 of 2012; [2017] KEHC 1819 (KLR) — (Explained)
16. *Saha, Muganga Chilejo v Republic* Criminal Appeal 28 of 2016; [2017] KECA 359 (KLR) — (Explained)
17. *SC v Republic* Criminal Appeal 22 of 2017; [2018] KEHC 4089 (KLR) — Explained

18. *Seet, Joseph Kieti v Republic* Criminal Appeal 91 of 2011; [2014] KEHC 7392 (KLR) — (Explained)

Regional Court

1. *Bukenya & others v* Uganda [1972] EA 549 — (Explained)
2. *Okeno v Republic* [1977] EALR 32 — (Followed)

Statutes

1. Constitution of Kenya articles 25, 50 — (Interpreted)
2. Criminal Procedure Code Act (cap 75) section 333(2) — (Interpreted)
3. Evidence Act (cap 80) sections 124, 143 — (Interpreted)
4. Penal Code (cap 63) sections 203, 204 — (Interpreted)
5. Sexual Offences Act (cap 63A) sections 2, 8(1)(2)(3)(4); 11(1) — (Interpreted)

Advocates

None mentioned

JUDGMENT

Introduction

1. The appellant herein George Ouma Okoko was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the charge were that on the February 5, 2020 at about 1500hrs at [Particulars Withheld] village, Central Sakwa location Bondo sub county within Siaya county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of BA, a child aged 15 years old. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The appellant pleaded not guilty to both the main and the alternative charge and the matter proceeded to full trial where the prosecution called 4 witnesses in support of their case. Placed on his defence, the accuse gave sworn testimony maintaining his innocence.

4. In her judgement, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt against the accused person and so she convicted the appellant and after considering his mitigation, she sentenced him to serve twenty (20) years imprisonment.

5. Aggrieved by the trial court's verdict, conviction and sentence imposed, the appellant initially filed his petition of appeal on the February 4, 2022 but subsequently filed an amended memorandum of appeal March 22, 2022 in which the appellant through his advocates raised the following grounds of appeal:

   a) That the prosecution did not prove the case against the appellant beyond reasonable doubt.

   b) That the evidence of the victim, PW1 was uncorroborated and hearsay and should not have been admitted or relied on.

   c) That the prosecution failed to call key witness i e the investigating officer.

   d) That the matter was reported 9 days later creating doubts as to the identity of the defiler.

   e) That the sentence of 20 years' imprisonment was manifestly excessive.

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

The Appellant's Submissions

7. The appellant submitted that there being no other independent evidence such as medical evidence to prove the identity of the defiler other than that of PW1's testimony and that although the complainant knew the appellant as a neighbour, the appellant's evidence required corroboration. Reliance was placed on the case of *Oluoch v R* (1985) KLR 549 where it was held *inter alia* that:

> " It is trite that a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with the greatest care."

8. On penetration, the appellant's counsel submitted that although the minor testified that she was defiled, her testimony was not corroborated and that despite the clinical officer saying that there was a broken hymen, this was not proof of penetration.

9. The appellant's counsel further submitted that it was clear from the P3 form that the hymen was broken but it was not clear when the same happened as the same could have been broken any time before/on February 5, 2020 and 16th hence the defiler could have been anybody other than the appellant herein. Further submission was that it was also noteworthy that there were no traces of spermatozoa and as such, the medical evidence adduced did not prove penetration. It was thus submitted that penetration as an element for prove of defilement was not established beyond reasonable doubt.

10. On the age of the minor, the appellant submitted that the alleged offence of defilement took place on February 5, 2020 whereas the victim's birth certificate was issued on February 20, 2020 and that as such, relying on the birth certificate which had been obtained after the alleged act was prejudicial to the appellant. The appellant submitted that there was need therefore for a cogent and valid evidence of the age of the victim and that this could only be scientific and therefore the age of the victim was not proved beyond reasonable doubt.

11. The appellant submitted that the prosecution did not prove beyond reasonable doubt that it was the appellant who defiled the complainant and thus considering the totality of the evidence adduced by the prosecution, the conviction of the appellant could not stand.

12. The appellant further submitted that there was a delay in reporting the offence and that there were inconsistences of character exhibited by PW1 and PW2 and further that the delay of 9 days in making a formal report to the police was inordinate and threw the credibility of prosecution witnesses to doubt.

13. It was further submitted that that the appellant ought to have been given the benefit of doubt considering the inconsistencies, gaps, and contradictions in the testimony of PW1 especially with regard to the exact place of her defilement. Reliance was placed on the case of *Waita Munyoki v R* [2018] eKLR where Odunga J stated that in that case the fact that the complainant did not immediately disclose to PW2 that it was the appellant that had defiled her, coupled with the fact that there was no evidence directly linking the appellant to the offence as well as the appellant's sworn evidence that there was a grudge between him and PW2 created reasonable doubt as to whether it was in fact the appellant who defiled the complainant.

14. The appellant submitted that the time and place of the appellant's arrest and by whom he was arrested was pertinent as it could have proven the aspect of his recognition through identification by the complainant and that the failure by the prosecution to call at least one arresting officer or investigating officer to corroborate the complainant's and PW2's evidence on how the appellant was arrested dealt a fatal blow to the prosecution's case. Reliance was placed on the case of *Mohammed Chebii Okomba*

v R [2021]e KLR, where it was held *inter alia* that in the absence of the arresting and investigating officers adducing evidence to corroborate her evidence and that of PW 2, the court was not completely certain that the appellant penetrated the complainant as she had contended and/or that the facts of the case were as she and PW 2 had narrated to the trial court.

15. It was submitted that though corroboration of the complainant's evidence was not required as a matter of law, it was necessary that a warning of the danger of convicting on complainant's uncorroborated evidence was essential.

16. With regard to the sentence meted, it was submitted that the same was harsh and excessive and unlawful in view of the Supreme Court's decision in Francis K Muruatetu case where the court held that the court is not bound to issue a mandatory sentence as the same is unconstitutional. The appellant further submitted that the provisions of section 8 of the *Sexual Offenses Act* must be interpreted so as not to take away the discretion of the court in sentencing. Reliance was placed on the case of *BW v Republic* KSM CA Criminal Appeal No 313 of 2010 [2019] KLR where the Court of Appeal considered the constitutionality of mandatory minimum sentences under the Act and adopted what the Supreme Court decision held in *Francis Karioko Muruatetu* [2017] eKLR.

The Respondent's Submissions

17. It was submitted that all ingredients of the offence of defilement were proved beyond reasonable doubt. On the age of the complainant, the respondent submitted that the age of the minor was proved via the birth certificate produced as PEX1 that showed that the complainant was 15 years old.

18. On penetration, it was submitted that PW1 gave graphic details on how the appellant defiled her and her testimony was corroborated by PW2 while PW3 confirmed the fact of penetration. The respondent submitted that the appellant was well known to both the complainant and PW2 and as such his identity was proved to the required standard.

19. The respondent submitted that PW1 gave sworn testimony and that there was no requirement in law that such evidence must be corroborated however her testimony was corroborated by PW2 and PW3.

20. It was further submitted that under section 143 of the *Evidence Act*, there was no particular number of witnesses required to prove a certain fact. The respondent further submitted that the role of the investigating officer was to collect, collate and avail witnesses in court and he was not a witness in the strict sense of the word. It was further submitted that there was nothing new that the investigating officer would have brought on board which had not been brought by the other witnesses.

21. The respondent further submitted that the delay in reporting the matter was well explained and in no way did it water down the prosecution's case.

22. On the sentence meted out on the appellant, it was submitted that the sentence meted out was the minimum provided under the law.

Role of this Court

23. The role of this appellate court on a first appeal is well settled. It was held in the case of *Okemo v R* [1977] EALR 32 and further in the Court of Appeal case of *Mark Oiruri Mose v R* [2013] eKLR that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

Evidence Before Trial Court

24. PW1, the complainant was taken through a *voire dire* examination and found understanding of the nature of an oath and thus allowed to give a sworn testimony. She testified that she was 15 years old and that on the February 5, 2020 at about 3:00pm she was standing in front of their kitchen when the appellant came closer and stood at the fence and asked her to move closer. It was her testimony that she moved closer and the appellant grabbed her into a bush and defiled her.

25. The complainant testified that the appellant wore a jacket that he removed before making her lie down, removing his clothes as well as her clothes and defiling by inserting his penis in her vagina. The complainant testified that the appellant blocked her mouth so she could not shout. She stated that he then walked away and she went home. She said that on 14/2/2020 she informed her aunt what had happened and that the next day they reported the matter at Bondo police station and she was taken to hospital at Bondo sub county hospital where she was examined. The complainant identified the appellant in court stating that he was a person she usually saw in public and would always meet on her way to visit her relatives.

26. In cross-examination, the complainant testified that the appellant pulled her to the nearest bush. It was her testimony that on that day, she went to school and returned home early as she was not feeling well. The complainant testified that she was afraid to tell her aunt what had happened to her. The complainant admitted that she was friends with the appellant’s daughter and that some of her clothes were in their house however she denied ever bathing in the appellant’s house. She further testified that she wore home clothes and not school clothes and that her clothes were not torn. The complainant denied having heard any story of sale of land but reiterated that the appellant defiled her.

27. PW2 EO testified that the complainant was her niece and that she stayed with her. She testified that the complainant was 15 years old having been born on March 7, 2005 and further produced her birth certificate as PEX1. It was her testimony that on the February 14, 2020 at about 8.30pm after having taken supper, the complainant informed her that Ouma defiled her in a bush on the February 5, 2020. She further testified that the next day she went and reported the issue at Bondo Police station where they were issued with a P3 form that was filled at Bondo sub-county hospital. PW2 testified that she knew Ouma before the incident as he had been her neighbour for about 2 years. She identified Ouma as the appellant.

28. In cross-examination, PW2 stated that she did not know whether the appellant had a criminal record or not but that he had a wife and 3 children. PW2 admitted that she was not aware of what had happened to the complainant from the 5th to February 14, 2020. She further stated that she did not know that the complainant and appellant’s daughter were friends but that the complainant had informed her that he had defiled her. She denied being friends with Mama Caren.

29. PW3 Jared Obiero, a clinical officer at Bondo sub county testified and produced a P3 form for the complainant who was 15 years old and who had alleged being defiled on the February 5, 2020 by a person known to her. He testified that he found on her genitalia lacerations and bruises on the labia minora and a broken hymen. It was his testimony that lab tests revealed that she had increased pervaginal discharge. It was his testimony that he concluded that the minor was defiled. PW3 produced the complainant's P3 form as PEX2, the PRC form as PEX3, lab request form as PEX4 and the attendance card as PEX5.

30. In cross-examination, PW3 stated that he had not mentioned who defiled the complainant and that he physically examined the complainant and further carried out tests on her that led him to form the opinion that she had been defiled. He stated that he did not examine the appellant. It was his testimony

that the complainant's history corroborated his findings and that the complainant was defiled whether she had slept with other men or not.

31. PW4 Ayub Ogola, the assistant chief Nyawita sub location testified that on the February 18, 2020 he was issued with a warrant of arrest from Bondo police station for the arrest of the appellant so he proceeded to the appellant's home where he found him with his mother and arrested him and escorted him to Bondo police station.

32. It was his testimony that the complainant's guardian had earlier on reported her defilement to him and he had advised her to report the same to the police. PW4 identified the appellant in court. In cross-examination, PW4 stated that he was not aware of any 2 village elders who had previously gone to the appellant's home. He stated that he went to the appellant's home at 8pm and that his motorcycle was fueled by the government and he did not request the appellant to refuel it. He stated that he was not aware that the complainant was used for financial gain.

33. The prosecution then closed its case and the appellant was found with a case to answer and was placed on his defence. In his testimony given on oath, the appellant denied committing the offence and stated that the complainant's parents used the girl to bring the case against him. He further stated that her parents took her away so as not to face the wrath of the residents of Nyawita. It was his testimony that he had a wife and 3 kids and that the complainant was friends with one of his daughters.

34. In cross-examination, the appellant admitted that he knew the complainant well before the incident as they were neighbours and that he had no grudge with the complainant or her parents.

Analysis And Determination

35. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal. I find the issues for determination emanating therefrom are as follows:

   a) Whether the prosecution proved its case against the appellant beyond reasonable doubt; and

   b) Whether the appellant's sentence was excessive and harsh.

   c) All other issues raised in the grounds of appeal shall be determined alongside the above two main issues

   On whether the prosecution proved its case beyond reasonable doubt

36. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006.

37. The ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic* [2016] eKLR, where it was stated that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim. The prosecution was under a duty to establish all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses.

38. On the identity of the appellant, it was submitted that there was no independent medical evidence on his identity as the complainant's defiler and further that the complainant's evidence was not corroborated.

39. Examining the complainant's testimony, the complainant was firm that it was the appellant who defiled her. She remained firm even under cross-examination that it was the appellant who defiled her. The complainant testified that the appellant was well known to her as he was a neighbour and she usually saw him. The complainant admitted and the appellant also testified that the complainant was a friend to the appellant's daughter. The offence allegedly occurred at 1500hrs when there was daylight making it easy for the complainant to identify her assailant. I find no reason to doubt the evidence of the complainant that she knew and positively identified her assailant whom she described very well on what he did to her after calling her, grabbing her into a bush, removing his jacket, her clothes and his clothes and defiling her while he covered her mouth with his hands so that she could not shout upon which she was left to go away. Iam therefore persuaded that the appellant was identified beyond reasonable doubt.

40. Regarding the complainant's age, the complainant testified that she was 15 years old. This was corroborated by PW2, the complainant's aunt who produced PEX1, the complainant's birth certificate that showed that she was born on March 7, 2005 and was thus 15 years old at the time of the offence.

41. The appellant submitted that the birth certificate was issued on February 20, 2020 and that as such relying on the birth certificate which had been obtained after the alleged act was prejudicial to the appellant and that there was need therefore for a cogent and valid evidence of the age of the victim and this could only be scientific.

42. In the case of *Joseph Kieti Seet v Republic* [2014] eKLR, HC at Machakos Criminal Appeal No 91 of 2011, Mutende, J held as follows, and I concur:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. 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 the 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..."

43. In the instant case, a birth certificate was produced as an exhibit and the only issue the appellant had with it is that it was issued after the offence occurred. I have had the opportunity to examine the birth certificate produced as PEX1 and note that it provides the date of registration of birth as May 7, 2018, meaning that the complainant's birth had been registered two years earlier but the birth certificate was never issued in time. In my view, no prejudice was occasioned to the appellant.

44. In the circumstances I find that the birth certificate as produced has no issue and it proved beyond reasonable doubt the complainant's birth date and thus her age. I find that the prosecution proved this element of age of the complainant to be 15 years beyond reasonable doubt.

45. On the issue of penetration, "penetration" is defined under section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The complainant testified that she was defiled by the appellant herein whom she knew very well. The question is whether that evidence requires corroboration.

46. The appellant submitted that the requirement for corroboration was a practice that was not entrenched in law and thus not legal and that as the complainant's testimony was not corroborated, there was doubt as to whether penetration occurred, which doubt should be resolved in his favour.

47. Section 124 of the *Evidence Act* provides that:

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

48. The evidence of the complainant on the fact of her being defiled was corroborated by that of the clinical officer (PW3) who testified that there was penetration of the child's genitalia, and this fact was noted in the P3 form and post rape care reports produced as exhibits, which also confirmed this. The broken hymen was no doubt evidence of penetration. There was no contrary evidence. This evidence proved beyond reasonable doubt that there was penetration as contemplated by the Act.

49. The appellant denied committing the offence and elected to adduce and challenge the evidence adduced by the prosecution witnesses. I have evaluated that evidence as adduced by the appellant on oath. The appellant claimed that the complainant's parents used the complainant to bring the case against him. On being cross examined, he stated that there was no grudge between him and the complainant's parents. Considering the firm and consistent evidence adduced by the minor that was corroborated by the medical evidence adduced by PW3, I am unable to decipher any material that would suggest that the complainant's parents could have coached the complainant to frame the appellant with such a heinous offence.

50. In his grounds of appeal, the appellant raised some issues which I will now address further.

51. It was pleaded and submitted by the appellant that the complainant's evidence was uncorroborated and amounted to hearsay and should not have been admitted.

52. As hereinabove discussed, it's clear that the complainant was firm in her sworn testimony which was very detailed and which evidence remained unchallenged even under cross-examination. The trial court believed the complainant to be telling the truth, after analyzing her testimony. Further as earlier stated, in accordance with the provisions of section 124 of the *Evidence Act*, the complainant's testimony on defilement was corroborated by the medical evidence adduced by PW3, the clinical officer who examined her. Further, the inconsistencies alleged by the appellant in the testimonies of PW1 and PW2 did not exist from my scrutiny of the said testimonies.

53. The appellant also faulted his conviction on grounds that the matter was reported 9 days later. However, this issue was never raised during the trial. In addition, there is no evidence that the material evidence was destroyed by the late reporting of the defilement. Taking into account all the evidence adduced by the prosecution as against the appellant's defence, I am satisfied that the prosecution proved all the elements of the offence of defilement as there was no inordinate delay in reporting the occurrence of the offence against the minor who stated that she feared informing her aunt. It is not in dispute that most children who are defiled are scared and embarrassed of the act and fear disclosing what is done to them. It is for that reason that even the Court of Appeal has acknowledged the use of

euphemism by children in describing the sexual intercourse acts done to them. It stated as follows in the case of *Muganga Chilejo Saha v Republic* [2017] eKLR :

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (*IE V R*, Kapenguria HC Cr Case No 11 of 2016), "he pricked me with a thorn from the front part of this body.", (*Samuel Mwangi Kinyati v R*, Nanyuki HCCRA No 48 of 2015), "he used his thing for peeing", (*David Otieno Alex v R*, Homa Bay HC Cr Ap No 44 of 2015), "he inserted his "dudu" into my "mapaja", (*Joses Kaburu v R*, Meru HC Cr Case No 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi HC Cr Appeal No 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See *A M v R* Voi HC Cr App No 35 of 2014, *EMM v R* Mombasa HC Cr Case No 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her. (emphasis added)"[more emphasis added].

54. Although the use of euphemism is not in question in this case, I find that Naturally, children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people.

55. I find that the reporting after 8 days after the incident was not prejudicial to the appellant and neither was it fatal to the prosecution's case.

56. The appellant further pleaded and submitted that the prosecution failed to call a key witness, the investigating officer or even the arresting officer to give evidence on how he was arrested. PW4 Ayub Ogolla testified that he was the assistant chief and that he received a warrant of arrest which he executed against the appellant. He had earlier on received a report from the complainant's aunt that the appellant had defiled the minor. In the case of *Bukenya & others v Uganda* [1972] EA 549 court addressed stated that:

> "(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> (ii) That court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
>
> (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

57. This court is however alive to the fact that there is no legal requirement in law on the number of witnesses to prove a fact. section 143 of *Evidence Act* (cap 80) Laws of Kenya provides: -

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

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

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

59. In the case of *Republic v Cliff Macharia Njeri* [2017] eKLR it was stated that

> "The other witness not called was the investigating officer. No doubt this witness was important as he could have shed more light as to investigations carried out and would have explained on what basis the accused was charged.

60. Having considered this issue, I find that the evidence of the investigating officer and the arresting officer could only have been crucial in this case if the evidence adduced was barely adequate to establish the elements of the offence of defilement. I do not find that this is a case where the trial court and this court could have or should make an adverse inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution and that that was the reason it was not called. In the case of *S C v Republic* [2018] eKLR, the court observed that:-

> "In my view, the statement of the investigating officer had no probative value. PW3 could not be cross-examined on that statement and neither could he answer questions relating to the actions taken by the investigating officer during the investigations. In this case, it is like the investigating officer never testified. However, failure to call the investigating officer is not fatal to the prosecution case in all situations. In cases where the evidence of the investigating officer is key in linking the accused to the crime, failure to call the investigating officer will cause irreparable damage to the prosecution's case. However, where evidence of other witnesses is sufficient to secure a conviction, failure to avail the investigating officer will do no harm to the prosecution case. It is however important that the prosecution avails investigating officers during trials. An investigating officer is the person who forms an opinion that a crime has been committed. He is the person to interlink the evidence of the witnesses and explain why the defence offered by an accused is not plausible. The role of the investigating officer in a criminal trial is crucial and the prosecution should always ensure that the investigating officer testifies. Having said so, I however do not think that the evidence of the investigating officer could have made any difference in this matter."

61. I further associate myself with the above finding. I further associate myself with Kemei J in *Pius Mutua Mbuvi v Republic* [2021] eKLR where the learned judge held that:

> "I am of the view that whereas it is a welcome move for the evidence of a police investigating officer to be given so as to inform the court the circumstances of arrest of an accused person by the police, in matters where other evidence is available and the same proves the prosecution case to the required standard, the absence of the evidence of the investigating officer would not weaken the prosecution case. The call would have to be made on whether the police evidence is essential to prove the charges that the appellant was facing. In view of my conclusion as to the proof of the prosecution case, I find no merit in the ground that was raised by the appellant."

62. From the trial court record, the minor's and the clinical officer's evidence was largely uncontroverted. The witnesses who are said not have been called was to give the same evidence already presented. It has not been shown that the evidence on record has gaps which needed further clarification.

63. Furthermore, it is established law that a conviction in sexual offences cases can be based on the testimony of a single credible witness, a position that is ably captured in section 124 of the *Evidence Act*. Accordingly, I find no reason to make adverse inference in the circumstances of this case.

64. Taking all the above into consideration, I am satisfied that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and that the conviction of the appellant was sound and safe. I find no reason to interfere with it. I uphold it.

On whether the appellant's sentence was excessive

65. The appellant pleaded in his grounds of appeal and submitted that his 20-year prison sentence was excessive in view of the Supreme Court Decision in Francis K Muruatetu case where the court held that the court is not bound to impose a mandatory sentence as the same is unconstitutional.

66. I note that section 8(3) of the *Sexual Offences Act* provides that upon conviction the offender shall be imprisoned for a term of not less than twenty years. Previously, the principle laid down by the Supreme Court *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with the *Constitution*.

67. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the *Muruatetu* [2017] case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis.

68. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentence fails to conform to the tenets of fair trial which are an in-alienable right guaranteed under articles 50 and 25 of the *Constitution*. See *Christopher Ochieng v Republic* KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No 93 of 2014 [2019] eKLR

69. However, the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR clarified the position and stated *inter alia* that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect of the sentence for murder under sections 203 and 204 of the *Penal Code*.

70. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful unless otherwise challenged through a constitutional petition and upheld by a court superior to this court.

71. The upshot of the above is that I find the instant appeal lacking in merit entirely and is hereby dismissed. The conviction of the appellant and the sentence imposed on him by the trial court is upheld. However, in accordance with section 333(2) of the *Criminal Procedure Code*, I order that the sentence imposed shall take into account any period spent by the appellant in remand custody during the trial, before he was released on bond.

72. Orders accordingly. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF JUNE, 2022

R.E. ABURILI

JUDGE