REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 95 OF 2016

DANIEL KIPKOECH KIRONG.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence delivered on the 4th day of August 2016 in Kapsabet Principal Magistrate's Criminal Case No. 469 of 2016 by Hon. Cherono, SRM)

JUDGMENT

[1] The appellant, **Daniel Kipkoech Kirong**, was accused before the lower court in **Kapsabet Criminal Case No. 469 of 2016** in which he was charged with the offence of defilement, contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the charge were that on **11 December 2015** at within Nandi County he intentionally and unlawfully caused his penis to penetrate the vagina of **LJ**, a girl aged 11 years old. In the alternative, the appellant was charged with indecent act with a child, contrary to **Section 11** of the **Sexual Offences Act**; in that on the **11 December 2015** within Nandi County, he unlawfully and intentionally caused his penis to come into contact with the vagina of **LJ,** a girl aged 11 years.

[2] The appellant denied those allegations and after trial, he was found guilty of the substantive count of defilement. He was consequently convicted thereof and sentenced to 20 years' imprisonment on **4 August 2016**. Being dissatisfied with that decision, the appellant filed this appeal on **13 August 2016** on the following grounds:

> **[a]** That the trial magistrate erred in both law and fact by failing to note that the doctor's report was erroneous and had omissions rendering it inadmissible;
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> **[b]** That the trial magistrate erred both in law and fact by failing to analyse that the age of the complainant which had a direct bearing on his sentence was not proved beyond reasonable doubt;
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> **[c]** That the trial magistrate erred in both law and fact by not considering that he was not examined by the doctor to clear any doubt as to whether indeed he had defiled the complainant;
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> **[d]** That the trial magistrate erred in both law and fact by not considering the existence of a grudge between him and the mother of the complainant;
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> **[e]** That the trial magistrate erred in both law and fact by relying on contradictory statements;
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> **[f]** That the trial magistrate erred both in law and fact by failing to note that the essential items of evidence, such as clothing and bedding, were not produced as exhibits;
>
> **[g]** That the trial magistrate erred in both law and fact by failing to consider that the report was made earlier before the incident happened.

[3] It was, accordingly, the appellant's prayer that his appeal be allowed, his conviction quashed and the sentence imposed on him of 20 years' imprisonment be set aside.

[4] With the leave of the Court, the appellant filed the following Amended Grounds of Appeal herein:

[a] That the trial court erred in law and fact by not observing that the Prosecution's case did not link him to the offence;

[b] That the trial court erred in law and fact by not observing that his constitutional right under **Article 49** of the **Constitution** had been breached;

[c] That the learned trial magistrate erred in law and fact by not observing that medical evidence did not link him with the offence herein.

[d] That the learned trial magistrate erred in law and fact by not observing that **Section 124** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** was not complied with;

[e] That the trial court erred in both law and fact by not observing that the age of the complainant was not proved beyond reasonable doubt;

[f] That the trial court failed to observe that the charge sheet was defective.

[5] The appellant urged his appeal by way of written submissions, filed herein along with his Amended Grounds of Appeal. His arguments were fashioned after the Amended Grounds of Appeal. Hence, in respect of Grounds 1, 5 and 6 of the Amended Grounds of Appeal, the appellant submitted that the complainant's allegations of defilement were not proved, as the age of the complainant remained doubtful at the close of the Prosecution case. He made reference to line 11 on page 31 of the Record of Appeal and urged the Court to note that, in her own words, the complainant told the lower court that she was 13 years old, yet the Child Health Card she relied on gave her date of birth as **8 February 2004**. He, likewise, took issue with the evidence of **PW2** who testified that she took the complainant to hospital on **12 December 2015** without giving any plausible reason for the delay. The appellant also impugned the Child Health Card, contending that it is a forgery for purporting that the complainant's mother gave birth to 3 children between **1994** and **1996**. Thus, in his submission, the Prosecution failed to prove a critical component of the charge of defilement beyond reasonable doubt; and on that account, it was the appellant's contention, in Ground 6 of his Amended Grounds of Appeal, that the main charge as framed was defective.

[6] In respect of the Ground 2, the appellant faulted the learned trial magistrate for not taking into account the fact that he was not presented before court within 24 hours of his arrest as required by **Article 49(1)(f)** of the Constitution. He cited the cases of **Amos Karuga Karatu vs. Republic** [2008] eKLR and urged the Court to find that the said violation entitled him to an acquittal; and therefore that the lower court erred in ignoring the same.

[7] In support of Ground 3, the appellant attacked the quality of the medical evidence adduced by the Prosecution; contending that the P3 Form was not as precise as it ought to have been, for failing to indicate whether the complainant's genital injuries were fresh or old. He further pointed out that, according to the clinical officer who filled the P3 Form, the patient in question was 12 years old. Hence, he submitted that penetration was not proved to the requisite standard. He relied on the Canadian case of **Queen vs. Manuel Vincent Quittanilla** 1999 A BOB 769 which was followed in **PKW vs. Republic**, HCCRA No. 331 of 2008; and the case of **Ben Mwangi vs. Republic** [2001] eKLR to underscore the importance of medical evidence in such cases.

[8] In Ground 4 of his Amended Grounds of Appeal, the appellant faulted the trial court for failing to comply with the provisions of **Section 124** of the **Evidence Act** in that, in choosing to believe the testimony of the complainant, she failed to give her reasons for such belief. The appellant referred the Court to the cases of **Jacob Mumo Mutia vs. Republic,** Criminal Appeal No. 70 of 2014 and **Geoffrey Kioji vs. Republic,** Criminal Appeal No. 270 of 2010. He consequently urged that the appeal be allowed, that his conviction be quashed; and that the sentence imposed on him be set aside.

[9] In his oral submissions before the Court, the appellant contended that the complainant was not examined by a qualified doctor; and therefore that the lower court ought not to have relied on the P3 Form that was produced by the Prosecution. He also reiterated his submission in connection with the discrepancies as to the date of offence and the age of the complainant as stated in the charge sheet and by the key witnesses in their respective testimonies. On that account, he urged that the benefit of the doubt created by those discrepancies be given to him.

[10] On behalf of the State, learned counsel **Mr. Mugun** opposed the appeal. He posited that, in respect of the substantive count of defilement, the Prosecution needed to prove three ingredients for purposes of **Section 8(1) and 8(2)** of the **Sexual Offences Act**; namely, age of the complainant, penetration and identification of the offender. In his submission all these three ingredients were proved before the lower court. He urged the Court to note that the complainant's evidence was that she was born on **8 April 2004**; and that in proof thereof, she produced her Child Health Card as the **Prosecutions Exhibit 1. Mr. Mugun** further pointed out that the complainant's evidence as to her age was corroborated by the evidence of her mother at page 34 of the Record of Appeal.

[11] It was further the submission of **Mr. Mugun** that sufficient evidence was presented before the lower court to prove penetration. He in particular made reference to the evidence of **PW3**, who examined the complainant after the incident and found her hymen missing. According to him, the evidence of **PW3** corroborated the narration of the incident as furnished by the complainant herself. With regard to the identity of the offender, **Mr. Mugun** stressed the point that this was a case of recognition as the appellant was a person well known to the complainant. He also submitted that the circumstances favoured positive recognition; granted that the incident occurred at about 5.00 p.m. in broad daylight. Hence, **Mr. Mugun** urged the Court to dismiss the appeal and uphold the conviction and sentence.

[12] I have given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the appellant as well as by the learned counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

"An appellant on a first appeal 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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a 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 draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

[13] The brief summary of the Prosecution case is that, on the fateful day, at about 5.00 p.m., the complainant, who testified as **PW1** before the lower court, was on her way to the local shopping centre to buy paraffin; and that on the way she met the appellant, a person well known to her as a hawker of herbal medicine. It was her evidence that the appellant greeted her by shaking her hand but refused to let go thereof; and that, when she attempted to extricate her hand from his grip, he slapped her before forcefully carrying her to the bushes by the roadside where he defiled her between 5.00 p.m. and 10 p.m. The complainant reported the matter to her mother and was thereafter taken to Kapsabet Referral Hospital for examination and treatment on **12 December 2015**. The complainant was issued with a P3 Form upon the matter being referred to Kapsabet Police Station; and the P3 Form was later completed by **PW3** upon examining the complainant. His key finding was that the complainant's hymen was broken and that her genitalia was swollen; leading him to the conclusion that the complainant had been defiled.

[14] Evidence was adduced before the lower court by both the complainant **(PW1)** and her mother **(PW2)** that the complainant was born on **8 February 2004**; and that at the material time, she was a class 5 pupil at [Particulars Withheld] Primary School. They both testified that, it was not until **20 January 2016** that the appellant was arrested and charged; adding that he had disappeared from the area and gone to [Particulars Withheld]. It was also the evidence of **PW1** and **PW2** that the appellant was arrested by members of the public after he threatened to kill the complainant so as to bring the defilement case to an end. Upon his arrest, the appellant was examined by **Ranson Ataya**, a clinical officer based at Kapsabet Referral Hospital. The P3 Form in that regard was produced by **Silas Rutto (PW4).**

[15] Sgt. Maximilla Onyango (PW5) was then based at Kapsabet Police Station. She confirmed that this complaint was made on **12 December 2015**; and that it was minuted to her for investigation purposes. She also confirmed that she issued the complainant with a P3 Form which was not returned until **21 January 2016**. She further told the lower court that the appellant went missing after the incident; and that when she learnt that he was admitted at Kapsabet Referral Hospital, she took steps to have him arrested and charged with defilement. **PW5** also confirmed that the appellant was indeed assaulted by members of the public after he threatened to kill the complainant.

[16] On being placed on his defence, the appellant described himself as a father and a seller of herbal drugs. He then narrated how on the **20 January 2016** he had visited the home of **PW2,** who was then a brewer of changaa, and bought c*hangaa* worth Kshs. 200/= for which he gave **PW2** a Kshs. 1,000/= note. He added that **PW2** thereafter declined to give him his change of Kshs. 800/= and instead became harsh with him and ordered him to leave. According to the appellant, it was because he refused to budge that **PW2** descended upon him, with the aid of her son and assaulted him; and that she thereafter took him to Kapsabet Referral Hospital where he was admitted for treatment; having sustained fractures on both hands. That upon being discharged on **5 February 2016,** he was surprised to be arrested on allegations of defilement. He therefore denied having defiled the complainant as alleged or at all.

[17] Granted the foregoing summary of the evidence, the learned trial magistrate correctly framed the issues for determination in her Judgment at page 58 of the Record of Appeal. She then proceeded to analyze the evidence and the applicable law before coming to her conclusion that all the essential ingredients of the offence of defilement as set out in the Main Count had been proved beyond reasonable doubt. The Main Count had been laid pursuant to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act,** which provision stipulates that:

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment.

[18] In the premises, having given due consideration to the appellants Amended Grounds of Appeal and the submissions made herein in respect thereof by the appellant and counsel for the state, the issues for my reconsideration and determination are:

[a] Whether the Complainant was, at the material time, a child for purposes of **Section 8(2)** of the **Sexual Offences Act**;

[b] Whether there was penetration of the complainant's genital organ;

[c] Whether the penetration was perpetrated by the appellant.

[d] Whether the appellant's constitutional right under **Article 49(1)** was violated; and if so, whether that violation vitiates the lower court proceedings.

[a] <u>On the age of the Complainant:</u>

[19] There is no gainsaying that the age of a minor is a critical component of a defilement charge which must be proved by the Prosecution beyond reasonable doubt. This point was aptly made by the Court of Appeal in **<u>Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010</u>** thus:

"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved

by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

[20] Hence, in **Rule 4** of the **Sexual Offences Rules of Court Rules** it is recognized that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

[21] It is also now settled that the age of a victim of a sexual offence can also be determined by observation and common sense. Moreover, in **P.M.M. vs. Republic** [2018] eKLR, it was held thus:

> **"…whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant…"**

[22] Hence, the complainant testified before the lower court that she was born on **8 February 2004**; and her evidence in this regard was corroborated by the evidence of her mother **(PW2).** In addition to the oral testimony of **PW1** and **PW2**, the Prosecution produced a Child Health Card as its **Exhibit 1.** It confirms the complainant's date of birth as **8 February 2004.** She was therefore 11 years and 10 months old as at **11 December 2015** when the incident in question is said to have happened. She was therefore closer to being 12 years old than 11. That notwithstanding, in the eyes of the law, she was deemed to be 11 years old. The Court of Appeal explained this approach in **Hadson Ali Mwachongo vs. Republic** [2016] eKLR, thus:

> **"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."**

[23] Accordingly, the complainant herein was a child for the specific purposes of **Section 8(1) and Section 8(2)** of the **Sexual Offences Act,** as read with **Section 2** of the **Children Act, No. 8 of 2001.** I have, in coming to this conclusion taken into account what the appellant perceived to be contradictions in the evidence of the complainant; and in particular her testimony that she was 13 years old. The appellant also took issue with the evidence of the clinical officer, **PW3**, who supplied the complainant's age as 12 years in the P3 Form. However, a careful consideration of the evidence reveals that that reference by the complainant to the age of 13 years was within the context of the date of **11 April 2016** when she testified. Thus, she was explicit that:

> **"…I am in standard 6 this year. I was in standard 5 last year. I am aged 13 years old this year. I was born in the year 2004. I have the child health card. It indicates that I was born on 8.2.2004…"**

[24] It is also noteworthy that by the time she testified before the lower court, the complainant was past her 12th birthday. As for **PW3,** there is no dispute that he filled the P3 Form on **21 January 2016;** only a few days to the complainant's 12th birthday. He cannot therefore be faulted for giving the complainant's **"estimated age"** as 12 years, for indeed that was a fair estimate. Consequently, I find no contradiction at all in the evidence presented by the Prosecution in proof of the age of the complainant. I likewise find no reason to conclude that the Child Health Card is a forgery as urged by the appellant; there being nothing by way of evidence to discount the assertions thereon.

[25] In the same vein, it is my finding that the appellant's assertion that the Charge is defective simply on account of the perceived variance as to the age of the complainant is plainly untenable. This is because **Section 134** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, is explicit that:

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

[26] The substantive charge of defilement, as set out in the charge sheet filed before the lower court on **9 February 2016**, fits the bill. In any case, a variance between the charge as laid and the evidence adduced in proof would impact on, not the validity of the charge but the burden of proof. Accordingly, it is my finding that credible evidence was presented before the lower court to prove beyond reasonable doubt that the complainant was a child aged 11 years as at **11 December 2015** when the subject offence is alleged to have taken place.

[b] <u>On Penetration of the Complainant:</u>

[27] The complainant testified as to how the defilement occurred; namely that, at about 5.00 p.m. on **11 December 2015**, she was on her way to the shop to buy paraffin; and that on the way she met the appellant; a person well known to her as a hawker of herbal medicine. She told the lower court that the appellant greeted her by shaking her hand; and that he thereafter refused to let go of her hand. She further stated that when she resisted his grip, the appellant slapped her and carried her to the nearly bush where he threatened to strangle her if she screamed. He then proceeded to repeatedly defile her, having held her captive from 5.00 p.m. to 10.00 p.m. in the night. The complainant further testified that she thereafter returned home and informed her mother **(PW2).** She was then taken to hospital the following morning.

[28] PW2 confirmed that she had sent the complainant to the shop on **11 December 2015** to buy paraffin; and that she did not return until after 10.00 p.m. She had not bought paraffin; and that when she asked her why, the complainant reported to her that she had met the appellant who had defiled her. **PW2** also mentioned that she noted that the complainant had blood in her genitalia and thighs. She confirmed too that she brought the incident to the attention of the chief of the area via telephone and was advised to take the child to hospital for

examination and treatment; which she did the following day.

[29] In addition to the complainant and **PW2**, the Prosecution called **Mr. Silas Rutto (PW3),** a clinical officer then based at Kapsabet County Referral Hospital who attended to the complainant on **12 December 2015**. He confirmed that the patient visited their facility with a history of having been defiled. He examined and treated her and prepared the treatment chits which he produced as the **Prosecution's Exhibit 2a, b and c**. He further confirmed that on **21 January 2016**, the complainant presented herself for examination for purposes of filling of the P3 Form. He confirmed that he relied on his treatment chits in filling the P3 Form. His specific findings were that the complainant's hymen was broken and that she had mild vaginal oedema. No other abnormality was noted by him. On the basis of his findings, he formed the opinion that the complainant had been defiled. He produced the P3 Form as the **Prosecution's Exhibit 3** before the lower court.

[30] The Prosecution evidence in respect of the allegations of defilement and the injuries suffered by the complainant remained uncontroverted. This is because, in his defence, the appellant focused on the events during and after **20 January 2016,** when he was allegedly assaulted at the home of **PW2**. He however challenged the Prosecution evidence, with particular regard to penetration, on two fronts; firstly, it was his contention that, since the complainant was a child of tender years, her evidence required corroboration; and that it was incumbent on the trial court to ensure compliance with **Section 124** of the **Evidence Act.** Secondly, it was the contention of the appellant that the medical examination was conducted by an unqualified person, and therefore that the evidence in that regard by **PW3** is worthless.

[31] With regard to the evidence of victim minors, **Section 124** of the **Evidence Act** provides that:

> **Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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 material 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.**

[32] From the evidence presented before the lower court, there is no question that the complainant was the only witness to the defilement incident. She was then a child of tender years for purposes of **Section 19** of the **Oaths and Statutory Declarations Act.** Accordingly, the trial magistrate conducted a *voire dire*, as is required by law; and thereafter made a determination that the minor had sufficient understanding of the oath and the need to speak the truth; and therefore that she would give sworn evidence. It is however not true that the trial court did not give reasons for choosing to believe the testimony of the minor, as was asserted by the appellant; for in its Judgment, at page 60 of the Record of Appeal, the trial court explained that:

> **"…The minor was consistent in her evidence. I chose to believe PW1 to be telling the truth. This co-opted with the findings of the doctor that the complainant had broken hymen and had mild oedema. I do find that indeed the complainant was defiled…"**

[33] It is clear therefore that, in this instance, not only did the trial magistrate give a reason for believing the testimony of **PW1**, but she was also satisfied that the evidence had been sufficiently corroborated. I have no doubt that she came to the correct conclusion. As to whether the medical evidence was given by an unqualified person, the appellant did not expound on this ground. I surmise therefore that he was thereby challenging the fact that the P3 Form was filled by a clinical officer as opposed to a medical doctor.

[34] It is now settled that a clinical officer is a practitioner in his/her own field; and therefore is sufficiently competent in terms of conducting examinations and filling P3 Forms in cases where they happen to treat the patients concerned on their initial call. In **Fappyton Mutuku Ngui vs. Republic [2014] eKLR,** for instance, the Court of Appeal held that:

> **"We do not think much turns on the appellant's complaint that PW5 was not competent to fill in a P3 form under Section 48 of the Evidence Act. PW5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated PW2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence.**

[35] Likewise, in **Raphael Kavoi Kiilu vs. Republic [2010] eKLR,** the Court of Appeal was of the view that:

> **The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under *section 2* of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:-**
>
> > ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ……"***
>
> ***Section 7(4)* of the Act states:-**
>
> > ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***

The Act goes further to provide that such officers may engage in private practice *"in the practice of medicine, dentistry or health work for a fee."* It follows that the clinical officer did testify in this case on his area of competence.

We have examined the provisions of Sexual Offences Act. There is no such requirement that a P3 form must be produced only by a medical doctor."

[36] Thus, in **Mark Wanjala Wanyama vs. Republic [2008] eKLR,** the Court of Appeal raised the poignant concern that:

If the evidence of the clinical officers were to be declared inadmissible in law, then we are at a loss as to how many such cases of rape, and assault, would see justice done to them in Kenya? We say so because we take judicial notice of the fact that in Kenya, very few medical facilities are manned by qualified doctors. We do not see any merit in that ground.

[37] Clearly then, the appellant's attempt to discredit the medical evidence adduced by **PW3** is utterly without foundation, and is for rejection; with the result that there was cogent proof, in the light of the foregoing, that the complainant was subjected to penetration of her genital organ for purposes of **Section 8(2)** of the **Sexual Offences Act.** Thus, in my re-evaluation of the evidence, I am satisfied that the Prosecution did prove beyond reasonable doubt that the minor was subjected to penile penetration on **11 December 2015** as charged in the Main Count.

[c] On whether the penetration of the complainant was perpetrated by the appellant:

[38] The inculpating evidence adduced before the lower court against the appellant was basically that of visual identification. It is therefore imperative, in such circumstances, to bear in mind the caution expressed by the Court of Appeal in **Paul Etole & Another vs. Republic** [2001] eKLR regarding such evidence. It held that:

"…Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger…"

[39] In this case, the incident took place in broad daylight at about 5.00 p.m. The complainant told the lower court that the appellant was a person well known to her as a hawker of herbal medicine; and that she stopped to greet him before the appellant turned against her. It is significant that the complainant revealed to her mother the identity of the offender in her first report; an indication that she was not in doubt at all about the identity of her assailant. It is noteworthy too that, in his defence, the accused conceded that he was, at the time, hawking herbal medicines for a living. Thus, this was a case of identification by way of recognition of a known individual in favourable circumstances. In **Anjononi & Others vs. Republic [1980] KLR 59** the Court of Appeal held that:

"...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."

[40] The contention by the appellant that he was framed on account of a grudge between him and **PW2** appears to be an afterthought; and the trial court considered it and dismissed it as such. Although at page 60 of the Record of Appeal, the trial court remarked that the accused did not call any witnesses to corroborate his claims, which was clearly a misdirection, granted that the burden of proof is on the Prosecution throughout a criminal trial, that misdirection did not detract from the fact that all the elements of the charge of defilement, including the identity of the perpetrator, were proved before the lower court beyond reasonable doubt. In the premises, the lower court cannot be faulted for coming to the conclusion that credible evidence was presented before it to inculpate the appellant.

[d] Whether the appellant's constitutional right under Article 49(1) was violated; and if so, whether that violation vitiates the lower court proceedings

[41] Regarding the appellant's contention that he was detained for more than 24 hours before his arraignment before the lower court, the record of the lower court confirms that, whereas he was arrested on **5 February 2016**, it was not until **9 February 2016** that he was arraigned before the lower court. **Article 49(1)(f)** of the **Constitution** is explicit that:

"An arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

[42] Since **5 February 2016** was a Friday, the next court day was **8 February 2016**. It is not altogether apparent why the appellant was not arraigned on **8 February 2016**, save that he had been beaten by members of the public and was admitted in hospital up to **5 February 2016.** The lower court record further shows that by **9 February 2016**, the appellant was still feeling pain and had to seek the intervention of the court to be taken for treatment before his plea could be taken. This could explain the delay; but whatever the case, there was a delay of one day in his arraignment; and the question to pose is whether that breach on the part of the Prosecution would vitiate the lower court's proceedings, including the appellant's conviction and sentence.

[43] Authorities abound to show that in such situations, the appellant would have recourse in civil litigation for the vindication of his constitutional right; and therefore, a violation this kind, even if proved within the context of the criminal trial, would not vitiate the conviction recorded by the lower court. One such authority is **Evans Wamalwa Simiyu vs. Republic** [2016] eKLR (which is binding on this Court as opposed to the persuasive decision of **Republic vs. Amos Karuga Karatu** that the appellant relied on) wherein the Court of Appeal held that:

> **"This issue has been the subject of several decisions of this Court. The correct position in law was set out in *Julius Kamau Mbugua v Republic (2010) eKLR*, where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. On this basis, we do not consider the issue fatal to the prosecution even if proved."**

[44] Regarding the sentence, **Section 8(2)** of the **Sexual Offences Act,** does provide for life imprisonment. I note that, instead of life imprisonment, the appellant was sentenced, on **4 August 2016**, to 20 years' imprisonment. Looked at in retrospect from the prism of the decision of the Supreme Court in **Francis Karioko Muruatetu vs. Republic [2017] eKLR,** that sentence cannot be faulted; for in **Jared Koita Injiri vs. Republic** [2019] eKLR**,** the Court of Appeal was of the view that:

Arising from the decision in *Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015* **where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by** *section 204* **of the** *Penal Code* **was unconstitutional. The Court took the view that;**

> *"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."*
>
> **In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by** *section 8 (1)* **of the** *Sexual Offences Act***, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."**

[45] The Court of Appeal proceeded to set aside the sentence of life imprisonment in favour of imprisonment for 30 years in the matter, in which the complainant was a 9-year-old minor. In the premises, I find no sufficient cause for interfering with the sentence imposed on the appellant by the lower court.

[46] In the result, the appeal lacks merit and is hereby dismissed in its entirety. The appellant's conviction and sentence are hereby upheld.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF FEBRUARY, 2021

OLGA SEWE

JUDGE