REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. E001 OF 2021 [SO]

WAKA EVANS AMIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence passed by Hon. Muthoni Mwangi,

Resident Magistrate in Siaya Principal Magistrate's Court SO Case No. 34 of 2019 on 11/1/2021)

JUDGMENT

Introduction

1. The Appellant herein **WAKA EVANS AMIRA** was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence are that on the 2nd day of June 2020 at Barding sub-location in Siaya sub-county within Siaya county, he unlawfully caused his penis to penetrate the vagina of JAO [full name withheld for legal reasons], a child aged 16 years. The appellant also faced the alternative charge of committing an indecent act with the same complainant child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. The appellant denied both charges and the prosecution in a bid to prove its case called 5 witnesses. The trial magistrate, Hon. Muthoni Mwangi considered the prosecution evidence as well as that of the defence witnesses and found the appellant guilty as charged, convicted him and sentenced him to serve fifteen (15) years imprisonment.

3. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

> ***a) That the learned trial Magistrate erred in law and in fact in making a finding that the Appellant was guilty of the offence of defilement considering the evidence adduced in court by the prosecution.***
>
> ***b) That the learned trial Magistrate erred in law and in fact in proceeding with the criminal case against the accused without complying with Section 200 of the Criminal Procedure Act.***
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> ***c) That the learned Magistrate erred in law and in fact in not informing the accused to make an election on whether he wanted the case to commence a fresh or proceed from where it had stopped.***
>
> ***d) That the learned Magistrate erred in law and in fact in making a finding that the accused person is guilty when there was no cogent evidence pinning the accused person to the act of defilement.***
>
> ***e) That the learned Magistrate erred in law and in fact in making a finding that the prosecution had proven its case beyond reasonable doubt.***
>
> ***f) That the learned Magistrate erred in law and in fact in not analyzing properly the evidence and proceedings before her.***
>
> ***g) That the learned Magistrate erred in law and in fact in not considering the circumstances of the case and only relying on the medical report of the Doctor and on the fact that the complainant pointed out the accused as the offender.***
>
> ***h) That the learned Magistrate erred in law and in fact not considering the evidence as adduced by the accused person.***

Submissions

4. The appeal was canvassed by way of written submissions but only the appellant's counsel Mr. Onindo filed his submissions. According to Mr Onindo, the charge sheet reads that the offence occurred at Barding yet the doctor's evidence is to the effect that the offence occurred at Kamwai Sub location and that the other prosecution witnesses, including the complainant's claimed that the offence occurred at Randago hence the prosecution did not prove that the offence occurred at Barding as per the charge sheet.

5. Further submission was that the trial court found that the offence occurred at the accused person's house yet the evidence by PW2 was that the offence took place at the house of PAN. Further, that the alleged PAN should have been called as a prosecution witness to confirm the presence of the appellant and the complainant in his premises or PAN should have been arrested and charged with assisting in the commission of a crime.

6. It was submitted that the Doctor's evidence was contradictory in that he claimed that the injuries were about 5 days old but later stated that he could not ascertain the age of the scar.

7. It was further submitted that the child psychologist who was allegedly called to counsel the victim before she agreed to speak should have been called as a witness so that the court rules out the possibility of the victim having been coerced to give false information, now that the complainant had, before being taken to the psychologist, told the doctor that nothing had happened to her.

8. further submission was that there were contradictions in the doctor's evidence and some fabrication of evidence on the nature of injuries suffered by the complainant and the age of the scar which contradictions the trial magistrate ignored or failed to comment on in her judgment.

9. it was also submitted that no investigations were carried out and that PW5 admitted so in his testimony. That the appellant presented himself to the Police Station on 21/6/2019 and that no reasons were advanced why it took the police long from 6/6/2019 when the incident was reported to them, for them to summon the appellant to the police station. That PW5 never visited the scene alleging it was tampered with yet no evidence of tampering was adduced and that he said the incident took place at Barding and not Randago.

10. On the defence of alibi raised by the appellant, it was submitted that the trial magistrate failed to analyse it simply because it was raised late and that the prosecution had no ample time to investigate the same yet the prosecution never complained or file submissions complaining that they had no time to investigate the alibi defence, arguing that the prosecution should have invoked section 212 of the Criminal Procedure Code to seek more time to rebut the appellant's alibi defence, and not for the court to say that the defence witnesses were lying. Reliance was placed on **ERICK OTIENO MEDA V REPUBLIC CR A NO.55 OF 2015** where the Court of Appeal affirmed that the burden of proving falsity if at all, of an accused person's defence of alibi lay on the prosecution. Counsel submitted that it was therefore upon the prosecution to rebut the alibi defence of the appellant and not for the court to find that that defence was a lie. It was submitted that in Kenya, the law does not state when the alibi defence should be raised hence the trial court should have indicated when such alibi defence should have been raised. Further, that the court contradicted itself when it stated that the prosecution did not call evidence to disprove the alibi defence yet conclude that it was a lie hence she was biased.

11. According to the appellant's counsel, the trial court ought to have looked at circumstantial evidence now that Humphrey Angatia the owner of the house in which it was alleged the incident took place testified saying nothing happened in his premises. He complains that the magistrate never commented on that evidence of DW3.

12. Relying on **Mumbi Musau v Republic**-, Counsel argued that not considering the evidence by defence witnesses is a breach of natural justice. Further reliance was placed on **Jesse Onyimbo Ochieng v Republic [2010]e** KLR where the court stated that failure to properly consider and re-evaluate the defence evidence was fatal. In that regard, Counsel submitted that the testimony of DW3 who was a crucial witness was not considered hence this court should find that the failure was fatal to the prosecution's case and acquit the appellant. Counsel emphasised that failure by the prosecution witness who was crucial, being DW3 and who was called by the defence but his evidence was ignored, was fatal to the prosecution's case.

13. It was further submitted that failure to consider the evidence of all the prosecution witnesses amounted to discrimination contrary to Article 27 of the Constitution as was held in the **Francis Karioko Muruatetu v Republic Petition No. 15 of 2015** Case.

14. On sentence, Counsel for the appellant submitted that the trial court meted out harsh sentence. Further, that she did not take into account the favourable probation report that stated that he was not a threat and was of good standing in the society, according to his village mates, and is a first offender. He relied on **Dennis Kibaara v Republic**- where the Court reduced a 20 year sentence to 5 years having regard to the circumstantial evidence and age of the accused.

15. Urging this court to reduce sentence imposed on the appellant, Counsel submitted that the complainant willingly accepted to follow the appellant, boarded his motorcycle, entered the house and willingly had sex with the appellant and that she never raised any alarm despite knowing that there were people in the vicinity which amounts to consensual sex that the court ought to have looked at on the behaviour of the complainant hence this court should reduce sentence, in the alternative, to enable the appellant fend for his family.

Analysis and Determination

16. I have considered the evidence adduced before the trial court for the prosecution, the defence, the grounds of appeal and the submissions filed by the appellant's counsel. The respondent did not file any submissions despite being accorded time to do so.

17. This being a first appeal, this Court is mandated to re-evaluate and re analyse the evidence adduced before the trial court afresh and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither heard nor saw the witnesses as they testified. The Court of Appeal in the case of **Gabriel Kamau Njoroge v Republic [1987] e KLR** restated the duty of the first Appellate court as follows:

"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this." See also the case of **Kagori Kaboi v Republic [2020] Eklr.**

18. The evidence as laid out before the trial court was as follows: The complainant, JAO [full name withheld for legal reasons] testified as PW1 after a thorough voire dire examination on her by the trial court which established that she was possessed of sufficient intelligence but did not understand the nature of an oath so she gave unsworn testimony but was cross examined. She stated that she was born on 10th September 2002 and that on the 2nd June 2019 she was at home when her class teacher Waka Evans, the appellant herein told her that he wanted to meet her. It was her testimony that she informed him that her mother wanted to send her somewhere and he told her to inquire and establish where exactly. She told him that she was to be send to Randago market to buy some food and thus they agreed to meet along the way which they did a few metres away from her home and the appellant asked her to board his motorbike which she did.

19. PW1 testified that it was around 4:00 p.m. when the appellant told her to alight and asked her to meet him at a homestead a few meters ahead where he told her to enter one of the houses where there was a man outside. PW1 testified that Teacher Evans entered the said house and told her that he wanted to have sex with her and she told him that she was not ready.

20. PW1 further stated that she agreed to have unprotected sex with the appellant who was her teacher since she respected him but that in the process, someone called the appellant and informed him that someone, one Mama Boniface (Ann) had seen him entering that home after which the appellant informed the complainant that there was danger and that she should go to the market and she left. That on her way out, she met Mama Boniface who told her that she had seen the complainant and the teacher. PW1 testified that she explained to her mother what had transpired between herself and the teacher and also explained the same before her School Principal. It was her testimony that she went to the Police Station and to Siaya District Hospital 4 days after she had had sexual intercourse with the appellant. The complainant identified the teacher she was referring to as the appellant before the trial court.

21. In cross examination, PW1 stated that she had known the accused/appellant since January 2018 and that she had met him once before, outside the school at a games function. She further stated that being the class secretary, she had the phone number of the appellant and had called him once before requesting for a classmate's phone number. The complainant further stated that she did not inform her parents on the day she went to meet with the appellant and further that the place where she met the appellant on the date of the incident was about half a kilometer from their home. She stated that the appellant was the 1st to enter the compound while she entered about 5 minutes later.

22. The complainant further stated that prior to the date the appellant defiled her, she was a virgin and never had a boyfriend. She stated further that when the appellant penetrated her vagina on that day she felt pain. She stated that she found her pant with some blood, that she was in pain but walked normally.

23. PW1 stated that at the time she wore a pink blouse and a black skirt. It was her testimony that mama Boniface had informed her mother of what she had witnessed after 2 days and that on 6th June 2019 she was taken to the Police Station and on the same day, she was examined at Siaya District Hospital. The complainant denied having been pushed to make any allegations against the appellant.

24. In re-examination, the complainant stated that she saw blood coming out for about an hour after she and the appellant had sexual intercourse. The trial record reveals that the court took note of the fact that the complainant was firm and consistent throughout her testimony.

25. PW2 AAO, the complainant's step-mother testified that on 2nd June 2019 at about 4.30pm, she saw the complainant pass and greet her then the complainant went and entered a certain homestead where there are three houses.

26. The appellant also followed her on a motor cycle into that same homestead. She stated that the complainant was wearing a pink blouse and a black skirt and that she first saw the complainant passing and after a few minutes the appellant whom she knew passed with a motorbike after which she saw them entering a certain homestead. PW2 stated that she saw the complainant leaving the said house after more than 10 minutes and that after about four minutes, the Appellant also left the homestead and that she witnessed all this from a distance of about 50 metres from where she was standing. She further stated that she reported the incident to the complainant's mother 2 days later while they were at a women's group meeting (Chama).

27. In cross examination, PW2 stated that it was the first time she had seen the appellant and that the compound she saw the appellant and complainant going into was about 50 meters ahead of her. She further stated that there was a man who lived in that compound whose known nickname was 'Pan'. PW2 reiterated that the complainant entered the compound first using the lower path and a few minutes later the appellant entered using the upper path. She further stated that after the complainant entered the compound,, she called 'Pan' who was coming from the bathroom and emphasized that only 'Pan' lived in that compound.

28. PW3 MAO the complainant's mother testified that the complainant was 16 years old. She further stated that on a Sunday, the exact date of which she could not recall, she sent her daughter to the market and her daughter returned at 5:30 p.m. It was her testimony that two days later, on 4th June 2020, she went for a *chama* meeting where she met Anna, PW2, who told her that she had seen the complainant with the teacher on Sunday and that they had gone into a certain homestead. She further testified that as the next day was a holiday, she went to report the incident to the School Principal on the 6th June 2020 and also reported the incident to the Chief's Camp at Marwa with the complainant's father also reporting to the children's office. She stated that the complainant was taken to Siaya District hospital where she was examined and the incident was reported at Siaya Police Station.

29. In cross examination, PW3 stated that she had sent her daughter to the market on 2nd June 2020 and she came back on the same day at 5:30 p.m. after which time she did not leave the compound again on that particular day. She further stated that PW2 was her co-wife. She

reiterated that she was informed of the incident on 4th June 2020 after which she asked her daughter, the complainant, who confirmed that it was true. She further stated that the following day was a holiday and she did not know whether the police station was open during holidays and hence the reasons why she reported the incident on 6th June 2020.

30. PW4 Isaac Imbwaga a Clinical Officer working at Siaya County Referral Hospital gave evidence that he examined the complainant and filled the P3 form. He testified that upon examination of the girl, he noted that her hymen was absent and that there was reddening of the vaginal walls, red vaginal discharge typical of menstruation. He stated that on high vaginal swab there were red blood cells due to menstruation as well as epithelial cells but no spermatozoa. It was his testimony that the approximate age of the injury was 5 days. He produced the said P3 form in respect of the complainant dated 6th June 2020 as Exhibit No. 1, treatment notes as Exhibit No. 2, Lab Request Form as Exhibit No. 3 and the PRC as Exhibit No. 4 and stated that based on his examination, he concluded that there were features suggesting penetration. He further stated that the hymen was absent but he could not ascertain the age of the scar but it appeared fresh. He further stated that there was reddening of the vaginal walls as the complainant was on her menses.

31. In cross examination, PW4 stated that it was possible that the reddening of the vaginal walls was due to the fact that the complainant was on her menses at the time of examination. He further stated that he could not ascertain the age of the scar as individuals heal at different rates based on the circumstances. In re-examination he stated that the bruised labia minora was due to friction and not menses. He further confirmed that the complainant had been defiled.

32. PW5 No. 66068 CPL Alfred Kiprop a Police Officer attached at Siaya Police station gave evidence that on 6th December 2020 at around 0715 hours the complainant and her mother MO went to the station and reported the matter. He stated that the appellant was not taken for medical examination as he was arrested 2 weeks later. He stated further that he was supplied with a birth certificate in respect of the complainant which showed the date of birth of the minor as 10th September 2002. He produced the same as Prosecution exhibit No. 2. He stated further that the act was committed on 2nd June 2020 but the report was made on 6th June 2020.

33. In cross examination CPL. Kiprop stated that it took him around 2 weeks to investigate the matter as the appellant had travelled to Kisii for sports. He admitted that he did not visit the scene of crime as the scene had been tampered with as it served as a dwelling house. he stated that PW1 and PW2 told him that people used to live in that house. PW5 further explained the difference in names as indicated in the birth certificate and the charge sheet stating that the name D was a name that the complainant used at home.

34. Placed on his defence, the appellant gave a sworn statement of defence and called two additional witnesses. It was the appellant's testimony that he used to work as a teacher at [particulars withheld] School from September 2012 to 1st July 2019. It was his testimony that the Principal of the School had informed him that there were allegations of defilement against him on 19th June 2019 after which he was issued with a show cause letter and later he attended a disciplinary hearing before the school board where the complainant herein, her parents and others were all present.

35. The appellant testified that on the day he is alleged to have defiled the complainant he was at home with his wife and children and that at around 4:00 p.m. he was watching football. He stated further that he conducted his own investigations and found a man by the name Humphrey in the homestead where it was alleged that he had defiled the girl.

36. The appellant further testified that he had never been to Barding sub location and did not know where it was. He stated that on the 2.6.2020 he was not at Barding but at his house in Karapul.

37. In cross examination, the appellant stated that it was between September and October when he looked for the said Humphrey. He stated further that he had taught the complainant chemistry and having known him for 1 year it was his view that she did not know him well. He further stated that on that Sunday he was alleged to have defiled the complainant, he and his wife went to separate meetings in church. He further stated that there were no issues between the complainant and himself.

38. DW2 Mary Namai Anyango, the appellant's wife testified that on the 2nd June 2020 she and her husband had gone to church and returned at around 2:00 p.m. when she cooked lunch as her husband watched television that afternoon. It was her testimony that neither her son nor the appellant left home that day. In cross examination she stated that her husband had a motorbike which they used to go to church on and that thereafter when they returned the appellant began watching television.

39. DW3 Humphrey Angatia gave evidence that he lived with his family and that he knew Ann, PW2, as his neighbor who lived some 200 metres from his home. It was his testimony that he was initially contacted by the appellant sometime around October 2020 when the appellant informed him that he had a case in which he was suspected to have brought a child to DW3's home. DW3 gave evidence that on that alleged day the appellant referred to, he was at home and did not leave home and further did not see anything. In cross examination DW3 stated that the appellant knew him that day and that he was surprised to see the appellant.

Determination

40. having revaluated the evidence adduced before the trial court, the grounds of appeal, the evidence adduced before the trial court by both the prosecution and the appellant and his two witnesses and the submissions filed by the appellant, in my humble view, the issues for determination are:

a) ***Whether the prosecution established the charge of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act brought against the Appellant, to the required standard of proof beyond any reasonable doubt;***

b) ***whether the prosecution's case was riddled with material contradictions fatal to their case;***

c) ***Whether the learned trial Magistrate erred in law and in fact in proceeding with the criminal case against the accused without complying with Section 200 of the Criminal Procedure Code;***

d) ***Whether the trial magistrate considered the appellant's defence before arriving at her decision of convicting the appellant;***

e) ***Whether the sentence imposed on the appellant was manifestly excessive as to warrant interference by this court.***

41. On whether the conviction of the appellant was sound based on the evidence adduced before the trial court, Section 8(1) of the Sexual Offences Act provides that:

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

42. The prosecution is required to establish three ingredients of the offence of defilement beyond reasonable doubt namely: the age of the complainant, the act of penetration and the identity of the perpetrator.

43. In the present appeal, the complainant stated that she was 16 years old. PW3, her mother also stated that her daughter was 16 years old although she could not recall exactly when her daughter was born. PW5, the Investigating officer testified that he had been issued with a birth certificate in the name of J A which showed the date of birth as 10th September 2002 and which was produced as exhibit No. 5. The alleged incident of defilement took place on 2nd June 2020 at which time the complainant was about 16 years 9 months. Accordingly, I find that the age of the complainant was proved to the required standard that is beyond reasonable doubt, to be 16 years and 9 months and as she had not attained seventeen years, her age remains 16 years.

44. On whether there was proof of penetration of the complainant's genitalia, Section 2(1) of the Sexual Offences Act defines penetration as:

"the partial or complete insertion of the genital organ of a person into the genital organs of another person."

45. The complainant testified that she knew the appellant who was her teacher at [particulars withheld] Secondary School. That on 2/6/2020 she met the appellant herein who told her that he wanted to meet her then she informed him that she was to be sent by her mother to go somewhere so he told her to inquire from her mother on where she would be sent which she did and her mother told her to go to Randago market to buy food. She told the appellant that because she respected him, she would meet him and he told her to meet him on the way.

46. On her way to the said market, she found him on the road not far from her home on his motorbike. He told her to board and she obliged. He rode on and stopped and told her to alight on the road. The trial court observed the complainant to be firm. There was a road so told her to wait for him there. He proceeded on the road then she saw him in another home at around 4:00pm. He called her to the home and he led her to a certain house where they had unprotected sexual intercourse. It was her testimony that though she objected at first, she gave in to the lure of sex out of respect for her teacher and that he left her after he was called and told that he had been seen entering that home with the complainant.

47. Although corroboration is no longer necessary under the proviso to section 124 of the Evidence Act, and in this case as the complainant was not a child of tender years, it is my humble view that in the instant case, the evidence of PW1 was sufficiently corroborated by the evidence of the examining medical officer who testified as PW4. PW4, the Clinical Officer who examined the complainant on 6th June 2020 stated that upon examination of the girl, he noted that her hymen was absent and there was reddening of the vaginal walls, red vaginal discharge typical of menstruation. On high vaginal swab there were red blood cells due to menstruation as well as epithelial cells but no spermatozoa. The approximate age of injury was 5 days. He produced the said P3 form in respect of the complainant dated 6th June 2019 as exhibit No. 1, treatment notes as exhibit No. 2, lab request form as exhibit No. 3 and the PRC as exhibit No. 4 and stated that based on his examination he concluded that there were features suggesting penetration. He further stated that the hymen was absent but he could not ascertain the age of the scar which appeared fresh. He further stated that there was reddening of the vaginal walls as the complainant was on her menses. However, he stated that the bruises on labia minora was not due to menses but friction suggestive of forceful penetration.

48. From the above evidence adduced, it is my humble view that the prosecution established the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

49. On whether the penetration was perpetrated by the Appellant, from the evidence of the complainant and that of PW2, the Appellant was well known to the complainant. The complainant stated that the appellant was her class teacher at [particulars withheld] School where she was in Form Two and she had known him since January 2018 when she was admitted to that School. The appellant/ accused person in his defense also stated that he was a teacher to the complainant and had taught her Chemistry in Form 2. The complainant stated that after the appellant told her to enter the house nearby, he followed her and asked her for sex. She resisted but she gave in out of respect for her teacher and he had unprotected sex with her then he received a call informing him that somebody had seen him enter the house with the girl so he panicked and told her to leave.

50. PW2 testified that she saw the complainant pass by and greet her and after a few minutes, the teacher whom she knew also passed on a motor cycle. She described the clothing worn by the complainant and the time was around 4.30 pm and that they entered a certain homestead nearby and after about ten minutes and above, the complainant came out and the teacher followed after 4 minutes later but they never spoke.

51. The appellant in his defence denied the offence saying that at the material time, he had gone to church with his wife and when he returned, he got engaged in watching football. He called his wife DW2 who stated that the appellant had gone to Church with her. He also called one Humphrey Angatia who testified that he was approached by the appellant in October 2020 and that he was the one who was in the home allegedly used by the appellant to defile the complainant. He denied ever seeing the two in that home on the material date.

52. In the case of **Wamunga v Republic (1989) KLR 424** the Court of Appeal stated as follows regarding the evidence of identification generally:

> ***"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

53. The evidence adduced by the prosecution was to the effect that the alleged incident took place at around 4:00 p.m. when in my view there was broad daylight that enabled the complainant to see and recognize her defiler who was well known to her as her teacher. There was no evidence that her view or sight was in any way inhibited. It is my view that the Appellant was positively identified as the perpetrator of the sexual assault occasioned on the complainant.

54. In his defence, the appellant denied the events as presented by the prosecution. The appellant offered an alibi to the effect that on the material date he had been to church with his wife and subsequently spent the rest of the day at home. This was corroborated by his wife DW2. DW3 testified that he owned the house that the incident alleged is said to have taken place and that on the material date he did not witness anything as stated by the prosecution witnesses. Amongst the grounds of appeal raised by the appellant and submitted on at length is that the trial magistrate failed to consider his alibi defence and moreso the evidence of DW3 who owned the house where the defilement is said to have taken place and proceeded to convict him, his alibi defence notwithstanding.

55. In the case of **Kiarie v R {1984} KLR** The Court of Appeal laid down the following principle:

> ***"An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."***

56. The appellant's counsel submitted that the law does not provide for the timing when an alibi defence should be raised and that in any event, it is the duty of the prosecution to disprove the alibi defence.

57. It is settled Law that the prosecution bore the burden of proving the charge against the appellant at the trial court, beyond reasonable doubt. However, in relying on an alibi defence, the entirety of the prosecution evidence, direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an alibi defence during the defence hearing stage of the proceedings should not escape scrutiny of the court.

58. In support of this right proposition, the court in **R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145** held:

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."***

59. In this case, the plea of alibi was never even part of the cross-examination issues raised at the trial by the appellant. Though in Law, time of the disclosure might not be in issue, the prosecution no doubt required adequate notice to investigate the allegation of the alibi defence.

60. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See Nyakundi J IN **Charles Kasena Chogo v Republic [2019] e KLR.**

61. Having considered the totality of the evidence of the prosecution witnesses especially the testimony of the complainant and PW2 vis a via the defence, I find the evidence of these two Prosecution witnesses who physically saw the appellant on the material date and time consistent, watertight and believable.

62. On whether the trial court considered the defence by the appellant which was an alibi defence, the appellant's counsel has castigated the trial court for failure to consider the alibi defence and the testimony of DW3. The appellant claimed that he was at his home watching football after leaving church service with DW2 his wife. DW3 Humphrey Angatia testified that he was at his home where the alleged defilement took place but that he never saw the appellant and the complainant.

63. It is trite that the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial since as was held by the Court of Appeal in **Victor Mwendwa Mulinge vs. Republic [2014] eKLR**:

> ***"It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."***

64. The Court of Appeal in **Wangombe vs. Republic [1980] KLR 149** held inter alia:

> ***"…in Ssentale vs. Uganda [1968] EA 365, 368 [Sir Udo Udoma CJ]…said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we***

have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible." cited by Odunga J in Republic v SSM [2020] eKLR.

65. In **Adedeji vs. The State [1971] 1 All N.L.R 75** it was held:

> ***"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

66. In the South African case of **Ricky Ganda vs. The State, [2012] ZAFSHC 59**, the Free State High Court, Bloemfontein held:

> ***"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses…it is acceptable in totality in evaluating the evidence to consider the inherent probabilities…The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."***

67. In **R v Mahoney {1979} 50 CCC** it was held:

> ***"The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."***

68. I have perused the trial court record and I find that the appellant raised the alibi defence during the defence hearing and going by the above authorities, the prosecution could not have started investigations during defence hearing. Had the appellant disclosed his defence prior to the said defence hearing, the prosecution would have investigated it.

69. The prosecution cannot be blamed for not investigating a defence which was never raised prior to the hearing. In addition, the appellant claims that the prosecution failed to call the owner of the home where the defilement allegedly took place yet the appellant claims that DW3 was the said owner. In my humble view, the evidence of DW3 was weighed against the evidence of PW1 and PW2 as well as the clinical officer. The trial Magistrate said so at page 11 3of her judgment. I have reassessed that evidence against the prosecution evidence and I find that the testimonies by the prosecution witnesses that the appellant and complainant entered a homestead and that is where the appellant directed the minor to enter a house where she was defiled for a few minutes before the appellant received a warning that he had been seen believable. The trial magistrate who had the opportunity of seeing and hearing the two witnesses testify observed that they were firm, consistent and reliable-see page 11 last paragraph of the judgment. I have no reason to differ with her factual findings.

70. The fact that the trial magistrate observed that the alibi defence was not disproved by the prosecution is a misplaced fact because the trial magistrate did not stop there. She went further and stated that that notwithstanding, the court is duty bound to consider the said evidence as the same cannot be ignored and had to be weighed against the prosecution evidence. Counsel for the appellant therefore submitted out of context that the trial court contradicted its own finding which I find not true as the record says differently.

71. Albeit it was submitted in contention that the place where defilement took place was an issue, the charge sheet is clear that defilement took place in Barding Sub location while the complainant said she was send to Randago Market. There is a whole difference between a sub location and a market place. A sub location covers wider jurisdiction and it was not shown that Randago Market is not within Barding Sub location. I find the complaint and allegation of contradiction unfounded and dismiss it.

72. On why the report was made on 6th yet the accused was not contacted by the police and that he had to personally go to the police station, the prosecution evidence was clear that the appellant who was a teacher was away in Kisii after this incident, for sports hence it took 2 weeks to investigate and therefore the allegation that PW 5 did not investigate the case is unfounded.

73. On whether the doctor's evidence was contradictory for saying the injury was 5 days and later saying he could not tell how old the scar was, I find that the contradiction was minor because he was relying on the history given to him by the complainant and her parents on what had happened.

74. On whether the child psychologist should have been called to eliminate the possibility of the child being coerced to fabricate evidence against the appellant, I find no merit in this allegation as sexual offences victims are entitled to psycho social support and the complainant being a minor, from her own testimony, she was initially afraid of telling her parents of what had happened to her until PW2 told her mother. The complainant also stated that she feared being hated by her teacher if she refused to have sex with him an indication that she was a victim who accepted to be defiled out of fear hence she was unwilling to divulge information out of fear until she was counseled. The evidence of the child Psychologist in my humble view would not have made any difference as the evidence adduced by the prosecution witnesses overwhelmingly placed the appellant at the scene of crime as the perpetrator of the offence. I find no evidence to suggest that the appellant was framed simply because the appellant was her teacher and known to her.

75. On alleged contradictions in the medical evidence on injuries sustained, the Clinical Officer was clear that labia minora was bruised indicative of forceful penetration and that the reddening of the genitalia was due to the complainant having her menses and that the hymen was freshly absent. that evidence is clear on what constituted penetration

76. in the end, I find that the trial magistrate did consider that defence by the appellant and rightly dismissed it.

77. I nonetheless observe that the appellant's grounds of appeal never raised any issue of contradictions which I have considered as submitted.

78. On whether the learned trial Magistrate erred in law and fact in proceeding with the criminal case against the accused without complying with Section 200 of the Criminal Procedure Act and whether she needed to ask the appellant to concede to proceeding with the trial from where it had allegedly reached, ssection 200 of the Criminal Procedure Code deals with instances where a criminal trial is handled by more than one magistrate. The said section provides:

> ***"(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –***
>
> ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
>
> ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***
>
> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

79. The appellant's claim seems to be anchored in sub section (3). The appellant seems to allege that the hearing of his case commenced under a different magistrate other than the convicting and sentencing magistrate. I have perused the trial court record and save on occasions where several mentions were held and specifically on matters other than the hearing of the appellant's case, I do note that at all times the appellant's case was heard before Hon. Muthoni Mwangi, Resident Magistrate, the convicting and sentencing magistrate and therefore the appellant's claim is devoid of merit.

80. On the whole, I find and hold that this appeal against conviction lacks merit and is hereby dismissed. I further observe that the appellant's appeal is convoluted in that it refers to judgment of 16th December 2020 yet the judgment and sentence were pronounced on 11th January 2021. Further, no probation report was called for or ignored by the trial court.

81. On whether the sentence of 15 years imprisonment imposed on the appellant was manifestly excessive, I have noted that the convict appellant mitigated before he was handed the sentence. However, the trial magistrate handed the appellant the mandatory minimum. The appellant was a first offender. I have considered the mitigation, the circumstances under which the offence was committed, the age of the complainant and the appellant. There is no excuse for a person of the appellant who was a teacher to the complainant who was in Form Two to lure the complainant to have sex with her knowing that she was a minor and therefore consent cannot be imputed under any circumstances as alluded to by the appellant's counsel in his submissions. Nonetheless, this court has power to interfere with such mandatory minimum sentence as espoused in the Supreme Court case of **Francis Muruatetu & another v Republic [2017] e KLR case and as applied by the Court of Appeal in the Jared Injiri Koita v Republic [2019]e KLR case.**

82. Taking into account all the above circumstances, although the sentence imposed was lawful, I set aside the mandatory minimum sentence imposed on the appellant and resentence him to serve Ten (10) Years imprisonment to be calculated from date of sentence in the lower court as the appellant was on bond during the trial and absconded on 10/7/2020 and 22/7/2020 leading to the surety withdrawing and being discharged hence the appellant cannot benefit from the provisions of section 333 (2) of the Criminal Procedure Code on sentencing.

83. In the end, I find the appeal against conviction devoid of merit and the same is hereby dismissed. The appeal against sentence is allowed to the extent that the fifteen (15) years imprisonment imposed on the appellant is set aside and substituted with ten (10) years imprisonment to be calculated from the date of sentencing in the lower court.

84. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 27TH DAY OF APRIL 2021

R.E. ABURILI

JUDGE

In the presence of:

Mr. Onindo Counsel for the Appellant online via Microsoft teams

The appellant from Kisumu Maximum Prison online via Microsoft teams

Mr. Kakoi Principal Prosecution Counsel

CA: Modestar and Mboya