



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E001 OF 2020

*(Being an appeal from Original Conviction and Sentence by Hon. L. Kiniale – PM in Bomet P.M.C Criminal Case Number 70 of 2019)*

LEONARD KIPYEGON CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defiling a minor contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya. The particulars of the charge were that on 15<sup>th</sup> October 2019, at Tarakwa sub-location, within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of S. C, a child aged 7 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative Charge were that on 15<sup>th</sup> October 2019 at Tarakwa sub-location, within Bomet County, he unlawfully touched the vagina of S.C, a child aged 7 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called eight (8) witnesses in support of its case.
4. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the accused person and he was put on his defence. The accused person gave an unsworn statement and did not call any witnesses.
5. At the conclusion of the trial, he was convicted of the main charge and sentenced to life imprisonment.
6. Being dissatisfied with the judgment, the Appellant appealed to this court, on numerous grounds that are condensed as follows:
  - i. **THAT**, the learned trial magistrate erred in law and fact by convicting the appellant when the prosecution did not prove the essential ingredients of the charge of defilement.
  - ii. **THAT** the learned trial magistrate erred in both law and fact in convicting the appellant under section 8(1) of the Sexual Offences Act as read with subsection 2 thereof without sufficient evidence and without making a specific finding as to whether the appellant in fact defiled the complainant on the date, time and place indicated in the charge sheet.
  - iii. **THAT** the learned trial magistrate erred in both law and fact by basing her judgment on inconsistent and contradictory evidence of the prosecution witnesses and by failing to consider the Appellant's Defence thereby shifting the burden of proof to the appellant.
  - iv. **THAT** the learned trial magistrate erred in both law and fact by disregarding the fact that the investigating officer is a relative to the complainant and thus occasioned bias against the appellant in handling of the case.
  - v. **THAT** the learned trial magistrate erred in fact and law by failing to request for an Identification parade and relying on an inconclusive medical report.
  - vi. **THAT** the learned magistrate erred in both law and fact by ignoring the legal principles governing mitigation including the failure to request for a pre-sentence report

vii. **THAT** in whole, the finding and holding of the learned trial magistrate as contained in her Judgment delivered on 28<sup>th</sup> October 2020 is inconsiderate, erroneous, unlawful, biased and untenable in law.

#### **The Prosecution case.**

7. It was the Prosecution's case that the accused person defiled the minor S.C (PW1) on 15<sup>th</sup> October 2019. The court conducted a *voire dire* examination on PW1 and concluded that she understood and answered questions well. The trial court also stated that PW1 did not understand the meaning and nature of an oath and would thus give an unsworn statement. She testified that on the material day, she was at home sleeping with her younger brother. Then somebody came and carried her from her bed and put her near the door and "did bad manners to her." At this point the trial court noted that she pointed at her private parts. PW1 testified that she had worn a biker which the accused person removed. The accused person later covered her mouth and when she screamed, he covered her with a blanket. It was PW1's testimony that the accused person defiled her twice and left. She then ran to Sheila's house who was a neighbour who then took her to her mother, PW3.

8. PW1 testified that she knew the accused person and that they were not related. She further testified that it was not the first time she was seeing the accused person. She further testified that she saw the accused person on the material day as there was sufficient moonlight.

9. Joyce Kailil is the accused's mother who testified as PW2. She stated that she knew the complainant as she was the daughter of her neighbour K. It was her testimony that the accused person was her son and that he rides a boda boda. That on the material day, the Accused ate and left and she did not see him until the following morning. She testified that she heard about the defilement the following day and at that point the complainant had already been taken to hospital.

10. The complainant's mother (PW3) testified that on the material day at around 9pm she was sick and left to for the neighbour's house where there was a church meeting. That soon after, PW2 came looking for her and told her that something had happened to PW1. Upon asking the minor (PW1) what had happened she told her that she had been defiled. PW3 testified that she physically examined her daughter and found that she was bleeding. That they took the minor to Tarakwa dispensary from where they were referred to Longisa hospital where she was treated. PW3 later reported the matter to Bomet Police Station where they were issued with a P3 Form. PW3 further testified that the complainant told her that it was the accused person who defiled her. PW3 stated in cross-examination that they had bought land from PW2's family.

11. PW4 testified that he was the accused person's cousin. That on the material day he was heading home at around 9 pm. It was his testimony that he greeted the accused and told him that he was headed for a crusade. That after 20-30 minutes on his way back while on the road, he saw two ladies at PW3's house. He testified that PW3 was his neighbour. He later learnt that the accused had been arrested.

12. PW5 told the court that he was a neighbour to both the accused person and the complainant. That on the material day he met the accused person on the road just next to their land. He did not know where the accused person was going or coming from and just greeted him and he seemed relaxed. PW5 did not see the accused person defile the complainant.

13. Kitome Kipkemoi (PW6) testified that he is a Police Constable attached to Kisii Police Station. That on 21<sup>st</sup> October 2019, he was off duty at home. He was informed about the defilement incident by PW3 who is his sister-in-law on 15<sup>th</sup> October 2019. That on 21<sup>st</sup> October 2019 there were efforts by members of the public to arrest the suspect. He further testified that he rescued the accused person from the mob and escorted him to Bomet Police Station and thereafter recorded his statement. He further testified that he knew the accused.

14. Irene Kemboi (PW7) was the Investigating Officer. She testified that on 30<sup>th</sup> October 2019, PW1 and her mother reported a defilement case at Bomet Police Station. It was her testimony that PW1 had been treated at Tarakwa dispensary and later referred to Longisa Hospital. That she escorted PW1 to Longisa hospital and issued the P3 form which was duly filled. PW7 testified that she recorded their statements but she was unable to get the statement of the complainant's brother as he was too young. PW7 produced a clinic card that was marked a P.Exhibit 1 and a torn pant marked as P.Exhibit 3.

15. Julius Magut (PW8) a registered clinical officer working at Longisa Hospital testified that he examined PW1 on 16<sup>th</sup> October 2019. She was escorted by police officers. It was the testimony of PW8 that the complainant had bruises on the left labia majora, lacerations on the left labia majora. That there were numerous epithelial cells and the hymen was not intact which showed vaginal penetration. PW8 told the court that the medical report was filled and signed on 23<sup>rd</sup> October 2019. PW8 produced the P3 form that was marked as P.Exhibit 2 and a Post Rape Care Form marked as P.Exhibit 4.

#### **The defence case.**

16. The Accused testified as DW1. He testified that on 21<sup>st</sup> October 2019, he was in his ordinary business of boda boda riding when at around 3.08 pm, a customer made a request to be taken to Bomet town. That on the way, another customer stopped him and made a request to be dropped at Bomet Police Station. That he was arrested by two police officers upon arrival at the station and placed in the cells without being informed why he had been arrested. He was taken to court the following day.

17. The Accused testified that he and the complainant's mother had a land dispute and that she had warned him that "she will do something that he regrets". He further testified that he was at home on the material day, 15<sup>th</sup> October 2019. He faulted the complainant's testimony stating that the complainant was unable to explain what he did to her.

#### **The Appellant's submissions.**

18. The Appeal was canvassed by way of written submissions. The Appellant through his advocate submitted that only two ingredients

forming the offence of defilement were proved. It is the Appellant's submission that the age of the complainant was not in doubt and the issue of penetration was settled by the medical evidence tendered by PW7. What the Appellant disputed is the identification of the accused person.

19. It is the Appellant's submission that the prosecution relied on flimsy evidence and uncorroborated testimonies of its witnesses. That the witnesses only testified that they met the accused person on the road side and did not see him commit the offence. The Appellant submits that PW3 and PW4 confirmed that there was a crusade nearby on the material day. The Appellant further submitted that he raised an alibi which was ignored by the trial court. It was the defence of the Appellant that at the time of the alleged offence he was still carrying on with his boda boda business.

20. The Appellant submitted that circumstantial evidence can be a basis of conviction only if there were no other co-existing circumstances weakening the chain of circumstances relied on. It is the Appellant's submission that the evidence adduced barely supported the complainant's allegations. He relied on the case of **Muchene Vs Republic (2002) 2 KLR 367, Nairobi High Court Criminal Appeal No. 1216 OF 1999** to support this submission.

21. It is the Appellant's submission that the arresting officer, PW6 was a relative of the complainant and that his (PW6's) testimony was false. He maintained that he was in his normal course of work when two unknown people approached him and asked for a ride to Bomet Police Station where he was thereafter arrested. The Appellant submitted that he was not subjected to mob justice by members of the public. He further testified that the mother of the complainant framed him as there had been a land dispute between them.

22. With respect to identification, the Appellant submitted that there were gaps in the evidence. He wondered how the moonlight could flood into the house to enable the complainant identify him. That if the complainant and her brother were already asleep then it was expected that the windows and doors to the house were closed.

23. The Appellant submitted that the prosecution relied on uncorroborated testimony of the complainant. That it is in no doubt that the evidence of a minor requires corroboration and in his case, there was no material corroboration. He relied on the case of **Bernard Kebiba Vs Republic (2000) eKLR** to support this submission.

24. The Appellant submitted that the trial court made a serious error in criminal jurisprudence when it solely relied on insufficient evidence and testimonies of the prosecution witnesses while ignoring the defence of the Appellant.

25. It is the Appellant's submission that the evidence tendered by the prosecution's witnesses and in particular PW3, PW6 and PW8 was contradictory and that the issue of the issuance, filling and dating of the P3 form was not clear. The Appellant further submitted that the charges against the Appellant had been predetermined and the Appellant was being framed for an offence he did not commit.

26. It is the Appellant's submission that the prosecution had not proved its case beyond reasonable doubt and that it was a case that was marred with a lot of doubt. He relied on the case of **Elizabeth Waithiegeni Gatimu Vs Republic (2015) eKLR**, to support his submission. It is the Appellant's submission that the trial court did not analyse the evidence properly and therefore failed to see the glaring contradictions, discrepancies and loopholes. That the charge was born out of malice and ill will because the prosecution did not take any steps to seek DNA of the spermatozoa.

27. On sentence, the Appellant submitted that the sentence meted by the trial court was punitive and harsh. The Appellant submitted that the trial court did not consider his mitigation and applied the sentence in a mandatory form while disregarding the court's discretion to reduce the sentence bearing in mind the circumstances in hand. He relied on the case of **Kisumu Court of Appeal, Criminal Appeal No. 33 of 2015 Paul Ngei Versus Republic (2019) eKLR**, to support his submission. The Appellant finally prayed that in the interest of justice, this court quashes the conviction and have the sentence set aside.

#### **The Respondent's submissions.**

28. It is the Respondent's submission that the elements considered in proving a case of defilement were proved. On the issue of penetration, the Respondent submitted that the P3 form, a Post Rape Care form and treatment notes were produced as exhibits that showed that the victim suffered bruises and lacerations to her genitals and the hymen was not intact. The Respondent further submitted that the fact that the Appellant was not examined did not negate that penetration was established. That whereas a medical examination on the offender was helpful, it was not mandatory. They cited the case of **Beranrd Odongo Ogutu Vs Republic (2018) eKLR** to support its submission.

29. The Respondent submitted that in terms of identification, PW1 stated that she identified the Appellant using moonlight which was adequate to enable her recognize the Appellant. That PW2 and PW3 all stated that the Appellant was a neighbour to PW1. The Respondent further submitted that the Appellant was the assailant and the same was not shaken during the trial. It is the Respondent's submission that the identification was safe and reliable.

30. With respect to the Appellant's alibi, the Respondent submitted that after an alibi defence is raised, the court ought to consider the defence and weigh it against the evidence of the prosecution already tendered so as to establish its efficacy. The Respondent further submitted that that the Appellant did not call any witness to corroborate his facts. They relied on the case of **R VS Sukha Sign S/O Wazir Singh & 7 Others (1939) 6 EACA 145**. It is the Respondent's submission that the Appellant was placed at the scene by the testimonies of PW1, PW4 and PW5 and that the trial magistrate rightly considered the Alibi defence and dismissed it as an afterthought.

31. The Respondent submitted that it had proved the elements of the offence to the required standard and that the Appellant was positively identified.

32. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal case of **Okeno –Vs–**

Republic (1972) EA 32 has been consistently cited as follows:-

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

33. I have given due consideration to the Record of Appeal filed on 19<sup>th</sup> November 2020, the Appellant’s Written Submissions dated 28<sup>th</sup> April 2021 and the Respondent’s Written Submissions dated 17<sup>th</sup> May 2021. Four issues arise for determination as follows:-

- (i) Whether the Prosecution proved its case beyond reasonable doubt.
- (ii) Whether the Defence places doubt on the prosecution case.
- (iii) Whether the Sentence preferred against the accused person was manifestly excessive, harsh and severe.

**(i) Whether the Prosecution proved its case beyond reasonable doubt.**

34. It is trite law that for the offence of defilement to be established, the age of the victim, penetration, and the positive identification or recognition of the offender must be proved. In **Ouma Vs Republic (1986) KLR 619**, the Court of Appeal had the following to say in regard to evaluation of the prosecution evidence:-

***“At the time of evaluating the prosecution’s evidence, the court must have in mind the accused person’s defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person”***

35. The accused person was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. Section 8 (1) of the Act states that any person who commits an act which causes penetration with a child is guilty of an offence of defilement. The Children’s Act no. 8 of 2001. A child is defined in the Children’s Act as any human being under the age of eighteen years.

36. The Court of Appeal in the case of **Hadson Ali Mwachongo Vs Republic (2016) eKLR**, stated that:-

***“The importance of proving the age of the victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello vs. Republic Cr. App 203 of 2009 (Kisumu) this Court stated as follows***

***In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1).”***

37. It is clear that the age of PW1 was not disputed. A clinic card produced as P.Exhibit 1 indicated that the complainant was born on 20<sup>th</sup> October 2012. The date of the alleged offence was 15<sup>th</sup> October 2019 which means the Complainant was aged 7 years. The Appellant submitted that the age of the complainant was not in doubt. In light of the above, I find that the complainant was aged 7 years.

38. Section 2 of the Sexual Offences Act defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of **EE Vs Republic (2015) eKLR**, the court stated that:-

***“An important ingredient of the offence of defilement is that there must have been penetration. Penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement.”***

39. Penetration is proved by the evidence of the victim which is corroborated by medical evidence. In the case of **Bassita Vs Uganda S. C Criminal Appeal Number 35 of 1995**, the Supreme Court of Uganda held that:-

***“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.”***

40. In the present case, the victim (PW1) testified that somebody called her from the bed and put her near the door and did “bad manners” to her twice. The court record notes that the PW1 pointed to her private parts and looked extremely shy. The courts have determined the use of the words “bad manners” or “tabia mbaya” as acceptable description by children of sexual intercourse or defilement. In the case of **Muganga Chilejo Saha Vs Republic (2017) eKLR**, the Court of Appeal held 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 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 such as “alinifanyia tabia mbaya.”*

41. PW8 produced and marked the P3 form and Post Rape Care Form as P.Exhibit 2 and P.Exhibit 4 respectively. PW8 testified that he examined the complainant on 16<sup>th</sup> October 2019 and found that she had bruises and lacerations on the left labia majora. He further testified that he found numerous epithelial cells and that the hymen was not intact and that was consistent with vaginal penetration. It was his finding that there was penetration.

42. Section C of the P3 form reveals the results of the examination which were bruises on labia majora, lacerations on the labia minora and a freshly torn hymen. The P3 form was signed by one Dr. Julius Magut, PW8. The accused person did not challenge the authenticity or the contents of the P3 form when he cross examined PW8. The Post Rape Care Form that was filled the day after the incident i.e 16<sup>th</sup> October 2019 confirmed the findings contained in the P3 form.

43. From the above, I find the evidence of the victim credible. It is also corroborated by the medical evidence contained in the P3 form and Post Rape Care Form. It is my finding that the act of penetration was proved beyond reasonable doubt.

44. The Appellant submitted that the prosecution did not take any steps to seek DNA of the spermatozoa and as such the prosecution was pinning there was no sufficient proof to link the Appellant to the offence. In the case of **Robert Mutungi Mumbi Vs Republic Criminal Appeal Number 52 of 2014 (2015) eKLR**, , the Court of Appeal held that:-

*“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”*

45. Furthermore, the law does not require the presence of spermatozoa as proof of penetration. The Court of Appeal in the case of **Mark Ouiruri Vs Republic (2013) eKLR**, expressed itself on this matter as follows:-

*“..... and the effect that the medical examination was carried out on her on 16<sup>th</sup> November 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl’s organ....”*

46. In this case therefore, and guided by the authorities above, I find the Appellant’s complaint that DNA was not extracted to be of no value. The absence of DNA was not fatal as penetration was clearly proved by the victim’s evidence and medical evidence contained in the P3 Form and the Post Rape Care Form.

#### **Identification of the Appellant**

47. With regard to the issue of identification, the Court of Appeal in the case of **Cleophas Wamunga Vs Republic (1989) eKLR** expressed itself as follows:-

*“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”*

48. The English case of **R VS Turnbull (1977) QB 224** is also useful in this regard. It explicitly explains that:-

*“If the quality (of identification evidence) 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. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution.”*

49. In the present case, PW1 testified that the Appellant was the person who defiled her as she saw him with the aid of the moon light. She further testified that it was not the first time she had seen him as she had seen him before on the road. The court record also noted that PW1 pointed to the accused person in court when she was asked if the perpetrator was in court.

50. The remaining prosecution witnesses did not witness the defilement though the testimonies of PW4 and PW5 placed the accused person near the crime scene. PW4 testified that he met the accused person on the road on the material day and greeted him. PW4 also testified that PW3 who was the mother of the complainant was his neighbour. PW5 also testified that on the material day, he met the accused person on the road next to their land and he also greeted him.

51. I find the evidence of PW3, PW4 and PW5 as corroborating that of PW1. The Appellant was clearly known to the victim and she recognized him with the aid of moonlight while PW3, PW4 and PW5 placed him at the scene.

52. Further, Section 124 of the Evidence Act empowers the court to convict an accused person solely on the evidence of the complainant. It provides:-

***“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 of it, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

53. The above position was affirmed in the case of **J.W.A Vs Republic (2014) eKLR**, where the Court of Appeal held that:-

***“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”***

54. A similar position was taken in **Mohamed Vs Republic (2006) 2 KLR 138**, where the High Court held that:-

***“It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”***

55. In this case, PW1 was taken through *voire dire* examination by the court and from the proceedings, it is clear to me that PW1 recounted very well what happened to her. She testified that the accused person defiled her twice. She was also able to remember that the accused person covered her with a blanket when she began screaming. Upon cross-examination, she testified that as the accused was running away, he turned back and she saw him. PW1's testimony was not shaken on cross-examination. PW1 also testified she had seen the accused person before on the road and that it was not the first time she had seen him, therefore the accused person was not a stranger to PW1.

56. I am satisfied that PW1 though being of tender years understood the duty of speaking the truth and answered questions well. She was even cross examined by the accused person and thus court had every reason to believe her testimony as truthful and accurate.

57. In light of the foregoing, I am convinced that the prosecution adequately proved the elements of the charge against the accused person and that there was positive identification of the accused.

#### **(ii) Whether the Defence places doubt on the prosecution case.**

58. I considered the defence case to see whether it cast doubt on the prosecution case. He stated that he was arrested for an offence he knew nothing about. He also stated that there was a land dispute between his family and the complainant's mother (PW3) and that PW3 had warned him that she would do something to him that he would regret. The accused claimed that on the material day, he was working then he went home and was at home when the offence occurred.

59. The Respondent submitted that the accused person did not call any witnesses to corroborate his evidence of transporting a customer using his boda boda on the material day or him being at home during the commission of the offence. The case of **R Vs Sukha Singh S/O Wazir Singh & 7 Others (1939) 6 EACA 145**, where the Court held that:-

***“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 interval, secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”***

Alibi is defined in the Black's Law Dictionary, 10<sup>th</sup> Edition as:-

***“A Defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.”***

60. It is trite that once a Respondent raises an alibi defence, the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial as held by the Court of Appeal in **Victor Mwendwa Mulinge Vs Republic (2014) eKLR** as:-

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

61. The Court of Appeal in the case of **Wangombe Vs Republic (1980) KLR 149** held as follows:-

***“..... In Ssentale vs. Uganda (1968) EA 365, 368 (Sir Udo Udoma CJ)... said that a prisoner who puts forward 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 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.”***

62. The prosecution through PW1, PW4 and PW5 were able to prove that the accused was not at home during the time the offence was committed. These witnesses placed the accused person near the scene of the defilement. PW2 who was his own mother testified that the accused person came home on the material day, ate and left and she did not see him until the following morning. The accused chose not to challenge this testimony through cross-examination. The testimony, which stood unchallenged, destroyed the Accused’s alibi that he was at home away from the crime scene at the material time. There is nothing on record to show that the accused was indeed home on the material day.

63. It is salient to note that this defence of alibi was raised at the defence hearing and not at the beginning of the trial.

64. It is my finding, from my evaluation of the evidence above that the accused raised a false alibi which failed to stand scrutiny.

65. One of the grounds raised by the Appellant is that the trial court disregarded the fact that the investigating officer was a relative to the complainant and that occasioned bias against the Appellant in handling of the case. This court notes from the record that PW6, a Police Constable attached to Kisii escorted the accused to Bomet Police Station after rescuing him from mob justice. PW6 testified in open court that PW3 who is the complainant’s mother was his sister in law. It is salient to note that PW6 was not the investigating officer in the case. PW7, Irene Kemboi was the Investigating Officer. It is my finding that the relationship between PW6 and PW3 did not occasion any prejudice against the Appellant as his role was limited to rescuing him from mob justice.

66. The accused stated that his family had a land dispute with the complainant’s mother being PW3 and that PW3 threatened to do something to him that he would regret. PW3 testified that they were close neighbours and she bought land from the family of the Accused. Upon cross-examination, she confirmed that she never quarrelled or threatened him. She further testified that she was not framing him. I dismiss the suggestion of a frame up as it is not supported by any evidence.

67. From my analysis of the evidence as stated above, it is my finding that the Appellant’s defence did not cast any doubt on the prosecution case which I have already found proven.

**(iii) Whether the Sentence preferred against the accused person was manifestly excessive, harsh and severe.**

68. The Appellant has argued in his appeal that the sentence was manifestly harsh. He was however charged under section 8(1) as read with section 8(2) of the Sexual Offences Act. The provisions state:-

*(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 imprisonment for life.*

69. In **Bernard Kimani Gacheru Vs Republic (2002) eKLR**, the Court of Appeal stated that:-

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

70. It is my finding that the sentence, though harsh was lawful. The Appellant cannot benefit from the dictum in the case of **Francis Karioko Muruatetu and Another Vs Republic, Petition No. 15 & 16 (Consolidated) of 2015**, as the Supreme Court has since clarified in Muruatetu (*Supra*) Guidelines that:-

***“We therefore reiterate that, this Court’s decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.”***

71. In the final analysis, I have come to the conclusion that the appeal lacks merit. I confirm both the conviction and sentence. The appeal is consequently dismissed.

72. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30TH DAY OF SEPTEMBER, 2021.**

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**R. LAGAT-KORIR**

**JUDGE**

**Judgment delivered in the presence of the Appellant (Virtually present at Naivasha Prison), Mr. Mugumya for the Appellant, Mr. Wawire holding brief for Mr. Murithi for the Respondent, and Kiprotich (Court Assistant).**