Mbeleti v Republic (Criminal Appeal 12 & 39 of 2020)
[2021] KEHC 181 (KLR) (21 October 2021) (Judgment)

Neutral citation: [2021] KEHC 181 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 12 & 39 OF 2020

MW MUIGAI, J

OCTOBER 21, 2021

BETWEEN

MUSYOKI MBELETI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence at Kithimani before Hon. E.W Wambugu (SRM) on 15 th January 2020)

JUDGMENT

BACKGROUND

1. The Appellant was charged in Kithimani Law Courts before Senior Resident Magistrate, Hon. E.W Wambugu and judgment was delivered on 15th day of January 2020. The Accused 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 offence being that on the 6th day October 2017 in Yatta Sub-County within Machakos County intentionally and unlawfully caused his male genital organ to penetrate into the female genital organ of BM, a child aged 6 years.

2. The Accused faced the alternative charge of indecent act with a child contrary to Section 11(1) of the same Act the particulars being that during the same period at the same place he intentionally touched and rubbed the female genital organ of BM, a child aged 6 years with his male genital organ.

3. In support of the Prosecution case, 4 witnesses testified while the Appellant was the only witness in support of his case.

TRIAL COURT PROCEEDINGS

4. On 7th March 2018, a voire dire examination was conducted by court on PW1 (Child) BM. The Learned Trial Magistrate found out that the Child could not understand the meaning of oath although

she was intelligent but did not appreciate the duty of telling the truth. The Learned Trial Magistrate directed that she was to give an unsworn statement.

5. PW1 stated her name is BM. She was in Pre-unit at [Particulars Withheld]. Her teacher J taught them to speak the truth. She stated that she resided in [Particulars Withheld] with her grandmother who is called R and grandfather while her mother lives at home. According to her, the Appellant is called Musyoki. She saw him at Matuu Hospital. According to her testimony, Musyoki held her mouth and throat. She stated in Kiswahili that 'Musyoki aliingiza kasoli hapa'. In court PW1 pointed her private part. PW1 was unable to proceed with her testimony hence the court directed that she step down.

6. PW2, R, stated that she resides in [Particulars Withheld]. According to her, PW1 was her grand-child. She stated that PW1 was 6 years old born on 24th June 2011 and a student in Pre-unit at [Particulars Withheld]. Her mother was her daughter M who has a mental problem. A copy of Certificate of Dedication in Church for PW1 was produced as P exhibit 1. PW2 stated that the Appellant was her employee since July 2017 until 6th October 2017. The Appellant ploughed land and looked after her goats. She had given the Appellant a house within the compound. According to her, the Appellant knew PW1. The Appellant prepared and served food to them. She stated that she picked PW1 from school.

7. It was PW2 testimony that on 6th October 2017 at 10 am, she went to visit her neighbor who had sustained injuries from a road accident. She went back home at 6 pm and found PW1 standing at the gate. PW1 eyes were red and her temperature was high. She thought it was her usual tonsils. She took PW1 inside the house, gave her Panadol and made her lie on the seat. According to PW2, she asked Musyoki, to serve food but when she gave PW1, PW1 declined to eat. She took PW1 to her bed and made her lie down but PW1 shouted saying that she was in pain and pointed her private parts. PW2 removed PW1's trouser whereby she saw PW1 vagina was red. She asked PW1 who said that the Appellant had held her and put in his 'Kasoli' which in Kamba language it is 'Kia' (Penis). According to PW2, the Appellant inserted his penis in PW1 vagina. PW1 told her that the Appellant took PW1 to the kitchen, sat PW1 on a stool, held her mouth and neck and told PW1 not to inform PW2 of anything. PW2 stated that she took PW1 to Gateway Hospital in Matuu where she was directed to get an OB before treatment. She went to the Police station. The Appellant was left behind and they were told to go back the next day. According to PW2, Police Officers took them to hospital whereby they were examined and the police took a report. P3 Form was produced as PMF1.According to her, the Appellant did not explain anything to her.

8. In cross-examination, PW2 stated that on that day, PW1 was picked by her mother who left PW1 with the Appellant. She stated that PW1 informed her what had happened. They all went to the Police Station and Hospital. According to PW2, her testimony is true. She stated that PW1 does not sleep with her mother but at PW2's home.

9. In re-examination, PW2 stated that she had told the court what she had seen. She saw PW1's vagina was red. PW1 told her it was done by the Appellant. She believed PW1 and it was the first time that PW1 told her about the Appellant.

10. PW1 was recalled. She stated that the Appellant held her mouth and neck. The Appellant blocked her mouth and strangled her at the Kitchen. The Appellant sat on a stool. According to her, the Appellant 'aliingiza kasoli (penis) hapa' (points at her private part). The Appellant removed her trouser and panty and inserted his 'Kasoli' once. She felt pain. She stated that the Appellant bought her sweets. According to her, PW2 was not at home. PW2 had gone to Matuu. On that day the Appellant prepared their meal. PW2 gave her medicine that evening. She stated that she told PW2 what the Appellant done to

her when PW2 came back home in the evening. It was PW2 who took her to hospital where she was seen by a doctor. They also went to Matuu police station.

11. In cross-examination, PW1 stated that she found the Appellant at home that day alone. According to her, it was her mother who picked her from school that day. She stated that her testimony was true about what the Appellant had done to her.

12. In re-examination, PW1 stated that the Appellant inserted his 'Kasoli' on her private part. The Appellant is called Musyoki who was before the court.

13. PW3, Philip Njaramba who is now a clinical officer at Masii Health Centre worked before at Matuu Level 4 Hospital, stated that he holds a Diploma in clinical medicine from KMTC. He stated that he had practiced for 10 years. He had a P3 form for PW1 who was 6 years old in 2017. According to PW3, PW1 had been brought at the hospital with a history of defilement on 6th October 2017 at around 5 pm by a person known. PW1 was sober and able to explain the incident. She had no injuries on her head, abdomen and limbs.

14. According to PW3, on further examination of PW1 private parts, PW1 had tenderness on the outer part of labia minora (outer part of the vagina) and redness on labia minora. There was no blood or discharge. He stated that Lab examination tests were done. He gave a lab request form. According to him, urinalysis and blood tests were done whereby urine had 3.4 puss cells which to him is sometimes normal. HIV test was negative. In conclusion he stated that there was an attempted and partial penetration since her hymen was intact. The partial penetration caused the redness on labia minora. He produced the P3 Form as P exhibit 1, Lab Request Form as P exhibit 2 and Lab results as P exhibit 3.He also produced PW1 birth certificate as PMF1 4.

15. In cross-examination, he stated that he examined PW1 and not the Appellant. According to him, the child was sexually assaulted and based on the history of the age of the child, 6 years, a penis was used to inflict the injury. He stated that the child was in pain.

16. PW4, Corporal Edna Kimaru from Matuu Police station was the Investigations officer. She recorded the child's witness statements and her witnesses. She stated that the defilement case against the Appellant was reported on 6th October 2017 at 2140 hours. The Appellant had been placed in the cell after being brought by the child's grandparents. She stated that she and PC Yegon took the child and Appellant to Yatta Health Centre but since the doctors were on strike, they were transferred to Matuu Level 4 Hospital after clinician had examined the child and Appellant. She stated that the child was 6 years old. The child's birth certificate was produced as P exhibit 4. She stated that the child had identified the Appellant as the person who defiled her. PW4 stated that he did not know the Appellant before and had no grudge with him.

17. In cross-examination, PW4 stated that the defilement was proved by the clinical officer. She stated that it is not in dispute that the Appellant was a casual laborer to the child's grandmother's home. It was her testimony that an examination was conducted again at Matuu Level 4 Hospital. According to her, they relied on the report from Matuu Hospital. She stated that she was present when the examination was conducted. She had gone to the hospital with child's grandmother.

18. In re-examination, PW4 stated that the child identified the Appellant who was working at their home. The grandparent also identified him. She stated that she later called the Appellant and interrogated him. According to PW4, when the report was done, the child had been taken to Yatta Health Centre. She stated that the result from Yatta Hospital were taken to Matuu Level 4 Hospital. It was testimony that she never saw the child's father.

19. On 21st May 2019, the Learned Trial Magistrate found that the Prosecution had established a case against the Appellant hence placed him on his defense pursuant to Section 211 of *Criminal Procedure Code*. He chose to give sworn evidence and not call any witness.

20. The Appellant testified as DW1 on 23rd October 2019. He stated that he understood the charge against him. It was his testimony that on the 6th day of October 2017 his employer, R went to a police station at 12 pm and reported although the employer had told him that she had gone to the market. DW1 stated that he did not know what report was given by his employer but the employer had said that she was to go back in the evening with someone. His employer came home at 6 pm. At 10 pm his employer told him to accompany her to withdraw money sent by her son to pay the Appellant his Kshs.20, 000/-. He stated that they went to an M-pesa close to the police station where he was arrested by police and locked in the cell. He stated that he has been in the dark since then. It was his testimony that after he was arrested, his employer went home with the child. He stated that he was not taken to hospital.

21. In cross-examination, DW1 stated that his employer was R. On 6th October 2017, his employer left for the market. DW1 stated that he went to work. According to DW1, he had no differences or grudge with his employer. He testified that his employer testified in court and he cross-examined his employer about the debt of Kshs.20, 000/- owed to him. According to DW1, his employer was looking after her granddaughter who was in school. He stated that the child was brought to her employer at 7 pm. According to DW1, he never met the child that day and the evidence is fabricated.

22. In re-examination, DW1 stated that if he had committed the offence, the child's mother and father would have been witnesses. The Appellant case was closed.

TRIAL COURT JUDGMENT

23. In her judgement, guided by the case of *Dominic Kibet Mwareng vs. Republic (2013) eKLR* on the ingredients necessary to prove the offence of defilement found that PW1 who was 6 years old as per the birth certificate fell under the age bracket contemplated by Section 8 (2) of the *Sexual Offences Act*. As regards the ingredient of penetration by dint of Section 2 of the same Act, she was satisfied that PW1 evidence supported by PW3 medical evidence there was partial penetration. Lastly, it was the Learned Trial Magistrate's finding that the incident occurred during the day hence there were no chances of PW1 mistaking the identity of the Appellant. Based on the above, the Learned Trial Magistrate convicted the Appellant for the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act*, No.3 of 2006.

24. In mitigation, the Appellant pleaded leniency and pardon. He stated that he was depended upon at home and a first offender. Upon considering the Appellant's mitigation, Victim Impact report filed in court and the Supreme Court decision in *Francis Karioko Muruatetu & another vs. Republic [2017] eKLR* with regard mandatory sentences, the Learned Trial Magistrate imposed a sentence of 40 years imprisonment.

MEMORANDUM OF APPEAL

25. It is the conviction and sentence by the learned trial magistrate that provoked filing of this appeal. In this appeal the Appellant has condensed his grounds of appeal as follows:-

    (1) THAT the learned trial magistrate erred both in law and in fact when he conducted an unfair and irregular trial contrary to the constitutional provisions.

    (2) THAT the learned trial magistrate erred both in law and in fact in substituting or upholding his opinion in the place of an expert and in off handedly rejecting the evidence of such experts which evidence created a doubt as to the critical aspects of minors and sex.

(3) THAT the learned trial magistrate erred both in law and fact by misconstruing or failure to carefully examine the evidence in the circumstances and therefore arriving at the wrong decision hence suspicion and doubt.

(4) THAT the learned trial magistrate erred both in law and fact in reliance on disjointed circumstances and or uncorroborated evidence which was unsafe to do. Accordingly, the learned trial magistrate erred in further concluding that the prosecution had proved its case beyond reasonable doubt.

(5) THAT the learned trial magistrate erred both in law and fact when he dismissed my strong and formidable defense that was capable of dislodging the prosecution case as he meted a very harsh punishment.

APPELLANT'S SUBMISSIONS

26. In this appeal, the Appellant contends that the process he was subjected to during the plea taking was not procedural as per the case of *Adan vs. R. (1973) EA 445*. Pursuant to Article 50(2) (b) of the *Constitution*, the charges against him were not explained in details to enable him answer. The court did not give direction that he supplied with all documents. According to the Appellant, Article 50(2) (g) (h) (i) (k) (l) on right to information, (i) (k) and (l) on right to remain silent, to adduce and challenge evidence and sub article (4) on evidence admissions were infringed.

27. On 19th December 2017, as per the Trial Court record, the Prosecutor confirmed to the Court that he supplied the Accused with copy of the charge sheet, investigation diary, 4 Witness Statements and copy of P3Form. If the claim was/is not true, the Appellant failed to raise the issue when the Prosecutor said so if he had not provided these documents to enable him prepare his defense.

28. A copy of the birth certificate was served to him when the case was mid-way after it was produced by PW4 as an Exhibit in Court which was not safe given that the learned trial magistrate was coincidentally unwell hence not able to detect the mischief. The medical report was prepared and produced by a clinical officer whose expertise was questionable. It is submitted that the same ought to have been done by a medical doctor.

29. Even though there is medical evidence that the minor was defiled, there is no evidence that the Appellant committed the offence. It is submitted that penetration had not been proved since the clinical officer, PW3 found the following that; there was no blood or discharge; Urine had 3.4 puss cells which is sometimes normal; HIV test was negative; hymen was intact. Reliance is placed on the case of Cr.App.No.195 of 2019 *Casper Wakanzo Shibia vs R*. where a medical evidence was held to be inconclusive with regard to the element of penetration. According to the Appellant, the fact that hymen was intact is a scientific proof that no penetration was done be it partial or complete. Reliance is placed on Lord Campbell in "*The Tracy Peerage* [1839] 10 cl and F 154 on the scientific witnesses.

30. The Appellant contends that there was lack of positive identification and credible investigation. According to him, the fact that he was employed by PW2 is not satisfactory that guilt can be inferred upon him. The mode of arrest connotes the charges had been framed against the Appellant. The planned arrest was a scheme to bar the Appellant from demanding his pay. Reliance is placed on the case of *Eliud Kamau Njuguna vs. R. Cr. App No.82 of 2010* in evaluation of the evidence sufficiently and considering circumstances for identification or quality of evidence of recognition of the Appellant.

31. The Appellant submitted that he is a victim of circumstances in this matter and that the evidence used to convict him did not satisfy the legal requirement of circumstantial evidence to warrant his conviction.

32. His testimony of debt in the sum of Kshs.20, 000/- was never considered by court. The Prosecution never substantiated the possibility of a debt having been settled. Reliance is placed on the case of *SM vs. R [1958] EA 715*, *MCgree vs. DPP [1973] CLR 232* and *AO & Others [1962]EA*. According to the Appellant the prosecution evidence was based on suspicion which cannot provide the basis of inferring the guilt.

33. As regards the sentence, the Appellant submitted that the sentence was excessive and harsh. It was not proportionate. Reliance is placed on the case of *R vs. Anthony Kiarie Njoroge & 4 Others. Cr. App No. 236 of 2005*, *AG vs. Batista Ligoni Beni Cr.App.No.65 of 2004* and in *Elizabeth Waithiengeni Gatimu vs. R [2015] eKLR*. According to the Appellant he is alive to the fact that the life sentence was imposed upon him because it was the minimum sentence. According to the Appellant, the trend has been to move away from minimum (mandatory) sentences and to sentence the accused persons depending on the nature and circumstances of the case. Reliance is placed on the case of *Evans Wanjala Wanyonyi vs. R. [2019] eKLR* where the Court of Appeal placed reliance on the Muruatetu's case (supra) in respect of the unconstitutionality of mandatory sentences.

34. The Appellant has urged the court to find that the Prosecution failed to discharge its duty of proving its case beyond reasonable doubt hence unsafe to convict the Appellant. Accordingly, the appeal should be allowed, conviction quashed and sentence set aside.

PROSECUTION'S SUBMISSIONS

35. On behalf of the Prosecution two sets of written submissions were filed on 17th and 18th of February 2021. It was submitted that the age of PW1 was proved vide a birth certificate, her testimony, PW2 testimony and PW3 through a medical report. Reliance is placed on the cases of *Kaingu Elias Kasono vs. R. (Malindi Criminal Appeal No. 54 of 2010* and in *Charles Wamukoya Karani vs. R. Criminal Appeal No.72 of 2013* on the proposition that age is a critical component.

36. As regards identification of the Appellant, it is submitted that the Appellant was living with PW1 and PW2 hence PW1 knew the Appellant well and properly identified him. On whether there was penetration, it is submitted that PW3 found that PW1 had tenderness on the outer part of labia minora and redness on the labia minora. Reliance was placed on PW3 findings that there was partial penetration by a penis which caused the redness. Further reliance is placed on the case of *FOD vs. R. (2014) eKLR* on the proposition that penetration must be proved which can either be partial or complete as per Section 2 of the Act.

37. As regards the plea taking process faulted by the Appellant, the Prosecution submitted that at page one of the court proceedings from line 11-17 and page 2 lines 2 clearly show how plea was taken. According to the Prosecution, every element was explained to the Appellant in a language that he understood. The birth certificate was produced in court as PMF1 and later as P exhibit 4 by the Investigation officer. It is submitted that the document ascertained the age of PW1. A voire dire examination was conducted by the court. According to the Prosecution, the Appellant did not suffer any prejudice with the production of the birth certificate since it did not avail any information that was adverse or detrimental to him or his case. It is submitted that no circumstantial evidence was relied on in this case since PW1's age was proved, medical report proved penetration and the Appellant was recognized by PW1. According to the Prosecution, a Prima facie case was established hence no burden of proof was shifted to the Appellant. The Appellant defense did not poke any holes on the prosecution case to dislodge the defilement case against him beyond reasonable doubt.

38. According to the Prosecution, the Appellant having been convicted on the main count of defilement, the 40 years sentence was appropriate hence the court should uphold the conviction and sentence.

RESPONSE

39. In response, the Appellant further submitted that penetration could not be proved when PW3 found that the hymen was intact. According to the Appellant, PW3 findings ought to be satisfied by cogent evidence but not mere assertions. The prosecution evidence was marred by suspicion. It is submitted that the learned trial magistrate failed to take into account his age while imposing the sentence. Reliance is placed on decision of Ojwang J. (as he then was) in *Yussuf Dahar Arog vs R. [2007] eKLR*.

DETERMINATION

40. I have considered the evidence adduced before the trial court and submissions filed on behalf of respective parties in this appeal.

41. This being the first appellate court, I am therefore required to re-evaluate and subject the evidence before the trial court to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same as observed by the EA Court of Appeal in *Okeno vs. Republic (1972) EA 32* where the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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 finding and conclusion; 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."

42. However in *M'Riungu vs. Republic [1983] KLR 455* the court held:

> " Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.."

43. The Appellant first submitted that the trial process was not fair. According to the Appellant Article 50(2) (a) (b) (g) (h) (k) and (4) of the Constitution, 2010 was infringed.

44. Article 50(2) of the Constitution,2010 provides as follows:-

(2) Every accused person has the right to a fair trial, which includes the right—

(b) to be informed of the charge, with sufficient detail to answer it;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence."

45. Article 50(4) provides that:-

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

46. The Appellant contends that the plea taking process was not procedural as per the case of Adan vs. Republic [1973] EA 445. At page 446 of the case, the Court of Appeal laid down the plea taking process where the accused person pleads guilty as follows:-

(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

47. Section 207 of the Criminal Procedure Code(CPC) prescribes the procedure for plea taking as follows:-

"

"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

48. I note as per the court proceedings what was recorded in plea taking was as follows;

" 9/10/17

Coram:

Prosecutor

Court Clerk

Interpretation in English/Swahili/Kamba

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language he/she understands. Who on being asked whether he/she admits or denies the truth of the charge(s) replies in Swahili

Count 1

Sio kweli

Alternative count

Sio ukweli

Court

Plea of not guilty entered."

49. In my view the procedure under Section 207 of the CPC was adhered to by the learned trial magistrate. The plea of not guilty taken by the Appellant was unequivocal. The Appellant did have an opportunity to cross-examine all prosecution witnesses. However, it is imperative to note that the Court of Appeal in *Elijah Njihia Wakianda vs. Republic [2016] eKLR* was not comfortable with such mode of recording used by the learned trial magistrate herein, where the Learned Judges stated:-

> " With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process."

50. The Appellant contends that the birth certificate was procured and served when the case was midway hence prejudicial to the Appellant. I note that on 19th December 2017 as per the court proceedings, the learned Trial Magistrate directed that the documents be supplied to the Appellant save for the birth certificate or age assessment which was to be supplied before the hearing date. On 19th December 2017,

as per the Trial Court record, the Prosecutor confirmed to the Court that he supplied the Accused with copy of the charge sheet, investigation diary, 4 Witness Statements and copy of P3Form. If the claim was/is not true, the Appellant did not contest this claim by raising the issue when the Prosecutor said so if he had not provided these documents to enable him prepare his defense.

51. On 7th March 2018 the Appellant stated that he was ready to proceed with the hearing. PW2, her grandmother stated that PW1 was 6 years old. I note that on 26th February 2019 a copy of the birth certificate was produced by the Clinical Officer, PW3 as PMFI4.

52. The Appellant contends that it was not safe to produce the birth certificate at that juncture when the learned Trial Magistrate had directed the same to be produced before the hearing date. According to the Appellant, the Magistrate was unwell hence unable to detect the mischief in the birth certificate since it was registered and issued on 25th July 2018 and 28th August 2018 respectively. However I note that the mischief alleged by the Appellant was not cross examined on. I note that at no point during the hearing did the Appellant inform court that he had not been supplied with a copy of the birth certificate after it was produced as exhibit by PW4.

53. I associate myself with the Court of Appeal in *Hadson Ali Mwachongo vs. Republic [2016] eKLR* where it was held thus:-

> " We are equally satisfied that the appellant's constitutional right to a fair trial was not violated. The record does not indicate the appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the court that he was ready for the hearing of the case...In short, the appellant's complaint regarding denial of access to witness statements is simply not borne out by the record. As this Court stated in Francis Macharia Gichangi & 3 Others v. Republic, Cr. App. No. 11 of 2004 it is to be reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very least raise the issue with the trial court."

54. The learned Trial Magistrate had directed the same be supplied to the Appellant before the hearing date. The Trial Court cannot be faulted when the Appellant failed to raise the issue or cross-examine on the birth certificate or object to its production. The birth certificate was presented in court without any objection from the Appellant.

55. The Appellant claim that his right to representation under Article 50 (2) (g) and (h) of Constitution of Kenya, 2010 were infringed, I find this assertions baseless noting that at no point did the Appellant raise the issue with the Trial Court. According to the court record the Appellant was able to participate in the court proceedings without difficulties.

56. According to Mativo J. in the case of *Joseph Ndungu Kagiri vs. Republic [2016] eKLR* observed;

> " [In my view] the basic test from the wording of Article 50 is that the right is dependent on "substantial injustice" test. That in cases where substantial injustice would not occur, then there would be no basis for an accused person to insist on being granted legal representation at the state expense.

57. The Learned Judge further held that:-

> " Not every accused person is entitled to legal representation at state's expense. Each case is considered on the basis of its own merit. The nature of the offence that an accused person has been charged with is instrumental in deciding whether an accused person qualifies or not.

> A reading to the provisions of the constitution on the right to legal representation reveal that an accused persons entitlement to legal representation at the expense of the state is not automatic but qualified. In other words an accused person must prove that unless he or she is assigned an advocate by the State, substantial injustice would occur...

58. Similarly, in *Dominic Kamau Macharia vs. Republic [2014] eKLR* the court explained that substantive injustice would occur in cases such as where there are complex issues of law or fact, where the accused is unable to conduct his own defense, or where public interest requires that representation be provided.

59. In my view I find that the trial was fair. The Appellant had an opportunity to fully participate in the hearing until his conviction and sentence.

60. As to whether PW1 (child) was defiled by the Appellant, PW1 stated that the Appellant took her to the kitchen, sat her on a stool, held her mouth and throat. PW1 stated in Kiswahili language that 'Musyoki aliingiza kasoli (penis) hapa' and pointed at her private part.PW1 stated that she felt pain. According to PW1, the Appellant was at home alone. According to PW2, when she came back home at 6 pm, she found PW1 at the gate, PW1 eyes were red and the temperature was high. PW1 declined to food served to them by the Appellant. PW2 removed PW1 trouser whereby she saw PW1 vagina was red. PW1 informed PW2 that it was the Appellant who had held her and put in his penis.

61. On further examination of PW1 private parts by PW3, it was found that PW1 had tenderness on the outer part of labia minora (outer part of the vagina) and redness on the labia minora with no blood or discharge. According to PW3, there was an attempted and partial penetration which cause the redness since her hymen was intact. The partial penetration caused the redness on labia minora.

62. According to the Appellant, the child was brought to PW2 home at 7 pm by her mother. According to the Appellant, the evidence was fabricated since he never met the child that day.

63. Section 8(1) and (2) of the *Sexual Offences Act* provides as follows:

    (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.

64. The ingredients of defilement are well highlighted in the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 where the court stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

65. As regards the age of PW1, the learned Trial Magistrate observed that PW2 evidence in respect of PW1 age of 6 years was corroborated by the birth certificate that established PW1was born on 24th June 2011 hence PW1 fell under the age bracket contemplated by Section 8(2) of the same Act. I note that the contents of the birth certificate and PW2 evidence were not challenged by the Appellant. The Appellant concentrated on challenging the admissibility of the birth certificate for not being supplied to him during the hearing.

66. In the event that learned Trial Magistrate expunged the birth certificate from the record, in my view this would still not be fatal to the Prosecution case. I am guided by the case of *Fappyton Mutuku Ngui vs. Republic [2012] eKLR* , where Joel Ngugi J. held that:-

> .. that "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

67. In the same vein, the Ugandan Court of Appeal in the case of *Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000* the court held that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense... [Emphasis added]

68. Indeed the learned Trial Magistrate conducted a voire dire examination for the reason that PW1 was child.PW1 stated that she was in Pre-unit at [Particulars Withheld], they pray, sing and read the Bible, she did not know what happens to those who lie, all this evidence was made to the learned Trial Magistrate concludes that PW1 didn't understand the meaning of oath but was intelligent enough and hence directed her to give unsworn statement. This evidence in my view clearly demonstrated that PW1 was a child.

69. Indeed age is a critical component as stated by the Court of Appeal in *Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010* 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".

70. In my view PW1 age was sufficiently proved by herself, PW2 and the birth certificate presented in court by PW3.

71. As to whether there was penetration on PW1 vagina by the Appellant, the learned Trial Magistrate relied on PW1, PW2 and PW3 evidence. PW2 and PW3 found that the vagina was red. According to PW3, the penetration was partial since the hymen was intact. During the hearing PW1, stated that after the Appellant inserted his penis in her vagina, PW1 felt pain. The Appellant asserted that the hymen was still intact as per PW3 hence there was no penile penetration.

72. Section 2 of the *Sexual offences Act* provides that:

> " Penetration" means the partialor complete insertion of the genital organs of a person into the genital organs of another person;"

73. In respect of what constitutes penetration in sexual offences, the Court of Appeal in the case of *Mark Oiruri Mose vs R (2013)eKLR* stated thus:

> '...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 penetration need not be deep inside the girl's organ....'

74. In the same vein, the Court of Appeal in the case of *Erick Onyango Ondeng vs. Republic (2014) eKLR* held that:-

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

75. According to the Appellant, he was not taken to the hospital for examination. During cross-examination, PW3 stated that he only examined PW1 and not the Appellant. However am guided by the case of *Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR* where the court held that;

> "As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded."

76. The Appellant faults the learned Trial Magistrate for relying on PW3 Lab report. According to the Appellant, the same ought to have been produced by a qualified medical doctor and not by PW3 who was a clinician. I associate myself with Nywamweya J in *Joseph Mwangi vs. Republic [2015] eKLR* where the Learned Judge observed that Section 124 of the Evidence Act provides that no corroboration is required in cases where the court believes that the complainant it telling the truth. The Learned Judge placed reliance by the holding of the Court of Appeal in *Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (Nyeri)* where it was stated that;

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

77. It therefore follows that medical evidence is not mandatory but if available the same can be furnished to court. In cross-examination PW.1 insisted that what she had said in court was the truth about what the Appellant did to her. Despite PW1's hymen being found intact, PW2 and PW3 evidence was that the vagina was red. PW1 stated that she felt pain.

78. In my view I find that penetration was proved.

79. According to the learned Trial Magistrate by dint of PW1 and the Appellant interaction before the offence, there was no chance of PW1 mistaking Appellant's identity. The Appellant faults the learned Trial Magistrate for not noting that he was tricked to escort PW2 to an Mpesa to withdraw Kshs.20,000/- owe to him by PW2.According to the Appellant if indeed he had committed the offence then proper investigation would have led to a lawful apprehension. It is submitted that the arrest was a scheme to bar him from demanding his pay. I note that it is not dispute that the Appellant was employed by PW2 a fact that the Appellant has admitted. However the Appellant asserted that employment is not satisfactory evidence that a guilt can be inferred upon him.

80. PW1 stated that the Appellant sat on a stool, held her mouth and throat before inserting his penis into her vagina. She also stated that the Appellant was alone at home. It was her testimony that after the Appellant defiled her, the Appellant bought her sweets. PW1 stated that the Appellant prepared their meal that day while PW2 asked the Appellant to serve them food. According to PW2, she had given the Appellant a house in her compound.

81. On identification in *R. vs. Turnbull & Others [1973] 3 AllER 549* it was held that:

> "...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

82. Based on PW1, PW2 and PW4 evidence, in my view the Appellant was not a stranger to PW1 and I therefore do not find that the appellant was framed on the basis of Kshs. 20,000/- owed to him by PW2. I find that the Appellant had been positively identified.

83. In summation, I find that the prosecution proved its case beyond reasonable doubt. The ingredients were sufficiently proved.

84. In respect of the sentence, the Appellant submitted that it was too excessive and harsh. The Appellant asserted that his age ought to have been considered before the sentence of 40 years imprisonment was meted on him. Under Section 8(2) of the *Sexual Offences Act*, the punishment prescribed is life imprisonment.

85. Indeed, in *Bernard Kimani Gacheru vs. Republic [2002] eKLR*, the Court of Appeal restated that:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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 stated is shown to exist."

86. Based on the Court record, the learned Trial Magistrate before sentencing the Appellant took into account the Appellant's mitigation, Victim Impact Report and stated that she was aware of the *Francis Karioko Muruatetu & another vs. Republic [2017] eKLR* (Muruatetu 1) with regard to mandatory sentences.

87. I note in a recent *SKM vs. Republic [2021] eKLR* where a child of 9 years was defiled, Gitari J. guided by Section 8(2) of the *Sexual Offences Act* sentenced the accused person to life imprisonment. It is therefore clear that a life imprisonment can still be maintained as the punishment under Section 8(2) of the *Sexual Offences Act*. The learned Trial Magistrate sentenced the Appellant as opposed to life imprisonment. In my view 40 years imprisonment cannot be said to be excessive. Despite the Appellant

being considered as first offender, I note that the Appellant was not remorseful. The offence against PW1 cannot be taken lightly. Indeed PW1 was been robbed of her innocence as rightly put by the learned trial magistrate. The duty of this court to safeguard and preserve the interest of children which remains paramount despite the Appellant also having rights to be protected by this court.

88. The court record show that the Appellant was arrested on 6th October 2017 as per the Information/ Charge Sheet and convicted on 15th January, 2020. Pursuant to Section 333(2) of Criminal Procedure Code which provides:-

> " 333(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody".
>
> The period spent in custody is 2 years and 3 months that shall be considered in reducing the sentence of forty (40) years by 2 years and 3 months.

89. In the result, I find no merit in this appeal save for resentencing in light of section 333(2) of Criminal Procedure Code.

Judgement accordingly.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF OCTOBER 2021.

M.W. MUIGAI

JUDGE