REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 12 OF 2019

(Being an Appeal from the Original Conviction and Sentence by Hon. Omwansa (P.M) in Sotik Principal Magistrate's Court Criminal Case Number 7 of 2018)

WESLEY MOROGO .....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 9th May 2018, at [Particulars Withheld] estate in Konoin Sub-County, within Bomet County, he intentionally caused his penis to penetrate the vagina of DN, a child aged 9 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 Charge against the Appellant were that on 9th May 2018, at [Particulars Withheld] estate in Konoin sub-county, within Bomet County, he unlawfully touched the vagina of DN, a child aged 9 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 the Appellant had a case to answer and was put on his defence. He gave a sworn statement and did not call any witnesses in aid of his defence.

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 accused person filed a Petition of Appeal on 10th May 2019 which he later amended as follows:

i. **THAT** the learned trial magistrate erred in law by imposing the statutory minimum sentence of life imprisonment but failed to note that under the supreme court decision in **Francis Karioko Muruatetu vs. R (2017)** the courts no longer bound by statutory minimum sentences.

ii. **THAT** the learned trial magistrate erred in both law and fact by convicting the appellant when the case against him had not been proved beyond reasonable doubt.

iii. **THAT** the learned trial magistrate erred in both law and fact by holding that the offence of defilement could be proved when the act of penetration was not proved against the appellant.

iv. **THAT** the learned trial magistrate erred in both law and fact by failing to give the appellant's defence an objective and open minded analysis and erred grievously by placing the burden of proof to the appellant in a criminal case.

The Prosecution's case.

7. It was the Prosecution's case that the Accused defiled the minor DN (PW1) on 9th May 2018. 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.

8. PW1 testified that on the material day, the Accused removed his 'dudu' and asked her to remove her clothes. PW1 then stated that

'alinidinya' and she felt very painful. She testified that she cried but the Accused who had a knife told her to keep quiet. That the Accused thereafter gave her rice to eat which she refused. The Accused later on gave her water to drink. She said that she went home and told her mother and Tressa how the accused person had put his 'dudu' into her and that she was taken to hospital.

9. It was PW1's testimony that she knew the Accused and that he was called Morogo and that his house was near theirs. She said that the Accused was the only one who did bad things to her on the bed and that it was the first time he did 'kudinya' to her. She stated that she was not coached and what she said was the truth.

10. DB (PW2) testified that she was a student at [Particulars Withheld] in Form 2. That she knew both the Accused and PW1 as they all lived at Camp II in [Particulars Withheld] estate. She testified that on the material day at around 4pm, on her way to Mike's house, she met PW1 who was carrying a mathematical set. It was PW2's testimony that the meeting point was near the accused person's house. PW2 testified that PW1 told her that she had slept with someone who then gave her five shillings. It was her testimony that PW1 told her that the person removed his 'dudu' and inserted it into her vagina. PW2 stated that they went to Mike's house and found his wife washing clothes. That they removed PW1's clothes and the inner pant. She further stated that the trouser [MFI (a)] was brown in colour and the inner pant [MFI (b)] was wet. That they decided to take PW1 to hospital which was about 50 meters away.

11. The victim's father EM (PW3) testified that he was PW1's father and that he knew the accused person. That on the material day, at around 5.40 p.m he was called by a security officer and requested to attend the dispensary. That on arrival at the dispensary, he found the community nurse together with his daughter. PW3 testified that the nurse told him that she had been brought there by two female good Samaritans. He said that PW1 told him that a man found her playing and asked her to accompany him to his house where upon arrival, he removed her clothes and assaulted her sexually. It was PW3's testimony that PW1 said that the man gave her Kshs. 5 afterwards. PW3 testified that PW1 was born on 16/2/2019 and produced a clinic card that was marked as **P. Exh. 4**

12. Charles Kiptum Maritim (PW4) a security guard with Finlays for over 10 years testified that on the material day at around 7 p.m., he received a call from a supervisor. That upon arrival at the health centre, he found a nurse who told him to get hold of the accused person. It was PW4's testimony that they took the Accused to the dispensary and handed him over to a nurse who took him to an inner room. That shortly thereafter police officers from Maramara came and took over the suspect. He identified the Accused in the dock.

13. PW5, Paul Onguso Mose testified that he was a security man who had worked for over 18 years and that he stayed at Finlay's Company. That on the material day at around 7 p.m., he received a call from the supervisor instructed him to go to the dispensary and upon arrival, he met his colleague and a nurse called Martha. That the nurse told them to go and look for the accused person. It was PW5's testimony that they met the accused person near a fence and they asked him to accompany them to the dispensary where they handed him over to the nurse. That the accused person did not complain or resist. That shortly afterwards, police officers from Maramara post came and carried on with the investigations. PW5 identified the Accused in the dock.

14. PW6 testified that he was a clinical officer attached to Kapkatet District Hospital and that he examined PW1 on 10th May, 2018 and filled the P3 Form which he produced as P.Exhibit 3. I shall return to his evidence later on in this judgment.

15. PW7 Martha Chepngetich Keter was the nurse at Chemasenge dispensary who examined PW1 on the material day about half an hour after the incident. It was PW7's testimony that she filled the PRC Form and produced the same in court. It was marked as **P.Exh 2**. I shall return to the findings later on in the judgment.

16. The Investigating Officer Number 106263 Police Constable Ivy Chepkoech testified as PW8. She told the court that she was attached to Maramara Patrol Base. That on the material day, they were on patrol at Finlay Company when the security manager received a call reporting a case of sexual assault at Chemasenge. It was her testimony that they proceeded to the scene and found the accused person and the girl who had allegedly been abused sexually. That they arrested the Accused and took him to the police station. It was PW8's testimony that she took custody of the exhibits being long trouser (**P-Exhibit 1a**), pant (**P-Exhibit 1b**) and the five shilling coin (**P-Exhibit 1c**). PW8 told the court that PW1 told her that she was given five shillings by the Accused in order not to report what had happened. She stated that she escorted both the victim and the Accused to Kapkatet District Hospital where the P3 form (**P.Exhibit 3**) was filled. That upon conclusion of the investigations, they charged the Accused.

17. In a Ruling delivered on 30th November 2018, the trial Magistrate found that the accused person had a case to answer and he was put on his defence. Section 211 of the Criminal Procedure Code was explained to him and he stated that he would give a sworn statement and call one witness.

The Defence case.

18. The Accused testified as DW1. He stated that he was a general worker at Finlays Company. That on the material day at around 4.30 p.m. he left work for his house, passed by the maize store where he was issued with 20 tins of maize weighing 2 kgs each and upon reaching his house, he left the maize and went to the shop to get milk.

19. He further stated that he purchased the milk and returned back to his house and it was then that a child who appeared to be in class 2 came to his house. That he asked the girl her name and whether she had been sent to him, and she told him that she was playing. It was his testimony that the girl left and he continued cooking.

20. The Accused testified that he went to buy vegetables at the Centre and while there, a security man called Paul Onguso informed him that he was required at the Health Centre. That upon reaching the Health Centre, he found a nurse who ushered him into a room where she extracted his blood and urine samples. He stated that he was the taken to another room where he found the child, her father and another medical officer. It was his further testimony that police officers came and asked the child what had happened and she said that she did not know the accused person. That he was later taken to Tendwet Police Station where the police promised to carry out more investigations.

21. The accused person testified that he was taken to Kapkatet District Hospital the following day. That upon arrival, the medical officer took blood and urine samples from him and the child. That after being tested, he was taken to Mogogosiek Police Station for 2 days and was subsequently taken to court. It was the accused person's testimony that when he went back to work, he was told he was being fixed because he had incited workers and was subsequently sacked.

The Appellant's submissions.

22. The Appellant submitted that he was a young man of good character and a first offender. That the trial court did not consider his mitigation and also applied the Sentence in the mandatory form prescribed under Section 8(2) of the Sexual Offences Act. It was his submission that courts should not be tied by the mandatory nature of a prescribed as same was unconstitutional. He relied on the case of **Francis Karioko Muruatetu & Another Vs Republic (2017) eKLR,** to support his submission.

23. It was the Appellant's submission that the ingredients necessary for proving the charge of defilement were not met in that the age of PW1 was not proved. He relied on the case of **Kaingu Elias Kasomo Vs Republic Criminal Appeal Number 504 of 2010**, to support his submission.

24. The Appellant submitted that the court did not consider that PW1 was autistic and seemed to lose concentration. That PW1 testimony could not be believed without corroborative evidence. The Appellant invited this court to thoroughly and independently re-evaluate PW1's evidence for contradictions and inconsistencies.

25. It was the Appellant's submission that the evidence of penetration was not proved. He submitted that PW2's evidence that she found PW1's private parts wet was not proof of penetration. He relied on the case of **Michael Mugo Musyoka Vs Republic Criminal Appeal No. 89 of 2013,** to support this submission. It was the Appellant's further submission that PW7's evidence of finding bruises at the inner vagina and labia majora of PW1 did not prove penetration. He contended that the state of the hymen was not explained whether it was intact, partially torn or freshly broken. He relied on the case of **Michael Odhiambo Vs Republic Criminal Appeal No. 280 of 2004,** to support his submission.

26. The Appellant submitted that the complainant's evidence was not corroborated by any other witness. That all the other witnesses gave hearsay evidence.

27. It was the Appellant's submission that the trial court convicted him on the basis of the weakness of the defence case rather than the affirmative proof of the prosecution case. That an accused person has no obligation to prove his innocence. The Appellant relied on the case of **Elizabeth Waithiegeni Gatimu Vs Republic (2015) eKLR,** to support this submission.

28. The Appellant concluded by submitting that the prosecution's failure to sufficiently rebut the defence made the conviction and sentence unsafe.

The Respondent's submissions.

29. The Respondent submitted that it was clear from the testimonies of PW1-PW8 that on the material day, PW1 was playing outside her home when the Appellant who was a neighbour lured her into his house and committed the offence of defilement.

30. The Respondent submitted that the age of the victim was uncontested. That the record showed that she was a minor. That the same was demonstrated by a copy of the birth certificate that was produced by the father (PW3) which indicated that she was born on 16th February 2009 and thus she was aged 9 years at the time of the defilement.

31. With regard to identification, the Respondents submitted that PW1 gave a detailed account on how the Appellant lured her into his house and that he was a neighbour. It was the Respondent's further submission that PW2 to PW5 confirmed that the Appellant was well known to PW1 and resided in the house where the incident was said to occur. That the Appellant was therefore positively identified.

32. On penetration, the Respondent submitted that PW6 who filled the P3 form indicated that the Appellant's act led to partial penetration within the meaning of section 2 of the Sexual Offences Act. The Respondent submitted that it had proved the elements of the offence to the required standard.

33. With respect to the Appellant's defence, it was the Respondent's submission that the Appellant gave sworn evidence and failed to call any witness in support of his assertions. That upon cross-examination, he admitted that he was known to PW1 and that PW1 had picked some money from his table. The Respondent further submitted that the Appellant's defence lend credence to the prosecution case.

34. With respect to sentence, the Respondent submitted that the guiding principles in sentencing were laid out in the case of **Wanyema Vs Republic (1971) E.A 494**. That the minimum sentence in this case is life imprisonment. It was the Respondent's submission that the trial court considered the aggravating circumstances, the Appellant's mitigation and his status as a first offender before handing down the sentence of life imprisonment. The Respondent further submitted that the sentence was legal, lawful and just and that this court should not interfere with the said Sentence.

35. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in the case of **Mark Ouiruri Mose Vs. R (2013) eKLR,** held that:-

> ***"This court has a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter."***

36. I have given consideration to the trial court's proceedings, Amended Grounds of Appeal filed on March 2021, the Appellant's Written Submissions filed on March 2021 and the Respondent's Written Submissions dated 12th March 2021. Three 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.

37. The 2nd and 3rd Grounds of appeal fall under this heading.

38. 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.

39. It is also trite that the court must consider the defence alongside the prosecution case. 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."***

40. 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. A child is defined in the Children's Act no. 8 of 2001 as any human being under the age of eighteen years. Proof of age is therefore important. In **Hadson Ali Mwachongo Vs Republic (2016) eKLR**, the Court of Appeal 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)."***

41. The ways in which the age of the complainant could be proved were discussed in the case of **Thomas Mwambu Wenyi Vs Republic, Criminal Appeal No. 21 of 2015 (2017) eKLR** cited with approval the case of **Francis Omuromi Vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** which 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 be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

42. In this case, PW1 could not tell the trial court her age. I observe however that the court conducted a voire dire examination on her which in itself is an indication that the court observed that she was a minor. In addition, her father produced a child Clinic Card (P.Exhibit 4) which indicated the birth date of PW1 as 16th February 2009. The production and validity of this clinic card was not challenged by the Accused. I am therefore satisfied that the age of the complainant was satisfactorily proved.

43. 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."***

44. In the case of **Bassita Vs Uganda S. C Criminal Appeal Number 35 of 1995,** the Supreme Court 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."***

45. In this case PW1 testified that she was in the Accused's house and the Accused removed his "dudu and asked me to remove my clothes

and my inner pant. Alinidinya. It felt painful…." That afterwards the Accused threatened her not to tell anyone. She also identified the Accused in court. The Appellant argued in his submissions that the victim (PW1) did not tell the court the person who removed her clothes and did not also state that her genital organ was penetrated by the genital organ of the Appellant.

46. I find the Appellant's submission mute as the court understood the description of the act by the PW1 to mean penetration. 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."***

47. The only relevant issue here is whether the court believed the evidence of the victim and recorded the reasons for so believing as required by Section 124 of the Evidence Act which 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."***

48. This court is empowered by the above section to convict an accused person solely on the evidence of the complainant. 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."***

49. 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."***

50. In this case, PW1 was taken through *voire dire* examination by the court and from the proceedings, PW1 recounted what happened to her. She testified that the accused person removed his 'dudu' and inserted it into her vagina. She even described the whole ordeal as painful. Upon cross-examination, PW1 testified that he saw the accused person with milk and that she did not find any money on the table. She concluded by stating that that they were only two of them in the house i.e. the accused person and her.

51. This court notes some inconsistencies in PW1's testimony. PW1 testified that she did not find any money on the accused person's table yet PW2 testified that she found PW1 with a 5 shilling coin which she got from the person she slept with. She also testified that she did not know who removed her clothes but upon re-examination, she stated that that the accused person removed her trouser and inner pant.

52. It is my view however that these inconsistencies in PW1's testimony are not fatal. I am guided by the Court of Appeal decision in the case of **Richard Munene Vs Republic (2018) eKLR,** where it addressed the issue of contradictions thus:-

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies and contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

53. In this case I have closely reviewed the record to assess the worth to be attached to the minor's evidence. I observe that the trial court did not indicate on the record why he believed the testimony of the minor. I also observe that the learned Magistrate also referred to PW1 as half autistic. The P3 form also contains PW6's observation that she was autistic. In my view, it was wrong for PW1 to be referred to as half autistic or otherwise without any proper medical evaluation and report or evidence to support the same.

54. Indeed the correct procedure would have been for the court to send the minor for medical examination and thereafter appoint an intermediary for her in the trial for proper communication with the court. I therefore agree with the submission of the Appellant that the testimony of the minor could not stand alone and needed corroboration.

55. The medical evidence in this case was presented by PW7 the nurse who first examined PW1 and filled the Post Rape Care Form (Exhibit 2) and PW6, the clinical officer who filled the P3 Form (Exhibit 3). PW6 who was a clinical officer attached at Kapkatet District Hospital testified that he examined PW1 on 10th May 2018 which was a day after the incident. He found no abnormality in the urine sample and upon conducting a high vaginal swab, he did not detect any spermatozoa. It was his further finding that the left labia majora was bruised. PW6 concluded that there was positive clinical evidence of vaginal penetration. Upon cross-examination, PW6 testified that he did not see any sperm cells and that there were bruises at the labia majora.

56. PW7, a nurse stationed at Chemasenge dispensary testified that on the material day, PW1 was brought to the facility with allegations of sexual assault. PW7 testified that she examined PW1's private parts and stated that the labia majora was bruised. She took blood and urine samples for testing and gave PW1 painkillers. It was PW7's testimony that she filled a Post Rape Care Form that was produced and marked

as P.Exhibit 2. Upon cross-examination by the Accused, PW7 testified that she tested the accused's blood and urine samples and nothing was found. It is salient to note that the production and contents of the PRC Form were not challenged by the accused person.

57. The Appellant has argued that the medical evidence was inconclusive. In particular he has stated that PW6 found no evidence in the examination of his (Appellant's) blood and urine linking him to the alleged offence. Further that the physical examination of the minor as well as the analysis of her samples showed no presence of spermatozoa. I must however hasten to dismiss the argument on absence of spermatozoa, as the law does not require the presence of spermatozoa as proof of penetration. See **Mark Ouiruri Vs Republic (2013) eKLR**.

58. A look at the evidence of PW7 shows that she examined the minor half an hour after the incident and that she found the labia majora swollen. The finding was also captured in the P3 Form in which PW6 conclusively stated that there was positive clinical evidence of penetration. A closer look at the P3 Form however makes it difficult for the court to see how the clinician arrived at the conclusion. The Post Rape Care Form which would have aided is also incomplete while some of the observations made on the clothing and physical appearance of PW1 is not supported by the evidence of PW2 who first met her immediately she left the Accused's house or her father (PW3) who also saw her immediately after.

59. I have borne in mind that both PW6 and PW7 were experts within the meaning of Section 48 of the Evidence Act. However it is trite that the opinion of an expert is not binding on a court and must be considered alongside other evidence. See **WKU V. Republic, Criminal Appeal No. 87 of 2019 (2020) eKLR**.

60. In this case I have evaluated the medical evidence alongside the evidence of PW2 and PW3. The totality of the evidence do not positively confirm penetration. Rather, it is my finding that the P3 Form and the Post Rape Care Form together with the testimonies of PW6 and PW7 considered alongside other prosecution evidence firmly prove that there was an attempt by the Accused to penetrate the minor and the applicable offence and charge therefore would be that of attempted defilement.

61. 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."***

62. The English case of **R Vs Turnbull (1977) QB 224** is useful in this regard:-

> ***"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."***

63. In this case the evidence shows that the Appellant was well known to the minor victim who had no difficulty describing that she was in his house and that they were the only persons inside that house. She had no difficulty identifying him in court. PW2 described how she met the minor soon after the incident and escorted her to the Appellant's house where they found his wife washing clothes. The two security guards, PW4 and PW5 who were sent to get the Appellant also knew him very well as did PW3, the father of the complainant.

64. Apart from the prosecution evidence, the Appellant made material admissions in his defence. Although he denied that he defiled the minor, he admitted that she was in his house and that he offered her food and did not stop her when she picked five shillings from his table. He also admitted that he knew the minor, as well as PW2, PW3, PW4 and PW5. Indeed, from the Record it is my observation that the incident occurred within the Finlay Tea Estate quarters where all the witnesses resided and therefore were known to one another.

65. I am satisfied therefore that the Appellant was positively identified as the person who defiled the minor.

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

66. I have considered the Appellant's defence which has been set out *in extenso* at paragraphs 18 – 21 of this judgment. In summary, the Appellant narrated how he had gone to the shopping centre to collect his food rations. He also stated that a child walked into his house and he asked her whether she had been sent to him; that she left with five shillings which he did not stop her from taking as he treated her like his own child. The Appellant further stated that he was being framed by the Estate Management for inciting workers and that he was subsequently sacked.

67. The above defence clearly makes material admissions while also denying the offence. Clearly the defence was a poor attempt at creating a false alibi and a mere denial. It is difficult to see any link between any industrial issues and the case at hand. I dismiss this tale as it is not supported by any evidence.

68. In totality, there is nothing in the accused person's Defence that would make this court place doubt on the veracity of the prosecution's case.

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

69. The Appellant has faulted the trial court for meting out the maximum sentence. Suffice to state that the sentence pronounced was the one provided in law under Section 8 (2) of the Act. The recent directions in the Supreme Court case of **Francis Karioko Muruatetu and Another Vs Republic, Petition No. 15 & 16 (Consolidated) of 2015** confirmed the validity of such sentence by stating 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."***

70. In this case however, I have already found that the evidence disclosed a lesser offence. I therefore apply the provisions of Section 79 (2) of the Criminal Procedure Code. The Appellant is thus convicted with the offence of attempted defilement contrary to Section 9 (i) of the Sexual Offences Act. It follows that the applicable sentence is one under Section 9 (2) which states that 'a person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than 10 years.'

71. In this case the court observed that the victim was autistic. This means that the Appellant took advantage of her condition. I consider this to be an aggravating circumstance which should attract a higher sentence.

72. The Appellant shall serve 15 years imprisonment from date of conviction and sentence in the trial court. Either party has 14 days' right of appeal.

73. Orders accordingly.

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

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R. LAGAT-KORIR

JUDGE

JUDGMENT VIRTUALLY DELIVERED IN THE PRESENCE OF THE APPELLANT (VIRTUALLY PRESENT AT NAIVASHA MAXIMUM PRISON), MR. WAWERU HOLDING BRIEF FOR MR. MURITHI FOR THE RESPONDENT AND KIPROTICH (COURT ASSISTANT).