REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 82 OF 2019

CORAM: HON. R.E. ABURILI J

EZEKIEL ONYANGO ALOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence in Siaya PM Sexual Offence Case No

15 of 2019 in a judgment delivered on 25th October, 2019 and sentence passed

on 18th November, 2019 by Hon J.O. Ongóndo, Principal Magistrate)

JUDGMENT

Introduction

1. The appellant herein **EZEKIEL ONYANGO ALOO** 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. Particulars are that on 29th October, 2014 in Gem sub-county, within Siaya County, the appellant caused his penis to penetrate the anus of BM[full name withheld for legal reasons], a child aged 7 years without his consent. The appellant also faced the alternative charge of Committing an Indecent Act with the said child, on the same date of 29th October, 2014 contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**.**

2. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.

3. The trial magistrate, Hon. J. Ong'ondo after hearing four prosecution witnesses and the unsworn testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence the appellant to life imprisonment.

4. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following ground;

a) THAT he pleaded not guilty to the charge.

b) THAT potential witnesses who were playing with the complainant were not allowed to testify.

c) THAT he was forced to proceed with the case before being given some of the statement of the witnesses like PW4.

d) THAT the medical officer's report didn't accurately indicate whether the child was actually defiled.

e) THAT PW2 did not clarify to the court why it took her 2 more days to take the victim to the Hospital.

f) THAT he was not informed of the evidence the prosecution was going to rely on before the beginning of the case.

g) THAT there was contradiction of evidence between PW2 and P4 over the injuries.

h) THAT he prayed to be given the proceedings of this case to enable him adduce more grounds.

5. After being served with the record of appeal comprising proceedings and judgment and all exhibits produced in the trial court, the appellant subsequently filed amended grounds of appeal as follows:

a) ***That the trial court failed to observe that the charge was defective and in variance with the evidence on records.***

b) ***That the trial court failed to observe that his fundamental rights and freedoms under Article 50(2)(c) of the Constitution were violated.***

c) ***That the trial court failed to appreciate that the procedure and law was not observed during trial.***

Appellant's Submissions

6. The appeal was canvassed by way of written submissions with no highlights. The appellant submitted that there was variance between the charge and the evidence on record and that the prosecution did not invoke section 124 (I) of the Criminal Procedure Code. It was his submission that the particulars of the offence indicate that the offence occurred on 29.10.2014 while evidence on record indicated that the offence was reported vide OB. NO. [....] at 12.10 pm, whereas the Plea was taken on 08.02.2019 which was before the first report as per the first report. Further, the appellant submitted that the charge sheet indicated that the arrest was effected on 07.02.2019 while the accused was arrested on 29.10.2014 and as such all these contradictions were unsafe to base a conviction upon.

7. The appellant also submitted that the trial process was not fair since the accused person was not given adequate time and facilities to prepare his defence contrary to Article 50(2)(c) of the Constitution.

8. The appellant submitted that the conduct and mode of delivering the judgment by the trial magistrate was unfair and not in compliance with the law. It was the appellant's submission that the judgment was pronounced twice with the first being read on 25.10.2019 and on the second occasion on the 18.11.2019.

Analysis and Determination

9. This being a first appellate court, as expected, I have to analyze, evaluate afresh and reassess all the evidence adduced before the trial court and draw my own independent conclusions, bearing in mind that I neither saw nor heard any of the witnesses as they testified. See **Okeno v 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 (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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, see Peters vs. Sunday Post [1958] E.A 424."***

10. Similarly, in **Kiilu & Another v Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; 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."***

11. Revisiting the evidence adduced before the trial court, the prosecution case was that on the 29/10/2014, PW1 the complainant BMO aged 12 years as at the time of hearing was a walking distance away from the appellant's home at 5.00p.m., where he was playing football in the company of AA[full name withheld] for legal reasons], and O[full name withheld] when the appellant called PW1 and told him that he wanted to send him. The complainant testified that the appellant went to his brother Ouma's house and told the complainant to follow him there. When PW1 entered the house, the appellant told him to kneel down as the appellant closed the door behind him and bolted it then he pushed a stone on the door. That the appellant then told PW1 to kneel down on his hands and further told him if that if he screamed, the appellant would cut PW1 with the panga which he placed beside the complainant. The appellant then removed his short and trouser and inserted his penis into the complainant's anus. According to the complainant, the appellant lowered his trouser to his knees and put a panga beside him and had anal sex with the complainant for a long time. The appellant then told PW1 to caress the appellant's penis with his [complainant's] hands after which he told the complainant to go home and remain silent failure to which the appellant would kill him. He further testified that as it was now 6.00pm, those he had been playing with had gone home. When he got home, he was afraid of telling his mother as the appellant had threatened to kill him if he disclosed what had happened to him.

12. The complainant further testified that when he started feeling pain, he informed his mother who went and reported at Mutumbu and he was taken to hospital at Malanga and was treated and later he was taken to Yala Hospital. The complainant identified the appellant in court as Ezekiel.

13. In cross-examination, the complainant stated that the appellant chased away the other children so they could not see him. He further

reiterated that he did not scream because the appellant had threatened to cut him if he told anybody or made any noise. He further stated that the offence took place at 5.00pm. He stated that he had been walking well but after 5 days he felt pain and told his mother.

14. PW2 RA, the minor's mother, testified that the minor was born on 1-9-2005 as per P Exhibit -1, the birth certificate. She stated that on 29/10/2014, she was at home with other children but the minor herein was absent as he had gone to play with other children at the appellant's home and returned home at 7.00 p.m. PW2 further testified that the complainant only disclosed what the appellant herein had done to him after five days when he started feeling pain when going to the toilet and she reported the matter at Mutumbu Police Post then took the boy to Malanga and later to Yala Hospital for further treatment and later reported at Yala Police Station.

15. PW2 further testified that the complainant opened up to his mother on how the appellant had sexually assaulted him and when she checked the affected parts, the mother observed that the boy's anus had been swollen and some discharge oozed from the area. She further testified that the complainant mentioned the appellant by name (Ezekiel) as the person who had assaulted him sexually.

16. She further testified that the appellant's father had threatened to set her house on fire if she testified in court and she had made that report at Yala Police Station as was evident from the OB report No. 14/29/3/19.

17. In cross-examination PW2 reiterated her testimony in chief and stated that she was not present when the appellant committed the offence but that the complainant informed her of the matter. She further stated that the appellant had threatened the child with death if he divulged the information.

18. In re-examination, PW2 stated that she checked the complainant's buttocks and noticed a discharge.

19. PW3 Evelyne Odhiambo a Clinical Officer from Malanga testified that before 2018 she worked in Yala. She testified that on the 4-11-2014, she received the complainant, B. [name withheld], a 7-year-old child with a history of defilement by a person well known to him, who threatened to kill him if he revealed the ordeal. On carrying out a rectal examination on the complainant, she saw redness along the anus, the hole was oozing with stool and that the rectum was painful upon touch. She further testified that despite receiving the patient 6 days after the offence, the redness, tenderness and oozing stool indicated penetration.

20. In cross-examination, PW3 reiterated her evidence in chief and stated that she treated the complainant and that there was evidence of penetration. She reiterated that there was redness and pain upon touch of the complainant's anus and that it was oozing stool caused by forcible penetration in the anus.

21. PW4 No. 112995 P.C Ann Ekadel from Yala Police Station testified that on the 4-11-2014 at 0920 hours she received a report of a case of defilement by a boy aged 7 years who was in the company of his mother. She testified that the minor reported that he was sexually assaulted by a neighbor, Ezekiel, on 29-10-2014. PW4 informed the complainant's mother to take him to Malanga Dispensary and that CPL Etyang was assigned to deal with matter. She further testified that the appellant was at large after committing offence but on 7-2-2019 at 1700 hours, the suspect Ezekiel was brought in with allegations of defiling the minor.

22. In cross-examination, PW4 stated that she recorded the statement of witnesses and the doctor examined patient. She further stated that the appellant was arrested when he returned home after being away for 5 years.

23. At the close of the prosecution's case, the appellant gave an unsworn statement of defence in which he denied the allegations levelled against him and stated that on 29.10.2014 at 6.00p.m, he returned home from the market at *[Particulars Withheld]* and found children in his house and they had damaged a radio, battery, mobile phone battery and ran escaped but as they ran away the complainant fell on a stone and injured his anus. He testified that he took the minor to hospital where he met the minor's mother and informed her of what had happened to him.

Determination

24. Having carefully considered the appellant's grounds of appeal, the evidence adduced before the trial court and submissions for and against this appeal, in my humble view, the main issue foe determination is whether the prosecution proved its case against the appellant beyond reasonable doubt.

25. As a preliminary point, I will consider the issues raised by the appellant. The appellant claimed that his right to a fair trial was violated as he was not given adequate time and facilities to prepare his defence as guaranteed under Article 50(2)(c) of the Constitution. Specifically, that he was not given some witness' statements specifically that of PW4.

26. Article 50(2)(c) and (j) of the Constitution of Kenya, 2010 provides:

> ***"Every accused person has the right to a fair trial, which includes the right—***
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

27. Addressing this right of an accused person being furnished with the relevant evidence, The Court of Appeal in **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR**, rendered itself as follows:

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified."

28. My perusal of the trial court record reveals that on the 8/2/2019 when the appellant herein was presented before court and the matter commenced, the accused entered a plea of not-guilty and was subsequently released on bond of Kshs. 300,000 with a surety of the same amount. The trial magistrate at the time Hon. T.M. Olando, SRM directed that the appellant be supplied with witness statements.

29. The matter came up for hearing again on the 25/3/2019 when the appellant again raised the issue of lack of statements and the prosecution was again ordered to supply the appellant with witness statements. The hearing did not proceed. The case was adjourned on application by the prosecution.

30. On the 26/4/2019, the case came up for mention when the appellant informed the court that he had witness statements and was ready for the hearing. The hearing was set for the 29/4/2019.

31. On the 20/5/2019 when the matter eventually proceeded for hearing and two witnesses, PW1 and PW2 testified with the appellant cross-examining them, the appellant informed the trial court at the end of the hearing that he did not have witness's statements for the rest of the prosecution witnesses to be called. The prosecutor in rejoinder informed the court that he had directed the investigating officer to take statements of the children.

32. The matter then came up for hearing on the 16/9/2019 when PW3 was to give her testimony at which point the appellant informed court that he was ready to proceed with the hearing. The appellant cross-examined PW3. The next day, the 17/9/2019 PW4 testified and the appellant also cross-examined her after which the prosecution closed its case.

33. It is worth noting that if a trial court grants an order that an accused person should be furnished with the evidence the prosecution intends to rely upon and the accused person fails to follow up the same from the prosecution, the blame would lie squarely on him. He would be expected and/or required to inform the trial court that he has not been supplied with the evidence as ordered by the court before he proceeds with the trial. Indeed, such accused person has the right to refuse to commence participation in the proceedings until such time that he is furnished with the said evidence. The appellant herein did not.

34. Where an accused person is a layman on issues pertaining to law and procedures in court, and most accused persons are, the trial court is charged with a higher responsibility to satisfy itself and ensure that such a person has been supplied with witness statements. In the instant case the appellant had the opportunity which he took, to inform the court on the occasions when he did not have the prosecution witnesses' statements and the court adjourned the hearing and ordered that he be supplied with witness statements. He also cross-examined the witnesses including the investigations officer who testified as PW4. Again at no point during the trial did the appellant seek out to the court for lack of documentary evidence from the prosecution. Accordingly, it is my humble view that this ground as raised by the appellant is an afterthought and holds no water and as such it is hereby dismissed.

35. It was also submitted by the appellant that the charge sheet brought against him was defective as there was variance between the charge and the evidence on record specifically on the dates set out in the particulars of the offence as entailed in the charge sheet vis a vis the evidence adduced by the prosecution witnesses.

36. The charge sheet brought against the appellant reads as follows:

"CHARGE: DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

PARTICULARS OF OFFENCE: <u>EZEKIEL ONYANGO ALOO:</u> On the 29th day of October 2014 at** [Particulars Withheld] **sub-location in Gem Sub-county within Siaya County, intentionally caused his penis to penetrate the anus of BM, a child aged 7 years without his consent.

ALTERNATIVE CHARGE: COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION (11) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

BRIEF CIRCUMSTANCES (PARTICULARS) in Summary P.C.R. Offences: <u>EZEKIELL ONYANGO ALOO</u>: On 29th October 2014 at Malanga sub-location in Gem sub-county intentionally and unlawfully touched the anus of BM a child aged 7 years without his consent. "

37. PW1, the complainant testified that the offence occurred on the 29/10/2014 when the appellant lured him from the playground and subsequently defiled him. This evidence was corroborated by PW2, the complainant's mother who stated that the complainant went to play with other children but only returned home at 7pm. He did not tell her anything until 5 days later when he started feeling pain on walking and on being questioned, he revealed what the appellant had done to him and cautioned him with threats to kill him if he revealed the ordeal to anyone. PW3 examined the complainant on the 4/11/2019 six days after he had been defiled and confirmed that on examination, she found that the complainant had been penetrated in his anus which was red, swollen and discharging faecal matter. It was painful on touching.

38. The court record reveals that plea was taken on the 8/2/2019. This large gap in time from the report of the case on the 4/11/2019 following the alleged defilement on 29th October 2014 to the arrest and charging of the appellant on 7/2/2019 was explained by PW4 who

testified that the appellant was at large after the incident for a period of 5 years.

39. The trial record further reveals that PW4 in her testimony alluded to the offence having taken place on the 29/10/2018. However it is my considered view that this was an error as a result of confusion of dates by PW4, which error is curable in law as the incident had taken place over five years earlier and there was no other evidence referring to any incident in 2018.

40. Section 382 of the Criminal Procedure Code provides, in material part that:

> ***"No finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***

41. All events described during the trial took place in 2014 except the arrest and charging of the appellant with the material offence which was in February 2019. I am unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before the trial court that the charge sheet was defective. I find no defect that would materially go to the substance of the charge.

42. Further, it is my humble view, there was no risk of confusion in the mind of the appellant as to the charge framed and evidence presented as the appellant was fully aware of the case that he was to meet when he was presented before the trial court on 8/2/2019. I find and hold that the charge as framed did not lead to any miscarriage of justice.

43. On whether the trial magistrate delivered judgment twice, as alleged by the appellant in his submission that the judgment was pronounced twice with the first being read on 25.10.2019 and on the second occasion on the 18.11.2019, I observe that there are no such two judgments on record. On the judgment day, **25th October 2019,** the trial court delivered judgment convicting the appellant and subsequently he meted out sentence on the latter date of **18/11/2019** after calling for and considering a presentence report from the probation officer, which is in order. Accordingly, the appellant's complaint is not merited and is hereby dismissed.

44. On whether the prosecution proved its case against the appellant beyond reasonable doubt, Section 8 of the ***Sexual Offences Act*** provides:

> ***"8. (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.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."***

45. It is trite that for an accused person to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. In **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013,** it was stated:

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

46. In **Kaingu Elias Kasomo v Republic at** Malindi, the Court of Appeal in criminal appeal No. 504 of 2010 stated:

"Age of the victim of the 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."

47. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello v Republic (2010) eKLR** where the Court stated that:

"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the 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. That must be so because dire consequences flow from proof of the offence under section 8(1) …proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

48. In **Dominic Kibet v Republic Criminal Appeal No. 155 of 2011** it was held:

"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."

49. In the instant case, the complainant's age was not disputed. PW2 testified that the complainant was born on the 1/9/2005 and as such the complainant was 9 years old when the offence was committed on the 29/10/2014. PW4 produced the complainant's birth certificate as Pexhibit 1 to prove beyond reasonable doubt, the complainant's age.

50. On whether the element of penetration was proved beyond reasonable doubt, the complainant testified that the appellant ordered him to kneel down on his hands and proceeded to defile him through the anus. PW3 the Clinical Officer who examined the complainant testified that her examination revealed redness along the anus, that the hole was oozing with stool and that the rectum was painful upon touch all symptoms that indicated penetration. It is noteworthy that the appellant was well known to the complainant being a cousin and further that the offence occurred during the day.

51. Section 124 of the Evidence Act, Cap 80 Laws of Kenya provides:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, where the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

52. Thus it is clear from a reading of section 124 of the Evidence Act that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See **George Kioyi v R Cr. App. No. 270/2012 (Nyeri)** and **Jacob Odhiambo Omumbo v R. Cr. App No. 80 of 200 (Kisumu)**.)

53. The prosecution proved its case beyond reasonable doubt against the appellant. The trial court considered the appellant's defence and found it wanting in light of the watertight prosecution evidence.

54. The appellant also raised the issue that the prosecution failed to call crucial witnesses to prove their case specifically the children who were said to have been playing with the complainant. This court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides: -

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

55. In **Bukenya v R (UGC 1952)**, the court stated:

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

56. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated:

"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that

witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

57. In **Keter v Republic [2007] 1 EA 135** the court held inter alia:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

58. In the instant case, the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case beyond reasonable doubt. The trial court was in my view not at liberty to determine which witnesses are sufficient to prove the prosecution case. Moreso, whereas the appellant was under no duty to say anything in defence, he testified and conceded that there were children who played with and damaged his radio and that as they ran away on seeing him, the complainant fell on a stone and injured himself. The appellant placed himself at the scene of crime. A fall on a stone would not penetrate the anus of the complainant unless such a fall is so vertical and the stone is so sharp and directed or targeted at the anus of the child. That theory by the appellant in my view was made up. This ground of appeal fails. It is hereby dismissed.

59. The appellant also stated in his petition of appeal that there were contradictions in the testimonies of PW2 and PW4 on the injuries sustained by the complainant. PW2 was the complainant's mother stated that she learnt of the victim's injuries which was pain in the anus 5 days after the incident because the victim did not disclose immediately after being defiled. When she checked the anus, she saw it swollen and some discharge oozing from therein. PW4 was the officer who received a report of the child having been defiled and so she only referred the child to Malanga Dispensary for examination and treatment.

60. I find no contradictions in the evidence of the two witnesses on the injuries of the complainant as the injuries were verified by PW3 Everlyne Odhiambo the Clinical Officer who attended to him and filled the P3 form which was produced as an exhibit. Furthermore, in **Richard Munene v Republic [2018] eKLR** it was stated:

"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 or 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."

61. Accordingly, I find that there was no contradiction during the trial so as to prejudice the appellant. Consequently, this ground fails.

62. The appellant also submitted that the particulars of the offence indicate that the offence occurred on 29.10.2014 while evidence on record indicated that the offence was reported vide **OB. NO. 14/29/3/2019** at 12.10 pm, whereas the Plea was taken on 08.02.2019 which was before the first report as per the first report. Further, the appellant submitted that the charge sheet indicated that the arrest was effected on 07.02.2019 while the accused was arrested on 29.10.2014 and as such all these contradictions were unsafe to base a conviction upon.

63. I have examined the submissions Vis avis then trial court record and evidence. The charge sheet and evidence in support of the charge are at not variance as far as the date of offence is concerned which 29/10/2014 is. The **OB No. 14/29/3/2019** mentioned was in the evidence of the complainant's mother where she stated that she made a report following the threats by the appellant's father to burn her house upon the appellant being arrested, which was OB NO.**14/29/3/2019**. There is no evidence on record that the accused was arrested on 29/10/2014. The evidence of PW4 is that the appellant was arrested on 7/2/2019 five years after the offence as he was at large. Accordingly, the submissions on contradictions are baseless and are dismissed.

64. Finally, the appellant impugned the trial court's judgement on the ground that it did not comply with the law. The appellant submitted that the non-compliance was in the trial court's double pronouncement of the judgement on 25.10.2019 and on the second occasion on the 18.11.2019.

65. I reiterate that I have perused the trial record and note that the judgement of the matter on appeal herein was read in the trial court on the 25/10/2019 whereas on the 18/11/2019 the trial court did a sentence hearing to mete appropriate sentence on the appellant who had been convicted on the 25/10/2019. Further it is noteworthy that the sentence hearing took place on the 18/11/2019 after the trial court received the probation officer's report on the appellant. Consequently, I find no fatal defect in the judgment capable of vitiating the appellant's trial and conviction.

66. On the whole, I find and hold that this appeal against conviction lacks merit. The same is hereby dismissed.

67. On sentence, I observe that the penal section 8(2) of the Sexual Offences Act mandates a life imprisonment upon conviction. The trial court, before sentencing the appellant considered his mitigation and a social inquiry probation report which guided him. The sentence imposed was lawful. The appellant took advantage of a very young boy child and defiled him. There is no justification whatsoever for such a heinous crime. The appellant then went at large for five years after committing the offence. He was escaping to face justice. The minor was pained and traumatized. He did not deserve this kind of inhuman treatment. The appellant must pay for his animal behavior. He must remain behind bars for the rest of his life. He does not deserve to live in society as he has no regard for the vulnerable children as the complainant. He is a threat to the survival of children. Children deserve protection. The complainant was a relative of the appellant. The life sentence imposed is lawful. However, it is the maximum provided under section 8(2) of the Sexual Offences Act.

68. The **Francis Muruatetu &another v Republic [2017]e KLR** decision did not outlaw mandatory sentences, the decision was only concerned with failure to allow mitigation and deprivation of discretion of the trial court in sentencing. In this case the trial court exercised its discretion and even called for a probation report on the appellant which report was not favourable. He also heard and considered the mitigations by the appellant before sentencing the appellant. Accordingly, I find no unlawfulness in the life imprisonment imposed on the

appellant. However, as the appellant was a first offender and as the trial court meted out mandatory sentence, I would apply the Francis Muruatetu and the **Jared Injiri Koita v R [2019] e KLR** decisions and resentence the appellant to serve **Thirty five [35]** years in prison running from the date of his sentencing in the lower court on 18/11/2019.

69. In the end, this appeal against conviction is dismissed. The appeal against sentence is allowed to the extent stated above. This file is closed.

Orders accordingly.

Dated, Signed and delivered at Siaya this 29th day of September 2020 virtually via Microsoft teams, the appellant in prison.

R.E.ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi SPPC

CA: Brenda