REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 131 OF 2017

CORAM: HON. R.E.ABURILI J

BENSON OUMA OUDIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, conviction and sentence delivered by Hon. James O. Ongondo, Principal Magistrate in Siaya PM's Court Sexual Offence Case No. 2 of 2017 on the 15/12/2017)

JUDGMENT

Introduction

1. The delay in the determination of this appeal was due to non-availability of the trial court record which was only availed to this court on 15th November, 2019 and after admission of the appeal on 20/11/2019 and directions given on the hearing of the appeal on 23/3/2020, Covid 19 pandemic set in thereby causing more delay.

2. The appellant herein **BENSON OUMA OUDIA** was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act of 2006. Particulars of the offence are that on the 28th December, 2016 at 2000 hours at [particulars withheld], Siaya County the appellant then accused intentionally caused his penis to penetrate the vagina of TAO [full name withheld for legal reasons] a girl aged 11 years.

3. The appellant also faced the alternative charge of Committing an Indecent Act with the same child TAO on the same date and at the same place contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**.**

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

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

6. Dissatisfied by the said judgment, conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

a) That the Learned magistrate erred in fact and in law by not considering that the accused person was not supplied with the witnesses' statement as per the provision of article 50(2)(b), (c) of the Constitution.

b) That the learned magistrate erred in fact and in law by failing to consider the alibi defence statement of the accused person.

c) That the learned trial magistrate also erred in fact and in law by not considering that the accused person was not subjected to any medical examination depending on the gravity.

d) That the learned trial magistrate erred in fact and in law by not considering that the prosecution did not prove the ingredients of defilement beyond any reasonable doubt.

e) That he be supplied with the lower proceedings to allow him adduce more grounds of appeal.

Appellant's Submissions

7. The appeal herein was canvassed by way of written submissions after directions were given upon admission of the appeal to hearing on 20/11/2019. The appellant acting in person submitted that the prosecution did not proof their case beyond reasonable doubt. He cited the fact that the complainant's age was not proved as no birth certificate was availed. It was the appellant's submission that PW4, the clinical officer, did not explain to court the methodology used in assessing the age of the complainant. Reliance on this proposition by the appellant was placed on the cases of **Arthur Mshila Manga v R CRA NO. 24 OF 2014** at Mombasa, where the court held that, ***"Age of a child was not proved beyond reasonable doubt as required on the authority of Kangu Elias Kasomo v R CRA No. 504/2010 eKLR."***

8. The appellant submitted that PW4, the clinical officer stated in court that no spermatozoa was seen and that the hymen tear-fresh less than 24 hours which evidence was not corroborated by the P-3 form whereby in section 'B' the appropriate age of injury was not indicated. He further submitted that no DNA test was conducted hence a breach of Section 36(8) of the Sexual Offences Act No. 3 of 2006.

9. The appellant submitted that the prosecution failed to disclose relevant materials in their case against him specifically the amended charge sheet, copies of the PRC form as well as the age assessment report which material or deliberate concealment of the same amounted to an ambush and constituted an improper attempt on the part of the prosecution to gain an underserved or unfair advantage over the appellant and caused him to suffer prejudice.

10. The appellant further submitted that the mandatory nature of the sentence provided for by Section 8(2) of the Sexual offences Act was unconstitutional as held by the Supreme Court in the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR** and the Court of Appeal in that of **Christopher Ochieng v R (2008) eKLR CRA No. 202 of 2011** and as such the trial court ought to have passed a sentence that was commensurate to the circumstances of his case.

11. The Respondent filed written submissions supporting the conviction and sentence imposed on the appellant and urging the court to dismiss the appeal herein.

Analysis and Determination

12. This is a first appellate court. As expected, I must analyze and evaluate afresh all the evidence adduced before the lower court and draw my own independent conclusions bearing in mind that I neither saw nor heard any of the witnesses testify. See **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court thus:

> ***"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."***

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

> ***"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."***

14. Revisiting the evidence as adduced before the trial court, the prosecution evidence was as follows: PW1 the complainant testified after *voire dire* examination and stated that on the 28/12/2016 she was at her grandmother's home at [particulars withheld] area when at about 12.00 p.m. the appellant visited the home as he used to because of the friendship he had with the minor's uncle PO. The complainant testified that on this day however her grandmother, AO was unwell and O was not at home. The appellant told the complainant's grandmother that he had a chicken to slaughter and asked her to allow the complainant to accompany the appellant to go and get the chicken.

15. The complainant further testified that she together with her cousin Y and J, went with the appellant to get the chicken but on arrival at the appellant's home which was 300 metres away, the appellant chased Y and J prompting them to return home and took the complainant to harvest some groundnuts.

16. She further testified that the appellant then sent her to go and get a paper bag from his house to carry the nuts but once the minor entered the appellant's house, the appellant followed her and closed the door behind him. It was the complainant's testimony that the appellant then violently undressed her starting of with tearing off her pant and repeatedly defiled her. She stated that she screamed but it was all in vain as the appellant was determined to accomplish his heinous mission.

17. The complainant further testified that a police officer named Ochieng knocked the door down, handcuffed the appellant and beat him up after which the appellant was taken away to the centre police station. She stated that she was taken to hospital for treatment and examination and was given medication. She stated that the offence occurred around 12.00pm and as they were alone in the room, she saw the appellant well. She further stated that the appellant did not use a condom.

18. In cross-examination by the appellant, the complainant stated that the appellant's father was sleeping in his house when the appellant threatened to kill him if he told anybody about the incident which prompted his father to go inside the house to sleep. She further stated that in her statement to the police, she gave the identity of the appellant as her assailant.

19. PW2 a minor YAO gave evidence similar to what PW1 stated and added that the appellant had asked to be given Kshs. 300 for the sale of chicken and asked her grandmother that the complainant accompany him but the grandmother insisted on PW2 and J going along too. It was PW2's testimony that the appellant chased her and J away and upon arriving home their grandmother told them to go back and get PW1.

20. It was her testimony that when She and J returned to where they had left PW1, they got the appellant harvesting groundnuts with the minor and he chased them away again with a jembe prompting them to go and report the same at Anyiko police post where the police upon receiving the information dispatched a team of 4 Police officers to the appellant's house.

21. PW2 testified that on arrival at the appellant's house, the police called on the appellant to open the door but he refused prompting the police to push the door open where they found the appellant dressed in a short trouser and t-shirt. She testified that the police told PW1 to wear clothes and get out after which they all went to the police station and recorded statements.

22. In cross-examination PW2 reiterated her evidence in chief and further stated that one policeman peeped into the appellant's house and saw the appellant defiling the complainant.

23. PW3 MAW testified that on the 28/12/2016 she was at home at [particulars withheld] when the complainant's uncle O borrowed her phone to inform the complainant's mother that she had been defiled after which the mother requested PW3 to take the complainant to hospital which she did as she took her to Yala hospital.

24. In cross-examination, PW3 stated that she was informed of the offence but she did not witness it. In re-examination she stated that when she took the minor to hospital the doctor informed her that the minor had been defiled.

25. PW4 Evelyne Odhune the Clinical Officer who examined the complainant testified that she received the minor on 28/12/2016 for medical examination following an alleged sexual assault. She observed that the hymen had been freshly torn within 24 hours which indicated that the complainant had been involved in a sexual act 24 hours prior to appearing for examination. She further observed that both labia had bruises with reddish appearances along vaginal walls. She produced as exhibits 1 the P3 form, Exhibit 2 laboratory results and exhibit 3 an outpatient treatment card for the complainant. She also produced the complainant's age assessment report dated 5th January 2017 showing she was aged 11-12 year, as exhibit 4.

26. In cross-examination PW4 stated that the appellant was not examined as the police did not avail him for examination.

27. PW5 No. [xxxx] APC Richard Onyango Oito testified that on the 28/12/2016 he was at Anyiko AP Gem when at 1330 hours a young lady came to report that Benson Ouma Oudia the appellant herein had locked her sister TA in his house and chased the Reportee away. APC Oito informed A.P.C Fredrick Hosea to accompany him to the scene where on arrival they knocked on the locked door but Ouma refused to open the door forcing PW5 to kick the door open. He further testified that inside the house he found the appellant, Mr. Ouma half-naked with the complainant. He testified that the appellant wore a boxer and t-shirt whereas the complainant wore a skirt and t-shirt but without an inner pant. APC Oito stated that after interrogating the complainant, she told him that the appellant had placed her panty under the mattress which he recovered and the complainant confirmed it belonged to her. He further testified that he then called the OCS Yala to go and transport the appellant to the station and take the complainant to hospital. He confirmed that he arrested the appellant in his [appellant's] own house.

28. In cross-examination APC Oita stated that there were other people in the compound where the appellant was arrested and that the appellant's parents came after the appellant was arrested and stated that they did not want anything to do with the appellant. APC Oita stated that he found the appellant with the complainant and that he did not take the appellant's confession.

29. PW6 No. [xxxx] P.C Robert Kandagor from Yala Police Station testified that on the 29/12/2016 at around 10.00am, the complainant aged 12 years reported that she was sexually attacked when her and her sister YA had been sent to get chicken from the appellant. He further testified that he asked P.C Beatrice to record the minor's statement, issued her with a P3 form and sent her to Yala hospital where she was treated and examined. He further testified that the accused /appellant was arrested by Aps from Anyiko Administration Police Camp.

30. In cross-examination, P.C. Kandagor stated that the appellant committed the offence on 28/12/2016 at 12.00p.m. He further stated that he gathered evidence from witnesses and that the birth certificate showed the age of the minor and further that her age was also assessed.

31. At the close of the prosecution's case, the appellant gave sworn statement of defence in which he denied the allegations levelled against him and stated that on 28/12/2016 he woke up as usual and went to work at Anyiko Centre up to 1.00pm when he returned home to take lunch which he ate under a tree but that as he was eating, AP's from Anyiko rode into the home on a motorcycle, arrested him and started assaulting him. The appellant testified that he was taken to the Police Post and detained and that at 4.00pm he was brought a girl and asked if he knew her inquiring into what he had done.

32. The appellant further testified that the child was taken to hospital and upon his demand to go with the minor, he was taken to Yala Police Station, locked in cells and later charged in court.

33. In cross-examination, the appellant admitted knowing the minor for a period of over 2 years and that the minor's grandmother stayed about 1 km from his home. The appellant further stated that he stayed in his house alone and that he had one person who assisted him to do mason work who had passed on.

Determination

34. Having carefully considered the appellant's grounds of appeal, the submissions for and against the appeal herein and the evidence adduced before the trial court by the prosecution witnesses and the appellant in defence, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant a conviction for the offence of defilement.

35. As a preliminary point, I will consider the point raised by the appellant that his right to a fair trial was violated as he was not given the amended charge sheet, copies of the PRC form as well as the age assessment report contrary to the provisions of Article 50(2)(c) of the Constitution.

36. This court takes cognizance of the provisions of Article 50(2)(c) and (j) of the Constitution of Kenya, 2010 that provide:

> ***"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."***

37. In addressing this right of an accused person being furnished with the relevant evidence, in the case of **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR**, the Court of Appeal rendered itself thus:

> ***"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."***

38. A perusal of the trial court record shows that when the matter came up before the trial court on the 5/7/2017, the appellant was given all the witnesses statements but was not given the P3 form which the prosecution indicated would be provided to the appellant during the hearing.

39. The matter proceeded for hearing on the 31/7/2017 when, despite the fact the appellant raised the issue that he had not been given the P3 form, the hearing still proceeded.

40. On the question of age of the complainant which the appellant claims was not proved, it was during the *voir doire* examination of the complainant that the complainant stated that she was 11 years old a matter substantiated by the prosecution who alluded to an age assessment report dated the 5/1/2017. This led to the amendment of the charge sheet which in its particulars of offence had indicated that the complainant was 12 years old and not 11 years old thus necessitating the fresh taking of plea after the amendment had been done as the appellant did not challenge the amendment.

41. PW4 the Clinical Officer testified and produced as exhibits both the P3 form as well as the age assessment report. The appellant had the opportunity and proceeded to cross-examine PW4 on this evidence.

42. 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 he 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 such trial court that he has not been supplied with the same 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.

43. Where an accused person is a layman on issues pertaining to law and procedures in court, the trial court is charged with a higher burden to satisfy itself that such a person has been supplied with witness statements. In the instant case the appellant had the opportunity, which he took to cross-examine the clinical officer who testified as PW4 on the P3 form and age assessment report which were produced as exhibits. Again, at no point during the trial did the appellant seek an adjournment or raise a query as to the lack of documentary evidence being supplied to him.

44. Accordingly, it is my considered view that this ground as raised by the appellant is an afterthought and holds no water and as such should be dismissed and further, there is no evidence that the appellant was in any way prejudiced as he had the opportunity to cross-examine PW4.

45. Furthermore, if the appellant strongly feels that his rights were violated by failure to give him some documents then he is at liberty to file a constitutional petition seeking for compensation.

46. As to whether the prosecution proved its case against the appellant beyond reasonable doubt, Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***"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."

47. It is now trite that for the accused 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 proven to be a child; and finally, whether the penetration was by the accused. 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."

48. 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:

"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."

49. 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."

50. In this case, the complainant testified that she was 11 years old. PW4 produced an age assessment report that indicated that the complainant was between 11-12 years old. In the Ugandan Court of Appeal case of **Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000**, it was held:

"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..."

51. The Court of Appeal of Kenya has also expressed itself on the issue of age assessment. In **Criminal Appeal No. 61 of 2014, Richard Wahome Chege v Republic**, the Court of Appeal sitting in Nyeri found the evidence of the complainant's mother to be sufficient proof of age. The learned Judges expressed themselves as follows;

"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself."

52. In **Machakos High Court Criminal Appeal No. 91 of 2011 Joseph Seet v Republic**, the court relied on the Clinic Health card of the child in a defilement case to uphold a conviction in a case where proof of age was an issue.

53. Guided by the above authorities, I am persuaded that the complainant's age was sufficiently proved to be 11 years. This ground of appeal therefore fails and is dismissed.

54. Regarding penetration, the complainant testified that the appellant tricked her to get into his house where he locked the door and defiled her after ordering her to kneel down, on her hands and proceeded to use his penis to insert in her vagina despite her despite her screams due to the pain that she was undergoing. PW4 the clinical officer who examined the complainant testified that the complainant's hymen had bruises with reddish appearances along the vaginal walls and that the hymen had been freshly torn likely 24 hours prior to the examination. The police officers led by PW5 received information from the witness PW5, went to the scene and found the appellant locked up in his house. They knocked the door but he refused to open so the officer kicked the door open and he found the appellant half naked while the complainant had no pants on. On asking her as to what had happened, she narrated her ordeal to him. The appellant was arrested at the exact scene of crime. In my humble view, the complainant's evidence was properly corroborated.

55. Section 124 of the Evidence Act Laws of Kenya provides that:

> ***"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."***

56. The appellant took issue that there were no forensic and other scientific tests including D.N.A test that connected him to the alleged offence. The appellant submitted that DNA tests were guaranteed under section 36 (1) of the Sexual Offences Act. I have already alluded to the legal position under Section 124 of the Evidence Act and further posit that the failure or refusal by the investigating officer or the police to examine the appellant was not by itself fatal to the prosecution case.

57. In enacting the provision of Section 124 of the Act Parliament in its wisdom was to reform the law for courts not to lean in favour of the accused and order for an acquittal on the grounds that there is no corroboration. The medical evidence on the complainant or that of the appellant is therefore not significant.

58. From the appraisal of the trial court's record in my view the prosecution placed sufficient corroboration from the undisputed medical evidence by PW4 who said the complainant was defiled, to the evidence of the complainant herself as well as that of PW5 who found the appellant locked in his house with the complainant which all render credibility that indeed the complainant was defiled.

59. The appellant claims that no tests were done on him to connect him to the allegation. The ingredients of the charge of defilement which must be proved by the prosecution are, age of the complainant, the identity of the perpetrator and penetration which must be proved by medical evidence. Medical examination of the perpetrator is not a mandatory requirement to prove defilement.

60. Evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement or rape as the case may be. In the case of **Fappyton Mutuku Ngui v R (2014) eKLR** while considering a similar issue of medical examination of the perpetrator, the court stated:

> ***"In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW-2-'s testimony which was trustworthy as to the person who had defiled her."***

61. In this case, the appellant was found by PW5 at the scene just after he had defiled the victim and locked up with her in the house. The question is what was the appellant adult man doing locked up and on the bed with a child aged 11 years? That evidence properly corroborated the evidence of the victim which I find was clear on what the appellant did to her. PW2 a minor also clearly stated how the appellant chased her with other children and remained with the victim only for the appellant to be found half naked and locked up with the victim child. The evidence against the appellant was overwhelming and proved that he was the perpetrator of the offence and no other person. The ground of appeal is therefore found to be without any merit and is hereby dismissed.

62. 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)**.) In the instant appeal, as the first appellate court, I am satisfied on the evidence adduced by the complainant and other prosecution witnesses that the prosecution proved its case beyond reasonable doubt against the appellant. There is nothing on record to suggest that the appellant was framed.The trial court considered the appellant's defence and found it wanting in light of the overwhelming watertight prosecution evidence.

63. It was the appellant's case that the trial court ignored his alibi defense. The appellant testified that he was eating his lunch when Administration Police Officers rode into his home and arrested him. He denied having committed the alleged offence. In the case of **Charles Anjare Mwamusi v R CRA No. 226 of 2002** the Court of Appeal stated:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."***

64. The legal principle is that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- see **Ssentale v Uganda [1968] EA 36-**. The foregoing principle was restated by this court in the case of **Bernard Odongo Okutu v Republic [2018] eKLR** where the court referred to the holding in the case of **Wang'ombe vs. Republic [1976-80] 1 KLR 1683**, where it was stated **"the**

prosecution always bears the burden of disproving the alibi and proving the appellant's guilt."

65. However, this defence should also be raised at the earliest opportune time as was held in the case of **Victor Mwendwa Mulinge v R [2014] eKLR** where the Court of Appeal rendered itself thus on the issue of alibi:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs. R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

66. The said Court of Appeal has also held that nevertheless, even when the defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others vs. R [2005] 1 KLR 52**.) In the present case, and as already observed above, the appellant's belated alibi defence is weighed against the evidence adduced by the prosecution which was accepted by the trial court and which I wholly concur with, the conclusion I make is that the alibi defence is and was effectively displaced.

67. The appellant has also impugned the judgment of the trial court in imposing a sentence of life imprisonment. He argues that the sentence is manifestly harsh and unconstitutional bearing in mind the **Francis Muruatetu v R case[2017]e KLR** decision of the Supreme Court on the unconstitutionality of mandatory DEATH sentence.

68. Trial Courts have a greater deal of discretion when it comes to punishment and meting out the appropriate sentence and other determinations. The law basically provides various range of sentences from which a Judge or Magistrates can opt to effect and apply in specific cases. The same law provides for a minimum mandatory sentences where the appellant case is stated to have been proved by the prosecution.

69. From the record the accused faced a charge of defilement contrary to section 8(1) of the Act. The victim of the defilement was found to be aged between 11 and 12 years old. The appropriate sentence on conviction is provided in Section 8(2) of the Act to be mandatory life imprisonment. The learned trial Magistrate therefore considered and paid due regard to the minimum legislated sentence for the offence of defilement and proceeded to sentence the appellant to life imprisonment.

70. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora 1954 24 EACA 70**. It is well set out that:

> ***"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice."***

71. Similarly, the Court of Appeal of East Africa in **Wanjema v Republic [1971] EA 494** stated that:

> ***"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

72. In the present appeal, the horrors and trauma of a victim of defilement are such that they leave a permanent psycho-traumatic experience. I am alive to the fact that when Parliament legislated for minimum sentences in sexual offences it was meant to deal with societal problem of sex predators of young children. However, even with long minimum custodial sentences the problem seem not to abate and neither have such incidents reduced to zero in our country.

73. However, The Supreme Court of Kenya's decision in **Francis Karioko Muruatetu (supra)** as consolidated with Petition No. 16 of 2015 (the Muruatetu decision) held that the mandatory death penalty as provided for under Section 204 of the Penal Code is unconstitutional as it deprives the trial courts discretion to impose an appropriate sentence depending on the particular circumstances of each case and having regard to the mitigation by the accused person.

74. The Court of Appeal in **Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014** and in **Jared Koita Injiri v Republic [2019**] extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory minimum sentences provided for under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that does not take away the discretion of the trial Court in sentencing. In the instant case, the minor complainant was aged 11 years old. She was lured and defiled repeatedly by the appellant and not even her screams seemed to scare him.

75. In **Christopher Ochieng v R [2018] eKLR** the Court of Appeal stated as follows: -

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis… Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another v Republic (supra) we should set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court."***

76. Guided by the Supreme Court decision in the Muruatetu case and persuaded by the case of **Christopher Ochieng v R (Supra)** and by

Dismas Wafula Kilwake (supra) and **Solomon Limangura v Republic [2019] eKLR** decisions in relation to sentencing, it is my humble view that the life imprisonment meted upon the appellant cannot stand. However, a long term sentence would be appropriate in the circumstances of this case in order for the appellant to stay away from the society and to be reformed and rehabilitated before he can be released back into the community.

77. Accordingly, I find the appeal herein against conviction not merited. The same is hereby dismissed.

78. The appeal against sentence is allowed to the extent that the life imprisonment imposed is hereby set aside and substituted with a prison term of 35 years to be calculated from the date of arrest.

79. **Orders accordingly,**

Dated, Signed and Delivered at Siaya this 19th Day of October, 2020

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okachi Senior Principal Prosecution Counsel

For the Respondent

Appellant in person at Kisumu Maximum GK Prison –virtually by Microsoft teams

CA: Brenda