REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO.26 OF 2019

BONFACE ANDAYI HEZRON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence before the Senior Resident Magistrate's Court at Ukwala in Sexual Offense Case No. 26 of 2018 in judgment delivered on 1st April 2019 by Hon C.I. Agutu, Senior Resident Magistrate)

JUDGMENT

Introduction

1. The Appellant **BONFACE ANDAYI HEZRON** was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on the 8th July, 2018 at [Particulars withheld] village in Ugunja sub-county within Siaya County intentionally caused his penis to penetrate the vagina of, **SA,** a child aged 9 years.

2. The trial magistrate, Hon. C.I. Agutu after hearing six prosecution witnesses, the appellant's defence and considering the appellant's mitigation, found the appellant guilty of the offence defilement as contemplated under section 8 (1) as read together with section 8(2) of the Sexual Offences Act and convicted him under section 215 of the Criminal Procedure Code sentencing him to life imprisonment.

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

a) That the learned trial Magistrate erred in points of law by failing to accord the appellant a right to a fair trial hence a prejudice.

b) That the trial magistrate failed to evaluate the evidence in its entirety thus arriving at an erroneous decision.

c) That the learned trial magistrate erred in point of law by failing to observe that the case was riddled with poor and shoddy investigations, thus ultimately rendered a fatal blow to their case hence prejudice.

d) That the trial learned magistrate erred in law by breaching and violating appellant constitutional rights.

e) That the present case was not proved beyond reasonable doubts at prescribed by the law under section 111(1) of the evidence Act.

Appellant's Submissions

4. The appellant submitted that the learned trial magistrate faulted in law by failing to observe that his right to fair trial under Article 25(c) and 50(2) (c) of the constitution were violated as he was not served with the court proceedings to prepare his submission and defense statement as per Article 50 (2) (c) of the Constitution. Reliance on this proposition was placed on the case of **Ahamad Abolfathi Mohammed & Amnsour Mousavi CRA No. 135 of 2016**, where the appellant alleges the court held that, '*that was in violation of Article 50(2) (j) of the constitution of Kenya which guarantees appellant access to all material information that the prosecution intend to reply on and is one of the key tenets of fair trials*.' The appellant further relied on the case of the English Court of Appeal in **R v Ward (1993) 2 ALLER 557** where he submitted it was stated that the prosecution was under a duty throughout the trial to disclose to the defense all relevant evidence whether it strengthened or weakened its case.

5. The appellant further submitted that the age of the victim was not proved beyond reasonable doubt as the provision of an immunization card by PW2, the complainant's mother was not sufficient to prove the complainant's age. He relied on the case of **Arthur Mshila Manga v R CRA No. 24 Of 2014**, where the court held that, *"The age of the child was proved beyond as required on the authority of* ***Kaingu Elias***

6. It was his further submission that the trial court failed to accord him the benefit of doubt as there were circumstances creating reasonable doubt about his guilt. He relied on the case of **Ndarugu v R (2016) eKLR APP. NO.76 OF 2012** where the court held that, ***"to give an accused person the benefit of doubt in criminal case it is not necessary that there should be many circumstances creating reasonable doubt in a prudent mind about the guilt of an accused, is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right an accused person is the most favored child of the law and every benefit of doubt goes to him."***

7. It was further submitted that his conviction was based on circumstantial evidence which was based on doubtful evidence and as such he should be set free. He further submitted that the trial court failed to observe section 169(1) of the CPC which provides that, *"Every judgment to contain the points of determination, the decision thereon and the reasons for decision,"* and as such there was no reason in the judgment that empowered his conviction whereas the failure to carry out a DNA test was basis for his freedom.

8. He further submitted that there was no medical evidence adduced linking him to the alleged offence contrary to section 122A (1) (j) and (2) of the Penal Code as read with 36(1) of the Sexual Offences Act. It was his submission that the Complainant and their relatives concocted the case against me because I used to deny them a cup for fetching water from the drum.

9. It was the appellant's submission that the trial court failed to observe that the term used in evidence by the complainant to define carnal knowledge was unlawful. He submitted that the term 'dudu' meant insects in Kiswahili. He thus submitted that such terms in law are contrary to section 137(a) (iii) CPC which requires that the particulars of the offence to be set out in ordinary language, without use of technical terms. He relied on the case of **Josephat Njue Solomon v R (2010) eKLR** where the High Court expressed view that the use of phrase unlawful carnal knowledge in particulars of a charge of defilement under the Sexual Offences Act did not fully and adequately allow such archaic terminology in respect of an offence Act.

10. The appellant submitted that the trial court failed to consider his defense statement and further failed to give him enough time to call his defense witnesses. He further submitted that the trial court erred in law by sentencing the appellant to life sentence whereas the same was unconstitutional following the findings of the court in the case of **Francis Kariuki Muruatetu** as well as that of **Maxwell Mwangi v R CA NO. 149 OF 2015**.

11. It was the appellant's submission that the trial court erred in law by failing to observe that PW4 did not examine PW1 and as such the unexplained absence of the clinical officer was grave to the prosecution case. He relied on the case of **Arthur Mishila Manga v R 2014 eKLR.**

Analysis & Determination

12. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (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. Revisiting the evidence adduced in the trial court, the complainant testified as PW1 under oath after voire dire examination saying she did not want to set her eyes on the appellant and stated that she knew the appellant herein very well and had seen him on several occasions. PW1 stated that the appellant had on several occasions brought his bag of maize for her and her siblings to take to the mill for him. PW1 said that the appellant had never thanked her for the service she rendered and was at times surprised to see him just idle while having the audacity to send them.

14. PW1 stated that the appellant worked for their neighbour whom she referred to as Fat Bob, and that the appellant was known to her as *"mfuasi"* and that he had told her that he was called Nexron – a probable corruption of Hezron. She stated that Fat Bob had just driven out when they went to fetch water in his well with her grandmother and other siblings. She stated that after fetching the water, PO, her maternal grandmother asked PW1 to return a container they had borrowed from the appellant which she obliged and after knocking the door to the appellant's house, she handed the container to him and he placed it behind the door. PW1 stated that the appellant then asked her to pick the container and place it on the table which she did and that as she was leaving, the appellant herein pulled her back tearing her blouse in the process. That he also pulled off her knickers and placed her on his bed and defiled her. That during the ordeal, the appellant gagged her mouth using his hand and warned her against biting him and that if she did he would kill her with the knife he had placed on her neck. She stated that after the appellant had had his first round and still holding her hostage, he was saying that he had not had his fill and was going to have another go before releasing her. She stated that the appellant defiled her again then brutally pushed her outside and threw her clothes after her. She stated that she noticed that blood and pus were trickling from her vagina and she experienced extreme pain while walking. She went and told her aging grandmother who told her not to get near the appellant as he would try it again on her. Her said grandmother called her mum over the phone and the mother came after one week from Busia where she worked.

15. PW1 testified that Fat Bob asked them not to directly confront the suspect as he would flee. That a report was made to the police and she was placed under medicare. PW1 identified her cloths in court including the blood stained knickers, the red shirt, Black and brown skirt and the pants.

16. In cross examination, the complainant reiterated her testimony in chief.

17. **PW2, BA,** the mother of PW1 testified that the minor was born on 10th August, 2009 and produced a child Health Card issued by the Ministry of Health under the programme of immunization. PW2 said she received a phone call from P, her mother that PW1 was sick. PW2 said the information was not detailed and she travelled home after two days. On arrival she found the minor asleep and the room emitted a stench which she said could not be detected by her mother since her smell glands were not functional. PW2 said she quietly observed the minor's walking gait as she left for her grandmother's bed. PW2 said the minor avoided her knowing that she was tempestuous. PW2 noted blood and pus trickle down the legs of her daughter, PW1 and that PW1 was also quacking. PW2 instinctively pulled down her child's skirt off and observed her pubic area and vagina and let out a shout calling P. PW2 then questioned her daughter who said she could not disclose what happened to her because she could be killed. When PW2 told PW1 that she would then be the one to kill her if she did not disclose, PW1 said it was *mfuasi* (appellant) who defiled her and threatened her with dire consequences if she ever dared to expose him. PW2 reported the matter to appellant's employer who was their neighbour. PW2 stated that Bob directed them to the police so she reported the incident at Ugunja Police Station and the latter released a landrover which took her and PW1 to Ambira Hospital.

18. PW2 restated PW1's evidence when she testified that her children usually milled for the appellant when they took theirs to be ground. PW2 said after PW1 was defiled, she became deeply traumatized and withdrawn. She became sickly and experienced pain while passing urine and faeces.

19. On cross examination, PW2 stated that the appellant had made sexual advances towards her but when she rejected him, he told anybody who cared to listen that she was infected with the Aids virus.

20. **PW3 PA** the mother to PW2 and grandmother to complainant testified that she stayed with the minor as the mother eked a living in Busia. PW3 stated that on the material date she had gone to fetch water at Bob's residence. She stated that Bob was a neighbour and a son in the language of the clan. She stated that she had permission from Bob to fetch water from his well and could therefore go in his absence provided his farm-hand was present.

21. PW3 stated on the material day, her grandchildren followed her to the well and that she brought a large container which she referred to as a super drum and filled it to the brim. PW3 said her grandchildren then helped in transferring the water in smaller containers and carrying the water home. PW3 the testified that she had borrowed a cup from the appellant herein which she used to transfer the water and on finishing the transfer, she asked the minors to take it back to the appellant then accused. PW3 said Mitchel followed her and when she asked about PW1 she was told she was following. PW3 said she had known *mfuasi* for a long period of time. PW3 said *mfuasi* worked for Bob then took a lengthy break and then came back. PW3 said the complainant came back carrying two buckets and attended school the next day but came back very tired. PW3 said PW1 missed school on Friday which prompted her to call the mother to the minor via the phone.

22. PW3 stated that on Friday when PW1 missed school she (PW3) was busy making preparations for a burial of a kinsman but that she had managed to spy PW1 peep at her private parts – vagina twice. She also stated that the room was smelly. PW3 said when PW2 came home she approached her and asked if she was in the know that PW1 had been defiled. PW3 said PW1 then narrated her ordeal perpetrated by *mfuasi* in her presence and in the presence of PW2. PW3 said they went and informed Bob who told them not to broadcast the issue nor confront the appellant but to report the matter to the police.

23. On being cross-examined by the appellant, PW3 stated that she made no report because the minor did not tell her that she had been defiled and that the appellant had warned her not to report the incident. She also stated that she had a problem with her sense of smell hence she could not smell.

24. PW4 Victor Odhiambo Achayo a medical person from Ambira Hospital testified that he examined the minor SA aged 9 years who told him that she was defiled by a person she had known a for long and she could identify and that the person defiled her on 8th July 2018 at his house and also examined the appellant aged 30 years on 15th July 2018. That on examination, the minor had been defiled and suffered bacterial infection as her external genitalia had pus, blood and was smelly. There were numerous leucocytes with pus cells and epithelial cells He stated that the minor visibly walked with a limping gait. The minor received necessary medical attention with antibiotics and painkillers being administered. He concluded that there was clear indication of defilement of the minor. He produced P3 form and Clinical Card and Treatment notes for the minor as exhibits 5(a) and 5(b).

25. **PW5 GO** an uncle to the minor testified that he knew the appellant as a caretaker of Bob's home. He stated that PW2, his sister drew his attention to his nieces walking style with her feet apart and in apparent pain. PW5 said the minor's mother got harsh and stripped her daughter and they noticed a steady trickle of blood and pus. PW5 stated that the minor told them that the appellant herein defiled her when she returned a cup to his house and that he swore her to secrecy. PW5 accompanied the team that reported the matter to Bob and they took PW1 to report to the police then to hospital.

26. **PW6 PC Nelia Muthoni** investigated the case and testified confirming that a complaint was lodged at Ugunja Police Station by PW1, PW2, PW3 and PW5. PW6 said she referred the team to Ambira Hospital. In the company of two police officers, PW6 arrested the appellant whom she also took for medical examination. PW6 said the minor's certificate of birth was not availed but a health clinic was given. PW6 produced PW1's red blouse as exhibit one, black skirt, exhibit two, pink pant exhibit 3, immunization card exhibit 4 medical exam report exhibit 5a, treatment notes exhibit 5b.

27. **Placed on his defence, the appellant** gave sworn testimony and indicated he had a witness who did not come to court to testify despite several accommodation by the trial court. He denied the charges levelled against him. He stated that he helped in chores in Bob's home and acknowledged that P, PW3 and her grandchildren had gone to fetch water at Bob's well in the compound. The appellant stated that the grandmother left together with her grandchildren. He argued that if he had indeed defiled PW1 there was no way he would have stayed in his employment.

DETERMINATION

28. 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.***

29. It is 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 a child; and finally, whether the penetration was by the Appellant. See **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

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

30. In **Kaingu Elias Kasomo vs. Republic** the Court of Appeal sitting at Malindi in criminal appeal No. 504 of 2010 stated as follows:

> ***"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."***

31. 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 categorize 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."***

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

> ***"…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."***

33. In the instant case the appellant impugned the trial court's judgement on amongst others that the complainant's age was not proven as the immunization card provided by PW2, the complainant's mother was not sufficient. In the case of **JOA v Republic [2019] eKLR** this court expressed itself s follows regarding the issue of age,

> ***"whereas proof of age of a complainant in defilement cases is a duty of the prosecution, to establish the age of the victim of defilement, it is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of***

age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim. This position finds support in several cases: In P M M v Republic [2018] eKLR, Mwongo J stated as follows and I concur:

"Whilst it is true that the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to her age does not constitute such proof, the Court may in certain circumstances rely on evidence other than an age assessment report or birth certificate. In the case of in Musyoki Mwakavi v Republic [2014] eKLR held that:

"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…"

In the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, it was held that:

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

37. As correctly observed by the learned Judges in the above cited case, whereas the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available including the trial court's own observation of the complainant in court can be relied on to determine the age of the complainant. Here, the medical evidence adduced by the clinical officer, which was not discredited by the appellant, estimated the age of the victim as one year and four months old. In addition, the appellant did not raise any issue on the question of age during cross examination."

34. In the instant case, though the complainant's certificate of birth was not availed, PW2, the complainant's mother identified a child health Card issued by the Ministry of Health under the programme of immunization which indicated that the minor was born on 10th August, 2009 making her nine years at the time of defilement. The said Card was produced by the Investigating Officer PW6 as an exhibit 4. The trial court found this to be reliable evidence of the complainant's age. In the circumstances, I do not find it prudent to disturb the finding of the trial magistrate. I uphold the same as prove beyond reasonable doubt that the complainant was aged 9 years at the time of the incident.

35. On whether penetration of the minor was proved beyond reasonable doubt, the appellant argued that there was no medical evidence adduced connecting him to the alleged offence and further that the complainant was not examined by PW4. From the evidence on record, it was the testimony of PW4, Victor Odhiambo Achayo a medic based in Ambira Hospital hat the complainant was treated at the hospital 7 days after the alleged incident on the 15th July 2018 when she was found to have a bacterial infection in her vagina and further that she walked with a limp with legs apart and also had a tender abdomen and pelvic region. PW4 further testified that the complainant had a bruised vaginal wall with pus discharge and a foul smell leading him to arrive at the conclusion that she was defiled.

36. On whether failure to take a DNA test on the complainant and appellant to determine whether the appellant was the person who defiled the complainant was fatal to the prosecution case and contrary to Section 36 (1) of the Sexual Offences Act No. 3 of 2006, first and foremost is that the complainant testified that she and her grandmother had gone to fetch water from a super drum where the appellant worked for one Bob Ongasi *(mfuasi)* when the appellant took advantage and defiled the complainant. The complainant was firm in her testimony that the appellant defiled her and threatened to kill her if she disclosed what had happened.

37. The appellant denied the alleged offence took place. He testified that on the material date he was at home as stated by the complainant when the complainant and her grandmother came to fetch water. The appellant did not cross-examine the complainant on her firm testimony and in addition, the medical person who examined her and filled the P3 form confirmed that pregnancy test was negative. The minor and the appellant were examined seven days after the incident.

38. Section 36 (1) of the Sexual Offences Act stipulates:-

"36. (1). Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence."

39. The above provision was considered by the Court of Appeal in the the following cases: **Robert Mutungi Mumbi v R Cr. App. No. 52/2014 (Malindi)** and **Williamson Sowa Mwanga v R Cr. App. No. 109/2014 (Malindi)**. In the former case, the Court of Appeal stated:

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

40. And in the latter case the Court of Appeal stated as follows on the issue of paternity and defilement:

" …. It is patently clear to us that whilst paternity of PM's child may prove that the father of the father of the child had defiled PM. that is not the only evidence by which defilement of PM. can be proved. The fact, as happens in many cases that a

pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at mot determine whether he was father of PM's child, which is a different question from whether the Appellant had defiled PM. As the court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured. (See Twehangare Alfred V. Uganda CR. APP No. 139 of 2001." It is partly for this reason that Section 36(1) of the sexual offence Act is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence to order that samples be taken from him for forensic, scientific or DNA testing."

41. With the above authority from the Court of Appeal and by which this court is bound and having regard to the circumstances of this case, the question is whether the trial Court should have ordered for a DNA test on the appellant to determine whether he committed the offence in question. To answer the above question, it is worth noting that the evidence of PW1 the complainant which was given on oath to the effect that she knew the appellant was never controverted by any other contrary evidence.

42. That evidence of PW1 was further supported by the appellant's own testimony, when he stated that on the material date, the 8th July 2018, the complainant, whom he called by name, in the company of her grandmother went to fetch water from the compound where he lived and worked. Further to this, it is worth noting the relationship between the appellant and the complainant's family as it emerges from the trial court record, was cordial and symbiotic, as the complainant and her kin fetched water at Bob's home (under the watch of the appellant) and the children milled grain for him.

43. The trial court which had the opportunity to see and hear PW1 testify made it clear that ***"the minor struck the court as very truthful and outspoken and there was no reason why she just pointed to the appellant."*** From the above uncontroverted evidence, and authorities, I am persuaded that the trial Court did not err in failing to order for a DNA test on the appellant to determine whether the Appellant committed the offence of defilement on the complainant as there was sufficient evidence adduced by the prosecution to prove that it was the appellant who had sexual intercourse with the complainant on the 8th July 2018.

44. Furthermore, Section 124 of the Evidence Act (a proviso thereof) is clear that a trial Court can convict the 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)**. The trial court believed the minor was telling the truth and recorded to that effect.

45. In the instant case, the trial court convicted the appellant not on the sole evidence of PW1 the complainant, but on corroborated evidence by the evidence of PW2 and PW3 as well as PW4. Based on the evidence adduced on record, I find no reason to interfere with the trial court's finding that the appellant and no other person defiled the minor.

46. The appellant further submitted that the trial court failed to observe that the term used in evidence by the complainant to define carnal knowledge, that is "dudu" was unlawful and contrary to section 137(a) (iii) of the CPC which requires that the particulars of the offence to be set out in ordinary language, without use of technical terms.

47. In **Josephat Njue Solomon v Republic (2010) eKLR** the High Court in Embu where the Court was dealing with the phrasing in the charge and not the testimony of a complainant in a suit, the Court expressed the view that the use of the phrase ***"unlawful carnal knowledge"*** in the particulars of a charge of defilement under the Sexual Offences Act is an issue of semantics which did not prejudice the appellant. With respect to the appellant, the reference to the term "dudu" as used by the complainant was in reference to the appellant's private parts-penis and not the charge brought against him. The ground of appeal is found to be devoid of merit and it therefore fails.

48. It was the appellant's further submission that the trial court failed to observe section 169(1) of the CPC which provides that, *"Every judgment to contain the points of determination, the decision thereon and the reasons for decision."* I have perused the judgement of the trial court and I am satisfied that it complies with the provision of section 169 (1) of the Criminal Procedure Code. The ground fails.

49. On the whole, Iam unable to find and hold that the evidence by the Prosecution against the appellant was insufficient unconstitutional, incredible, unreliable, fabricated, speculated, conjecture and/or that it lacked probative value to justify the conviction of the appellant with the offence of defilement of the complainant herein.

50. The appellant raised a constitutional infringement issue by submitting that he was not given time to call his defence witnesses and that his defence was not considered. I have perused the trial court record and I find that the trial court considered the defence by the appellant and more so, the appellant was accorded more than sufficient time to call his witnesses but he did not call them. He cannot be heard to complain to this court. I find the ground unsupported. I dismiss it.

51. ***Accordingly the appeal against conviction fails and is hereby dismissed.***

52. The appellant has also urged this court to exercise its discretion and review his sentence claiming that the sentence of life imprisonment is unconstitutional. The mandatory sentence for defilement of a child aged 11 years and below is life imprisonment under section 8(2) of the Act. In **BW vs Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, the Court of Appeal considered the constitutionality of mandatory minimum sentences under the Act; and adopted what the Supreme Court decision held in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

53. From the above, it is settled that mandatory minimum sentence is unconstitutional and the court is bound to re-examine the sentence in view of the Legislative position that offences of defilement are serious offence and merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed.

54. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act as follow:

> ***"[We] hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.***
>
> ***The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."***

55. Further, section 354 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under subsection 3(b), ***"in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence".*** That being the case this Court, being an appellate Court, must act within the settled legal principles in appeals against sentence.

56. In **Wanjema v Republic (1971) EA 493** the court laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

57. Considering the nature of the offence and the manner it was undertaken by the Appellant and the Appellant's mitigations, the life imprisonment sentence is in my view excessive**.** ***I therefore set aside the sentence of life imprisonment imposed on the appellant and resentence him to serve 50 years imprisonment to be calculated from the date of arrest in the lower court***. Accordingly the appeal against conviction fails and is hereby dismissed.

Dated, signed and Delivered at Siaya this 30th Day of November, 2020

R.E.ABURILI

JUDGE