



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 69 OF 2018

MOSES MULI KING'OO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Hon. D. Mulekyo, Chief Magistrate

delivered on 2nd October, 2017 in Kwale Chief Magistrate's Court Criminal Case No. 911 of 2010)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with subsection (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that during the month of February, 2010 in Kwale County within Coast Region unlawfully and intentionally committed an act which caused his penis to penetrate into (sic) the vagina of MM [name withheld] a girl aged 12 years. He was sentenced to life imprisonment.

2. On 9th March, 2018, the appellant filed a petition and grounds of appeal. On 23rd November, 2018 the appellant's Advocate, Mr. Opolu, filed an amended petition of appeal raising the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing the appellant without considering the offence of defilement was not proved beyond reasonable doubt;

(ii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant without considering that the prosecution case was governed by mass contradictions;

(iii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant without considering that the provisions of Section 214 of the Criminal Procedure Code was not considered;

(iv) That the Learned Trial Magistrate erred in law by convicting and sentencing without considering his reasonable defence statement;

(v) The Learned Trial Magistrate erred in fact and in law in convicting the appellant against the weight of the evidence on record;

(vi) The Learned Trial Magistrate erred in fact in failing to properly evaluate the appellant's defence which was triable, plausible and wholly displaced the prosecution's case;

(vii) The sentence imposed upon the appellant by the Learned Trial Magistrate was manifestly harsh and very excessive in the circumstances;

(viii) The entire trial was conducted contrary to the mandatory requirement of the Criminal Procedure Code, the Evidence Act and Article 50(2) (b) of the Constitution and Section 137(f) of the Criminal Procedure Code;

(ix) The Learned Trial Magistrate erred in fact by failing to properly evaluate the circumstantial evidence on record;

(x) The Learned Trial Magistrate erred in fact in failing to find for a fact that there was no evidence of defilement on record during the month of February, 2010;

- (xi) The evidence of PW1, PW2, and PW3 on record is wholly at variance with the medical evidence provided by the P3 form and the pelvic ultra sound scan;
- (xii) The complainant was upon examination found to be suffering from syphilis a sexually transmitted disease that remained unexplained;
- (xiii) From the pelvic ultra sound scan the complainant was found to be six (6) weeks pregnant the date of conception being 11th March, 2010;
- (xiv) There was no conclusive proof of age of the complainant as no age assessment was done on her;
- (xv) The charge before the court was defective and bad for duplicity. A duplex charge is a nullity in law and vitiates conviction;
- (xvi) The medical evidence on record reveals that the complainant was suffering from a missed abortion; and
- (xvii) Contrary to the particulars on the charge sheet stating the offence to have occurred during the month of February, 2010, the P3 form in contradiction states the date and time of the offence to be March, 2010 at an unknown time.

3. Although a list of authorities was filed by the appellant's Counsel, he failed to avail the same to this court in support of his submissions. The appellant's Counsel filed written submissions on 26th November, 2018 which he highlighted by stating that the charge was duplex. He submitted that the allegation against the appellant was for defilement which was committed in the month of February, 2010 but the evidence that was led was for several acts of defilement in the same month. In Mr. Opolu's view, each act of defilement was supposed to attract a single charge and not to be lumped up as that was contrary to the provisions of Section 137(f) of the Criminal Procedure Code. He indicated that the charge was an unfair one.

4. In reference to the medical evidence adduced by PW2, Philip Kibet, Mr. Opolu pointed out that the P3 form indicated that there were no products of conception at the time he examined PW1 as he found there was a missed abortion. It was submitted that the trial court misinterpreted what a missed abortion was. Mr. Opolu stated that a missed abortion is like a still birth.

5. It was further submitted that the Hon. Magistrate held that in an attempt to conceal the defilement, the appellant went on to aid PW1 in procuring an abortion.

6. Counsel for the appellant pointed out that PW1 was suffering from syphilis, a sexually transmitted infection but PW1 was not examined to find out if he had syphilis, thus it was not clear who infected PW1.

7. It was submitted that the foetus was conceived in the month of March, 2010 as it was 6 weeks old as at the time a scan was done on PW1 and the P3 form indicated that the offence occurred in the month of March, 2010.

8. It was argued that the age of the PW1 was not established yet the same was material when determining the provisions under which the appellant should have been charged and the applicable sentence.

9. Mr. Opolu contended that the case against the appellant was based on circumstantial evidence and that the said evidence should have formed a chain unerringly pointing to his guilt in the commission of the offence. He cited the case of **Eric Odhiambo Okumu vs Republic** CA 84 of 2014 to support the said assertion. It was submitted that the sentence of life imprisonment imposed against the appellant herein was unlawful as PW1 was said to be 12 years old.

10. On her part Ms Marindah, Prosecution Counsel highlighted the submissions that had been filed by Ms Ogweno, Principal Prosecution Counsel, by urging this court to invoke the provisions of Section 382 of the Criminal Procedure Code to cure the defect brought about by duplicity in the charge by failure to indicate the date and time when the offence was committed.

11. She submitted that the existence of a foetus in the victim's uterus was evidence of penetration. It was stated for the respondent that PW1 in her evidence testified that she was defiled by the appellant on several occasions.

12. With regard to PW1 having syphilis when she was examined in Hospital, Ms Marindah submitted that failure by the prosecution to ascertain if the appellant had the said disease did not mean that he did not defile PW1. She further submitted that the age of the victim was given as 12 years as per the P3 form.

13. In the Prosecution Counsel's view, the ultra sound scan exonerates the appellant as it shows that PW1 was not defiled in the month of February, 2010. Ms Marindah conceded that the age of the appellant was not established through documentary evidence.

ANALYSIS AND DETERMINATION

14. The duty of a first appellate court is to consider the evidence adduced in the lower court, analyze it and re-evaluate it before coming to an independent decision. An appellate court must however bear in mind that it has neither seen nor heard the witnesses testify first hand and give an allowance for that. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated this duty as follows:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come

to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.

15. The evidence tendered before the trial court was that PW1, MM [name withheld] was in class 6 at a Primary School. She recalled that in February 2010 at 10:00 a.m., while at home, the appellant herein who was her Science Teacher called her to his home and asked her to collect some clothes from his house. When she entered the house she did not see any clothes. She testified that the appellant followed her to the house and pulled her to the bed. He removed his shorts, removed her pants and forced her legs open. He then inserted his penis in her private parts and had sex with her. PW1 said she knew about sex from their science lessons. PW1 testified that the appellant told her to go home and not tell anyone about the incident. She recounted that two weeks after that when she went to wash clothes at a River, the appellant appeared, pulled her to a nearby bush and had sex with her. On a third occasion, the appellant forced her into sex again.

16. It was her evidence that in the month of March 2010, she developed illness and her mother (PW2) became suspicious. She took her to a dispensary for a pregnancy test but it was not done as there was no equipment to test her.

17. It was PW1's evidence that on a 2nd occasion, her mother accompanied by the appellant and his wife boarded a matatu for Msambweni District Hospital where she was to undergo a pregnancy test. On the orders of the appellant, the matatu they were in bypassed the said Hospital and they went to Ukunda where they alighted. The appellant telephoned someone and a man appeared who took her to a certain house where he inserted a metal object in her vagina. He then pricked her with the metal object and she felt pain. He also injected her on her buttocks. When that was happening, her mother and the appellant's wife had been ordered to stay a distance away from that house.

18. It was her evidence that before the other man inserted the metal object in her vagina, she panicked when she saw Doctor's equipment in the room she had been taken to and after she was ordered to lie on a bed. She got out of the bed crying and tried to get out of the room but the appellant was blocking the door. She was led back to the room where she was once again ordered to lie on the bed. On reaching home she started bleeding heavily. Her mother complained to the appellant who told her not to worry.

19. The following day her mother took her to Msambweni Police Station and to Msambweni District Hospital. She was examined and admitted for a day. The Doctor said she had an incomplete abortion. She identified her P3 form and treatment notes in court.

20. PW2, Philip Kibet Chebii, a Clinical Officer at Msambweni District Hospital testified that he examined PW1, a 12 year old girl on 23rd April, 2010 following allegations of defilement that had happened in February, 2010. PW2 noticed that her hymen was missing. An ultra sound test revealed a missed abortion of 6 weeks. It revealed that there was a dead foetus in her uterus. A laboratory test revealed that had syphilis. PW2's evidence was that the foetus was removed through vacuum aspiration. He produced the P3 form and ultra sound test report as exhibits.

21. PW3, VN [name withheld] was the mother of PW1. She gave the age of PW1 as 14 years and some months as at the time she was testifying in court on 14th March, 2013. She could not recall the year PW1 was born as her clinic card was at home. She however indicated that PW1 was 12 years old in the year 2010. According to PW3, PW1 missed her periods in the months of February and March, 2010. PW3 indicated that she realized the foregoing when PW1 did not request for sanitary pads. When asked about it, she kept quiet. PW3 stated that PW1 developed a strange appetite for sour food like mangoes and had morning sickness. She took her to a clinic where the Doctor gave her some medicine and recommended a pregnancy test.

22. It was PW3's evidence that on the evening of that day, he interrogated PW1 but she refused to tell her the truth. Later, she told her that the appellant had had sex with her. PW3 went to the suspect's house and he agreed to discuss the matter with her. It was PW3's evidence that the appellant admitted having had sex with PW1 on 3 occasions and he agreed to accompany them to Hospital to confirm if PW1 was pregnant. He said he needed to be given a week to look for money.

23. It was her evidence that a week later, on 12th April, 2010, her, PW1, the appellant and his wife boarded a matatu ostensibly to Msambweni District Hospital. PW3 was surprised when they did not alight at the said Hospital and on asking the appellant why they had gone past the Hospital, he asked her if she did not know where they were going. They went up to Ukunda, where upon alighting from the Matatu, the appellant telephoned someone. Shortly afterwards, a man appeared. The appellant and the said man then led away PW1. PW3 tried to find out what was going on but she was dismissed by the appellant. She and the appellant's wife were left behind.

24. PW3 testified that the 3 returned about 5 hours later. He gave her Kshs. 200/= for fare. On the way home, PW3 asked PW1 what happened and she recounted having been told to lie on a bed and about the appellant's co-accused having inserted metal rods in her private parts. She further told PW3 that she was warned not to tell her. PW3 further recounted that on arrival at their home, she heard PW1 sobbing from her room. On entering the room, she saw a lot of blood trickling down PW1's legs. She became alarmed and went to see the appellant who said he had no more money to spend. PW3 testified that she sought assistance from her sister (PW4) who accompanied her and PW1 to Msambweni Police Station. A Police Officer took them to Msambweni District Hospital where a Doctor told them that PW1 had had an incomplete abortion. She was treated. PW3 stated that the appellant went underground for some time but was traced after a few months. She said that she had no dispute with the appellant who was her neighbour.

25. EK [name withheld] is reflected in the lower court proceedings as PW3 instead of PW4. It was her evidence that on the night of 22nd April, 2010, PW3 told her that she wanted to take her child who was sick to Hospital. She went to see PW1 who told her she had been unwell and her stomach was aching. EK said that because of a certain smell, she thought that PW1 was having her periods but did not know. PW1 explained to EK the way the appellant had taken her for treatment. EK realized that PW1 had been taken for an abortion. They went to the Police Station to report and then to Msambweni District Hospital. The Doctor noted that an abortion had failed. She told them that the appellant is the one who had impregnated her. EK said that she knew the appellant and he ran away when they pressed charges against him.

26. The issues for determination are:-

- (i) If the age of the victim was proved;
- (ii) If there was penetration;
- (iii) If the charge was defective; and
- (iv) If the prosecution proved its case beyond reasonable doubt.

Age of the victim

27. The Court of Appeal has decided in various cases such as **Alfayo Gombe Okello vs Republic [2010] eKLR** and **JWA vs Republic [2014] eKLR** that the age of a child as stated in the P3 form and produced in court can be used to ascertain her/his age.

28. Further, in **Francis Omuromi vs Uganda Court of Appeal Criminal Appeal No. 2 of 2000**, it was held thus:-

“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 victims parents or guardian and by observation and common sense” (emphasis added).

29. In **Richard Wahome Chege vs Republic [2014] eKLR**, the Court of Appeal stated as follows regarding proof of a victim's age in a defilement case:

“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”.

30. In the present case, although no birth certificate or a Child Health Card was produced as proof of PW1's age, her mother, PW3 stated that she was 14 years old as at 14th March, 2013 and 12 years old in the year 2010. The P3 form which was produced by PW2 as P. exhibit 1 gave the age of PW1 as 12 years. PW3 who gave birth to PW1 was the best placed person to know her daughter's age. In the circumstances of this case, I am satisfied that PW3's evidence was sufficient to establish that the age of PW1 as at the time the offence was committed was 12 years. I am satisfied that the issue of PW1's age was supported by the P3 form which gave her apparent age as 12 years.

If penetration was proved

31. PW1 testified that the appellant had sexual intercourse with her on 3 occasions. She gave a vivid account of the same. On the 1st occasion the appellant tricked her into getting into his house when his wife was away and he defiled her. On the second occasion he accosted her by a River and defiled her. On the 3rd occasion she was at a borehole when the appellant forced himself on her and defiled her.

32. There is ample evidence that the defilement led her to conceive, a fact which is proved by the evidence of her mother PW3 who noticed that PW1 had failed to get her monthly periods, was vomiting and was having cravings for sour things. I concur with Ms Marindah, the Prosecution Counsel that penetration herein was proved by the fact that PW1 fell pregnant following the series of defilements at the hands of the appellant.

33. An ultra-sound scan taken after the appellant took her for an abortion, confirmed that the appellant had penetrated PW1's vagina as pregnancy was confirmed but the foetus was dead in PW1's uterus. The conduct of the appellant of taking PW1 to have an abortion is evidence of a guilty mind and corroborates the evidence of PW1 that it was the appellant who defiled her. If he had not, he would not have bothered to take her for an abortion.

34. The P3 form showed that PW1's hymen was missing. The foregoing was evidence that penetration had taken place. It is therefore my finding that the evidence adduced was sufficient to prove that penetration of PW1's vagina took place. In her evidence, PW1 stated that the appellant was her Science Teacher and that she had learnt about sex from her science classes.

If the charge was defective

35. The charge sheet indicates that the offence took place in the month of February, 2010. The P3 form shows that the offence took place in March, 2010 at an unknown place. PW1 was sent to Msambweni District Hospital on 23rd April, 2010. A pelvic ultra sound scan was done on the same day. The report thereof gave the age of the foetus in PW1's uterus as 6 weeks. Mr. Opolu lay emphasis on the fact that if defilement had taken place in the month of February, 2010 as per the charge sheet, the foetus in PW1's uterus would not have a gestational age of 6 weeks.

36. Doing simple calculations, a foetus of 6 weeks as at 23rd April, 2010 would mean that it was conceived in the month of March, 2010. The foregoing would be in line with the contents of the P3 form which gives the time the offence was committed as March, 2010. Mr. Opolu therefore submitted that the provisions of Section 137(f) of the Criminal Procedure Code were contravened. The said provisions state as follows:-

“The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this code, not be open to objection in respect to its form or contents if it is framed in accordance with this code:-

(f) Subject to any other provisions of this Section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.”

37. It was claimed that the particulars of the charge did not disclose the time, date and place where the offence was committed. Further, that the charge was defective for duplicity. The appellant’s Counsel relied on the case of **Nzioka vs Republic** Criminal Appeal No. 175 & 153 of 1987 where Torgobor J held that where a statutory provision creates more than one offence in a section, the proper and safe method of preferring a charge under such an enactment is under separate counts. The Judge found the charge in the said case bad for duplicity and quashed the appellant’s conviction.

38. In the present case, it is my considered view that there is no duplicity in the charge as the charge sheet specifically states that the appellant was charged under the provisions of Section 8(1) as read with subsection (2) of the said Section, of the Sexual offences Act No. 3 of 2006. The charge sheet did not combine the main charge with any other count and it is clear from the charge sheet that the charge of indecent act was an alternative charge to the main charge.

39. The evidence of PW1 disclosed the fact that she was defiled on 3 occasions, which she described in her evidence. She was a young 12 year old girl who did not indicate to the court if she recorded the dates when the offences were committed. In her evidence, she talked of the 2nd defilement happening 2 weeks after the first incident.

40. A third incident happened thereafter. She did not disclose how far apart the third defilement was from the second one. It may as well have gone to the month of March 2010 but without record keeping of the incidents, PW1 could not recall with military precision the dates when the offences occurred. It came out in her evidence that she had been defiled on 3 different dates. Even if the charge read that the offence was committed on diverse dates in a given month, the charge would not be defective for duplicity.

41. As to the manner in which a charge should be drafted, Section 134 of the Criminal Procedure Code provides as follows:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.” (emphasis added).

42. The appellant alleged that the specific areas where the 3 acts of defilement occurred had not been disclosed. It is my finding that the evidence of PW1 established that the series of defilements occurred in close proximity of PW1’s home which was in [particulars withheld] village. I therefore hold that the particulars contained on the charge sheet were sufficient for the appellant to understand the charge brought against him and the place where the offence of defilement occurred.

43. In addition to the foregoing, the appellant was represented by an Advocate in the lower court. The trial took a prolonged duration of 7 years mostly due to adjournments that were made by the appellant and his co-accused. Any objection to a defect in the charge should have been made at the earliest opportunity before the trial court. The appellant cannot now clutch onto straws of having been tried on a defective charge. It is my considered finding that the defect in the charge in so far as it states that the offence occurred in the month of February 2010 instead of indicating that it occurred on diverse dates in the months of February and March, 2010 is curable under the provisions of Section 382 of the Criminal Procedure Code.

44. The said Section provides as follows:-

“Subject to the provisions hereinbefore contained, 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 inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.” (emphasis added).

If the charge of defilement was proved beyond reasonable doubt

45. The evidence on record unerringly points to the appellant as the one who defiled PW1. He went to the extent of sourcing his co-accused in the lower court to insert a metal rod in PW1’s vagina in an effort for her to abort the foetus that was growing in her uterus. It is this court’s finding that the actions of the appellant were aimed at eliminating the evidence of the defilement that had taken place.

46. Although the appellant and his co-accused were acquitted of the offence of supplying drugs and instruments to PW1 to procure an abortion, the acquittal was based on a technicality for having been charged under the wrong provisions of the law. The fact however remains that the appellant’s commission of the offence of defilement was corroborated by his own conduct. The appellant fooled PW3 by telling her and his wife to wait for him when he went to procure an abortion for PW1, without her knowledge or PW3’s.

47. PW1 on being cross-examined by the appellant and his co-accused on the issue of the medicine she was given at a dispensary said that it was not true that her father told the Chief that the abortion occurred after she was given malaria tablets. PW1 was categorical that she was given Panadol tablets for fever when her mother took her to a clinic for treatment. She did not talk of having been treated for any other

ailment. What is of critical importance is that there is overwhelming evidence that the appellant defiled PW1 and tried conceal the evidence of her pregnancy.

48. Failure to have the appellant tested for syphilis which PW1 was suffering from does not weaken the prosecution's case. It was not mandatory for him to have been tested. In any event, PW3 testified that the appellant went into hiding when he got wind of the fact that PW1 had lodged a report at the Police Station. In his defence, the appellant indicated that he was arrested on 5th June, 2010. It is worth noting that the offence was reported at the police station on 23rd April, 2010.

49. In the case of **Denis Osoro Obiro vs Republic (2014) eKLR, the Court of Appeal** stated thus on the requirement of medical evidence of accused persons in defilement cases:-

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

50. With regard to the missed abortion, the court did not fall into error but analyzed the evidence thoroughly and found that the missed abortion was caused by insertion of a metal rod into PW1's vagina by the appellant's co-accused. I am of the same opinion as the Hon. Magistrate and PW2 who on re-examination stated that the attempted abortion was not successful following the death of the foetus in the womb. PW2 further said that there was no evidence of PW1 having taken antibiotic tablets before he examined her.

51. The appellant's Counsel's submission with regard to the evidence tendered was that it was circumstantial in nature. It is my finding that this case was firmly grounded on direct evidence as recounted by prosecution witnesses.

52. The appellant's defence was that there was a dispute about land between him and PW1's family as a result of which PW1's father threatened him by saying that they would see where his teaching job would take him. He stated that in April, 2010, his wife told him that the Police had gone to look for him on an allegation of defilement. He was arrested on 5th June, 2010 for the offence he was charged with. The rest of his defence was tantamount to submissions.

53. The defence raised by the appellant was aimed at showing that as a result of the grudge between him and PW1's family, he was charged with trumped up charges. It is however noteworthy that PW3 said that she had no grudge against the appellant.

54. The appellant's co-accused in his defence admitted that he attended to PW1 in his clinic. He however denied trying to induce an abortion on her but stated that PW1 was spotting when he examined her. With regard to the findings of the missed abortion reflected on the ultra sound scan, he said that it meant the foetus died in the uterus due to natural causes. He further stated that at the time he examined PW1, she was already having a threatened abortion.

55. I have deemed it necessary to examine the above defence as it is clear that the appellant's co-accused was trying to exonerate himself and the appellant from the charge they faced of procuring an abortion for PW1 by supplying drugs and instruments. As the Hon. Magistrate found, PW1 was not spotting at the time she left her home in the company of her mother, the appellant and his wife. If anything she believed she was being taken for a pregnancy test at Msambweni District Hospital but the appellant had other plans in mind.

56. Taking all the above into consideration, the appellant's defence was full of falsehoods. The Hon. Magistrate found PW1 and PW3 to be simple and honest witnesses. Like the Hon. Trial Magistrate, I find that the prosecution's case was proved beyond reasonable doubt.

57. Although the appellant was charged under the provisions of Section 8(1) as read with Section 8(2) of the Sexual Offences Act, the charge that was proved against him was that of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. I therefore enter a conviction against the appellant under the latter provisions.

58. The appellant was sentenced to life imprisonment. A severe sentence was called for in this case as the appellant who was PW1's Science Teacher turned to a predator instead of a guardian to PW1 and by so doing breached the trust bestowed upon him by being placed in a position of authority by his employer. The appellant was however a first offender and the sentence of life imprisonment in my view, was harsh.

59. The provisions of Section 8(3) of the Sexual Offences Act provides for a minimum sentence of 20 years imprisonment for a person who defiles a child of 12 years of age. I therefore set aside the sentence of life imprisonment and substitute it with a sentence of 20 years imprisonment. The sentence shall run from 3rd October, 2017 being the date he was sentenced by the Trial Court.

60. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 26th day of April, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Ms Oyier holding brief for Mr. Opolu for the appellant

Ms Ogweno - Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant