REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CR. A. NO. 57 OF 2017

(CORAM: R.E. ABURILI – J)

DANIEL AMOLLO OSWERI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal against sentence and conviction 8.6.2017 in Criminal Case No. 1114 of 2016 in Siaya Law Court before C. A. Okore – SRM)

JUDGMENT

1. The appellant **Daniel Amolo Aswere** 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 were that on the 15.10.2016 at around 6.30 p.m. at [particulars withheld] village in Rarieda Sub-County within Siaya County, the appellant, unlawfully and intentionally caused his penis to penetrate the vagina of CAO, a girl aged 10 years. The appellant also faced an alternative charge of Committing an Indecent Act with a Child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. It was particularized that on the 15.10.2016 at around 6.30 p.m. at [particulars withheld] village in Rarieda Sub-County within Siaya County, unlawfully and intentionally touched the vagina of CAO, a child aged 10 years.

2. The appellant was tried, convicted of the offence of defilement of a child and sentenced to serve life in prison. This appeal therefore challenges the conviction and sentence imposed by the trial court.

3. In determining this appeal, this Court is alive to the principles laid down in ***Okeno Vs. Republic [1972] E.A. 32*** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination **(*see also Pandya Versus Republic [1957] E.A. 336*** and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

4. Further in ***Shantilal M. Ruwala Versus Republic [1957] East Africa 570*** it was held that 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, 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 Versus Sunday Post [1958] East Africa 424.***

5. Examining the evidence adduced before the trial court, **PW1 Jared Obiero Opondo** who a clinical officer testified that the patient CAO went (to their facility with a history of having been defiled by a person well known to her and upon a medical/genital examination, he observed that the minor's labia minora had bruises and the vaginal mucosa was also bruised. He also observed that there was an increased vaginal discharge. He concluded by stating that the evidence revealed that the minor was defiled. He produced as exhibits a P3 form as P. exhibit 1 and treatment notes as P. exhibit 2.

6. **PW2 , CAO**, a minor gave evidence after *voire dire* examination by the trial court and stated that on the 15.10.2016 at around 6.30 p.m. she was walking home from Akala Market and whilst on the way, the appellant approached her while riding a motor cycle and offered her a lift which she obliged. He told her that he wanted to do bad manners with her but she dissuaded him not to as she was sick, he did not heed. He rode the motor cycle into a certain bush after which he stopped the motor cycle and urinated.

7. She stated that the appellant grabbed her, took off her clothes and pinned her down. She started crying but he soothed her then he stooped, took out his penis and inserted it into her vagina and as she tried to scream, he covered her mouth and then strangled her. The victim felt pain and that after the incident which did not take long, the appellant gave her KShs.20 and told her to go. PW2 stated that she got up and started walking home and that is when she met Lawrence (PW3) who then told her that he knew the appellant person by the name. The minor then said that she went home and told her parents what had transpired. She stated that on the following day, she was taken to Akala health center where she was examined and treated. She further stated that after treatment together with her father (PW4) they searched for the appellant

and he was traced and her father managed to arrest him and he was beaten by members of the public and escorted to Riat Police Patrol Base. The complainant went to the police station and recorded her statement. In cross examination she maintained her evidence in chief.

8. **PW3 LA** a minor testified that on the 15.10.2016 at around 6.30 p.m. he was riding a bicycle when he saw the appellant carrying the complainant on a motor cycle and he saw them entering a certain bush. It was his evidence that after sometime, he met PW2 walking along the road while crying and that is when she told him that the appellant had done bad manners on her and this is after he had told her that he knew the appellant. PW3 further stated that the following day, PW2 and her father went to PW3's home and PW2's father said that PW3 was required at Ndori Police Patrol Base and so he accompanied them to the Police Station. In cross examination, PW3 maintained that he saw the appellant carrying the complainant on a motor cycle and that he saw them enter a bush at Karai area and that PW2 told PW3 that the appellant had done bad manners to her.

9. **PW4 AOA** the father of the minor complainant testified that on the 15.10.2016 he left work and went home at around 8.00 p.m. and on arrival he found PW2 and her mother who is his wife crying. On inquiring from her, as to what the problem was, PW2 told him that she had been defiled by a motor cycle rider who offered her a free ride on her way back home only to be led in a bush and defiled. The witness further testified that on the following day, PW2 directed him to the home of PW3 who knew and saw the defiler and they proceeded to the home of PW3 who told them the identity of the suspect. Hey then went to Akala Health Centre where PW2 was examined and found to have been defiled. She was treated after which they began a man hunt for the suspect and they traced and apprehend him after which they escorted him to Riat Police Base. He also stated that the complainant was born on 12/1/2005 as per her immunization card.

10. **PW5 PC David Warutumo** attached at Ndori Police Patrol Base testified that on the 16.10.2016 he was at the Station when the complainant (PW2) went to the station accompanied by her father PW4 and other officers together with the appellant and reported that she had been defiled by the appellant. The officer stated that he booked the report and launched investigations and issued both the complainant and the appellant with P3 forms and then escorted them to Akala Health Centre for examination and treatment and the P3 forms were later filled. He stated that he later charged the appellant person with the present offence. The Officer produced the immunization card for the complainant as P. exhibit 3 which showed the age of the complainant.

11. On being placed on his defence the appellant gave sworn testimony and stated that on the 16.10.2016 at about 1 p.m., he had gone to Akala market and whilst at Ramweya Primary School he met the village elder who told him that he was looking for him (the appellant). That they proceeded with the village elder to Akala Police Station where the appellant was placed in the cells whereupon he was told that he had defiled a child. He stated that on the following day, he was arraigned in court where the present charges were read over to him.

12. In his petition and supplementary petition of appeal filed in court on 31st May 2017, the appellant complains that:

> ***1. THAT the Learned trial Court Magistrate erred in law and fact by failing to observe that the age of the Complainant was not sufficiently proven.***
>
> ***2. THAT I cannot recall all that transverse during the trial hence pray for the trial records too adduce sufficient grounds at the hearing thereof.***
>
> ***3. THAT I pray for orders of Habeas Corpus.***

12. In the supplementary grounds of appeal, the appellant claims that:

> ***1. That provisions of law were assumed under Sexual Offences Act by the prosecution.***
>
> ***2. That the outline of Criminal Procedure on trial proceedings was not in accordance with the law.***
>
> ***3. That the medical evidence was not conclusive on the circumstantial facts.***
>
> ***4. That the investigations were shoddy and to sustain a conviction.***

13. In the appellant's written submissions which he adopted as canvassing the appeal herein which was opposed by the prosecution counsel, the appellant submitted under the following heads:

a. VOIRE DIRE EXAMINATION

14. It was submitted that in any criminal case where the witness is a minor, it is required by the law to conduct a ***voire dire*** before being sworn in to give a testimony. That PW3 was a minor but the trial court failed to comply with the provisions of **Section 19 of the Oaths and Statutory Declarations Act**. It was therefore submitted that the failure to comply with the law prejudiced the trial since the intelligence and competence of the witness was not ascertained as by the law required and that failure to comply with trial process further was in breach of **Section 151**.

b. FAILURE TO COMPLY WITH ARTICLE 50(C) OF THE CONSTITUTION

15. The appellant submitted that, when he appeared in court for the first time on the date of plea taking, it was ordered that the case be mentioned on 3.1.2017 and that the hearing to be done on 17.1.2017. That the records are clear that when the matter came up for mention on 3.1.2017, the trial court compelled the appellant to proceed with the hearing of the case with 4 witness without considering that he was entitled to adequate time to prepare as required by **Article 50(2)(c) of the Constitution**. He therefore submitted that the trial court failed to observe, respect, promote and fulfill the **appellant's Rights and Freedoms in the Bill of Rights as required by Article 21 of the**

Constitution

c. NON- CONCLUSIVE MEDICAL EVIDENCE

16. According to the appellant, the medical evidence in a **Sexual Offence** should clearly indicate the condition of the hymen and virginity of the victim. That the report should also indicate the specific time that the alleged victim visited the medical facility for treatment. In the instant case it was submitted that the doctor (PW1) did not indicate the condition of the hymen but only concluded that defilement took place. That the doctor did not explain the condition of the hymen, whether it was absent or not and if absent, whether it was broken prior or after the alleged incident. It was the appellant's contention that given the age of the victim Ten (10) years, it could not have been possible for her to have engaged in a **Sexual Act** for the first time with no injuries sustained in the genital. That had there been any injuries them the doctor could have noted that the hymen was torn or broken.

17. That the above fact defeats the evidence of PW2 who testified that she bled and felt pain. That there was neither any exhibit produced in court to ascertain that indeed there was an injury sustained. The appellant therefore submitted that failure to observe the conclusiveness of the medical examination was in breach of Sections 26 and 26 of the Sexual Offences Act.

18. In his oral submissions the appellant only urged the court to reduce sentence because life imprisonment is too harsh.

19. In opposing the appeal, Miss Odumba prosecution counsel submitted that the conviction of the appellant was sound and sentence lawful and mandatory. That the prosecution had proved the age of the complainant by production of the child's clinic card, that the appellant never claimed that he was framed by the complainant's father and that the ingredients of defilement were established. Counsel urged the court to dismiss the appeal.

DETERMINATION

20. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I have considered the grounds of appeal and the arguments made thereon, and I note that the three issues for determination are whether a *voire dire* examination of PW1 was conducted by the trial Court; and if not the effect thereof. Secondly, whether the complainant's age was determined, whether there was conclusive medical evidence to prove defilement and lastly, whether the Appellant's conviction was on the basis of sufficient and satisfactory evidence.

21. On the first issue that the trial court erred in failing to conduct voire dire examination of the child PW3 witness to establish whether he was telling the truth, etymologically, *voire dire* is a French vocabulary implying to speak the truth. In law, *voire dire* examination denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interests and capacity is objected to by the law or facts. It is trite law that evidence of a child under the age of 18 years may be received, not on oath or affirmation, which should be recorded in proceedings especially where the court has ascertained itself that such child possesses sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.

22. The High Court of Tanzania in ***Alfred Tedo v. R [2001] TLR 126*** stated that:

> ***"… under s.127(3) of Evidence Act, 1967 a court may convict an accused person on uncorroborated evidence and after fully being satisfied that the child or children are telling nothing but the truth…"***

23. This fall on the court's assumption that children could not know the nature of oath. The court has to asses her intelligence on where and how to tell the truth; because evidence on oath or affirmation does not need corroboration unlike other evidence. Therefore; *voire dire* examination is always conducted by the trial court to assess the intelligence of the child of tender age. This examination focuses on intelligence and duty to tell the truth from children. For instance, El-Kindy, J once stated in Robi v. R[1971] HCD No. 389 that :

> "… ***It is necessary that the trial court must examine the child's witness before admitting his evidence to determine the capacity of such witness to give evidence…"***

24. It is a common practice of higher courts to furiously criticize subordinate courts especially upon failure to conduct *voire dire* examination. The defunct East African Court of Appeal once held in ***Gabriel Maholi v. R [1960] EA 159*** that:

> ***"… Even in the absence of express statutory provision, it is always the duty of the court to ascertain the competence of a child to give evidence. It is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also, that the child understands the difference between truth and falsehood."***

25. Judges, magistrates as well as other quasi-judicial officers before taking the evidence of the child, must acknowledge the intelligence of the child and therefore apply the correct standard of proof so as their conclusion can be fully justified by evidence. For instance, court's observation in ***Oloo Gai v. R12 12 [1960] EA 86,*** the defunct East African Court of Appeal sitting in Nairobi; whereby the judge failed to direct himself and assessors on the dangers of relying on uncorroborated evidence of a child of tender years and had overlooked significant items of evidence bearing on reliability of child's story. Finally the Court stated that conviction cannot stand on the basis as follows:

> ***"… It would have been better for the trial judge to record in items that he had satisfied that a child understands the nature of oath…"***
>
> ***It should be drawn once again that judicial officers are required by evidence laws to ascertain the validity and viability of***

evidence from children of tender age.

In ***Joseph v. R13 13 [1971] HCD No. 58*** Onyiuke, J stated that:

> ***"… It is a condition of the reception of such evidence that the trial magistrate must not only be satisfied that the child understands the duty of speaking the truth, but that he must manifestly appear to be so satisfied because s.127(2) of Evidence Act, 1967 requires him to record such fact in the proceedings"***

26. In Kenya, the conduct of a *voire dire* examination and its purpose was explained by the Court of Appeal in ***Johnson Muiruri vs Republic [1983]* KLR 445** as follows:

> ***"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.***
>
> ***It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.***
>
> ***When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.***
>
> ***A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.***
>
> ***The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."***

27. The Appellant alleges that the evidence of PW3 who was a minor in support of the prosecution case that he met and saw the appellant carrying the complainant on a motor cycle and that the appellant headed to the bush was given without a *voire dire* examination contrary to the law. Namely, section 19 of the Oaths and Statutory Declarations Act.

28. Section 19 of the Oaths and Statutory Declarations Act. which provides as follows:-

> ***"where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."***

29. In ***Julius Kiunga M'rithia vs. Republic, [2011] eKLR***, the court held as follows as to the purpose of the said section -

> ***"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about -***
>
> ***(1) whether the child understands the nature of an oath; or***
>
> ***(2) if the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."***

30. The procedure for conducting a *voire dire* examination was set out in **Fransisco Matove vs. Regina [1961] E.A**. that (1) the trial magistrate should question the child to ascertain whether the child understands the nature of the oath, and (2) if the court does not allow the child to be sworn, it should record whether or not, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.

31. The Court of Appeal has severally held that the age of fourteen years remains a reasonable indicative age of competency to testify for purposes of Section 19 of the Oaths and Statutory Declarations Act. See ***Maripett Loonkomok v Republic, [2016] eKLR, Patrick Kathurima vs Republic, Criminal Appeal No.137 of 2014, and Samuel Warui Karimi vs R, [2016] eKLR.***

32. In the instant appeal, I have perused the record of the trial Court and note that indeed PW3 gave sworn testimony and stated that he was a pupil in class 4 at O. Primary School. There is no indication that he was a minor but the trial court a gage 14 of the Judgment stated that PW3 was also a minor. However, no voire dire examination was conducted on him prior to his testimony being taken to establish whether he understood the nature of the oath.

33. The effect of this non-compliance with section 19 of the Oaths and Statutory Declarations Act was articulated by the Court of Appeal in ***Samuel Warui Karimi v Republic* [2016] eKLR** that:

> ***"…we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant <u>and not any other witness."</u>***

34. In **Maripett Loonkomok v Republic [2016] eKLR** a different bench of the Court of Appeal was of a different view of the effect of non-compliance with the said section and held as follows:

> ***"It follows from a long line of decisions that voir dire examination on children of tender years must be conducted <u>and that failure to do so does not per se vitiate the entire prosecution case.</u> But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;***
>
> ***"In appropriate cases where voire dire is not conducted<u>, but there is sufficient independent evidence to support the charge</u>… the court may still be able to uphold the conviction." See <u>Athumani Ali Mwinyi</u> v <u>R</u> Cr.Appeal No.11 of 2015***
>
> ***On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant's evidence was congent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."***

35. From the above Court of Appeal decisions, it is apparent that while the evidence of a witness of tender years who is not subjected to a *voire dire* examination is not dependable evidence, the other evidence adduced in a criminal trial can still be relied upon to determine the guilt or otherwise of an accused person.

36. In the present appeal, the complainant who was PW2 gave evidence after voire dire examination by the trial court, she was cross examined by the appellant. However, her witness PW3 was not subjected to voire dire examination. The question that must be answered by this court is whether there was sufficient evidence to prove the guilt of the appellant, and therefore to sustain a conviction, if the evidence of PW3 was to be excluded as being unreliable.

37. Excluding the testimony of PW3, I find that it would not be unsafe to uphold the conviction of the appellant because there is sufficient evidence by PW2 that she knew the appellant very well, as she used to see him around, that he gave her a lift on a motor cycle and led her into a bush and defiled her. She cried but he held her mouth and even tried to strangle her as she cried, it was at about 6.30 pm he removed her clothes and inner pant, pinned her on the ground, he soothed her, stooped down and removed his penis and inserted it into her vagina, she screamed but he covered her mouth and stared strangling her, after he was done he woke up, gave her 20shillings and told her to go. She went and told her parents and gave them the appellant's name.

38. The following day she was taken to Akala Health Centre where she was examined by PW1 a clinical officer and filled her P3 form confirming that she had injuries on her labia minora, vaginal mucosa was bruised and there was increased vaginal discharge. The age of injury was one day and the weapon used was blunt. He concluded that the minor was defiled. He also produced her P3 form and treatment notes as exhibits.

39. In addition, PW5 the investigating officer produced as exhibits the complainant's Clinic immunization card which showed that the complainant was born on 25/1/2015 hence she was a child. In my humble view, the above evidence alone without that of PW3 established the ingredients of the offence of defilement namely, that the appellant perpetrator was positively identified through recognition by the victim as she knew him prior to the incident which took place before dark, that the victim was a minor and that there was penetration of her genitals by the appellant's penis.

40. It is worth noting that **Section 124 of the Evidence Act** does not make it mandatory for corroboration of the Victim's evidence in Sexual Offences. The Court, once it believes that the victim of Sexual Offence is telling the truth, and that the Prosecution has adduced sufficient evidence in support of the charge and that they have proved their case against the Accused Persons as the defiler beyond reasonable doubt, the court can proceed to convict the accused. The Section provides:

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya, where the evidence of the alleged victim is 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, 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 reasons to be recorded, in the proceedings, the Court is satisfied that the alleged victim is telling the truth."***

41. Thus, whereas in criminal cases corroboration of the evidence of a child is necessary even where a ***voire dire*** examination is conducted, nonetheless, in Sexual offences, there is an exception to the extend set out in the proviso to Section 124 of the Evidence Act that the Court is

allowed to solely rely on the evidence of a children if the Child is the victim, provided the Court first satisfies itself on reasons to be recorded, that the child is being truthful.

42. In the instant case, the trial Magistrate observed that the prosecution witnesses were firm and that PW2, the victim appeared to be believable and that the defence mounted by the appellant did not challenge the prosecution's case.

43. The trial Magistrate having been satisfied that on the detailed and consistent testimony of the victim, she was telling the truth that it was the appellant who defiled her, I find and hold that failure to conduct voire dire examination on PW3 was not fatal to the prosecution's case and that excluding the evidence of PW3 which was corroborative of what PW2 stated with regard to meeting with the appellant on the way to the bush would still leave the court with more than sufficient evidence that the appellant herein is the person who was responsible for defiling the complainant child.

44. The second issue is whether there was conclusive medical evidence to prove penetration of the complainant's vagina. The appellant submitted that there was no medical evidence to indicate the condition of the hymen and whether the victim was a virgin and the specific time that she visited the health facility for treatment. In cross examination, the appellant asked the victim child a question which elicited the answer: *"I had never been defiled by an adult Iam ten years.."* what the appellant in his submissions is seeking to persuade this court to believe is that the victim was not a virgin and that therefore it was important that the clinical officer who examined her tells the court whether or not the hymen was absent and not to just conclude that the minor was defiled.

45. Section 34 of the Sexual Offences Act ***prohibits adduction of evidence as to any previous sexual or conduct of any person against or in connection with whom any offence of Sexual nature is alleged to have been committed, other than evidence relating to Sexual experience or conduct in respect of the offence which is being tried; unless the Court has on Application by any party to the proceedings, granted leave to adduce such evidence or to put such questions."***

46. In the instant case the Appellant never sought leave of Court to put such a question of previous Sexual experience of the Complainant. Nonetheless, PW1 the Clinical Officer who examined her a day after the ordeal observed that she had her labia minora and vaginal mucosa bruised she had increased vaginal discharge ad that he concluded that she was defiled. In my humble view, penetration was established as defined in section 2 of the Sexual Offences Act that ***"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another Person."***

47. Therefore, it matters not that the child complainant had earlier on had any sexual encounter. The complaint was emphatic that the appellant put his penis into her vagina, she screamed in pain and therefore no medical or forensic evidence could have displaced the cogent evidence adduced by PW1 and PW2 that the complainant was defiled. I find and hold that there was conclusive medical and physical evidence that the complainant was defiled and therefore the appellant's allegation that sections 26 and 36 of the sexual offences Act is devoid of merit as forensic evidence was not necessary in the circumstances of this case. **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."***

48. The Court of Appeal in the cases of **Robert Mutungi Mumbi V. R Cr. App. No. 52/2014 (Malindi)** and **Williamson Sowa Mwanga V. R Cr. App. No. 109/2014** (Malindi) considered the above provisions and stated in **Robert Mutungi Mumbi V. R Cr. App. No. 52/2014 (Malindi) thus**:

> ***"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."***

49. And in the latter case of **Williamson Sowa Mwanga** the Court of Appeal stated:

> ***" ….. 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."***

50. With the above decisions, I find and hold that there was no necessity in the instant case for the trial court to require DNA test to establish whether the appellant is the one who defiled the complainant as there was watertight evidence that he had defiled the minor. I reiterate that with or without such corroborative evidence would not have made the appellant's case any better.

51. On the issue of whether the trial court failed to comply with Article 50 (2) © of the Constitution in that he did not give the appellant ample time to prepare his defence, the trial court record shows that on **17/10/2016** the appellant appeared in court and took a plea of not

guilty after which the matter was slated for hearing on **21/11/2016** which was over one month away. In addition, on 17th October 2016 the trial court ordered that the appellant be supplied with witness statements. On the scheduled hearing date the prosecution had 2 witnesses but the appellant stated that he was not ready as he did not have statements. The court on that basis adjourned the hearing to 17.1.2017 and directed the prosecution to supply statements of witnesses to the appellant. On 15.12.2016 when the case was for mention, the appellant reiterated that he did not have statements and the court again ordered that he be supplied with statements.

52. On the hearing date of 17/1/207 he hearing was again adjourned for the appellant to get witness statements. On 1.2.2017 the hearing proceeded when the appellant stated that he was ready.

53. With the above record in mind, I do not see any merit in the appellant's complainant that he was not given time to prepare for the defence as he was accorded an opportunity to go through the trial after the court was satisfied that he had been supplied with witness statement and he did inform the court that he was ready with the hearing. Accordingly, I find no violation of the appellant's constitutional rights under Article 5 of the Constitution.

54. The appellant also claimed that the age of the complainant was not sufficiently proved. The complainant stated in her testimony that she was aged 10 years. Her father identified a clinic immunization card which the investigating officer produced as an exhibit that she was born on 28th January 2005. Her parents' names including that of PW4 is indicated in the card as being her father. The P3 form dated 16/10/2016 shows that she was 10 years old and that she was epileptic. There was no contrary evidence as to the age of the complainant.

55. In ***Hadson Ali Mwachongo VR [2016] eKLR C.A. (Mombasa) per Makhandia, Ouko & M'inote, JJA*** the learned Judges of the Court of Appeal stated:

> ***"Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 10 years, 13 years etc, as at the date of defilement. It will be a few days or months above or below the prescribed age. The question then arises, is at victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old or as more than 11 years old" If the victims treated as 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed" In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old"***

56. The court further stated:

> ***"We are of a different mind for the following reasons. Section 2 of the interpretation and General Provisions Act defines "year" to mean 9 years reckoned according to the British Calendar Act, (75), a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years and not 11 years old. That approach entails not taking into account the period above prescribed age so long as it does not amount to 9 years.***

57. What this means is that under the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 11 years, 9 months and 13 days old must be treated to be an 11 year old. Accordingly, I find no doubt that the complainant was aged 11 years and therefore her age was conclusively ascertained

58. On the whole I find and hold that the appeal herein against conviction is devoid of merit. I dismiss it.

59. On sentence, the appellant submitted in support of his ground of appeal that the sentence imposed on him was manifestly excessive. Under section 8(2) of the Sexual Offences Act, where the victim is aged 11 years or less, the prescribed punishment is life imprisonment. This the mandatory sentence imposed by the statute. However, the Court of Appeal very recently, in ***Jared Koita Injiri v Republic [2019] eKLR*** applying the principles espoused by the Supreme Court in the case of ***Francis Karioko Muruatetu and others* V *Republic SC Pet. No. 16 of 2015*** where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that:

> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."***

60. In Jared ***Koita Injiri v R*** case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the Sexual Offences Act, and the Court of Appeal opined that ***"if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."*** The court further stated:

> ***"The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.***
>
> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

61. I have no doubt that the above decision by the Court of Appeal will now open a floodgate of constitutional petitions for resentencing in all cases where convicts are serving life sentence for the offence of defilement of children under the age of 12 years. However, I find the decision a positive development as it grants the court discretion to mete out appropriate sentence and in appropriate cases, a court of law should not shy away from imposing life imprisonment.

62. In the instant case, the appellant was accorded an opportunity to mitigate and he stated that he was an orphan, stays with his grandmother, has three children who depend on him and that his wife got an accident and wholly depends on him he requested for a non-custodial sentence. The trial magistrate considered the mitigations in sentencing the appellant. He also considered the seriousness of the offence calling for deterrent sentence but stated that the law gives a limit for which a convicted person was to be sentenced and therefore imposed a mandatory life imprisonment.

63. I have considered the mitigations considered by the trial court and the seriousness of the offence which was committed on a young epileptic child who was well known to the appellant adult. He has his own children and wife. There is no justification for him to have preyed on a child. He deserves severe punishment but life in prison will not teach him anything other than keeping him away from the society so that he does not repeat such a heinous offence. Others like the appellant will also fear committing such offences. Life imprisonment is lawful.

64. However, as life imprisonment is no longer mandatory, I would exercise judicial discretion and resentence the appellant to serve 25 years imprisonment, to be calculated from the date of his arrest on 16th October, 2016.

65. Accordingly, the appeal against conviction is dismissed. I uphold the judgment and conviction of the lower court. I allow the appeal on sentence, partially as stipulated above.

Dated, signed and delivered in open court at Siaya this 24th day of June, 2019.

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi SPPC for the State

CA: Brenda and Modestar