REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 128 OF 2017

BETWEEN

ELPHAS MUSUNDI ..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 6.10.2017 By Hon. T. K. Kwambai, RM in Butali SRMC Criminal Case (SO)No. 1194 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, Elphas Musundi was charged with the offences of ***defilement contrary to Section 8 (1) (3) of the Sexual Offences Act, No. 3 of 2006,*** the particulars being that on the 3rd day of October 2016 at [particulars withheld], Matete Sub County within Kakamega County intentionally caused his penis to penetrate the vagina of LN, a child aged 11 years.

2. The appellant also faced an alternative count of ***committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006,*** in which it was alleged that on the 3rd day of October 2016 at [particulars withheld] area in Matete Sub County within Kakamega County he intentionally and unlawfully caused his penis to come into contact with the vagina of LN, a child aged 11 years. The appellant pleaded not guilty but after a full trial during which the prosecution called 8 witnesses, the Trial Magistrate convicted the Appellant of the offence of ***defilement contrary to Section 8 (1)(3) of the Sexual Offences Act*** and sentenced him to serve 20 years imprisonment.

The Appeal

3. Being dissatisfied with both conviction and sentence, the Appellant lodged this appeal dated 18th October, 2017. In his petition of appeal the appellant raised seven grounds of appeal which are as follows:-

> **1. That the Trial Court erred in law and in fact in convicting and sentencing the Appellant on the basis of a defective charge sheet.**
>
> **2. That the trial Court grossly erred and/or misdirected himself in law and facts in recording a conviction and finding the offence disclosed and proved where the actual age of the complainant was not proved.**
>
> **3. That the trial Court grossly erred and/or misdirected himself in law and facts in taking the appellant through an unfair trail which did not meet the threshold of Article 50 (2) (g),(h) and (j) of the constitution.**
>
> **4. That the trial Court grossly erred and/or misdirected himself in law and facts in placing inordinate weight on the evidence of PW1 without observing that the medical evidence adduced did not ascertain culpability as required under section 36 of the Sexual Offences Act.**
>
> **5. That the trial Court grossly erred and/or misdirected himself in law and facts in failing to address the inconsistencies, fabrication, malice and doubts in the prosecution's case.**
>
> **6. That the trial Court grossly erred and/or misdirected himself in law and facts in shifting the burden of proof on the appellant.**
>
> **7. That the trial Court grossly erred and/or misdirected himself in law and facts in rejecting the Appellant's defence.**

Duty of this court

4. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. In the well-known case of ***Okeno Vs Republic [1972] EA 32,*** the Court of Appeal for Eastern Africa stated thus:-

> ***"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."***

The Prosecution Case

5. The prosecution called 8 witnesses. Evidence was led that on the 3rd October 2016 when the Complainant had gone to the Appellant's shop to buy mandazi, the appellant grabbed her, dragged her to the back room of his kiosk, gagged her mouth and defiled her.

6. The complainant testified that the Appellant removed her clothes and slept on her and put his penis in her vagina. She later told PW2 of the incident which was subsequently reported at Matete Police station.

7. Her evidence was corroborated by PW2, another minor, JM. aged 12 years, who testified that on the date of the incident the complainant went to buy mandazi from the Appellant's shop only for her to come back crying and told her that the Appellant had defiled her.

8. On the 8th October 2016 PW4 SNN, a minor aged 13 years, noticed that the Complainant was walking with difficulty and upon inquiry she informed one of the teachers by the name Galo of the incident. The same was reported to the police and the complainant' mother, PW6

9. PW6, Brigit Nasimiyu testified that she was informed of the incident on the 8th October 2016 by Clyde Jogoo Wambase, headteacher of PW1's Primary school and that when she later examined the minor, she confirmed PW1's statement that she had been defiled. PW6 produced a copy of the minor's dedication card as PExhibit 2 and stated that the minor was born on 10th October, 2004.

10. PW7 Kizito Sifuna, a clinical officer at Malava Sub County Hospital, testified that he examined the complainant on the 10th October 2016.He stated that the complainant had been examined at Webuye district hospital on the 8th October 2016 and that tests had revealed the presence of red cells in her vagina which also had a white discharge and that her hymen was broken. He concluded that there was penetration. He produced in evidence a copy of notes from Webuye District hospital as Pexhibits 1 and 3 and the age assessment report as Pexhibit 4.

11. In cross examination he confirmed that the presence of the red blood cells indicated penetration.

12. PW8 PC (W) Miller Rapango of Matete Police Station confirmed that the incident was reported on the 8th October 2016 and that PW1 gave her an account of what had transpired between her and the Appellant on the 3rd October 2016. She stated that she noticed that the Complainant was walking with difficulty and that she identified the Appellant as her assailant.

The Defence case

13. By a ruling dated 29th August 2017 the appellant was found to have a case to answer and accordingly put on his defence. He gave sworn evidence in which he stated that he did not commit the offence and that he was just arrested by the police on the 8th October 2016 and informed of the accusations.

14. He stated that on the 3rd October 2016, he was in his shop the whole morning but left at about 2.00pm to go buy flour and returned at 6.00pm. In cross examination he stated that he did not know the complainant and denied selling any mandazis to her on the material day.

Submissions.

15. Appellant submitted that the charge sheet was defective as it indicated that the complainant was 11 years yet in evidence the minor was said to have been 13 years old. He challenged the prosecution's evidence on the age of the complainant stating that there was no adequate proof of the same as the evidence tendered was contradictory.

16. He also submitted that his rights under ***Article 50 (2),(g)(h)(j) of the Constitution*** were violated as he was not informed of his right to an advocate neither was one availed and that he was not issued with witness statements before trial.

17. He further submitted that the prosecution did not establish sufficient medical evidence to prove penetration and that there was no medical correspondence between him and the Complainant as per the provisions of section 36 of the Sexual Offences Act.

18. Lastly, the appellant submitted that the prosecution failed to prove his culpability as the complainant was not able to identify him as her assailant.

19. The State opposed the appeal on grounds that it had proved all the ingredients of the offence of defilement and thus prayed that the appeal be dismissed.

Issues for determination

20. Upon a careful reconsideration and evaluation of the evidence on record, and taking into account all the submissions made by both the appellant and the respondent and further upon careful consideration of the law, the following issues arise for determination:-

> **1. Whether appellant's rights as envisaged under article 50 (2) (g) (h) and (j) of the constitution were contravened and consequences of such contravention if any.**
>
> **2. Whether in the final analysis the prosecution proved the case against the appellant beyond any reasonable doubt.**
>
> **3. Whether the sentence meted out on the Appellant was excessive in the circumstances.**

a)Whether appellants rights as envisaged under article 50 (2), (g), (h) and (j) of the constitution were contravened and consequences of such contravention if any.

21. ***Article 50(2) of the Constitution*** provides as hereunder:

> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> **……**
>
> ***(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> ***(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
>
> ***(i) To remain silent, and not to testify during the proceedings;***
>
> ***(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

22. The Supreme Court of Kenya had occasion to delve into these matters in the case of Case of ***Republic versus Karisa Chengo & 2 Others (2017) eKLR*** where it noted that though legal representation was critical in criminal proceedings, there are certain instances in which legal representation at state expense would not be accorded. That such representation would only be guaranteed where it was clear to the court that substantial injustice would be suffered if such representation is not accorded.

23. The Supreme Court highlighted certain parameters to be considered by the court in determining whether or not legal representation at state expense should be ordered. Such factors include but are not limited to the seriousness of the offence and the attendant sentence upon conviction, the ability of an accused to hire counsel; whether or not the accused is a minor, the literacy of the accused as well as the complexity of the charge facing accused.

24. In the case of ***Nicholas Tambula V Republic [2018] eKLR*** the court held that

> ***"...the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result."*** Also see ***Meshack Juma Wafula V Republic [2019] eKLR.***

25. In the case of ***Meshack Juma Wafula V Republic [above] t***he Court of Appeal cited the case of ***Pett v Greyhound Racing Association (1968) 2 All E.R. 545 (P.549)*** where Lord Denning said:-

"It is not every man who has the ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness on the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day a magistrate says to a man; you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for that task."

26. The bottom line on the question of legal representation is that the right to legal representation is not absolute, and can be limited. For a court to rule that legal representation is deserved, ***"It must be established that the accused will suffer substantial injustice if one is not accorded legal representation and that is why the courts have said that the gravity of the offence, the nature of the reality or severity of the sentence must be taken into account; whether accused is a minor or illiterate and not able to understand the court proceedings is also a factor to be considered."*** Also see ***Joseph Kiema Philip V Republic [2019] eKLR*** and ***Vincent Muchera Isalano V Republic [2019]eKLR*** in which the Superior Courts held that the trial courts failure of its mandatory obligation to inform the accused person of his right to legal representation resulted in the court not affording the appellants a fair hearing.

27. In the instant case, it is true the Appellant was unrepresented. However, at no point in the proceedings did the trial court inform him of his rights to representation which it ought to have done considering the nature of the offence and the possible sentence upon conviction. It should however be noted that the Appellant herein at no time during the proceedings complained of the same. He was an adult aged 30 years during trial and is not illiterate. He properly and comfortably participated in the trial and exhibited no difficulties during the hearing. He went ahead and exhaustively cross examined all the witnesses. It is thus my considered view that although the Appellant was not informed of his right to legal representation, the same did not cause any substantial injustice to him. The appellant's ground of appeal based on alleged breach of ***Article 50(2)(g)*** cannot therefore stand.

28. The Appellant further submitted on alleged violation of his rights under ***Article 50 (2)(j) of the Constitution.*** According to the proceedings, the Appellant was on the 21st December 2016 supplied with the witness statements before trial and thereafter indicated that he was ready to proceed with the hearing. No other complaints were made of the lack of statements and thus this ground too cannot stand.

b) Whether the prosecution proved the case against the appellant beyond any reasonable doubt.

29. ***Section 8(1) and (3) Of The Sexual Offences Act*** provides that:-

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2)……..

8(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.

30. Thus the key ingredients for the offence of defilement are therefore, age of the victim, the fact of penetration and whether the appellant herein was properly and positively identified as the culprit. See the case of ***Dominic Kibet Mwareng V Republic [2013] eKLR*** in which the above ingredients were highlighted.

Proof of age of the Complainant

31. It was the complainant's evidence that she was aged 12 years at the time of the alleged incident. PW3, the Complainant's mother testified that the minor was born in 2004. She produced a copy of a dedication baptism card (PExhibit 3) from Redeemed Gospel Church indicating that the complainant was born on 8th October 2004.

32. PW7 a clinical officer who examined the complainant also confirmed that he did an age assessment and established that the minor was 11 years old at the time. The same age was recorded in the treatment notes which were produced in evidence.

33. In the case of ***Hilary Nyongesa Vs Republic Eldoret Criminal Appeal No 123 of 2009*** the court stated that:

> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved….And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***

34. In the case of ***Kaingu Elias Kasomo -V- R Malindi Cr. App. No. 504 of 2010*** the Court of Appeal stated that:-

> ***" the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence…….Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth.***

35. In ***Musyoki Mwakavi –VS- Republic Machakos High Court Criminal Appeal No. 172 of 2012,*** the court was of the view 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…".***

36. In the case of ***Edwin Nyambaso Onsongo Vs Republic (2016) eKLR,*** in which the court cited the case of ***Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR)*** the Court of Appeal held that:-

> ***"… the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "… we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.***

37. It is also worth noting that Rule 4 of the Sexual Offences Rules of Court Rules recognizes that:

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."***

38. It is clear from all the authorities cited above that a baptismal Card, the medical records and the evidence given by the complainant herself or her parents are conclusive proof of age of the complainant. The Trial Court herein made reference to the evidence of the minor, her guardian and the medical reports to make the same assessment of age. It is therefore sufficient to say that the age of the minor was proved beyond any reasonable doubt.

39. The Appellant however contended that the charge sheet was defective as the complainant's age stated therein is 11 yet the offence stated is for a minor aged 12 to 15 years.

40. It should be noted that at the time of the offence, the minor was 5 days shy of reaching 12 years old.

41. In ***Brian Kipkemoi Koech V Republic [2013] eKLR*** the court held that

> ***"What constitutes a defective charge sheet was spelt out in the case of YOSEFU AND ANOTHER -VS- UGANDA (1960) E.A., 236. The East Africa Court of Appeal held:-***
>
> ***"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."***
>
> ***And in SIGILAI -VS- REPUBLIC (2004) 2 KLR, 480, it was held that:-***
>
> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence."***
>
> ***On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute 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. "***

42. The Court of Appeal in ***Peter Ngure Mwangi V Republic [2014] eKLR,*** stated, *inter alia*, that:-

> ***"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:***
>
> ***"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:***
>
> > ***(i) when it does not accord with the evidence before the committing magistrate either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,***
> >
> > ***(ii) when for such reason it does not accord with the evidence given at the trial."***

43. The Court of Appeal in ***Yongo Vs Republic [1983] KLR, 319*** held, inter alias, that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

> ***"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:***
>
> ***(a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or***
>
> ***(b) It does not, for such reasons, accord with the evidence given at the trial; or***
>
> ***(c) It gives a mis-description of the alleged offence in its particulars."***

44. In the case of ***John Irungu V Republic [2016] eKLR***; ***Criminal Appeal No. 20 of 2016,*** the charge against the appellant had only indicated the punishment section of the offence with which the Appellant

was charged. The Appellant claimed that the charge was defective and the Court of Appeal answered him thus:

> ***"Section 137 of the Criminal Procedure Code, which sets out the rules for framing charges and informations, requires a charge or information to commence with the statement of the offence describing the offence briefly and in plain language and without stating all the essential elements of the offence. Where the offence charged is one created by an enactment, the statement of the offence is required to contain a reference to the section of the enactment creating the offence. This is the provision that the appellant contends was violated in his case.***
>
> ***As section 137(a)(iv) of the Criminal Procedure Code makes abundantly clear, the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. As this Court observed in Samuel Kilonzo Musau v Republic, Cr. App No. 153 of 2013, that provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See also George Njuguna Wamae v. Republic, Cr. App. No. 417 of 2009)….***
>
> ***We are in agreement with the first appellate court that the failure to refer to section 8(1) of the Act did not occasion a miscarriage of justice in view of the clear statement of the particulars of the offence and therefore cannot form the basis for interfering with the decisions of the two courts below."***

45. The case of ***Obedi Kilonzo Kevevo V Republic [2015]eKLR*** is also relevant to the extent that a court will declare a charge sheet defective only if the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant, and further that it is not in all cases in which a defect is detected in the charge on appeal would render a conviction invalid. This is by dint of ***Section 382 of the CPC.***

46. The Charge herein contains particulars of the offence described under ***Section 8 (1) as read with Section 8(3) of the Sexual Offences Act.*** The particular of the charge indicated the age of the minor as 11 years. The evidence adduced by the prosecution was geared towards proving that the minor was aged 12 years which was as per the charge.

47. From the evidence and the proceedings, I find no defect error and/or discrepancy and if there is, same was a minor omission curable under Section 382 of the Criminal Procedure Code and that the said error did not in any way occasion any injustice to the appellant. In fact as stated in the case of ***Hilary Nyongesa Vs Republic Eldoret Criminal Appeal*** (above) age is important when it comes to sentencing and in this case the error complained of favoured the Appellant in terms of the sentence imposed. The appellant's complaint that the charge sheet was defective is therefore baseless.

Proof of penetration

48. It is the complainant's evidence that she was defiled by the Appellant. She stated that the Appellant gagged her mouth, took her to the back room of his kiosk, took off her clothes and inserted his penis into her vagina.

49. PW7 stated that he examined the minor and noted that her hymen was torn and that there was a presence of white cells that showed sexual activity .He concluded that she was defiled.

50. The Appellant denied having defiled the minor.

51. ***Section 2 Of The Sexual Offences Act*** provides that:-

"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

52. In ***George Owiti Raya Vs Republic [2013] eKLR*** it was held that:-

"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."

53. In the case of **Erick Onyango Ondeng V. Republic (2014) eKLR** the Court of Appeal held as follows on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

54. In her Judgment in the present case, the Trial Court held that

"……there was presence of epithelial cells on examination and no hymen. The external vagina was intact with no bruises .I tend to believe because this wasn't the first time she was being defiled .The presence of the epithelial cells confirmed that there was friction on the vaginal walls during sexual intercourse. This therefore ascertains that there was penetration."

55. PW7 the clinical officer testified that although there were no bruises on the vagina the complainant had a vaginal discharge and that the evidence of the white cells proved that she had been defiled.

56. In ***J O O V Republic [2015] eKLR*** the court quoted a paragraph of the judgment in the case of ***Mark Oururi Mose versus Republic [2013]eKLR*** to the effect that:-

"…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….' (emphasis mine).

This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated."

57. In ***Philip Ochieng Owino V Republic [2019] eKLR*** the court stated that

"18. Medical evidence confirmed that the hymen was not freshly broken but the presence of epithelial cells which the clinical officer stated was evidence of friction on the vaginal wall corroborated the complainant's evidence that she had been repeatedly defiled. And although the evidence of defilement is that of a single witness, complainant's disappearance for 6 days and medical evidence provided sufficient proof that the complainant was telling the truth."

58. The above holding was reiterated in the case of ***Gilbert Cheruiyot Yegon V Republic [2019] eKLR.***

59. From the referenced above authorities it is clear that the presence of the white blood cells confirm that the minor had been engaged in sexual activity and the Clinical officer, PW7 confirmed the same. I am thus satisfied that penetration was proved by the prosecution to the required standards.

60. As an appellate court, I am satisfied that the conclusions reached by the learned trial court on the question of penetration were sound, and I accordingly confirm the same.

<u>Whether the appellant was positivity identified by the minor as her assailant.</u>

61. It was the Complainant's evidence that the Appellant was well known to her. She stated that the Appellant is a shop keeper who had a shop near her school and that she would buy mandazi therefrom regularly. Her evidence was corroborated by PW2 and PW3.

62. She did not at any time waiver in her identification of the appellant. Given that the appellant was a man well known to the child there exists clear evidence of identification by recognition.

63. This evidence of recognition was held by the Court of Appeal in ***Anjononi & Others Vs Republic [1989] eKLR*** to be 'more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person's knowledge of the assailant in some form or other'.

64. The Appellant contends that the Learned Trial Magistrate erred in law and fact in failing to warn herself of the dangers of convicting on the evidence of a single witness, namely the complainant.

65. I hasten to state here that The law on the point that the Courts can convict on the evidence of a single witness was settled in the case of **CHILA V R [1967] EA 722 at 723** that:

> ***"The law of East Africa on corroboration in Sexual Offences is as follows:-***
>
> ***The Judge should warn the assessors and himself of the danger of acting on the uncorroborated Evidence testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given then the conviction will normally be set aside unless the Appellate Court is satisfied that there has been no failure of justice. In this case, as earlier stated, the trial Magistrate after concluding that "I have assessed the minor and I find her fit to proceed with this trial. She can be sworn." In her assessment of the Prosecution's evidence, she stated. The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence."***

66. In the judgment, the learned trial court noted that the complainant was consistent in her evidence that it was the appellant who defiled her on 3rd October, 2016, and that PW1 informed PW2, PW3 and PW4 of the same.

67. In the case of ***Fred Omar Omondo V Republic [2014] eKLR,*** the court was of the view that the proviso to ***section 124 of the Evidence Act*** entitled the trial court to rely on the evidence of the complainant entirely if it was satisfied she was telling the truth.

68. In ***Moses Nato Raphael V Republic [2015] eKLR*** the court of appeal held that

> ***"As to whether the sole evidence of the child was sufficient to found a conviction, the law on this issue is well settled. Section 124 of the Evidence Act, Cap 80, Laws of Kenya provides a proviso that permits admission of evidence from a victim without corroboration in sexual offences cases only. Section 124 of the Evidence Act provides as follows;***
>
> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), 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." (emphasis ours)***
>
> ***All the Court needed to do was warn itself of the danger of convicting on the evidence of a single***

witness, who is also a minor. The learned Judge did this in her re-evaluation of the evidence and was satisfied that the child knew the appellant very well before and she could not have mistaken him for another person."

69. The above principle has also been applied in the following cases: ***Martin Okello Alogo V Republic [2018] eKLR; G O A V Republic [2018] eKLR*** and ***S C N V Republic [2018] eKLR,*** the single thread running through these decisions being that as long as the trial court is satisfied that the single witness is telling the truth, a conviction based on such evidence will be allowed to stand. The learned trial court in the present case was satisfied that the complainant, who remained consistent in her testimony was believable.

70. I note from the record the complainant herein gave an elaborate account of how the appellant defiled her. Her evidence remained unshaken even during cross examination as she maintained the same account. Her evidence was also corroborated by medical evidence which proved that she was indeed defiled. I am therefore satisfied that the evidence adduced by the complainant meets the standard of proof and the trial Magistrate did not err in convicting the appellant based on the evidence of the said single witness

Sentencing

71. ***Section 8(1) and (3) of the Sexual Offences Act*** provides that:-

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2)……

8(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.

72. In ***Evans Wanjala Wanyonyi V Republic [2019] eKLR,*** the Court of Appeal held that:-

"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered the legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; 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. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

In this case, the appellant was sentenced to 20 years imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) (3) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

73. In the instant case, the appellant was sentenced to 20 years imprisonment. In mitigation, he stated that

he was remorseful and prayed for court's leniency. He was also said to be a first offender. It is to be noted however, that the appellant behaved irresponsibly and betrayed the trust the community had in him of protecting its young people, especially the girl child who is predated upon left right and centre. In the circumstances of this case therefore, I would reduce the sentence from 20 to 15 years imprisonment.

Conclusion

74. In conclusion, I make the following orders on this appeal:-

1. The appellant's appeal on conviction be and is hereby dismissed.

2. The appellant's appeal on sentence partially succeeds in that the sentence of 20years imprisonment is set aside and in lieu thereof, the appellant is sentenced to fifteen (15) years imprisonment with effect from 6th October, 2017 when he was first sentenced.

3. Right of appeal within 14 days from the date of this judgment

75. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 20th day of December, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of

Appellant in person

Mr. Mutua for respondent

Erick – Court Assistant