S v Republic (Criminal Appeal 1 of 2018)
[2018] KEHC 883 (KLR) (18 December 2018) (Judgment)

Daniel Kipkemoi Sawe v Republic [2018] eKLR

Neutral citation: [2018] KEHC 883 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL 1 OF 2018

M NGUGI, J

DECEMBER 18, 2018

BETWEEN

DKS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho CM Cr. No. 48 of 2013 (Hon. S. Mokua (CM)) dated 29th January 2018)

JUDGMENT

1. The appellant was charged in Kericho Chief Magistrate's Court Sexual Offences Case No. 48 of 2013 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 31st of August 2013 at [particulars withheld] Centre in Londiani District within Kericho County, intentionally caused his penis to penetrate the vagina of JC, a child aged 8 years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Penal Code*. The particulars of the offence are that on the same date and place as in the main count, he intentionally touched the vagina of JC, a child aged 8 years, with his penis.

3. The appellant pleaded not guilty to the offence on 4th September 2013. The trial started before Hon. J. Nyagol who took the evidence of one witness. It was then taken over by Hon. G.M. A. Ong'ondo (as he then was), and upon compliance with section 2003(3), the appellant elected to proceed from where the matter had reached. The matter was completed before Hon. Mokua (CM), who had on 26th April 2017, in compliance with section 200(3) of the *Criminal Procedure Code*, explained to the appellant his rights under the section and the appellant had elected to proceed with the matter from where it had reached.

4. In its judgment dated 26th January 2018, the trial court found the appellant guilty on the main count of defilement and sentenced him to life imprisonment.

5. Aggrieved by both his conviction and sentence, the appellant filed a petition of appeal dated 7thFebruary 2018 in which he raised some 7 grounds of appeal. A further Supplementary Petition of Appeal was filed and relied on by his Counsel, Mr. Onesmus Langat, at the hearing of the appeal. In the Supplementary Petition of Appeal dated 20th February 2018, the appellant raises the following grounds:

    1. The Learned Magistrate erred in law and fact by presiding over the case carrying life sentence without granting the appellant an opportunity to retain a lawyer.

    2. The Learned Magistrate erred in law and fact by presiding over the case for a period of five years which inordinate delay violated the appellant's right to fair trial.

    3. The Learned Magistrate erred in law and fact by convicting and sentencing the appellant on the basis of a defective charge sheet.

    4. The Learned Magistrate erred in law and fact by convicting and sentencing the appellant on the basis of unreliable medical report.

    5. The Learned Magistrate convicted and sentenced the appellant without critically ascertaining the child's age.

    6. The Learned Magistrate convicted and sentenced the appellant on the basis of uncorroborated child's testimony at the alleged age of 11 years which was an account of events that allegedly took place when the child was purportedly 8 years.

    7. The Learned Magistrate erred in law and fact by failing to put weight on the appellant's defence that this was a street child who lived by the streets and could have been defiled by other street children.

6. This is a first appeal, and I am accordingly required to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses- see *Okeno v R* [1972] EA. 32 and *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR

7. The prosecution called 4 witnesses in support of its case against the appellant. PW1 was JC, a teacher at [particulars withheld] Primary School. Her testimony was that on 3rd September 2013, the complainant, whom she had taught in class one, had come to school, crying. She was later followed by the appellant. PW1 and teacher A had asked her what was wrong, and she said she had a stomach ache. The complainant had been taken to the head teacher's office, and while there, she had said that she had a stomach ache because "Huyu alinifanyia tabia mbaya" while pointing at the appellant. The complainant had been taken to Lutheran Church dispensary and later to Soil Conservation Health Centre where she was examined and the P3 form filled.

8. In cross-examination by the appellant, she stated that it was the head teacher, not the appellant, who decided to take the child to hospital. She did not know where the child was before the appellant brought her to school. She confirmed that when the child came to school on the 3rd of September 2013, the appellant was walking behind her.

9. In response to question from the court, PW1 stated that she did not know the parents of the pupil. The complainant had explained to them that "tabia mbaya" is that at night the accused would place her on the seat and on the bed.

10. After conducting a voire dire the court noted that the complainant, PW2, was intelligent and knew the significance of taking an oath and therefore directed that she could be sworn. Her evidence was that on 30th August 2013 after supper, her mother, RC, asked her to go to the house of 'uncle', the appellant, whom she pointed at in the dock. She had gone to his house and slept on a seat, then the appellant had taken her and put her in his bed, then slept beside her. PW 2 stated as follows with respect to the defilement:-

> " Suddenly accused moved closer to me. He removed my skirt, knickers and he removed his trouser, too. He lay on top of me. He inserted his genital organ namely penis which he uses to urinate into mine. I felt pains on my vagina. I slept."

11. PW2 stated that when she went back home, her mother chased her away armed with a panga and she returned to the home of the accused where the accused defiled her again. She had gone home the following day instead of going to school, and the appellant had followed her and chased her to school. She had told her class teacher, M, that the appellant had penetrated her genital organ at his home and the teacher told her to report the same at Chepseon Police station. She had been examined at Kipkelion Sub-district Hospital and an age assessment done. She stated that she was 11 years old at the time of her testimony, in February 2016.

12. PW3 was Weldon Mutai, a clinical officer based at the Kipkelion Sub-district hospital. He produced the P3 form (exhibit 2) which had been prepared by his colleague who had been transferred. His evidence was that the complainant had difficulties walking and her clothes were wet. There was also a foul smell in her wet underpant. PW3 further testified that the complainant's genitalia, labia (minora) and majora were swollen and had bruises. The hymen was swollen and there was a whitish discharge. The opinion formed from the medical examination and findings was that the complainant had been defiled. He stated on cross examination that the defilement took place on 31st August 2013 but that the P3 form was filled on 13th September 2013.

13. PW4, No.55348 Cpl. Mululu Sangara testified that on 23rd March 2016 he escorted the complainant to Kericho District Hospital for age assessment which was done by Dr. Langat. The court notes that the age assessment indicated that on 23rd March 2016, the complainant was aged 16 years. PW4 produced the age assessment report as P. Exhibit -1. The court notes that the age assessment report dated 23rd March 2016 shows that the complainant was 11 years at the time of the assessment.

14. When placed on his defence, the appellant gave sworn evidence and called one witness, the complainant's mother. The appellant stated in his sworn statement that he was a Good Samaritan to the complainant. That she used to be in Chepseon town on Tuesday and Friday as a vagabond. He had once found her in town when there was a lot of rain and taken her to his place. He had informed one Ann, the Children's Officer as well as one Bernard and the Area Chief of what he had done. He had also purchased school uniform for the girl. It was his evidence that the complainant had gone to Dandora where she was beaten up by young boys and injured on the head and leg. Given that she had earlier been at his place, it was taken that he had raped her. He further stated that the following day, he had beaten her and escorted her to school.

15. On cross-examination, the appellant stated he knew the parents of the complainant and that he informed the parents and the area chief. The complainant was aged 9 years and he had taken her to

[particulars withheld] Primary School Standard 1. He did not have any documents to confirm that he had taken the complainant to school.

16. DW2 was RC, the mother of the complainant. Her evidence was that the appellant had rescued a street child, that he took her up and she was later beaten by street children. On cross examination she stated that the appellant did not stay with the victim and that the victim was 'putting up here' where the appellant was staying.

17. In its judgment, the trial court identified four issues as arising for determination. These were what the age of the complainant was, whether there was penetration, who had perpetrated the offence, and whether the complainant was a truthful witness. The court found that the complainant, having been assessed to be 11 in 2016, was 8 years old in 2013. He further found that there had been penetration, and on the third issue, he found that it was the appellant who had defiled her. He also found that the complainant was a truthful witness and he believed her testimony in its entirety.

18. These are the findings that the appellant challenges in his supplementary petition of appeal. The appellant was represented by Learned Counsel, Mr. Langat, while Mr. Ayodo appeared for the state.

19. I have considered the record of the trial court, the prosecution and defence evidence which I have set out above, as well as the submissions of Counsel for the parties. I will consider each of the grounds raised by the appellant and the submissions thereon and the response from the state in turn, and render a finding thereon.

Right to Legal representation

20. Mr. Langat submitted that an accused person has a right to legal representation under Article 50 (2) (g), but nowhere in the proceedings is it indicated that the appellant was informed of this right. Had he been informed of this right and obtained the services of a lawyer, some of the mistakes highlighted in the appeal would not have happened.

21. In response, Mr. Ayodo argued that the appellant had the time and resources to retain counsel before the trial started and throughout the trial. Further, that it is only in capital offences that a counsel is provided at state expense.

22. It is indeed correct, as submitted by Mr. Langat, that Article 50 (2) of the *Constitution* provides that every person has a right to choose and be represented by an advocate and to be informed of this right promptly. Article 50(2) (h) provides that an accused person has a right to have an advocate assigned to him at state expense if substantial injustice would otherwise result. Contrary to the assertions by Mr. Ayodo, there is a duty on the state to provide Counsel if 'substantial injustice' would otherwise result- see the Supreme Court decision in *Republic v Karisa Chengo & 2 Others* [2017] eKLR.

23. The issue for the appellate court to consider is whether 'substantial injustice' has resulted from the failure to provide the accused with Counsel. In my view, this turns on whether the accused person understood the charges that he faced, and whether he was able to address himself to the issues that arose and properly conduct his defence. See *Bernard Kiprono Koech v Republic* [2017] eKLR and *Peter Kimanzi Malii & Titus Kikuyu Muasya v Republic* [2017] eKLR.

24. In this case, the appellant was able to conduct his case, cross-examine witnesses, and call his own witness in his defence, his witness being no other than the complainant's mother. In the circumstances, I am satisfied that there was no prejudice occasioned to the appellant by the court conducting his trial without his having legal representation. This ground must therefore fail.

25. I must observe, however, that this is not the ideal situation, and that an accused person ought to have legal representation, but it is the unfortunate reality that we have to deal with in this jurisdiction-that the majority of persons charged before our courts are unrepresented.

Inordinate Delay

26. The second argument raised by the appellant was that there was inordinate delay in the appellant's trial. Mr. Langat submitted that the trial took close to 5 years, which violated the appellant's right to a fair trial provided under Article 50 (2) (e) of the *Constitution*. During this period, the appellant attended court almost 60 times, that the trial was adjourned 17 times, the reasons advanced for the adjournments being that the complainant was not in court or witnesses were not bonded. The response from the state is that the delay was not occasioned by the prosecution but was partly due to the police file and also by challenges related to the mobile court in Kipkelion which the prosecution had no control over.

27. As submitted by Counsel for the appellant, his trial took a while, about 4 years. The question is whether this time period violated the appellant's right to a fair trial as provided under Article 50 (2) (e) of the *Constitution*. This Article guarantees to an accused person the right to a fair trial which includes the right "to have the trial begin and conclude without unreasonable delay." In *Charo Karisa Salimu v Republic* [2016] eKLR, the Court of Appeal, in considering an appeal where the appellant argued that there had been unreasonable delay in proceeding with his trial stated as follows:

> " We have cited the two Canadian authorities merely to illustrate the importance of timely dispensation of justice as one of the hallmarks of a free and democratic society, to draw a parallel with the provisions of Article 50 (2) (e) aforesaid and to confirm that the Article is not a mere pious aspiration on paper; that by requiring that a trial must begin and conclude without unreasonable delay, the people of Kenya through the Constitution expect the criminal justice system to bring suspects to trial expeditiously because delays in a trial have far reaching ramifications to the accused person, the victim, the families, witnesses and even the general public. Article 50 is therefore an important safeguard to prevent any oppressive incarceration and to minimize anxiety on the part of the accused person. It is perhaps informed by the time-honoured chapter 40 of the 1251 Magna Carta which stipulated that;
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> "to no one will we sell, to no one deny or delay right or justice."
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> It appears to us that the same complacency displayed in the trial of this appellant is no different from the experience elsewhere. The Judges in *R v Jordan* case (supra) observed that;
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> "(4) Our system, however, has come to tolerate excessive delays. The circumstances in this appeal are illustrative. Notwithstanding a delay of over four years in bringing a drug case of modest complexity to trial, both the trial judge and the Court of Appeal were of the view that the appellant was tried within a reasonable time. Their analyses are reflective of doctrinal and practical difficulties plaguing the current analytical framework governing s. 11 (b). These difficulties have fostered a culture of complacency within the system towards delay."

28. It is worth noting that in the above case, the trial of the appellant had only been concluded some 10 years after he was first charged in court, and a further 6 years had elapsed since his conviction. The Court of Appeal found his original trial to be a nullity, but found that there had been unreasonable delay and it could not order a retrial.

29. In *Julius Kamau Mbugua v Republic* [2010] eKLR, the Court of Appeal identified some 10 principles to be considered in determining a matter in which it is alleged that there has been inordinate delay that

has resulted in violation of the right to a fair trial. It noted that the right to a trial within a reasonable time is part of international human rights law. It is not, however, an absolute right as it must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.

30. The court observed that in determining whether the right has been violated, the approach is not by a mathematical or administrative formula but rather by judicial determination which require the court to consider all the relevant factors within the context of the whole proceedings. What is 'reasonable time' would need to be considered against the particular circumstances of each case, in the context of the domestic legal system, and against the prevailing economic, social and cultural conditions.

31. The Court further enunciated the principle that the allegation that there has been inordinate delay should be raised at the earliest opportunity, but that the right is to trial without undue delay. It is not a right not to be tried after undue delay. Even where it is demonstrated that there was inordinate delay, if the applicant is already convicted, the quashing of a conviction is not considered a normal remedy. The court would be required to consider another, appropriate remedy, taking into account the fact that the applicant has been proved guilty of a serious crime, and it would be inappropriate to unleash such a criminal back to society.

32. I have considered the record of the trial court in this case. I note that the matter first came to court on 4th September 2013 and that judgment was delivered on 26th January 2018. What this means is that the trial proceeded for a period of 4 years and a few months. I note that there were several adjournments during the life of the trial which were occasioned by several reasons. Missing witnesses, missing police file, failure to avail the complainant, for purposes of conducting an age assessment, failure to secure the investigating officer, the absence of the appellant on some occasions which he explained was due to the fact that the matter was being heard by the mobile court in Kipkelion. I also note that the appellant did on two occasions observe that he had come to court very many times and needed the matter to end.

33. However, from the principles established by the two decisions cited above, the general approach in determining whether the right to a fair trial has been violated is not by a mathematical or administrative formula but rather by the court considering all the relevant factors within the context of the whole proceedings. In this case, I am not satisfied that the delays violated the accused's right to a fair trial. The fact that the trial was going on before the mobile court in Kipkelion, that the case was heard by three magistrates, that at some point a warrant of arrest had to be issued for the appellant for failure to attend court, all show that there were a number of diverse factors that contributed to the delay, which cannot be laid at the feet of the prosecution, and in my view do not amount to a violation of the appellant's right to a fair trial. This ground must therefore also fail.

Defective Charge Sheet

34. It was submitted on behalf of the appellant that the charge sheet was defective, but that the trial court did not address this. The defect, according to the appellant's Counsel, related to the date of the offence as it is set out in the charge sheet. His submission was that he has never seen a date written as 8/30/31/13. He further submits that it was not clear either, from the evidence of the prosecution witnesses, when the alleged offence took place. Mr. Langat noted that PW1 testified that she was defiled on 30th August, 2013 while PW3 testified that the defilement took place on 31st August 2013, while PW1 stated that the complainant complained to her on 3rd September 2013. It was his submission that the prosecution witnesses do not cure the ambiguities in the charge sheet and the Magistrate did not see it fit to address the ambiguities.

35. Mr. Ayodo submitted on the alleged ambiguities in the charge sheet that the appellant understood very well what the charge sheet meant, which is why he participated in the proceedings. Further, that the complainant had mentioned the date on which the offence occurred.

36. I have considered the appellant's ground of appeal in relation to the charge sheet. The complaint relates to the manner in which the date on which the offence was alleged to have been committed is written in the charge sheet. For the appellant to succeed on this ground, the court must find that the charge sheet is incurably defective. The law is that not every defect or omission in a charge sheet renders the charge defective-see *Alivi v Republic* [1990] KLR 188 and *Bisonga v Republic* [2014] eKLRin which it was held that it is not every defect or omission in a charge sheet that renders it defective. A mere technical defect in the charge sheet which is not fundamental and does not cause a failure of justice is curable-see *Kilome v Republic* [1990] KLR 194.

37. I have considered the charge sheet in this case. The part of the charge sheet complained of reads:

> "DKS: On the 30/31/8/13 at [particulars withheld] in Londiani District within Kericho county intentionally caused his penis to penetrate the vagina of J C a child aged 8 years."

38. It seems to me that the person who drew the charge sheet in this case took the rather indolent route of using slash marks to denote certain words that should have been included in the charge sheet. I say indolent as I see no reason why the charge sheet should not have read, for instance, "On the 30th and 31st of August 2013..." However, in my view, the manner of denoting the date on which the offence occurred does not in any way prejudice the appellant. It is clear that the offence is alleged to have occurred on 30thand 31stof August 2013. In her testimony, the complainant testified that she was defiled by the appellant on the night of 30th August 2013 when she was sent to the appellant by her mother, and again on the 31st of August 2013 when her mother chased her away with a panga, and she was forced to go back to the appellant's house, where he again defiled her.

39. In my view, the appellant was quite clear on the dates when the offence was alleged to have taken place, and to understand the charge against him and the nature of his conduct that constitutes the offence. No injustice was occasioned to the appellant from the manner of writing the date in the charge sheet, and such defect as can be discerned in it is minor and of no consequence to the offence charged. This ground of appeal must also fail.

Conviction on the Basis of an Unreliable Medical Report

40. The appellant challenges his conviction on the basis that the trial court relied on unreliable medical evidence. Mr. Langat submitted that the medical report was produced by one Weldon Mutai on behalf of Janet Ngeno whom he referred to as his colleague. His submission was that the court ought not to have relied on her report as PW3 gave only his qualifications but not those of his colleague, Janet Ngeno.

41. It was his submission further that the examination of the complainant was done 2 weeks after the alleged offence, on 13.09.2013, and in the circumstances, the evidence is unreliable.

42. The submission by Mr. Ayodo on this point is that although the doctor who testified was not the examining doctor, he testified that he knew the doctor who examined the complainant and confirmed that she was a colleague and in the circumstances the report cannot be said to have been unreliable.

43. I have considered this ground of appeal and the submissions of the parties with respect thereto. It is correct that in certain circumstances, a medical report may be inadmissible where it is not produced by its maker. In *Naomi Bonareri Angasa v Republic* [2018] eKLR the court stated as follows:

> " 14. Whether the P3 medical form was admissible depends on whether it is produced by the maker thereof or under section 77 of the *Evidence Act* (Chapter 80 of the Laws of Kenya). The doctor who examined PW1 and prepared the P3 form was not called. Section 77 of the *Evidence Act* allows a person other than the one who prepared a report such as the P3 forms in issue to produce it provided the presumption of authenticity is met. The section provides as follows:
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> 77.
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> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
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> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
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> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

44. The court went on to conclude as follows:

> 15. Once the presumption of authenticity under section 77(2) aforesaid is met the document is admissible but the trial court may, suo moto or upon request by the accused person, call for the maker of such document to appear in court for cross-examination on the form and content of the report. In *Joshua Otieno Oguga v Republic* KSM CA Criminal Appeal No. 183 of 2009 [2009] eKLR the Court of Appeal considered the same issue and held that:
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> That in short means that if the appellant wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by PC. Ann Kambui as she did.
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> 16. In this case, the prosecution did not lay any basis for the admission of the document.PW4 only testified that the doctor or vouch for his qualification or even confirm that he was familiar with his handwriting and signature. He only stated that the doctor who prepared the report had left public service. The medical evidence was therefore inadmissible."

44. In this case, PW3 laid a basis for his production of the P3 form prepared by his colleague, Janet Ngeno, who had left the hospital, under section 77 of the *Evidence Act*. He stated that the report had been prepared by his colleague who had been transferred, that he had worked with her for four years and

was familiar with her handwriting. There was no objection to his producing the P3 form, nor was a request made for the maker of the document to be called. In the circumstances, it is my finding that this ground also has no merit, and must fail.

The Age of the Child

45. The appellant also challenges his conviction on the basis that the age of the complainant was not established. His submission was that the charge sheet indicates that the complainant was 8 years old in 2013 so she was 11 years when she testified in 2016. He further states that the record shows that the complainant was 16 years at that time. There was no birth certificate produced though there is an age assessment by one Dr. Langat indicating that the complainant was 11 years of age. Mr. Langat's submission is that Dr. Langat does not give his qualifications in the age assessment report, and so he could be anyone. According to Mr. Langat, only dentists can provide the age of a person. In his view, the age of the complainant was an ambiguity, yet the age of the victim is key in sexual offences in determining sentence. Mr. Ayodo submitted in response that the age assessment was done by a qualified doctor and the age of the complainant was established.

46. It is correct, as submitted by Mr. Langat, that ascertaining the age of a victim of a sexual offence such as defilement is of paramount importance as the age determines the sentence to be meted out on the perpetrator. As for how the age is to be established, in the case of *Joseph Kieti Seet v Republi*c [2014] eKLR, the court stated as follows:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:
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> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

47. In this case, there was no document produced to establish the age of the child. She stated that she was 11 years old, and that she was 8 years old at the time of the offence. The age assessment report indicated that the child was 11 years at the time of the assessment in 2016. While PW4 stated in his evidence that the child was 16 according to the age assessment dated 23rd March 2016, which he produced as exhibit 1, it is clear that his testimony was erroneous as the report indicates that she was 11 years old.

48. Mr. Langat submitted that the age assessment could not be relied on as only a dentist can carry out an age assessment. No authority was cited to support this submission. I note, however, that the age assessment was carried out by a doctor in a government hospital, and having found no basis for the submission that the doctor was not qualified to carry out the age assessment, I find that the age of the complainant was established as 8 years at the time of the offence. I note further that in his sworn statement in his defence, the appellant stated that the child was 9 years old. This placed her within the age bracket covered under section 8(1) and 8(2) of the *Sexual Offences Act*. Accordingly, this ground of appeal with respect to the child's age must also fail.

Uncorroborated Child's Testimony

49. The appellant challenges his conviction on the basis that the trial court relied on the uncorroborated evidence of a child. Mr. Langat submitted that it is unbelievable that a child of 11 years could remember events which occurred when she was 8 years old, and in his view, she was coached. The trial court had also failed to have the evidence of the complainant corroborated by other independent witnesses, and

the prosecution had failed to call the mother of the complainant as a witness as her evidence would have exonerated the accused. Mr. Langat notes that the mother of the complainant, who testified asDW2, had testified that the appellant was a pastor who used to attend to street children. It is his submission therefore that the evidence of PW2 is uncorroborated as required by law. Mr. Ayodo submitted in response to the argument that the complainant could not have remembered things that had happened 3 years earlier that the victim cannot be faulted for having a good memory. He was of the view that defilement is a serious offence and it would be difficult for her to forget the event.

50. I have considered the submissions by Learned Counsel on this point. The proviso to section 124 of the *Evidence Act* states 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."

51. The above proviso makes it clear that corroboration is not required in order to prove commission of a sexual offence. What is required is for the court, where the only evidence before it is that of the victim, to record the reasons for believing the victim. In this case, the court observed as follows:

> "The complainant was consistent on what happened to her when at the accused person's place. She was cross examined and her testimony was not shaken. She stood firm that she was telling the truth.Looking at the entire evidence, the complainant was forthright in what she was saying. She also demonstrated confidence which wouldn't have been the case had she been lying. Therefore the complainant was truthful in all that she stated; I believe her testimony in entirety."

52. In my view, the trial court properly addressed itself to the requirements of the law. It analysed the testimony of the complainant and reached the conclusion that her testimony was truthful and he believed it in its entirety.

53. However, had the testimony of the complainant required corroboration, the medical evidence adduced through PW3 confirmed that the complainant had been defiled. It was the testimony of the Clinical Officer that the complainant had difficulties walking, and her genitalia, the labia (minora) and majora, were swollen, as was the hymen. She also had a whitish discharge. This medical evidence, combined with her consistent testimony, established that she had been defiled. The appellant's appeal on this ground therefore fails.

Failure to put Weight on the Appellant's Defence

54. The appellant faults the trial court for alleged failure to consider the appellant's defence. Mr. Langat submitted that the complainant was a street child and at that age she was already sexually active. When she was examined she had stayed in the foster house for two weeks and she could have been defiled there. Further, that the mother of the complainant had testified in the appellant's defence.The response from the state is that at page 3 of the judgment, the court considered the appellant's defence and concluded that it did not challenge the prosecution evidence, noting only that the appellant's defence was that he had been framed.

55. I have considered the record of the trial court and the manner in which it dealt with the appellant's defence. It addressed both the appellant's sworn statement and the evidence ofDW2, the complainant's mother. The court observed that the evidence ofDW2 contradicted that of the appellant in that she

stated that the complainant was staying nearby the accused person's place. The appellant's sworn statement and that of the complainant's mother, weighed against that of the complainant, does not help the appellant in any way. While it was taken into account by the trial court, it did not, in my view, in any way displace the strong prosecution case against him.

56. In fact, the evidence of the appellant and his witness is a matter that causes serious disquiet.DW2, the complainant's mother, testified in defence of the person accused of defiling her daughter. The complainant's evidence is that her mother had sent her to 'uncle'.DW2 had chased her away when she returned home after the first night when she was defiled. One must wonder at the motivation ofDW2 in sending her own daughter to the appellant's house at night. This seems to me to be a matter that should be investigated by the Children's Officer, Kericho, as the child appears to be in need of care and protection. I direct that this judgment be placed before the said officer to follow up and ensure that the child is receiving adequate care and protection.

57. In any event, I can find no reason to fault the manner in which the trial court dealt with the appellant's defence. In my view, this ground also lacks merit.

58. The upshot of my analysis and findings above is that all the appellant's grounds of appeal are lacking in merit. The appeal is therefore dismissed, and both the conviction and sentence upheld.

DATED DELIVERED AND SIGNED AT KERICHO THIS 18TH DAY OF DECEMBER 2018.

MUMBI NGUGI

JUDGE