SAM v Republic (Criminal Appeal 36 of 2015) [2017] KEHC 4652 (KLR) (22 June 2017) (Judgment)

Stephen Ali Mdoe v Republic [2017] eKLR

Neutral citation: [2017] KEHC 4652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL 36 OF 2015

CM KAMAU, J

JUNE 22, 2017

BETWEEN

SAM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence in Criminal Case Number 417 of 2014 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G. M. Gitonga (RM) on 1st April 2015)

Failure by a trial court to allow a child offender to cross-examine the complainant in a sexual offences case does not violate the child offender's right to a fair trial

The appeal was against the conviction and sentence of the appellant for the offence of defilement. The court noted that the complainant was not a single witness, thus the appellant could not be said to have been prejudiced by failure by the trial court to give him an opportunity to cross-examine the complainant. Consequently, the appellant's right to a fair trial was not infringed. The court further noted that the appellant was aged 18 years and could not be sent to a borstal institution. He could not also complete the sentence of 3 years in a maximum prison for the reason that he committed the offence while he was a child.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - rights of a child - right to a fair trial - where the appellant (a minor) was charged with the offence of defilement and was not allowed to cross-examine the complainant by the trial court - whether failure by a trial court to allow an alleged child offender to cross-examine the complainant in a sexual offences case violated the alleged child offender's right to a fair trial – Constitution of Kenya, article 50(2)(k,); Criminal Procedure Code (cap 75), section 208(2) and (3).*

Criminal Law *– sentencing – sentencing of child offenders - whether an appellant who had been sentenced to life imprisonment for an offence committed while a minor could be sent to a borstal institution on appeal when he had become an adult at the time the appeal was determined.*

Evidence Law *– evidence - admissibility of evidence - admissibility of sample specimens' results obtained by the prosecution without consent – whether sample specimens' results obtained by the prosecution without consent were admissible - Penal Code, Cap 63 Laws of Kenya, section 122.*

Brief facts

The appellant (a minor) was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act (cap 63A). In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. After trial, the appellant was convicted of the main charge of defilement and sentenced to life imprisonment by the trial court. Dissatisfied with the judgment of the trial court, the appellant lodged an appeal to the High Court challenging both his conviction and sentence. It was the appellant's case that the sentence of life imprisonment imposed on him by the trial court was harsh, excessive and unlawful as he was a minor at the time of commission of the offence. Further, it was the appellant's argument that the trial court erred in law and fact in failing to allow him to cross-examine the complainant. The appellant contended that neither was an age assessment conducted nor a birth certificate produced by the prosecution to prove the actual age of the complainant at the time of commission of the offence. It was the appellant's further contention that the prosecution did not seek his consent before taking specimens from him. He argued that the evidence arising from such specimens was inadmissible.

Issues

i. Whether failure by a trial court to allow an alleged child offender to cross-examine the complainant in a sexual offences case violated the alleged child offender's right to a fair trial.

ii. Whether sample specimens' results obtained by the prosecution without consent were admissible.

iii. Whether an appellant who had been sentenced to life imprisonment for an offence committed while he was a minor could be sent to a borstal institution on appeal when he had become an adult at the time the appeal was determined.

Held

1. While section 208(2) and (3) of the Criminal Procedure Code did not specifically state that an accused person could only cross-examine a witness who adduced sworn evidence, the weight attached to unsworn evidence was very minimal. The evidence not adduced on oath had little or no probative value as an accused person could not be convicted on unsworn evidence unless the same was corroborated by some other material evidence.
2. Given that the complainant was not a single witness, the appellant could not be said to have been prejudiced by failure by the trial court to give him an opportunity to cross-examine the complainant. Consequently, the appellant's right to a fair trial as enshrined under article 50 of the Constitution was not infringed.
3. The trial court erred in law when it admitted in evidence the lab request form. That was notwithstanding that it did not allude to the same during its judgment. The trial court did not convict the appellant based only on the evidence of the samples that were taken from him. The trial court relied on other evidence. Although the appellant's rights were violated, there was additional evidence that was considered by the trial court in convicting him. If the trial court had only relied on the lab request form to convict the appellant, the court would not hesitate to set the appellant free.
4. A perusal of the birth certificate showed that the complainant was born on December 26, 2008. There was nothing to indicate that the complainant's birth certificate was not genuine. The appellant's assertions that the information in the complainant's birth certificate had been superimposed were

neither here nor there as he had not provided evidence to the trial court to demonstrate that he was an expert or certified document examiner.

5. In the absence of any evidence to the contrary, the court was satisfied that the complainant's age had been proven. According to the birth certificate the complainant was aged about 6 years and 3 months and it was immaterial that the charge sheet indicated 5 years.
6. Given that the appellant was arrested immediately after the alleged incident of defilement, the court was satisfied that he was properly identified as having been the one who defiled the complainant. Both PW2 and PW3 gave very detailed description of the black t-shirt and the shorts that the appellant was wearing and his dyed hair thereby convincing the court they were able to identify and recognize him.
7. It was difficult to imagine why a group of 20 people, none of whom had a grudge against the appellant, could descend to his home and arrest him for no apparent reason. Weighing the appellant's evidence against that of the prosecution, the court was persuaded to conclude that the appellant was not being truthful. His alibi defence was displaced by the evidence of the prosecution witnesses.
8. According to the age assessment report, the appellant was aged 16 years old at the time of the alleged offence of defilement. The trial court could not be faulted for sentencing the appellant as an adult as the age assessment report it was furnished with showed that the appellant was aged 18 years at the material time. The appellant could not be sentenced to life imprisonment or incarcerated in a prison for adults as he was aged below 18 years at the time of commission of the offence. It was immaterial that the appellant had attained 18 years while his appeal was being heard.
9. The appellant was incarcerated on April 1, 2015. He had served over 2 years of imprisonment. Section 8(7) of the Sexual Offences Act provided that if the appellant had been found guilty of a sexual offence, he ought to have been sentenced in accordance with the Borstal Institutions Act (cap 92). Section 6(1) of the Borstal Institutions Act provided that a child offender could only be sentenced to 3 years imprisonment.
10. The appellant's rights were infringed upon by being imprisoned with adults in a maximum prison and that was not in his best interests as a child. He had actually served 2 years at the maximum prison. The time the appellant had served in prison was sufficient for the offence that he had committed.
11. The court had the power to discharge the appellant in line with section 35(1) of the Penal Code. The appellant was aged 18 years and could not be sent to a borstal institution. He could not also complete the sentence of 3 years in a maximum prison for the reason that he committed the offence while he was a child.

Appeal partly allowed.

Orders

i. *Conviction of the appellant by the trial court was upheld.*
ii. *The sentence of life imprisonment that was imposed on the appellant by the trial court was unlawful and as such set aside.*
iii. *The appellant was set free unless otherwise lawfully held.*

Citations

Cases

Kenya

1. *Odhiambo v Republic* Criminal Appeal 280 of 2004; [2005] KEHC 3215 (KLR); [2005] 1 KLR - (Explained)
2. *Okello, Alfayo Gombe v Republic* Criminal Appeal 203 of 2009; [2010] KECA 319 (KLR) - (Explained)

Statutes

Kenya

1. Borstal Institutions Act (cap 92) section 6(1) - (Interpreted)
2. Children Act (cap 141) sections 4, 189, 190, 191- (Interpreted)

3. Constitution of Kenya articles 50(2)(k); 53(f)(i)(ii)- (Interpreted)
4. Criminal Procedure Code (cap 75) sections 208(2)(3); 382- (Interpreted)
5. Evidence Act (cap 80) section 83(1)(b)- (Interpreted)
6. Penal Code (cap 63) sections 35, 122A, 122C, 122D - (Interpreted)
7. Probation of Offenders Act (cap 64) In general- (Cited)
8. Sexual Offences Act (cap 63A) sections 8(1)(2)(7); 11(1)- (Interpreted)

Advocates

Miss Karani for the respondent

JUDGMENT

1. the appellant herein, SAM , was tried and convicted by Hon GM Gitonga, Resident Magistrate for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve life imprisonment. He had also been charged with the alternative offence of committing indecent act with a child contrary to section 11(1) of the said Act.

2. The particulars of the main charge were as follows:-

   > " On September 9, 2014within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of MM a child aged 5 years."

   Alternative Charge

   > " On September 9, 2014within Taita Taveta County, intentionally touched the vagina of MM a child aged 5 years with your penis."

3. Being dissatisfied with the said judgment, on July 16, 2015, the appellant filed a Notice of Motion application seeking leave to file an appeal out of time which application was deemed as having been duly filed and served. When the matter came up in court on November 2, 2016for directions on the filing of Written Submissions in respect of the Substantive Appeal herein, the appellant requested that an Age Assessment Inquiry be conducted on the ground that he was a teenager below eighteen (18) years of age. As the State was not opposed to the said application, this court made an order for the appellant to be referred to Moi Referral Hospital, Voi for the said Age Assessment.

4. On November 9, 2016, an Age Assessment Report dated November 4, 2016from the said Hospital was presented to this court. However, this court found the same not to have been comprehensive as it merely stated that the appellant herein was above eighteen (18) years. As a result, this court directed that the appellant be referred to the Coast General Hospital, Mombasa for a more comprehensive assessment of his age.

5. Om November 23, 2016, an Age Assessment Report dated November 9, 2016 was presented to this court. The same showed that the appellant was currently aged eighteen (18) years. In view of the fact that the offence was said to have been committed in 2014, then he must have been aged sixteen (16) years of age. The State submitted that it would proceed with the Appeal herein as the Complainant, MM (hereinafter referred to as "PW 2) was aged five (5) years at the material time of the incident. However, it conceded that the sentence was too severe as the appellant was a minor at the material time.

6. On November 23, 2016, this court directed the appellant to file his written submissions. On February 7, 2017, he filed the said written submissionsalong with amended grounds of appeal. The amended grounds of appealwere as follows:-

1. That the trial learned magistrate (sic) erred in law and fact by finding to consider that the trial proceedings were a nullity and a is-trial as he was denied a right to (sic) cross-examination PW 2 (Complainant) after she testified in the present case.

2. That the trial magistrate erred in law and act by failing to consider that the life sentence was harsh, excessive and unlawful as it was imposed on a minor-juvenile aged below 18 years.

3. That the trial magistrate erred in law and fact by failing to consider that no genuine copy of a Birth Certificate or an Age Assessment Report was processed- produced as an exhibit to prove the Actual (sic) age of PW 2 (complainant) at the time of commission of the felony.

4. That the trial magistrate erred in law and fact by failing to consider that both the medical treatment notes and the P3 Form were fraudulently and irregularly acquired and admitted into the evidence by the prosecution.

5. That the trial magistrate erred in law and fact by failing to consider that specimens were forcefully from his body in breach of section 122A(1) and 122C(1) of the *Penal Code*.

6. That the trial magistrate erred in law and fact by failing to consider his defence which was un-rebutted and not challenged by the Prosecution.

7. The State's written submissions were dated March 14, 2017 and filed on March 15, 2017. the appellant's response to the State's submissions was filed on April 20, 2017.

8. When the matter came up on April 20, 2017, both the appellant and counsel for the State asked this court to rely on their respective written submissions in their entirety,which submissions were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

Legal Analysis

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo vs Republic* Cr App No 280 of 2004 [2005] 1 KLR where the Court of Appeal held that:-

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

10. Having looked at the appellant's and State's written submissions, it appeared to this court that the only issues that had been placed before it for determination were:-

    a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

    b. Whether or not the sentence that was imposed upon the appellant was harsh, severe and excessive in the circumstances.

11. The issues were therefore dealt with under the following headings.

I. Right to Fair Trial

A. Right to Cross-examine PW 2

12. Amended ground of appealNo (1) was dealt with under this head.

13. the appellant submitted that the trial was a mistrial and a nullity as his right to Cross-examine PW 2 which was mandatory and constitutional was breached. It was his contention that the Learned Trial Magistrate took her unsworn evidence and adjourned the hearing to December 8, 2014 for the taking of evidence of other Prosecution witnesses without giving him an opportunity to Cross-examine her thus violating his right to fair trial as enshrined in article 50(2)(k) of the *Constitution of Kenya, 2010*, a fact he averred was conceded to by the State.

14. On its part, the State submitted that the learned trial magistrateconducted a proper voire dire examination and ascertained that PW 2 was competent to testify but because she did not understand the duty of telling the truth, he directed that she adduce unsworn evidence.

15. It pointed out that the learned trial magistrateerred when he failed to give the appellant an opportunity to cross-examine PW 2. It referred this court to section 208(2) and (3) of the *Criminal Procedure Code* that provides as follows:-

    (2) The accused person or his advocate may put questions to each witness produced against him.

    (3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

16. While section 208(2) and (3) of the *Criminal Procedure Code* cap 75 (Laws of Kenya) do not specifically state that an accused person can only cross-examine a witness who has adduced sworn evidence, the weight attached to unsworn evidence is very minimal. In fact the evidence not adduced on oath has little or no probative value as an accused person cannot be convicted on unsworn evidence unless the same is corroborated by some other material evidence.

17. In view of the fact that PW 2 was not a single witness, the appellant could not be said to have been prejudiced by failure by the learned trial magistrate to have given him an opportunity to Cross-examine PW 2. His right to fair trial as enshrined in article 50 of the *Constitution of Kenya, 2010* was thus not violated.

18. In the premises foregoing, this court saw no merit in amended ground of appealNo (1) and the same is hereby dismissed.

B. Sample Extraction

19. Amended Ground of Appeal No (5) was dealt with under this head.

20. the appellant submitted that the prosecutiondid not seek his consent before taking specimens from him and that in any event, No 92293 PC Stella Wanjiru (hereinafter referred to as "PW 4") was below the rank of an Inspector who is empowered to take specimens in accordance with section 122A of the *Penal Code* and consequently, the evidence was inadmissible. He further argued that nonetheless, the results were worthless as they failed to link him to PW 2's defilement.

21. It was the State's submission that despite the error, the appellant's conviction could still stand on the other evidence that was adduced. It contended that PW 2 testified that on September 9, 2014, she was in the company of her friends F and Twhen the appellant dragged her into the bush and defiled her.

22. It added that the said F and T called L W (hereinafter referred to as "PW 3") and directed her to the bush where she found the appellant zipping his trouser and PW 2 crying. It also averred that George Ombaye (hereinafter referred to as "PW 5") confirmed presence of spermatozoa after he did a high vaginal swab on PW 2.

23. It further contended that although the Learned Trail Magistrate erred in admitting the samples that were taken from the appellant without his consent contrary to section 122C of the *Penal Code*, this evidence did not affect the medical evidence that was adduced regarding PW 2's injuries.

24. As both the appellant submitted, section 122A of the *Penal Code* stipulates as follows:-

> "(1) A police officer of or above the rank of an Inspector may by order in writing require a person suspected of having a serious offence undergo a DNA sampling procedure it there are reasonable grounds to believe that the procedure might produce evidence tending to conform or disprove that the suspect committed the offence."

25. Section 122C(2) of the *Penal Code* provides as follows:-

> "Such consent may where the suspect is a child or incapable person be given by the suspect's parents or guardian."

26. Section 122D of the *Penal Code* states as follows:-

> "The results of any test or analysis carried out on a sample obtained from DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against a suspect unless an order under Section 122 A or consent under section 122C is first proven to have been made or given."

27. According to PW 4's evidence, she found the appellant at the laboratories at Wesu District Hospital where he had been confined after having been arrested by members of public. Contrary to what the appellant stated and confirmed by the State, there was no indication in her evidence or Cross-examination that she took samples from the appellant without his consent.

28. However, PW 5 tendered in evidence a Lab Request Form showing that the appellant had no HIV but the urine had pus cells. This connoted that samples were indeed taken from the appellant. Whether the same were taken at the instance of PW 4 or at the instance of the OCS who instructed her to go to Wesu District Hospital was not clear to this court. Notably, in his sworn evidence, the appellant stated that when he was taken to Wesu District Hospital, he met a person who told him he was a doctor and the said person started taking his blood which he did not object to.

29. This court therefore agreed with both the appellant and the State that the Learned Trial Magistrate erred in law when he admitted in evidence the said Lab Request Form. This is notwithstanding the fact that he did not allude to the same during his judgment.

30. Having said so, it appeared to this court that the Learned Trial Magistrate did not convict the appellant based only on the evidence of the samples that were taken from him. He relied on other evidence. It was therefore the view of this court that although the appellant's rights were violated, there was additional evidence that was considered. If the learned trial magistratehad relied on that evidence solely to convict the appellant herein, this court would not have hesitated to set him free.

31. Accordingly, while this court found amended ground of appealNo (5) to have been merited, it was not sufficient to have persuaded this court to find that the appellant's Appeal ought to be allowed on this ground alone.

II. Proof of the Prosecution Case

A. Proof of Pw 2's Age

32. Amended ground of appealNo (3) was dealt with under this head.

33. the appellant contended that the Birth Certificate was not genuine as some information appeared to have been superimposed and other information was omitted. He pointed out that the part of the period of year of registration had not been completed and that the same ought to have been L0340804873/08 and not 0340804873. He also averred that the font used was not official.

34. He placed reliance on the provisions of section 83(1)(b) of the *Evidence Act* that any document presented to the court must be genuine. It was his submission that he did not raise the issue of the genuineness of the said Birth Certificate because he was a layman in law.

35. It was thus his argument that PW 2's age was not proved. In this regard, he referred this court to the case of *Alfayo Gome Okello vs Republic* CA No 2003/2009 Court of Appeal Kisumu where he said Gicheru JA (as he then was) stated as follows:-

> "...In this case the age of the child was never medically assessed or proved through any documentation. The other piece of evidence on age was an estimate made in the P3 Form dated...The onus was on the prosecution to clear such doubts failure to which the benefit would go to the appellant. We so find."

36. Notably, the correct citation of the case that the appellant relied upon was *Alfayo Gombe Okello v Republic* [2010] eKLR) and the case was decided by a bench of Gicheru JA amongst others...

37. The State submitted that the appellant did not raise the issue of PW 2's Birth Certificate having been a forgery and that it could only have been through the authentication by the Registrar of Births and Deaths that it could be determined if the said Birth Certificate was genuine or not. It was its assertion that PW 2's age was proven as PW 4 adduced in evidence PW 2's Birth Certificate that showed that she was born on August 26, 2008giving her age as six (6) years at the time of the alleged defilement.

38. It urged this court not to find the age of five (5) years that had been indicated in the Charge Sheet not to have been a material error as the same did not cause the appellant any prejudice, it could be corrected under the provisions of section 382 of the *Criminal Procedure Code* and that the penalty under section 8(2) of the *Sexual Offences Act* was in respect of children who were below eleven (11) years of age.

39. A perusal of the Birth Certificate showed that PW 2 was born on December 26, 2008. There was nothing to indicate that the said Birth Certificate was not genuine. the appellant's assertions that information in the said Birth Certificate had been superimposed were neither here nor there as he had not provided evidence to the trial Court to demonstrate that he was an expert or certified document examiner.

40. If indeed, the said Birth Certificate was forged, nothing would have been easier than for him to have adduced evidence to prove the fact. An assertion that is not proven remains a mere assertion. It was the considered view of this court that the same was a desperate attempt to divert the court's attention to the core issues herein.

41. Indeed, In the absence of any evidence to the contrary, this court was satisfied that PW 2's age had been proven. According to the said Birth Certificate, she was aged about six (6) years and three (3) months

and it was immaterial that the Charge Sheet had indicated five (5) years as was rightly argued by the State.

42. In the circumstances foregoing, amended ground of appealNo (3) was not also merited.

B. Medical Evidence

43. Amended ground of appealNo (4) was dealt with under this head.

44. the appellant also stated that the Medical treatment notes and P3 Form were irregular, peculiar and obtained fraudulently because the outpatient card which generated the information in the Medical treatment notes and the P3 Form was blank and did not have the outpatient names, sex, age, residence etc. He submitted that if the Prosecution was to be believed, then it did not still create a clear line of reasoning linking both medical evidence whose particulars were shown in the Outpatient card to have been unknown to PW 2.

45. On its part, the State argued that PW 2's patient number in the medical treatment notes from Wesu District Hospital showed that her outpatient number was [particulars withheld] which was the same number in the P3 Form. It stated that the appellant ought to have asked PW 5 questions pertaining to the said outpatient number but he failed to do so.

46. This court carefully perused the Hospital Attendance Notes from Wesu District Hospital Voi and noted that as the appellant, the Outpatient Card did not indicate the name, sex, age, resident, outpatient or in patient numbers. On its own, it would have been difficult to confirm that the same belonged to PW 2.

47. However, a closer perusal of the Laboratory Request and Report Form showed that the same belonged to PW 2. It bore a number [particulars withheld] and showed that spermatozoa were present when she was examined. The said Outpatient Card that was adduced in evidence also showed the same results. Both documents were dated September 9, 2014which was the same date PW 2 was said to have been defiled. The number [particulars withheld] was the same number that appeared on page 1 of the P3 Form as the Medical Officer's Ref No.

48. The results in the Laboratory Request and Report Form and in the Outpatient Card showed a linkage. The Number in the Outpatient Card linked it to the P3 Form. There was therefore no doubt in the mind of this court that the said Outpatient Card belonged to PW 2 and all the appellant's assertions were merely red herrings to remove the focus of this court from the real issues for determination.

49. In the premises foregoing, Amended Ground No (4) was not merited and the same is hereby dismissed.

C. Evidence of the Prosecution Witnesses

50. Amended ground of appealNo (6) was dealt with under this head.

51. the appellant submitted that he had proffered a cogent alibi defence his right that was not unrebutted by the Prosecution witnesses and hence his Appeal should be allowed.

52. On its part, the State pointed out that the appellant raised his alibi defence during his defence denying it an opportunity to test its veracity during Cross-examination. It termed the alibi defence as having been an afterthought that was aimed at circumventing the evidence that was adduced by the Prosecution witnesses.

53. A careful perusal of the evidence pointed to the fact that the appellant defiled PW 2. According to PW 2, on the material date of September 9, 2014at about 12.30 pm, she was coming from school in

the company of her friends, F and T when the appellant told them to run. As the others ran, he held her hand and dragged her in the bushes where he inserted his penis into her vagina. She said that her teacher, PW 3, met her two (2) friends who told her that the appellant had dragged her into the bush.

54. PW 3 stated that she met PW 2's two (2) friends who informed her that PW 2 had been dragged into the bush. Upon reaching the bush, she saw the appellant zipping his trousers while PW 2 was crying following the appellant carrying her pantie. She said that PW 2 informed her that the appellant had penetrated her with his penis. the appellant started running away but she started screaming whereupon he was arrested by members of the public.

55. PW 5 confirmed that PW 2's hymen was broken and there was presence of *spermatozoa* in her vagina. He confirmed that the appellant was brought to the hospital by members of the public.

56. In his sworn evidence, the appellant stated that on the material date at about 2.00PM, he was resting after lunch when a group of twenty (20) people came to his house and asked them to accompany them to Wesu District Hospital whereafter police came and arrested him.

57. PW 3told the trial courtthat she used to see the appellant around saw him zipping his trousers and consequently, she had no reason to have framed him for the said offence. The medical examination that was conducted on PW 2 showed that her hymen was broken and there were spermatozoa. Both PW 3 and PW 5 actually corroborated her evidence that she was defiled.

58. The question of who defiled her was also straight forward. Since the appellant was arrested immediately after the incident, this court was satisfied that he was properly identified as having been the one who defiled PW 2. Indeed, both PW 2 and PW 3 gave very detailed description of the black T-shirt and the shorts that he was wearing and his dyed hair convincing this court that they were able to identify and recognise him.

59. As the learned trial magistratepointed out, it was difficult to imagine why a group of twenty (20) people, none of whom had a grudge against the appellant, could descend to his home and arrest him for no apparent reason. Weighing his evidence against that of the prosecutionwitnesses, this court was persuaded to conclude that he was not being truthful. His alibi defence was therefore displaced by the evidence of the prosecutionwitnesses.

60. In the premises foregoing, this court found that amended ground of appealNo (6) was not merited and the same is hereby dismissed.

III. Sentence

61. Amended ground of appealNo 2 was dealt with under the following heads.

62. He further submitted that the sentence that the learned trial magistrateimposed on him was harsh and excessive in the circumstances and thus in breach of section 189, 190 and 191 of the *Children Act*. In particular, he referred this court to Section 190 of the *Children Act* that provides as follows:-

> " No child under the age of 18 years will be imprisoned or put in a detention camp."

63. He also placed reliance on article 53(f)(i)(ii) (sic)of the *Constitution of Kenya* that provides as follows:-

> " Every child has the right
>
> (f) not to be detained, except as a measure of last resort, and when detained, to be held-

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age

64. He argued that the learned trial magistrateerred when he failed to seclude him from adult prisoners and for the shortest time as stipulated in the *Constitution* and this violated the said *Children Act*, the *Constitution of Kenya* and the UN on Protection of Human Rights, 1990.

65. On its part, the State urged this court to dismiss the appellant's Appeal herein. It submitted that the appellant never raised the issue of him having been a minor during his trial and consequently as he was over twelve (12) years when he had carnal knowledge with PW 2, he deserved a custodial sentence.

66. It placed reliance on the provisions of section 8(7) of the *Sexual Offences Act* that stipulates as follows:-

> "Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (cap 92) and the *Children Act* (cap 141)."

67. As was seen in the age assessment report, the appellant was aged sixteen (16) years at the time of the alleged incident. The Learned trial magistratecould not be faulted for having sentencing the appellant as an adult as the age assessment reporthe had been furnished with by the Moi District Hospital showed that the appellant was aged eighteen (18) years at the material time.

68. Having found that the appellant was properly convicted for the offence, this court found and held that he could not be sentenced to life imprisonment or incarcerated in a prison for adults as he was aged below eighteen (18) years at the time of the incident herein. It was irrespective that he had reached eighteen (18) while his Appeal was being heard.

69. Section 191 of the *Children Act, 2001* provides as follows:-

> "In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—
>
> a. By discharging the offender under section 35(1) of the *Penal Code* (cap 63);
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> b. by discharging the offender on his entering into a recognisance, with or without sureties;
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> c. by making a probation order against the offender under the provisions of the *Probation of Offenders Act* (cap 64);
>
> d. by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
>
> e. if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
>
> f. by ordering the offender to pay a fine, compensation or costs, or any or all of them;

g. in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

h. by placing the offender under the care of a qualified counsellor;

i. by ordering him to be placed in an educational institution or a vocational training programme;

j. by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (cap 64);

k. by making a community service order; or

l. in any other lawful manner.

70. the appellant was incarcerated on April 1, 2015. He has so far served over two (2) years. Section 8(7) provides that if he had been found guilty of a sexual offence, he ought to have been sentenced in accordance with *Borstal Institutions Act*. Section 6(1) of the said *Borstal Institutions Act* provides that a child offender can only be sentenced to three (3) years imprisonment.

71. The said section provides as follows:-

> “ Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5 of this Act, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years.”

72. Bearing in mind that the appellant’s rights were infringed upon by being incarcerated with adults and in a maximum prison and that it was not in his best interests as a child as stipulated in section 4 of the *Children Act, 2001* and he had actually served about two (2) years at the maximum prison, it was the view of this court that the time appellant served was sufficient for the offence that he committed.

73. In any event, this court has power to discharge the appellant herein in line with section 35(1) of the *Penal Code*. In addition, the appellant is now aged eighteen (18) years and cannot now be sent to a borstal institution. He cannot also complete the sentence of three (3) years in a maximum prison for the reason that he committed the offence when he was a child.

74. This court therefore found merit in amended ground of appeal No (2) herein and the same is hereby allowed.

Disposition

75. For the foregoing reasons, the upshot of this court’s decision was that the appellant’s appeal that was lodged on November 25, 2015 was successful and same is hereby allowed only to extent of the sentence. This is because the learned trial magistrate acted correctly when he convicted the appellant for the offence of defilement of PW 2. In this respect, this court hereby affirms the conviction against the appellant herein.

76. This court hereby directs that the sentence of life imprisonment that was imposed by the learned trial magistrate was unlawful and the same is hereby set aside. As the appellant has served a substantial amount of his sentence in a maximum prison, which this court would have pegged at three (3) years in

a borstal institution in line with section 8(7) of the *Sexual Offences Act* and section 6(1) of the *Borstal Institutions Act*, the court hereby directs that the appellant be set free forthwith unless held or detained for any other lawful reason.

76. It is so ordered.

DATED AND DELIVERED AT VOI THIS 22[ND]DAY OF JUNE 2017

J. KAMAU

JUDGE

In the presence of:-

S A M-Appellant

Miss Karani- for State

Josephat Mavu– Court Clerk