EKN v Republic (Criminal Appeal E009 of 2023)
[2025] KEHC 3229 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3229 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E009 OF 2023

E OMINDE, J

FEBRUARY 13, 2025

BETWEEN

EKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Sentence and Conviction in Iten Senior Principal Magistrate's Court Case (Sexual Offences) No. E026 of 2021.

2. The Appellant was charged with the offence of Incest by male contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that between 25th October 2021 and 26th day of October 2021, at Keiyo Sub County within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the vagina of CJ who was to his knowledge his daughter, aged 8 years.

3. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that between 25th October 2021 and 26th October 2021, at Keiyo Sub County within Elgeyo Marakwet County, he intentionally and unlawfully touched the vagina of CJ who was to his knowledge his daughter, aged 8 years.

4. The Appellant pleaded not guilty and the matter proceeded to full trial wherein the prosecution called 4 witnesses. After close of the prosecution case, the trial Court found that the Appellant had a case to answer and placed him to his defence. The Appellant gave sworn testimony and called 2 witnesses in his defence.

5. Upon considering the testimonies and the evidence presented, the trial Court convicted the Appellant of the main charge and sentenced him to 80 years' imprisonment. Aggrieved with the sentence and

conviction, the Appellant instituted the present appeal vide the Petition of Appeal filed on 17/08/2022 premised on the following grounds;

i. That, the charge sheet was defective.

ii. That, the trial magistrate greatly erred in law and facts by not observing that the prosecution did not prove their case beyond reasonable doubt.

iii. That, the prosecution evidence was contradicted and fabricated.

iv. That, Penetration was not proven.

v. That the Appellant was not accorded a fair trial.

vi. That, the trial magistrate grossly erred in law and facts by failing to realise that essential exhibits were not tendered in evidence as legally mandated by law.

Prosecution evidence at trial court

6. PW1 the complainant, was a minor. She testified that at night she usually slept in her fathers' bed and her brothers would sleep in the kitchen. She stated that her father did 'tabia mbaya' to her and pointed to her groin area. She testified that she screamed and he said she was not to tell anyone. She later told her teacher named S who took her to hospital. In cross examination she testified that her father was the first one who did 'tabia mbaya' to her but so did V, her brother. Further, that someone in her class told her to say her father did to her 'tabia mbaya' but she does not know their name.

7. PW2 was Wilson Talam, a Clinical Officer attached to Iten County Hospital. He testified that the complainant came with a history of defilement by her father on unknown number of days on 27/10/2021. On examination, he observed that the hymen was broken, not fresh. He testified that there was possible penetration because of the broken hymen. He produced the P3 form that was marked as PExh-2. In cross examination, he testified that he examined the victim and the hymen was broken. He further testified that even though stable, she was walking in pain.

8. PW3 was GK, a teacher at Biretwo Primary School. She testified that she knew the accused as he was a parent at their school. That she also knew the complainant as she was a pupil at their school and she was in Grade 1. That on 26/10/2021, she was on duty. During lunch she was informed that the complainant was crying. She took her to the staff room and inquired from her what the problem was and the complainant told the witness that she was sick and that she had pains on her leg, chest and head. That she later touched her vagina and told them that she had pains. That they took her to the hospital with the Head Teacher one S.

9. That she was examined at Biretwo Dispensary. PW3 testified that she told them 'baba ananifanyia tabia mbaya'; that 'baba anaingiza kitu yake'. She was given medication. The witness testified that on 27/10/2021 the complainant went back to her and told her that 'baba' did 'tabia mbaya' to her. She then went to tell the head teacher who instructed her to take the complainant to Iten hospital which she did. That the complainant was taken to the lab and the doctor confirmed. The Doctor later filled the P3 form, reported the matter and they recorded their statements. They told the minor to go to a relative called teacher D. In cross examination, the witness testified that the complainant was pushed as they were lining up for lunch. She was crying and told the teacher that she was sick.

10. PW4 was P.C M Kirwa attached to Chepsigot Police Post. It was her testimony that she was the investigating officer in the case. That on 27/10/2021 an incest report was made by a teacher. She then took the minor to Iten hospital, recorded statements and commenced investigations. She later went to

the complainant's home and initially did not find the Appellant, but on the next day, he surrendered himself to the station.

11. She stated that she took the complainant to the scene and she showed them where she usually slept with her father. The minor told her that her father used to penetrate her from behind before giving her sweets. That it was one bed and the complainant also showed them a cane that the father used to threaten her with if she shouted. She further testified that she used toilet paper to wipe herself and throw in a pit latrine and she took them to and showed them the toilet. She also produced the birth certificate of the complainant as Pexh1.

12. In cross examination, PW$ stated that the complainant in her statement stated that V who is her brother and who was at school at the time they visited the scene had put his penis into her vagina. That she reported to her father that V had defiled her. That the father took advantage and also defiled her and so she decided to charge the father and did not pursue the case against V. That the complainant's mother had passed on and she was not informed that the Appellant had been implicated for causing her death by the Appellant's in laws and that she was not aware of and did not know of their differences.

Defence Evidence

13. DW1 was the Appellant. He testified that he is a farmer and a 'fundi', previously a Police Officer for 13 years. He confirmed that the complainant is his daughter and that he normally sleeps on the bed with her. He denied committing the offence and stated that he was framed. He testified that on 28/10/2021 when the children came from school he received a call from FC who is also his daughter who asked him what he had done to the child. MK who also is his daughter called asking him what he had done to the Cy. That M told him he had defiled the child. He tried to find out and called the school and eventually, his daughter was taken to his cousin's house where he wet seeking to talk to the child but was prevented from talking to him by the teachers.

14. He testified that minor later opened up and told him that V had done "tabia mbaya" to her then on Monday and then told her to go and bathe and threatened her not to report the matter. He testified that he was surprised that she mentioned him and was not aware that she had been implicated him in the offence. That he went home and found V had disappeared. That he went to the Chepsigot Police Post on 28th October 2021 when he was informed that they were looking for him. He stated that his older children are the ones who would bring shopping home and he never bought the sweets. He stated that he was framed by his in laws and that the findings of the doctor never revealed anything.

15. In cross examination he stated that there is a separate house that belongs to his brother where V and his brother A sleeps. That there were sweets biscuits and crisps in the house and the complainant lied that he enticed her with sweets. That the complainant is a young child and she was couched to lie that he had defiled her yet it is V who defiled her and that he never wiped her with tissue and also no semen was recovered. That the child bathes in the morning and not in the evening.

16. DW2 was BKM, a neighbour to the Appellant. He testified that on 25/10/2021 the complainant passed by his house on the way to school and came back in the evening and greeted him on her way back from school. That she did the same on 26/10/2021 but did not do the same on 27/10/2021. In the evening, her brothers came and inquired on her whereabouts and he directed them to check the neighbours' house. He testified that on 27th October 2021 the Appellant came carrying shopping and he looked worried. That he went into the house and he followed him. That inside he found V and his brother and he left to look for the complainant. That he later saw the appellant at 8.00pm and he informed him that he was in trouble. That the appellant informed him that the complainant had been defiled by V and himself and the police were looking for him.

17. He testified that the appellant told him that he would go to the Police Station. That they went with the neighbours to the Police Station upon receiving a phone call on 30th October 2021 that the appellant was in the cells. He stated that the police told them that the appellant and V had defiled the complainant and V too would be arrested but he was not. He stated that the Appellant had a dispute with his in laws who allege that he had murdered his wife and that it is the post mortem that saved him. Further, that the in-laws are now claiming her property.

18. DW3 FK testified that the appellant is her father and the complainant is her sister. That on 27th October 2021 she received a call from her aunty one DC who informed her that the complainant had a problem in school and their father had not been informed. She went to the school and asked the administration and the Principal informed her that the complainant had problems with her leg. She went home and met teacher D who told her that the complainant had informed her that their father had defiled her. That she was at the gate and the complainant ran to her and told her that she had leg pains and that V hade defiled her. That V is their 12-year-old brother. That when the complainant saw the teacher she ran away.

19. That she called her elder sister who lives in Ukambani who called their father and she went back to Kabarnet. That her father later called her and she narrated to him what had transpired and he was shocked and denied committing the offence. Their father was later arrested. That when she tried to ask the complainant why she implicated their father, she kept quiet. That she is the one who had bought the sweets and snacks. She confirmed that the complainant usually sleeps with their father but that she could not say whether he had committed the offence or not because she was not at home. In cross examination, she stated that her father took good care of them and even though she cannot tell what he does at night, he could not defile the complainant.

20. As aforesaid, upon considering the testimonies and the evidence presented, the trial Court convicted the Appellant of the charge of Incest by male contrary to section 20(1) of the *Sexual Offences Act* and sentenced him to 80 years' imprisonment.

Hearing of the Appeal

21. The appeal was canvassed by way of written submissions. The Appellant filed submissions in person whereas the state filed submissions on 06/06/2024 through State counsel Calvin Kirui.

Appellants' submissions

22. It is the Appellants' case that the complainant presented two sets of testimony during the trial which created doubt to the crime of incest on Appellant. That the complainant initially reported that she was defiled by V who happened to be her brother and then introduced another version that V did to her 'tabia mbaya' then said it was 'baba'. He submitted that these two versions of testimony were presented during trial that resulted to the Appellant to be sentenced to 80 years.

23. Further, he urged that the complainant stated during the proceedings that she had been coached to implicate her father. The admission that she was coerced to implicate the Appellant raises credibility issues and makes her untruthful. Considering that the trial court indicated that it believed the narrative that the complainant was believable, it creates the impression that the trial magistrate did not strictly adhere to Section 124 of the *Evidence Act* which requires the witness to be credible.

24. The Appellant submitted that he was framed as the main accusers in this case are his in-laws who have never given up their plan to settle scores. He urged that they had previously implicated him for the sudden death of his wife. He was eventually put in jail as a prime suspect for her death but the post

mortem report that indicated the cause of death as a result of asthmatic distress exonerated him. He stated that there is an admission on record that the in-laws had coached the complainant to implicate him and urged that this court make a finding that this case is a framed-up case against the Appellant and discharge him from this case.

25. The Appellant submitted that the trial magistrate erred in law and fact by failing to note that the complainant was taken to Hospital initially on account of being injured on the knee after being pushed out of a lunch queue and not defilement. This compromised the prosecution case as this piece of evidence was concealed and only the defilement piece was highlighted.

26. The Appellant submitted that an old broken hymen was not proof of the penetration in the defilement case against him. He urged that the medical doctor who gave an expert opinion in his case did not do it as stipulated in the *evidence act* under Section 48. That when he indicated that the old broken Hymen was an indication of "possible penetration" it introduced a lot of uncertainty/doubt to his opinion by the court. Further, that it is known that the broken hymen can be attributed to other activities besides sexual activities. He urged that the trial court made an error in relying on this uncertain expert opinion to convict and sentence him to a long term sentence.

27. It is the Appellants' case that the trial magistrate did not ensure compliance with Section 33 (a) and (b) of the *Sexual Offences Act* in his case. He urged that the complainant did not give a complete description on the circumstances surrounding the happenings in this criminal activity which consequently, did not provide enough evidence to support the conviction of the Appellant. The intervening factor was that, apart from Appellant in this case, V was mentioned as a perpetrator, and this should have had the Appellant exonerated from this case.

28. He submitted that the court had an opportunity to question V but either by design or default did not want to stir the waters to nail the perpetrator in this case by summoning him. The Appellant submitted that the failure by the court to get the full picture of the circumstances in this case created a miscarriage of justice which this court has an opportunity to correct by allowing this appeal on this ground.

29. It is the Appellants' case that the poor investigation by the police was a discrimination against him under Article 27 of *the Constitution* of Kenya. That there were various relevant aspects in his case which ought to have been investigated such as V as a possible perpetrator in this case and why his in laws who are the main accusers in this case brought in this case after being accused earlier for causing the death of his late wife among other aspects. He urged that the appellate court should make a declaration that he was discriminated against as the principle of equality was not observed and should offer him an appropriate remedy by allowing this appeal on this ground.

30. The Appellant submitted that the major ingredients of the offence of incest were never established making his conviction and sentence unsafe in the circumstances. The terms 'tabia mbaya' and 'kuingiza kitu yake' left unanswered questions and further, that 'Kuingiza kitu yake' is a vocabulary that is not available to the complainant being a minor, which is evidence of being coached by an adult person. The appellant urged that the doubt on ingredient of the positive identification of perpetrator was introduced when V was mentioned as a perpetrator.

31. On penetration, the Appellant urged that the evidence was not conclusive and does not fit within the date line of the alleged offence. Further, he reiterated that the funny walking style was due to a sustained injury on the knee after a fall. The failure to properly prove the ingredients was vital to make the prosecution case fail and therefore this court should find him innocent of the charges.

32. The Appellant urged that the trial court committed a procedural irregularity by not complying with Section 333 (2) of CPC. The Appellant was arrested on 18th October 2021 and stayed in remand until

he was granted bail. This period comes to about two (2) months that he spent in pre-trial custody. He urged that the sentencing court under Section 333 (2) of CPC had an obligatory duty to consider this period as part of his sentence of 80 years. Since this period was not taken into account the Appellant urged that he invokes the appellate jurisdiction of this court to kindly intervene by reducing this period to be part of his sentence.

33. The Appellant urged that the unusual, unfair and unjust punishment does not meet the ends of justice for him. That the harsh and excessive sentence of 80 years is a very unusual sentence which is a very good reason that the appellate court should intervene. The sentencing court indicated that it was shifting from the jurisprudence of imposing an indeterminate sentence of life to a determinate sentence of 80 years. The sentence was wrong on principle as it did not conform to principles of proportionality and certainty among others. He urged that the appellate court is empowered by law to interfere with such improper sentences and substitute with those that are conforming with the current trends on sentencing objectives which favour shorter sentences to achieve their goals.

34. The Appellant submitted that his life expectancy will lapse before the completion of his sentence of 80 years and additionally, that the trial magistrate failed to take a judicial notice that life expectancy is 70 years. Considering that the Appellant is now aged 50 years old, this when put together with his sentence comes to 130 years. He urged that the court didn't keep in its mind that it is unrealistic that he would complete this sentence. Further, that the sentence is inhuman and degrading and goes against the constitutional requirement on punishment under Article 25 (a) of Constitution.

35. The Appellant submitted that the trial court convicted and sentenced the Appellant on the basis of the hearsay evidence, urging that the *evidence act* outlines that hearsay evidence is not admissible when prosecuting a case. Further, that majority of the witnesses were mostly restating what they were told as their account of the alleged event. This practice is inadmissible in the context of this case and a special mention is the similar vocabulary of the two witnesses that 'aliingiza kitu yake ' which implies that the complainant said what she was told to say in court among other examples.

36. That the restating of a similar statement from what they were told in court is contrary to the provisions of the *Evidence Act* and could not found a conviction and sentence. The Appellant maintained that he has a fighting chance and that the appellate court should overturn the decision of the Trial Court through an acquittal.

Respondent's Submissions

37. Learned counsel for the state submitted that the prosecution proved the offence to the required standard. Counsel urged that the offence of incest is defined under Section 20(1) of the *Sexual Offences Act*. Further, that the ingredients of the offence of Incest were set out in the case of DMK v Republic [2022] eKLR, to include:

    i. Proof that the offender is a relative of the victim.

    ii. Proof of penetration or indecent Act.

    iii. Identification of the perpetrator.

    iv. Proof of the age of the victim.

38. Counsel submitted that the first ingredient does not form part of the Appellant's grounds of Appeal. However, the Appellant raised the ground that the Prosecution failed to prove its case beyond reasonable doubt. Counsel urged that the evidence of PW1 was that the Appellant was her father and at the material time, she was living with him. It also came out in evidence that the complainant's

mother is deceased and the complainant slept with the Appellant on the same bed every day as a norm. The Appellant did not dispute that he is the complainant's father. It was also the evidence of all the prosecution and the defence witnesses that the Appellant is the complainant's father. This fact was therefore undisputed.

39. On the 2nd ingredient, counsel sought to rely on the evidence of the complainant and the clinical officer. He urged that "Penetration" is defined under Section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The complainant testified that she usually slept in the Appellant's bed while her brothers slept in a separate room. He submitted that the complainant testified that the Appellant did "tabia mbaya" to her many times on the material date. She reported the incident to her teacher and identified the Appellant as the assailant.

40. Counsel for the State submitted that the question to be answered is whether that evidence requires corroboration and cited Section 124 of the *Evidence Act* which provides as follows;

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim 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 evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

41. Counsel submitted that the evidence of the complainant on the fact of her being penetrated was corroborated by that of the clinical officer (PW2) who stated that upon examining the complainant, she noted that her hymen was broken and she was walking in pain. These findings were noted in the P3 form and the Post Rape Care Reports produced as exhibits, which also confirmed penetration. Further, that as rightly noted by the trial court, there was no other evidence of anything that would have caused the injuries on the complainant's genitalia.

42. It is the State's submission that this evidence proved beyond reasonable doubt that there was defilement as contemplated by the Act. Counsel urged that the Investigating Officer testified as PW4 and produced the complainant's birth certificate as Exhibit No. 1. The said birth certificate indicates that the complainant was born on 13/09/2013. The incident herein happened on 25th October, 2021. This means that the complaint was 8 years old as at the time of the incident. The Appellant did not challenge this evidence and no contrary evidence was produced. As such, the age of the complainant was proved beyond any reasonable doubt.

43. Counsel submitted that the Appellant alluded to the fact that he was being framed by his in-laws who intended to have him jailed so that they could claim his children and his late wife's property. Further, he claimed that it was his son, one V, who defiled the Complainant. Counsel stated that from the evidence of PW1, she was consistent that the Appellant defiled her first, after which she was also defiled by her brother V. The Appellant chose to concentrate on the defilement of the complainant by V but failed to dispel his involvement and his actions of defiling the Complainant.

44. Counsel urged that in sentencing the Appellant, the trial court was careful in considering the mitigation from the Appellant and the Prosecution's sentencing submissions. The aggravating factors included the tender age of the complainant and the extensive damage occasioned on her by the Appellant who is the only surviving parent and the person charged with parental protection and

responsibility. From the above, it is very clear that the discretion of the court was therefore exercised judiciously.

45. Counsel concluded his submissions by urging that the prosecution availed overwhelming credible and admissible evidence proving each of the elements of the offence. That the prosecution successfully proved beyond reasonable doubt that the Appellant committed incest as against the complainant. The court, after careful consideration of the prosecution evidence, the defence and the Appellant's mitigation rightfully exercised its discretion and sentenced the Appellant appropriately. He urged the court to dismiss the appeal.

Analysis & Determination

46. The offence of Incest is provided for under Section 20(1) of the *Sexual Offences Act* as follows:

> " Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years, provided that if it is alleged in the information or charge that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

47. In the case of DMK v Republic [2022] eKLR Justice Ngenye Macharia set out the ingredients for the offence of incest as follows:

i. Proof that the offender is a relative of the victim.

ii. Proof of penetration or indecent Act.

iii. Identification of the perpetrator.

iv. Proof of the age of the victim.

48. In the instant case, on the requirement of proof that the offender is a relative of the victim, it is common ground that the applicant is the father of the complainant. On proof of age, the complainant's Birth Certificate produced as PEx1 was not at all challenged by the Defence. It indicates that the complainant was born on 13th September 2013 which placed her at 8 years old at the time the alleged offence was committed. On the identification of the perpetrator, the appellant being the father of the complainant is very well known to her, she lived with him and he slept with her on the same bed. On proof of penetration, the P3 Form produced by the Doctor who testified as PW2 indicated that on examination of the complainant, he found that her hymen had been broken not fresh meaning that penetration of the complainant's genital organ had already occurred. This evidence too was not at all controverted by the defence.

49. Basically therefore, all the ingredients required to prove an allegation of defilement have been appropriately established by the Prosecution and the only issue in contention is whether from the said evidence the Trial Court properly directed itself in making a finding that it is the appellant who defiled the complainant. It is the appellant's submission that it is the complainant's brother V and not himself who defiled the complainant. In this regard a recap of the salient points of the appellant's submissions is necessary and the same is as here below.

50. The appellant submitted that the complainant presented two sets of testimony during the trial. That the complainant initially reported that she was defiled by V and then introduced another version that

V did to her 'tabia mbaya' then said it was 'baba'. He urged that the complainant stated during the proceedings that she had been coached to implicate her father. He stated that there is an admission on record that the in-laws had coached the complainant to implicate him. He submitted that the main accusers in this case are his in-laws who have never given up their plan to settle scores having previously implicated him for the sudden death of his wife.

51. That the fact that V was mentioned as a perpetrator should have had the appellant exonerated from this case. That the court had an opportunity to question V but either by design or default did not want to stir the waters to nail the perpetrator in this case by summoning him. The Appellant submitted that the failure by the court to get the full picture of the circumstances in this case created a miscarriage of justice as against him.

52. The appellant submitted that the trial magistrate erred in law and fact by failing to note that the complainant was taken to Hospital initially on account of being injured on the knee after being pushed out of a lunch queue and not defilement. This compromised the prosecution case as this piece of evidence was concealed and only the defilement piece was highlighted. That further an old broken hymen was not proof of the penetration in the defilement case against him.

53. Lastly, the appellant submitted that the major ingredients of the offence of incest were never established making his conviction and sentence unsafe in the circumstances. That the terms 'tabia mbaya' and 'kuingiza kitu yake' left unanswered questions, and further, that 'Kuingiza kitu yake' is a vocabulary that is not available to the complainant being a minor, which is evidence of being coached by an adult person.

54 I have considered the proceedings of the lower court and also read the impugned judgement of the Trial Court. As is required of this Court, I must also re-evaluate the evidence on record while being mindful of the fact that I did not interact with the evidence and the testimony of the witnesses first hand. From the record of proceedings, having considered the submissions made by the appellant, I must immediately state that there is a need to set the record straight as regards what is submitted and what the actual record of the Trial Court reflects.

55. From my perusal of the said record of proceedings the following facts are apparent; Firstly, there are no two versions of the complainant's testimony. There is only one and it is the one that is as herein above summarised. Secondly, from the said record of proceedings, nowhere in her testimony did the complainant state that she was coached to implicate the appellant as alleged and there is also no such admission by the complainant on record as alleged; Thirdly, there is also no evidence on record that the complainant was taken to hospital to be treated for an injury to the leg which then morphed into this defilement case as alleged by the appellant.

56. Having pointed out the above, I will now turn to the two issues of whether the Trial Court misdirected itself in finding that it is the appellant and not his son V who defiled the complainant and whether this case is a fabrication against the appellant by his in laws who want to settle scores with him having previously accused him over the death of his wife which accusation turned out to be false.

57. The Trial Magistrate in her judgement was of the finding that the defendant's defence was a mere denial and was also untrustworthy. She said in the judgement that contrary to the appellant's submission that the appellant stated that it is his son V who had defiled the complainant she was satisfied that the complainant's evidence was consistent that it is the appellant who defiled her first then V. The Trial Magistrate further made a finding that it is the Prosecution and not the Court that is best placed to know why V was never charged with the subsequent defilement of the complainant.

58. In considering the complainant's evidence, I do agree with the Trial Magistrate's finding on the consistency and unambiguity of the complainant's testimony on who defiled her and when. Her testimony on how her father defiled her is very graphic by way of the testimony of the Investigating Officer as already herein above summarised and I need not repeat it. Further, the complainant testified that her father defiled her many times. The P3 Report showed that her hymen (at the age of 8) was already broken and the tears as observed by the Doctor were not fresh. This finding by the Doctor only goes to corroborate the complainant's testimony of repeated defilement and over time.

59. Further, the complainant testified that the appellant would give her sweets after defiling her. The appellant on his part testified that indeed there were sweets in the house but that he is not the one who bought them since the shopping for the house was usually done by one of his daughter's. This was confirmed by his witness DW3 who is the said daughter. It follows therefore that this aspect of the complainant's testimony was corroborated by the testimony of the appellant and his witness. However, of note is that in the appellant's bid to exonerate himself by clarifying that the sweets were bought by his older daughter, he unwittingly confirmed the evidence of the complainant. This too is a fact that goes to corroborate the testimony of the complainant with respect to the case against the appellant.

60. On the submission that the case against the appellant is a fabrication, the Court notes that the Investigating Officer who eventually charged the appellant after conducting her investigations stated in her evidence that she was not at all aware of the fact as now submitted by the appellant that there was any animosity between the him and his in-laws. That she was also not aware that the in laws of the appellants had accused him over the death of his wife.

61. She testified that this is because the issue was never raised and/or brought to her attention by the appellant during her investigations. In noting that this is the appellant's first line of defence, it is my considered opinion that if indeed it was a genuine defence, then the appellant ought to have raised it with the Investigating Officer at the earliest opportunity especially considering that his other line of defence was that it is not him but his son who defiled the complainant. This having not been done, then I find this line of defence to be an afterthought and without merit.

62. The appellant submitted that the complainant testified that V is the one who defiled her. However, the record of proceedings shows that the complainant stated that the appellant defiled her and that V too defiled her. The fact of this aspect of the complainant's testimony does not water down the case against the appellant in any way, nor does it by itself exonerate the appellant. The fact of the matter is that it is the appellant against whom the ODPP preferred a charge of defilement and it is against the appellant that they were required to prove their case beyond reasonable doubt.

63. Having brought in V as his line of defence, other than merely insisting that it is V and not him who should be held culpable simply by the mere mention of the said V by the appellant, the onus was upon the appellant to sufficiently demonstrate to court how it is V and not him who should be held culpable because the Burden of Proof as envisaged under Section 107 and 108 of the *Evidence Act* now shifted to him in light of the line of defence that he had adopted.

64. I agree with the Trial Magistrate that it was not the duty of the Trial Court to demand that the said V too be charged. This is because the decision to charge is not a task that is within the realm of the Hon Magistrate but that of the ODPP who elected to charge the appellant as one of the persons mentioned by the complainant as having defiled her. All that was required of the Trial Court is to reach a finding based on the evidence presented before it by the Prosecution as against the accused person that was before her and now the appellant before this Court that it has proved the case to the required standard of proof.

65. Further, contrary to the appellant's submission that the kind of language used by the complainant is not available for her use due to her age, the court takes cognizance of the fact that in almost all sexual offences cases involving children victims of defilement who fall in the complainant's age bracket and below, the kind of language used by the complainant herein is indeed and in fact the language that all the children almost without exception use in describing what was done to them in their varied testimonies. I therefore find this submission to be misconceived.

66. Lastly, the record of proceedings with regard to the testimony of DW2 as regards what the appellant told him when they met at 8.00pm is key and it wraps up the issue of whether, apart from V, the appellant too defiled the complainant, with finality. The relevant excerpt from the proceedings of the Trial Court is as follows;

> "I saw the accused person at 8.00pm and he told me he was in trouble. He informed me that the complainant had been defiled by V and himself and the Police were looking for him." (Emphasis mine)

67. In light of my findings above, I am satisfied that the conviction of the appellant by the Trial Court was based on evidence that was consistent, coherent and cogent and very well corroborated which evidence I am also well satisfied proved the case against the appellant to the required standard of proof which is beyond reasonable doubt. I therefore see no good reason why I should interfere with the said conviction and the same is upheld.

68. On the sentence of 80 years meted out upon the appellant, he submits that he is 50 years old and so therefore if 80 years is to be added to his age, he will have to serve a total of 130 years in prison which is unrealistic and flies in the face of the principle of proportionality in sentencing for reasons that even normal life expectancy is 70 years. The fact of his age at 50 years as submitted has not been controverted by the prosecution. I note that Section 20(1) of the *Sexual Offences Act* under which the appellant was convicted provides that if the female so defiled is under the age of 18 years, then the offender shall be liable to imprisonment for life.

69. I am persuaded with the appellant's submission that a sentence of 80 years meted upon an individual who is 50 years old is akin to a term of life imprisonment. The Court of Appeal in the case of Julius Kitsao Manyeso *v Republic (Criminal Appeal No. 12 of 2021*) [2023] KECA 827 (KLR) declared the sentence of life imprisonment to be unconstitutional and further held in the case of Ayako vs Republic [2023] KECA 1563 [KLR] (Supra) that life imprisonment translates to thirty (30) years imprisonment. Going by these two decision therefore, I now hereby set aside the sentence of 80 years' imprisonment and substitute the same with a term of 30 years' imprisonment. As per the provisions of Section 333(2) of the *Criminal Procedure Code*, the sentence is to take into account the period that the appellant spent in remand before his release on bond.

READ DATED AND SIGNED AT ELDORET ON 13TH FEBRUARY 2025

E. OMINDE

JUDGE