



**Masinde v Republic . (Criminal Appeal E014 of 2023)
[2024] KEHC 7409 (KLR) (21 June 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E014 OF 2023
JRA WANANDA, J
JUNE 21, 2024**

BETWEEN

PATRICK WAMALWA MASINDE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged in Eldoret Chief Magistrate’s Court Sexual Offences Case No. 367 of 2015 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. It was alleged that the Appellant, on 7/7/2015, at [Particulars withheld] in Wareng District, within Uasin Gishu County intentionally and unlawfully caused his penis to penetrate the vagina of DJR, a girl aged 10 years.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
3. The Appellant pleaded not guilty to all the charges and the case then went to full trial in which the prosecution called 6 witnesses. At the close of the prosecution’s case, the Court found that the Appellant had a case to answer and put him on his defence under Section 210 of the Criminal Procedure Code. The Appellant gave a sworn statement and called 1 witness. By the Judgment delivered on 20/2/2023, he was convicted on the main charge and sentenced on 26/2/2023 to serve life imprisonment.
4. Dissatisfied with the said decision of the trial Court, the Appellant instituted this appeal on 28/2/2023, against the conviction and sentence on 5 grounds reproduced verbatim as follows:
 - i. That the trial Magistrate grossly erred in law and facts by not considering that the evidence of PW1 was contradictory, questionable, doubtful and untrustworthy to warrant conviction.



- ii. That the trial Magistrate grossly erred in law and facts by basing his judgment on medical evidence that was not conclusive and unsupported by other medical evidence including treatment sheets.
- iii. That the trial Magistrate grossly erred in law and facts by not considering the age of the minor was not proven by the prosecution through sufficient evidence.
- iv. That the trial Magistrate grossly erred in law and facts by failing to evaluate and analyze the evidence on record and arriving at an erroneous conclusion that the Appellant committed the offence while the evidence of PW1 is very clear from the record that she was pricked by a stick.
- v. That the trial Magistrate grossly erred in law and facts by failing to accord the Appellant the benefit of doubt due to prosecution uncorroborated evidence.
- vi. That the sentence of life imprisonment is harsh and excessive in the circumstance.

Prosecution evidence before the trial Court

5. Before the trial Court, the prosecution called 6 witnesses.
6. PW1 was the minor-complainant (victim). Because of her age, she was taken through a *voire dire* examination after which the Magistrate recorded that she was too young to understand the effect of taking an oath but that she nevertheless was aware of the importance of telling the truth. Under such circumstances, the Magistrate directed that the minor would give unsworn evidence which she then proceeded to do. She testified that she is 11 years old and in class 4, that on the material date, she was preparing to go to school and was in the company of her brother K who had gone out after one Chesang, one Patrick and one Mama Chirchir, that it was not her brother who defiled her, that she did not go to call her brother as she was afraid that he would also defile her. She further testified that he had met her brother while coming from the neighbour, that her brother ran away when her mother asked him why he did not watch out for PW1, that the mother wanted to beat the brother, that her mother works at [Particulars withheld] and came at 12:30 pm. She told the Court that the clothes were taken to hospital when she went there. She further testified that the Appellant had brought her soap on that day at 9:00 am to go to school with, just as the Appellant had promised earlier as they had been meeting outside previously.
7. In cross-examination, PW1 stated that she was with her younger brother who had gone to the bathroom outside, that there are about 5 houses in the plot, that the Appellant was the only one around, that Mama Chirchir stays at a different line while the Appellant stays along the same line. She stated further that it was heading to midday and that she was to go to school at 2 pm and that her mother was not in, that she could not scream as the Appellant had sealed her mouth with cello tape which he had come with and which was black in colour, that the tape was painful but did not leave any mark on her mouth, that her brother did not get them together and that she had told Mama Chirchir that she had been hit by a stick. She stated further that she did not state that the Appellant who is a neighbour came to the house. She then stated that he pursued her into her parents' home and sealed her mouth with cello tape, removed her panty and navy blue short yellow biker, removed his trouser, removed his penis and put it in her private part and that he gagged her neck and strangled her. She added that she bled in her private part and the Appellant left her, and that he removed the cello tape from her mouth, chased her and ran to the plot toilet.
8. She stated further that she put on the same clothes and ran to her neighbour Mama Chirchir who called her mother and who came and took her to hospital and she was later taken to the police station where she recorded a statement. She then identified the Appellant in Court by pointing him out in the



dock as the person who defiled her. She stated that the Appellant had not been a bad person and is a friend to her mother. She denied that it is her mother who told what to say or that she was not told what to say in the statement. She stated that she remembers what she wrote but that it was not read to her. She reiterated that the Appellant was at home on that day and stated that she does not know when he was arrested, that she was admitted in hospital for 6 days, that she could not remember when she recorded her statement or whom she saw at the police station, that she with her mother alone at the station and again denied that it is her mother who told her what to write and also denied that she was with Mama Chirchir. She stated that she was slightly injured on the neck, that her mother wanted to strike her brother for not looking after her and not for defiling her. She maintained that her brother was not at fault. Regarding the statement, she stated that she was narrating and the police officer was recording it. She then reiterated that her brother ran away after her mother threatened to stab him, that the stick injured her in the morning and that the defilement was at home.

9. PW2 was also a minor, the said Kennedy [second name withheld]. Because of his age, he too was taken through a voire dire examination after which the Magistrate recorded that he was too young to understand the effect of taking an oath but he nevertheless was aware of the importance of telling the truth. Under such circumstances, the Magistrate directed that the minor would give unsworn evidence which he then proceeded to do. He testified that he was aged 15 years and a class 7 pupil, that on 7/7/15 he was at home when he saw the Appellant leave their house with his sister, PW1, that he followed her sister but she ran away, that he went home after visiting the shop only to be asked by his mother where she was when her sister was being defiled, that the mother wanted to beat him and he ran away for 2 weeks to Maruli where was a street boy. He stated that the Appellant is a neighbour. In cross-examination, he stated that the two left their house and that his sister was crying. He however conceded that in his statement, he did not mention the crying part. He denied that he had differed with his mother over this case and confirmed that he knew one Filani Biwott. He denied defiling PW1 and stated that he did not hear PW1 scream.
10. PW3 was [name withheld], PW1's mother. She identified PW1's birth certificate and stated that on the material date, she was called by a neighbour and told that her child had been injured upon which she rushed home and found PW1 bleeding from her private parts, that when she asked, PW1 told her that she had been pricked by a stick, that she wiped PW1 and took her to hospital where she was issued with a P3 Form, that on the next day when she recovered is when she narrated how she had been gagged by the Appellant and defiled in her house, that PW1 told her that the Appellant had bought her soap for school which she then identified in Court. She then identified the stained clothes and stated that she knows the Appellant as a neighbour. In cross-examination, she stated that initially PW1 had told her that she had been pricked by a stick, that she later told her that it was her brother who had defiled her but again on the next day when she took her to hospital PW1 told her that that it was the Appellant who defiled her, that PW1 told her that the Appellant had threatened to kill PW1. She stated further that PW1 was admitted in hospital for 7 days, that the Appellant had been her neighbour for 1 year and that she had no grudge against him. She denied that the Appellant had been her lover hence the reason for framing him.
11. PW4, Phitaris Biwott stated that on 7/7/15 she was in her house when PW1 came running and asked for a phone to talk to her mother which she gave PW1, that after the call, the mother called PW4 asking her to check PW1 who had said that she had been pricked by a stick, that she asked PW1 to go change clothes which PW1 did but that she was still bleeding when she came back, that she gave her pads and a bed sheet and when the mother came, she washed PW1 and took her to hospital, that PW1 claimed that she had been pricked by a stick but when asked again, she stated that it was her brother who had defiled her but in the hospital, PW1 told her that it was the Appellant, the neighbour. In cross-examination, she stated that they live in the same plot, that PW1 never mentioned the Appellant at the first time,



that she later changed and stated that it was her brother who had defiled her and that it was a day later that that she mentioned the Appellant. She also stated that she did not see any cello tape.

12. PW5 was one Dr. Eliud TUNET from Moi Teaching and Referral Hospital who produced the P3 Form. He stated that PW1 reported being defiled and on examination, it was noted that her clothes were blood stained. He added that the girl reported that she was in the house alone when she was attacked by a person known to her, that the examination showed that she was in shock, had lost blood and was in pain, that the injuries showed that she had fresh bleeding down on the vaginal wall unit posterior force with hymenal tear and that she was still bleeding, that laboratory tests showed blood cells but no spermatozoa was seen and no infections were detected, that she was taken to the theatre where stitching was done to the tears and she was discharged after 6 days. He stated further that the injuries were confirmation of defilement. In cross-examination, he stated that it was indicated that the offence was committed on 7/9/2015, that she was treated on the same day and the P3 Form filled on the same day, that the injury was caused by a blunt object, that it was not indicated who gave the history and that PW1's estimated age was 10 years. In conclusion, he stated that PW1 had a tear on the perineum and hymen, both internal and external.
13. PW6 was one Corporal Jane Jeptoo. She stated that she was from the Directorate of Criminal Investigations Office (DCIO) at Eldoret but was formerly at Langas Police Station, that on 9/07/2016, PW1's mother reported a case of defilement and they recorded a statement and issued P3 Form. She then produced a copy of PW1's birth certificate. In cross-examination, she stated that the incident was on 7/07/2015 and the Appellant was arrested on 16/07/2019 after investigations had been conducted, and that it is PW1 who identified the Appellant. She added that PW4, a neighbour recorded a statement in which she stated that PW1 initially told her that she had been pricked by a stick but later stated that it was her brother who had defiled her, that when the mother confronted the brother, he ran away, that she cleaned PW1 and that the evidence led to the Appellant, that it is PW1 who identified the Appellant, and that she knew the Appellant as a neighbour. PW6 then confirmed that the cello tape alleged was never recovered, that PW1's clothes were kept as evidence and she handed them over to another officer when she went on leave. In conclusion, she confirmed that no blood samples were taken.

Defence evidence

14. After the Prosecution case, the Court found that the Appellant had a case to answer and placed him to his defence. Pursuant thereto, the Appellant gave sworn testimony as DW1 and called 1 witness, DW2.
15. The Appellant testified that on 7/7/2015 he left his house for work at 7 am with one Simon (DW2) who had come to his house, that they left together for the Appellant's place of work where they later left and went together to Eldoret town and that they remained till 4 pm when they parted and that he came back to the house at 1 am. He stated further that on 8/7/2015, he left for work without hearing any complaint and that it was not until 15/7/2015 when police officers from Langas police station came to his house and asked him to accompany them to the station where he was placed in a cell and was accused of defilement. In cross-examination, he stated that he knows PW1 as a neighbour, and insisted that PW1 never mentioned him as the defiler, and that he knows one Kennedy [second name withheld] who was the one to be charged. He confirmed his knowledge that PW1 was 10 years old. He then reiterated that on the fateful date, he was in Eldoret town on official duties and had gone to see someone with the intention of employing him at Ukwala Supermarket.
16. DW2, Simon Wekesa testified that the Appellant is his cousin. He told the Court that on 7/7/15 they had an arrangement in town with the Appellant and that he drove to the Appellant's house and picked him up. He testified further that the Appellant was working at a hotel and that they left the Appellant's place of work for town and he stayed with him from 7 am to 4 pm. According to him, the



issue of defilement did not arise on that date. In cross-examination, he stated that he wanted to assist the Appellant to obtain employment at Ukwala Supermarket. He stated that the Appellant did not know his son and denied that the Appellant is his son. He stated that his son's name is Edwin Wafula. He told the Court that they went to Ukwala Supermarket at 8:00 am that but the person whom they were to meet was not there. He conceded that he did not know PW1's mother.

Judgment of the trial Court

17. After analyzing the evidence, on 20/02/2023 the trial Court found the Appellant guilty and convicted him. The Appellant was then given an opportunity to mitigate which he did. On 26/2/2023, the trial Court then sentenced the Appellant to serve life imprisonment for the charge of defilement. In imposing the sentence, the Magistrate stated that Section 8(2) of the Sexual Offences Act provided for life imprisonment as the only mandatory sentence upon conviction.

Hearing of the Appeal

18. The Appeal be canvassed by of written Submissions. The Appellant filed his Submissions on 29/9/2023 through his Advocates, Messrs Lusinde Khayo & Co. while the State filed on 9/10/2023 through Prosecution Counsel, Ms. Emma Okok.

Appellant's Submissions

19. Counsel for the Appellant submitted that there has been evidence that PW1 complained of having been hit by a stick and also having been defiled by the brother, that later, PW3 stated that PW1 changed her statement and alleged that it was accused who defiled her, that both PW3 and PW4 confirmed that the initial statement by PW1 was that she had been pricked by stick and later, that she had been defiled by the brother. Counsel submitted that the Prosecution failed to dismiss all these statements and arrive at a conclusion that it was the Appellant who defiled PW1.
20. Counsel further submitted that the testimonies of PW1 and PW2 are contradictory, that PW1 stated that PW2 was coming from a neighbour's house whereas upon cross-examination, she stated that she was with her brother who had gone to the bathroom outside. Counsel further argued that PW2 stated that he was leaving the bedroom when he saw the Appellant and PW1 but where he saw them and what they were doing was not explained. He contended further that PW1 ran away, but no one knows why she ran away and no explanation is given. Counsel further argued that when PW3 came, PW2 ran away for 2 weeks. According to Counsel no explanation was made to align these issues and point a finger to the Appellant. According to Counsel, the probable conclusion would be true that PW2 had defiled PW1 and thus afraid of the consequences necessitating him to run and stay away for 2 weeks. Counsel submitted that the trial Magistrate grossly erred in law and fact by not considering that the evidence of PW1 was contradictory, questionable, doubtful and unsustainable to warrant a conviction. He cited the case of Mark Makoani Musyoka vs Republic (2020) eKLR and the case of Julius Kioko Kivuva vs Republic (2015) eKLR.
21. Counsel further submitted that the P3 Form reveals the case was reported at the police on 9/7/2015 and PW1 sent to hospital on 10/7/2015, that this does not corroborate with the evidence that PW1 went to the hospital on 7/7/2015 and admitted, there were no treatment notes to prove any admission of PW1. Counsel argued that PW5, upon cross examination, stated that the incident occurred on 7/7/2015 and that PW1 was treated on the same day and P3 form filed on the same day. He doubted the truth of this and submitted that there was nothing to show that PW1 was treated on 7/7/2015 and P3 Form was filed on 14/7/2015. He faulted the trial Magistrate for grossly erring in law and fact by basing his judgment on wrong evidence that was not conclusive and not supported by any medical evidence, not



even treatment sheets. Counsel added that there are lapses in the prosecution case that were never sealed and cannot give a complete analysis of whether defilement took place, and that the Appellant is the culprit.

22. Counsel argued that trial Court recognized that indeed there was confusion on who defiled PW1 but believed that enough evidence was given to exonerate PW2 from being the culprit without any explanation whatsoever and despite PW1 stating that she was defiled by PW2. Counsel contended that the trial Magistrate stated that the Appellant's testimony was incoherent and left more questions than answers but that no question was raised by the Magistrate. He submitted further that the Magistrate grossly erred by failing to evaluate and analyse the evidence and arriving at an erroneous judgment and that the Appellant committed the offence while the evidence of PW1 is very clear that she was pricked by a stick.
23. Counsel submitted further that the charge facing the Appellant were very serious in nature, it attracted a sentence of life imprisonment and thus the prosecution had a duty to carry out serious investigation, that according to PW6 (the doctor), PW3 reported the incident, her statement was recorded and a P3 issued. Counsel contended that PW6 confirmed having heard of a stick that pricked PW1 and also of her brother PW2 having been the one who defiled PW1 but nothing was done. Counsel contended that there was no evidence of a visit to the scene by the Investigating Officer to ascertain how viable it would have been for the Appellant to have defiled PW1. According to Counsel, no investigations were done. Counsel maintained that the Investigating Officer would have done better as both PW2 and the Appellant could all defile PW1 as they were all male who were at the scene.
24. Counsel argued further, while citing the case of *K.K.M vs Republic (2017) eKLR*, that the offence of defilement is proved when certain ingredients are proved, namely, complainant's age, proof of penetration and identification of the offender. He also cited *Lord Parker in R vs Howard (1965)3 ALL ER 684 AT 685* on the issue of consent. He then submitted that the prosecution case was not a water tight and was not proven beyond doubt to warrant a conviction. According to him, it was unsafe to convict the Appellant.

Respondent's Submissions

25. On her part, the Prosecution Counsel submitted that the offence of defilement was proved beyond reasonable doubt.
26. With regard to penetration, Counsel submitted that the complainant, PW1 stated that she was at home at around midday and was preparing to go to school at 2.00p.m, that her parents were away at the time, that the Appellant came with a cello tape that he used to seal her mouth with and pushed her into her parents' house, removed her clothes, defiled her and strangled her on the neck, that she bled on her private parts and the Appellant left her, that she then removed the cello tape and ran into the plot toilet. Counsel also submitted that PW1 stated that she told her neighbour one Mama Chirchir that she had been hit by a stick but had not been injured, that it was Mama Chirchir who assisted her to call her mother who came and took her to hospital. According to Counsel, PW1 was categorical that it was not her brother who defiled her and that her mother wanted to stab her brother for not looking after her. She also recounted the evidence of the other witnesses and
27. Counsel further submitted that PW2 Kennedy [second name withheld] who is PW1's elder brother stated that he saw the Appellant leave their house with PW1, that he ran away from home for 2 weeks as his mother wanted to beat him for not watching over his sister who had been defiled and that he saw PW1 and the Appellant leaving their house and PW1 was crying.



28. Counsel submitted that PW3, PW1's mother, stated that she was called by her neighbour, PW4, who informed her that PW1 had been injured, that she rushed home and found PW1 bleeding on the private parts and when she inquired from her, PW1 told her that she had been pricked by a stick, that PW1 collapsed and she took her to hospital and that on the following day, PW1 confided in her that the Appellant is the one who had defiled her in their house.
29. Counsel submitted further that PW4, a neighbour, stated that she was in her house when PW1 came in running, that PW1 was bleeding and when she was asked she said that she had been pricked by a stick but later changed and stated that it was the Appellant who had defiled her.
30. Counsel added that the evidence on penetration was further corroborated by PW5, the doctor, who produced the P3 Form, that his evidence was that PW1 was presented to the hospital with a history of defilement, that her clothes were blood stained, that PW1 stated that she was in the house alone when she was attacked by a person well known to her, that she was in shock, had lost blood, was in pain, she had fresh bleeding down on the vaginal wall unit, posterior force tear and hymenal tear, that she was admitted in hospital for 6 days and that the injuries were confirmation of defilement..
31. On age, Counsel submitted that PW1 stated that she was 11 years old at the time of the incident, that her birth certificate was produced and which indicated that she was born on 13/07/2004, and that since the incident occurred on 7/07/2015, PW1's age of 11 years was conclusively proved.
32. With regard to the identity of the perpetrator, Counsel submitted that PW1 and PW2 placed the Appellant at the scene, that PW1 identified the Appellant as a neighbour and friend to her mother, PW2, and that PW3 also confirmed that the Appellant was a neighbour at the same plot. Counsel added that the incident occurred during the day and that the witnesses were therefore able to clearly see the Appellant. According to Counsel, there was no possibility of a mistaken identity.
33. Counsel added that in his defence, the Appellant claimed that on the material date, he left his house at around 7.00 am together with DW2, that they went to his place of work and stayed there up to 4.00p.m, that DW2 however gave incoherent evidence on what exactly transpired thus leaving room for doubt. According to Counsel, the defence evidence was not strong enough to rebut the prosecution case and that the trial Court was right in disregarding the same.
34. Regarding PW1's initial conflicting statements that she had been pricked by a stick and later changing to allege that she had in fact been defiled by her brother, Counsel argued that the it is worth noting that PW5, the doctor, stated that when PW1 was brought to the hospital, she was in pain and in shock. Counsel also observed that PW1 stated that the Appellant had strangled her during the incident and when she came to, she informed the mother that the Appellant had threatened to kill her, that it may be possible that this is the reason why she initially concealed the identity of the Appellant. Counsel maintained that PW1 was categorical during cross-examination that it was the Appellant and not her brother who had defiled her. According to Counsel therefore, the evidence on identification was therefore solid.
35. Counsel maintained that the prosecution discharged its burden of proof, that the Appellant was properly convicted, that the prosecution evidence was credible, consistent, reliable and well corroborated and that all ingredients of the offence of defilement were established beyond reasonable doubt.
36. With regard to sentence, Counsel submitted that the Appellant was sentenced to life imprisonment, that he was given a chance to mitigate, that he prayed for leniency stating that he did not commit the offence, and that the Appellant was treated as a first offender.



37. In the end, Counsel submitted that the Appellant abused the trust bestowed upon him by the society and instead took advantage of a young girl and defiled her, that as her neighbour, he was supposed to be her protector but instead turned out to be her tormentor, that he also assaulted her. Counsel therefore argued that the sentence of life imprisonment imposed by the trial Court was a sufficient and deterrent sentence and urged the Court to confirm it.

Determination

38. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See *Okeno vs. Republic* [1972] E.A 32)

Issues for determination

- a. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
 - b. Whether the sentence of life imprisonment imposed against the Appellant was justified.
39. I now proceed to analyze and determine the said issues

a. Whether the charge was proved case beyond reasonable doubt

40. It is trite law that for the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration and positive identification of the offender.

41. Section 8(1) and 8(2) of the [Sexual Offences Act](#) provides as follows:

“ 8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

42. The importance of proving age was underscored by the Court of Appeal in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR, as follows:

“The importance of proving the age of the victim of defilement under the [Sexual Offences Act](#) by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello v Republic* Cr. App 203 of 2009 (Kisumu) this Court stated as follows: -

“In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)”.



43. In instant case, PW1 testified that she was 10 years old. PW3 (her mother) also confirmed this and also produced PW1's birth certificate. The certificate indicates that PW1 was born on 13/7/2004. The alleged offence having occurred on 7/7/2015, PW1 was indeed therefore approaching 11 years old at the time thereof. This dispenses with the first ingredient as adequately proven.
44. With regard to penetration. Section 2(1) of the *Sexual Offences Act* defines penetration as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
45. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:
- “Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.” (Emphasis added).
46. Medical evidence was provided by PW5, the doctor He testified that PW1's clothes were blood stained, that she was in shock, she had lost blood and was in pain. He stated further that the injuries sustained showed that she had fresh bleeding down the vaginal wall unit posterior force the tear and hymenal tear and that she was still bleeding even at the time of examination. He also testified that the victim had go to theatre for examination on analysis and for stitching to be done to the tears and that she was discharged after 6 days. He stated that lab test showed blood cells but no spermatozoa and no infections were dictated. According to him, the injuries were confirmation of defilement and that the injury was caused by a blunt object.
47. Although, as submitted by the Appellant's Counsel, no treatment notes or hospital admission documents were produced and although there is some contradiction in dates as entered in the P3 Report, in light of the presence of the other sufficient evidence, I do not think such omission or contradiction had any effect on the findings of the trial Magistrate.
48. Counsel for the Appellant has contended that PW2 did not state where he saw the Appellant and PW1 and neither did he state what they were doing when he saw them. However, this cannot not rule out penetration. From her testimony, PW5 (the doctor) was very clear that penetration did occur. From the record it is further evident that this incident took place at midday and PW1 was categorical that she had been defiled by the Appellant whom she knew very well. The evidence of the complainant on the fact of her being defiled was also corroborated by that of PW5. Penetration, as contemplated by the Act, was therefore proved.
49. On the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga v Republic* [1989] eKLR expressed itself as follows:
- “Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.



50. In the instant case, the Appellant's Counsel has suggested that PW2 who happened to be PW1's brother was the one who in fact defiled PW1 and that the Appellant was framed. This is because PW1 had initially alleged so before she subsequently changed and instead implicated the Appellant. The other reason is because PW2 (the brother) ran away from home after the incident and stayed away for 2 weeks. However, in her testimony, PW1 was clear that it was the Appellant who had defiled her and not her brother. PW1 further vividly narrated how the Appellant pushed her into the house, sealed her mouth with cello tape before removing her undergarments and defiling her. PW1, PW2 and PW3 all told the Court that the reason PW2 (the brother) ran away from home was because of the fear of being beaten by the mother for failing to watch over PW1 (his younger sister) and because the mother had threatened to stab PW2. I find this explanation credible and believable.
51. I also note that the offence occurred during midday and as such, the element of mistaken identity on the part of PW1 as regards the identity of the person who defiled her would be too remote. It has also not been disputed that the Appellant was a neighbour and therefore a person well known to PW1. The allegations by DW2 that the case was a fabrication between PW5 (the doctor) and PW1's mother was not substantiated neither was there any demonstration of any grudge between the Appellant and PW3 or any motive for framing the Appellant. The allegation by the Appellant that he and PW1's mother were lovers, in addition to not being substantiated and which was in any case denied by the PW3, would not in any way without further explanation, demonstrate any motive for framing the Appellant.
52. In his defence, the Appellant raised allegations amounting to a defence of alibi insofar as he claimed that he was not at the scene of crime at the time that the offence is said to have taken place. He claimed that he had gone to work at 7 am accompanied by DW2 and then went to Eldoret town where he was pursuing an employment opportunity at Ukwala Supermarket. He claimed that he was at all times with DW2 until 4 pm. DW2 who claimed to be the Appellant's cousin stated that he picked the Appellant from the latter's home in the morning and drove with him to the Appellant's place of work and that they then left together for Eldoret town to pursue an employment opportunity at Ukwala Supermarket. He too claimed that he was with the Appellant from 7am to 4 pm. The explanations put forward by the Accused and his witness were insufficient, contradictory and without basis. This defence did not cast doubt on the prosecution case. DW2 then claimed that PW3 and PW5 colluded because they were workmates in the hospital from which the P3 Form was issued.
53. In her findings, the trial Court found that the alibi defence was too weak and that DW2 gave incoherent testimony thus leaving many questions unanswered. I cannot agree more. DW2's credibility as a witness was doubtful. This is because, first, although claiming to be a cousin to the Appellant, he conceded that the Appellant did not even know his son's name. Secondly, although he alleged that PW1's mother and PW5 had colluded to issue a false P3 Form, he conceded that he did not even know PW1's mother. Thirdly, although he claimed that he was assisting the Appellant to get a job at Ukwala Supermarket, he could not even give the name of the person at Ukwala Supermarket with whom he was dealing.
54. The upshot of the above is that I find that the Appellant was positively identified as the assailant and like the trial Court, I too out the chances of a mistaken identity.
55. Accordingly, I find that the trial Court had before it, sufficient material to support its finding that the prosecution proved its case beyond reasonable doubt. I cannot find any ground to find that that the trial Court erred in convicting the Appellant for the offence of defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.



i. Whether the sentence of life imprisonment was justified

56. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms:

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”.

57. In applying the above guidelines, I observe that Section 8(2) of the *Sexual Offences Act* provides as follows:

“(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

58. In view of the above, it is clear view that the sentence imposed by the trial Court was within the law. Nevertheless, I take judicial notice of the emerging jurisprudence that strict adherence to mandatory minimum or maximum sentences is now being discouraged and the majority view now prevailing is that Courts retain the discretion to depart from such mandatory sentences. In connection to this issue, the Supreme Court in the case of *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR, while dealing with a case of murder, declared the mandatory death sentence unconstitutional. This is how the Supreme Court put it:

“(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”

59. Prior to the subsequent directions of the Supreme Court given in the same Muruatetu case on 6/07/2021, which clarified that Muruatetu only applied to murder cases, Courts, deeming themselves bound by the authority, had been routinely re-sentencing convicts for different offences, including for sexual offences. Since the giving of the directions, the Courts now exercise their discretion in re-sentencing convicts in sexual offences on the basis of the unique circumstances of each case.

60. A notable case in which the Court of Appeal applied similar logic to Muruatetu and set aside a mandatory sentence in a case of defilement is *Dismas Wafula Kilwake vs Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the Court in sentencing offences.



61. Another case is *GK v Republic (Criminal Appeal 134 of 2016)* [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
62. There is also the case of *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR), where Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial Court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution*. He however clarified that his view was that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
63. I may also mention the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, where the Court of Appeal reiterated that it was impermissible for the legislature to take away the discretion of Courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
64. Further, the constitutionality of the life sentence has also now been questioned. In dealing with a matter where, as herein, the Appellant had been sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, the Court of Appeal, in the case of *Manyeso vs Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), stated as follows:-

“...an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We, therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”

65. Regarding sentence, Majanja J, quoting Muruatetu, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, stated as follows:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

- (a) age of the offender;
- (b) being a first offender;



- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

66. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

“With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.”

67. In view of the legal guidelines set out in the various authorities cited above, and although when given the opportunity to mitigate, the Appellant did not say anything meaningful, I find that the sentence of life imprisonment should be reduced a determinate period of imprisonment. There is no evidence that the Appellant was a repeat offender. I also deem it necessary to give the Appellant the opportunity to reform while in prison and thereafter be released to achieve social re-adaptation. I believe that after a reasonable prison term, the Appellant will have suffered sufficient retribution for his actions and will be ready for rehabilitation to the society.

Final Order

68. In the circumstances, I make the following Orders:

- i. The Appeal against conviction fails.
- ii. The sentence of life imprisonment imposed by the trial Court against the Appellant is however set aside and substituted with a sentence of 20 years imprisonment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Mugun for the State

Appellant present

Ms. Khayo for the Appellant

