CT v Republic (Criminal Appeal 130 of 2021)
[2024] KEHC 8921 (KLR) (19 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 130 OF 2021

DK KEMEI, J

JULY 19, 2024

BETWEEN

CT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant, Cleopas Tindivale, was charged before the Principal Magistrate's Court at Kimilili in Sexual Offences Case No. 60 of 2018 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that the Appellant, on the night between 26th August 2018 and 27th August 2018 at [particulars withheld] Village, Bungoma North District within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of SWJ, a child aged Twelve (12) years.

2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that on the night between 26th August 2018 and 27th August 2018 at [particulars withheld] Village, Bungoma North District within Bungoma County, intentionally committed an indecent act with a child namely SWJ a child aged twelve (12) years by touching her vagina with his penis.

3. In his judgement, the learned trial magistrate found that the Appellant committed the offence with which he was charged in the main charge. It was the learned trial magistrate's finding that the evidence was overwhelming against the Appellant and therefore proceeded to convict him on the main charge and sentenced him to serve Twenty (20) years imprisonment therefor

4. Being dissatisfied with the conviction and sentence, the Appellant has lodged the instant appeal based on the following supplementary grounds:

i. That the learned magistrate erred in law and fact in convicting him on uncorroborated evidence.

ii. That the learned magistrate erred in law and fact in arriving at a decision while putting into consideration the evidence that were full of contradictions and without analysing the same.

iii. That the trail magistrate erred in fact and law by failing to consider the defence of alibi adduced by the Appellant during defence hearing which was not shaken.

iv. That the minimum mandatory nature of sentences under the *Sexual Offences Act* is unconstitutional.

5. The lower court record reveals that the prosecution called six (6) witnesses in support of its case.

6. After a brief voire dire examination, the court formed the view that the complainant failed to comprehend the difference between telling the truth and the dire consequences to be meted out for speaking lies. It further observed that the complainant's level of comprehension is not well advanced to understand the implications of oath taking and therefore directed her to tender her unsworn evidence.

7. According to SWJ, she is a resident of [particulars withheld] village and that she is a student. She told the Court that the Appellant is her father and that her mother is called CM. She recalled on 26th August 2018, she retired to bed at 7.00 PM while her mother and three siblings were all attending her uncle's burial at Namwela, she slept in one of the rooms she shared with her siblings and during the night she woke up to someone laying on top of her. She screamed but the individual threatened her by stating "ukipiga nduru nitakukata na panga". He proceeded to undress her and removing her panty which was white and blue in colour then "aliweka kitu yake ya kukojolea kwa kitu yangu ya kukojolea". He inserted his penis into her vagina and lifted one of her legs while the other rested on the bed. He further threatened to stab her with a knife if she screamed. She testified that she was able to recognise the voice as it was "baba's" voice, the Appellant herein. When the Appellant finished, he lit the lamp as she lay their crying and then left to return to his bedroom. She examined herself and noticed blood on her body. She told the Court that she did not sleep that night. Her brother, PW2, asked her what was the problem but all she did was cry and keep quiet as the Appellant had threatened to stab her. The next morning at 6.00 AM she proceeded to mama Atanas, a neighbour, and informed her on what the Appellant had done to her and who requested her to call her grandmother. She left for her grandmother's home where she was taken to Sango dispensary but there was no attending doctor. They proceeded to Naitiri Hospital where she was treated. After they went to Mbakalo Police Station, the Appellant was later arrested. She identified the Appellant in Court as the man who defiled her.

On cross examination, she testified that she shares her bed with PW2 and M and that her brothers were asleep and that the Appellant herein is her biological father.

8. After a brief voire dire examination, the court formed the view that PW2 aged twelve years old did not understand the importance of speaking the truth or the dire consequences to be meted out for speaking lies. His evidence was therefore unsworn.

9. According to, AJ, (PW2), he studies at [particulars withheld] Boys and that the complainant herein is his elder sister. According to him, on 26th August 2018, he retired he to sleep with his siblings, the Complainant, B and M, as they shared a bed and that his mother was not around. He told the Court that he heard the complainant crying and on stretching out his hand, he felt someone on top of her and he assumed that the person laying on top of her was caring for her. He got scared and moved towards his smaller brother M. He heard the person threatening the complainant telling her that "ukipiga nduru nitakukata". The complainant continued to cry and shortly after the room was

lit, that is when he realised that it was ''baba'' the Appellant. He lit their one-acre fund lamp. The next morning, the complainant was still crying and when he inquired about it she kept on crying. He identified the Appellant in Court as the person who defiled the complainant and that it was "baba".

On cross-examination, he told the Court that he was taught to speak the truth at all times and that they were sleeping on the floor and that a mattress was placed there. He told the Court that he did not know what was happening when he heard the complainant crying and that he saw the Appellant walk out of their room after he lit the lamp.

10. PW3 was TI, who testified that on 27th August 2018, she woke up to proceed to the market and returned late in the evening. She found PW2 and M coming from fetching water. She asked them to tell the complainant to bring her some avocados and she came by her house shortly but refused to leave. She asked her if everything was okay but the complainant started crying and on further probing she informed her that the Appellant had laid on top of her as she was sleeping the previous night and that he had threatened to stab her with a knife. They proceeded to the complainant's grandmother house where she recounted the events of that night and she escorted her to Sango but due to unavailability of a doctor they went to Naitiri. On their way to the hospital, they met one Irene and they recounted all that happened to her and who quickly notified the mother of the complainant. The complainant was admitted at Naitiri and discharged the next day in the morning. They proceeded to Mbakalo Police Station where they recorded their statements. She identified the Appellant in Court as she knew him as a neighbour.

On cross examination, she told the Court that the complainant appeared very low when she brought her the requested avocados and that she was wearing a black skirt.

11. PW4 was CMN who testified that she was the wife of the Appellant herein and that the complainant is her daughter. She recalled on 26th August 2018 she departed for a funeral and left at home her four children namely: A, B, S and M with the Appellant, her then husband. She told the Court that while at the funeral she received a call from one Irene on 27th August 2018 informing her that her daughter, the complainant herein, had been defiled by the Appellant and that she had been escorted to the hospital for medical attention. She shared the news with her uncle and he instructed two boys to escort her to the hospital. On arrival, she found the complainant at the Naitiri hospital and she was admitted for one day. On exiting the hospital, they proceeded to Mbakalo Police Station where she made her report.

On cross-examination, she told the Court that she was not at home on 26th August 2018 and that she only received a phone call informing her of the incident that had occurred.

12. PW5 was Bonface Tendet who testified that he is a clinical officer based at Tanina Health Centre but was previously stationed at Naitiri Hospital. He told the Court that he attended to the complainant herein and also filled her P3 form. He testified that the complainant arrived at the hospital with a blood stained pant and that she complained that she had been defiled by a person well known to her on 26th August 2018. The examination of the complainant revealed that the vagina was normal with presence of lacerations of the labia minora and the absence of a hymen. He observed blood stains and whitish discharge in the labia minora. The laboratory examination on the urine sample showed that the parietals were normal except for the presence of epithelial cells which meant that there was wear and tear. They conducted VDRL tests that were negative. The HIV tests were also negative. He produced the P3 form dated 29th August 2018 in Court as evidence and marked as PExhibit 3 and the complainant's discharge summary as PExhibit 2. He finally concluded that the defilement had taken six hours to be reported.

On cross-examination, he told the Court that he was the one who filled the P3 form of the complainant but does not have her treatment notes. He told the Court that the urinalysis indicated presence of

epithelial cells which was a clear indication of a wound wear and tear to the hymen. He told the Court that he does not know who broke the hymen.

On re-examination, he told the Court that the patient exhibited a history of having been defiled by someone known to her and that his examination of the labia minora and majora were consistent with his findings that she was defiled. He insisted that the bleeding was not as a result of the complainant experiencing her menses and that they would have found a pad on her if that was the case.

13. According to PW6, No. 73691 PC Silas Cherono he is stationed at Mbakalo Police Station and that he was the investigating officer in this matter. He recalled on 28th August 2018 the Complainant and PW4 came to the station to file a defilement report by a person known to them. He recorded statements and issued them with a P3 form which was filled and brought back to the station. He interrogated the complainant who informed her that she had been defiled by the Appellant who is her father, and that PW4 had left her and her three brothers as she attended a funeral when the incident occurred. He told the Court that the complainant reported the incident to PW4 who later took her to her grandmother and was taken to Naitiri Sub-County Hospital where she was examined. On reporting the issue, he asked PW4 to bring the complainant's birth certificate and the respective witnesses so that he could record their statements. He produced in Court the birth certificate of the complainant as PExhibit 4 and a letter from Naitiri Primary School as PExhibit 1. He was made aware that the perpetrator was the father and after conclusive investigations he arrested him.

On cross-examination, he told the Court that PW3 came to the station in the company of the complainant and as per her statement, she was sleeping in the same bed as her two younger brothers as they shared a bedroom. He testified that the Complainant stated that the Appellant threatened to stab her if she was to make any kind of noise and that she was able to recognize the voice and when the Appellant proceeded to light the lamp after the ordeal, the complainant was certain that it was her father. It was his statement that the complainant also complained to PW3 about what the Appellant did.

14. At the close of the prosecution's case, the Appellant was found to have a case to answer and was thus placed on his defence whereupon he tendered his sworn evidence and called upon three witnesses.

15. The Appellant testified as DW1. He told the Court that he denies the charges levelled against him According to him, on 26th August 2018, he left the house of his eldest wife early morning to go to the house of PW4. On arrival at 8.00 AM, he found his wife, PW4 and was well welcomed. At the home of PW4, there was a funeral and that he was to discuss with her about the attendance issue. He met her neighbour, one Rosemary, and they held discussions on how PW4 would proceed to the burial. As it was a Sunday, PW4 departed for her people's home after church and that the children who lived with them to be precise, the complainant and PW2 were not his children but M was his son. He testified that they were the children of PW4's sister. He told the Court that on that day of the alleged incident, he was with his mother and that he never went back to his house as after leaving there he went back to his 1st wife's house. He told the Court that the children sleep at the house of Rosemary as it is big and that they spent the night there on that night of 26th August 2018. According to him, PW4 was simply jealous as he exhibited more care and love for his 1st wife.

On cross examination, he told the Court that PW4 was his wife of 15 years and that the complainant herein is his daughter and that PW2 is his 2nd born. He told the Court that he was at PW4's house on 26th August 2018 to simply give her fare to attend the funeral and that he did not see the complainant. He told the Court that he was not in good terms with PW4.

On re-examination, he told the Court that he did not participate in the filing details of the complainant's birth certificate and that he only learnt that the complainant was at the hospital on 28th August 2018.

16. DW2 was Ms. RN who testified that she lived with the Appellant herein as he is her son. She told the Court that she knew the children of the Appellant with PW4 and that they were four, namely: S, A, B and M. She told the Court that on 26th August 2018 all the children slept at her home and that they used to live with her and that she did not notice any problem with the complainant.

On cross-examination, she told the Court that she never heard that the complainant was taken to the hospital and that she did not witness any incident. PW4 attended a funeral but all the children slept at her house.

17. DW3 was BNT who testified that she is the eldest sister of the Appellant herein and that the Appellant came to visit her then left for the house of the 1st wife. She told the Court that he never went to the home of PW4 that morning of 27th August 2018 as he went to work at the same place he was on 26th August 2018. She told the Court that the on 27th August 2018, the Appellant was riding a bicycle and that the children always slept at DW2's house.

On cross-examination, she told the Court the Court that she saw the complainant sitting outside their house and on inquiring how she was, she told her that she was not okay saying that she was in her monthly period. They took her to the hospital where she was admitted and later discharged. She insisted that the Appellant was only at the house of PW4 on 26th August 2018 to give her fare so that she could attend the funeral at their home. She insisted that the Appellant was in good terms with his children and that PW4 was the issue.

On re-examination, she told the Court that the blood on the complainant was simply her menses and that she never complained about the Appellant to her. She told the Court that she did not go with the complainant to the hospital and that she was not aware that the women who left with her took her to the hospital.

18. DW4 was RWJ who testified that the Appellant is her husband as she is his 1st wife. According to her, on 26th August 2018 the Appellant went to cut trees for charcoal and informed her that PW4 had request for fare as she was heading to a funeral at her home place. After giving PW4 the money, he headed to the house of DW3 where he was given some milk and that he came back home with the same milk at 7.00 PM. She told the Court that that night the Appellant never left the house as they slept at around 8.00 PM. According to her, the Appellant was not feeling well that's why he did not step out. On 27th August 2018, she prepared breakfast for him and he proceeded to a client's home to chop a tree that had fallen. She told the Court that on 26th August 2018, all of PW4's children slept at DW2's house as the house of PW4 was very tiny. She insisted that on 26th August 2018, the Appellant never left their house and that PW4 did not want the Appellant to take care of her children.

On cross-examination, he told the Court that she resides 3Km from the home of the complainant and that she does not know what happened there. She told the Court that on 26th and 27th 2018 she did not follow her husband to work. She told the Court that PW4 was jealous of her and that the Appellant had a good relationship with his children.

On re-examination, he told the Court that if PW4 had a grudge with her she would frame the Appellant so that her children will not continue with their education.

19. The learned trial magistrate upon consideration of the whole evidence, found that the prosecution had proved its case against the Appellant beyond reasonable doubt and convicted him on the main count and then sentenced him to Twenty (20) years' imprisonment.

20. The Appeal was canvassed by way of written submissions. Both parties have filed and exchanged their submissions.

21. I have carefully considered the rival submissions filed in this matter and the cases relied upon by the parties. The only issue for determination is whether the prosecution proved its case beyond reasonable doubt.

22. This being a first appellate Court and as is expected, is obliged to analyse and evaluate afresh all the evidence adduced before the trial Court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. (See Okeno v Republic [1972] EA 32) where the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] E.A 424."

23. Similarly, in Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

24. Section 8 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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if –

a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) 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* and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

25. This being a case of defilement, what was to be proved are the ingredients of the offence of defilement and in the case of George Opondo Olunga v Republic [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

26. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is; whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. (See the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013), where it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

27. The Appellant was put on his defence on 22nd September 2021. The Court record indicates that the Appellant opted to give a sworn statement and that he had three witnesses. It is clear that he knew his options and he exercised them effectively. The purpose of section 211 of the Criminal Procedure Code is to concretize the right to fair trial by ensuring that an accused person understands his rights – including the right to call witnesses and or give an unsworn statement. The purpose of the right is not merely formalistic.

28. In this case, the issue of identification and age of the complainant has not been challenged in this appeal. The complainant's evidence is that of recognition and has not been disputed by the defence witnesses and the production of a birth certificate by PW6 was enough evidence to ascertain the age of the complainant. The Appellant was well known by the complainant and her younger brother as he was their father ("baba"). The incident took place in the night and that the complainant's younger brother (Pw2) was on the same mattress with the complainant who gave evidence that he heard the complainant crying and on reaching out to her, he felt someone lying on top of her. He believed that the person was consoling her until he heard him threaten to stab her. That statement inspired fear in him prompting him to crouch over to his younger brother's side. He told the Court that their one-

acre fund lamp was suddenly lit and he saw the person was his father, the Appellant herein. It was the evidence of the complainant that she recognised the voice of the person who was threatening her as he defiled her and after the ordeal and when the lamp was lit it truly confirmed that it was indeed her father, the Appellant herein. No evidence emerged to the effect that there were any grudges between the Appellant and PW4 prior to the incident and both parties confirmed that the Appellant was in a good relationship with his children. Therefore, the only critical element that must be proved to sustain a conviction for the offence of defilement under these provisions of the law is the act of penetration.

29. There can be a safe recognition even at night and the Court of Appeal stated as much in Douglas Muthanwa Ntoribi v Republic [2014] eKLR while upholding evidence of recognition at night that:

> " The learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error."

30. In Peter Okee Omukaga & Another v Republic [2011] eKLR the Court of Appeal stated on the evidence of recognition at night:

> " We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours' from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

31. On the element of penetration, "Penetration" is a term of art and is defined under section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

32. In John Mutua Munyoki v Republic [2017] eKLR, the Court of Appeal in this regard held that:

> " Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt...The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:
>
> 'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests

were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'

The Court proceeded and stated that:

'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'

As we shall endeavour to demonstrate later in this judgment, much as the trial Court believed the testimony of the Complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the Complainant was actually defiled by the Appellant since there was no credible evidence as to the penetration of the Complainant. It is trite that those doubts should have been resolved in favour of the appellant."

33. The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case, since the complainant was a minor, the evidence of the clinical officer is key so as to corroborate such testimonies. I have critically analysed the evidence of the clinical officer (PW5) who testified herein.

34. It was his testimony that he noticed no hymen and that the complainant's vagina had blood stains and a whitish discharge with lacerations on both her labia minora and majora. The STI's and HIV tests were negative. I have looked at the P3 Form produced as Exhibit 3 and note that the said clinical officer concluded that there was vital evidence to indicate that the complainant was defiled.

35. The sum effect of the above evidence is that it raises no doubt as to whether there was actual or partial penetration. It is clear from the P3 form that the hymen was missing.

36. It is also noteworthy that there was whitish discharge, blood statins and bruises on labia minora and majora as the P3 form indicates that the complainant was examined six hours after the ordeal. The complainant gave a detailed occurrence of the incident including the date, time and venue that in my view is sufficient to prove penetration. There was no reason at all why the complainant could frame her own father. Again, the evidence of the complainant's brother is that he recognized his father at the scene of crime. Therefore, in the circumstances, it is my finding that the second element of the offence which is penetration was proved beyond reasonable doubt.

37. The test to be applied inter alia to the principles in the cited cases elsewhere in this analysis is to be found in the case of Bassita v Uganda *S. C. Criminal Appeal No. 35 of 1995* where the Supreme Court held:

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims' evidence and medical evidence must always be adduced in

every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

"For evidence to be capable of being corroborated it must:

(a). Be relevant and admissible Scafriot [1978] QB 1016.

(b). Be credible DPP v Kilbourne [1973] AC 729

(c). Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99

(d). Implicate the accused"

38. Consequently, it is my finding that penetration as an element for proof of defilement was established beyond reasonable doubt and in the circumstances, it is my finding that the prosecution's evidence in this regard is watertight and proceed to find that the finding on conviction on the main count arrived at by the learned trial magistrate was properly arrived and that the same must be upheld. Suffice to add here that the trial magistrate did adhere to the provisions of section 124 of the *Evidence Act* in view of the evidence of the clinical officer who confirmed the defilement. I am satisfied by the evidence of the prosecution that it was the Appellant who had defiled the complainant and not the "jealousy by PW4" as alleged by the Appellant and his witnesses. It must be noted that even in the absence of corroborating evidence, the evidence of a victim of sexual offence is sufficient under section 124 of the *Evidence Act* as long as the trial court warned itself on the danger of convicting on such evidence as follows:

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

39. Therefore, the evidence of the complainant and PW3, could properly be a basis upon which a conviction could be founded. In *Phillip Nzaka Watu v Republic [2016] eKLR, Criminal Appeal 29 of 2015*, the court observed that: -

> " ...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

40. Consequently, and be that as it may, in this case the complainant is a child of tender years and indeed, before a child of tender years is allowed to testify in court the court is required to satisfy itself that the child understands the duty of speaking the truth and whether he/she is of sufficient intelligence

to allow his/her evidence being taken. This is done by conducting a voire dire examination before the evidence is taken. In the instant case, the trial magistrate indeed undertook the same on the complainant and proceeded to take her unsworn evidence.

41. The Appellant's defence is in the nature of an alibi. The law is settled that an accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises a reasonable doubt as to whether or not the accused was at the scene of the crime (see Kiarie v Republic [1984] KLR 739). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. The Appellant did not give notice of his alibi in order for the prosecution to call evidence in rebuttal. In such a case, the duty of the court is to consider the alibi alongside the prosecution case and in doing so i find the Appellant's defence as mere moonshine or cock and bull story and reject it in light of the clear evidence by the complainant and PW2 putting him at the scene of the incident on the night of 26th August 2018. The appellant's alibi defence did not cast any doubt upon the evidence of the prosecution which was quite overwhelming against him. The defence claim that there was bad blood between him and the mother of the complainant was shattered by the evidence of the prosecution since the Appellant was squarely placed at the scene of crime. The Appellant loved all his children and hence there was no possibility of them framing him for the offence. Besides, it is highly unlikely that the mother of the complainant could use her vulnerable daughter as a victim of defilement so as to get at the Appellant over his conduct in loving his first wife and abandoning his second wife (Pw4).

42. Looking at the totality of the evidence tendered, I have no doubt as to whether the child was telling the truth on what had transpired. She was categorical that she was defiled by the Appellant, a person she knew very well as he is her father and even identified him at the dock. PW2 also was able to recognize him vide the lighting of the one-acre fund lamp and who also identified him at the dock.

43. It transpired from the evidence that the key witnesses were persons who lived with the Appellant who were unlikely to frame him up in any way. This simply leads to the conclusion that the evidence is sufficient to convict the Appellant for the main charge herein, and i therefore find him guilty of the main charge of defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. Hence, the conviction arrived at by the trial court on the main charge of defilement was quite sound. I see no reason to interfere with it.

44. Regarding sentence, it is noted that the Appellant was sentenced to serve twenty (20) years' imprisonment. Under section 8(3) of the *Sexual Offences Act*, a person found guilty of defiling a child aged twelve to fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The complainant herein was found to be aged twelve (12) years old hence the sentence imposed fell within the prescribed age bracket.

45. In Wanjema v Republic [1971] EA 493, the predecessor of this court stated that: -

> " [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

46. It is noted that the trial court duly considered the Appellant's mitigation before sentencing him. The victim of defilement was aged twelve (12) years old at the time of the offence. It is clear from the evidence on record that the Appellant even threatened to stab the child, hence the victim has been psychologically scarred for the better part of her life. Her innocence was stolen by a person who ought

to be her protector, her parent and her confidant. The sentence provided for under section 8(3) of the *Sexual Offences Act* is imprisonment for a term of not less than twenty years.

47. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the *Sexual Offences Act*. It is observed as follows: -

> " We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

48. Prior to the Supreme Court's decision in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the courts construed mandatory sentences literally, just like the trial court herein.

49. However, as the Supreme Court held, the mandatory nature of prescribed sentences for the offence of murder, was unconstitutional because it took away the court's discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.

50. I am alive to the fact that the Supreme Court did issue directions dated 6th July 2021, after its judgment in the "Muruatetu Case", clarifying that that decision was only about murder cases.

51. However, i hold the considered view that if the mandatory nature of the death penalty was declared unconstitutional, similar reasoning can extend to mandatory sentences such as those in section 8 of the *Sexual Offences Act*.

52. In Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General, Odunga J (as he then was) after a comprehensive review of the law, authorities both local and foreign, stated: -

> "
>
> " 88. A study of the offences under the said Act reveals that the Act prescribes minimum mandatory sentences in several sections.
>
> 89. In determining the relevance and constitutionality or otherwise of such sentences, and statutes in general, it is my view that the current constitutional dispensation particularly Article 27 of *the Constitution* ought to be taken into account. Clause 7 of the Transitional and Consequential Provisions thereof provide as follows:
>
> All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.
>
> 90. It is clear that minimum mandatory sentences, prima facie, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence

informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances. I am, however, alive to the provisions of Section 4(1) and (2) of the *Probation of Offenders Act*, Cap 64 Laws of Kenya which provides as follows:

(1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—

(a) convict the offender and make a probation order; or

(b) without proceeding to conviction, make a probation order,and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

(2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the youth, character, antecedents, home surroundings. health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which, the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

91. It is arguable whether in light of the foregoing, sexual offenders qualify to be considered for probation. If they do, then the proponents of minimum mandatory sentences may find it difficult to justify such sentences on the ground that sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences. It is however my view that such reasoning may be taken to mean that there is lack of faith in the judicial system to mete appropriate sentences, a proposition that is dangerous in a system that believes in the rule of law. The fact that a trial court may err in imposition of sentences ought not to be a reason for taking away judicial discretion and handing it over to the legislature. The judicial system provides for an appellate process where parties are dissatisfied with decisions of the lower court. To remove from the Courts, the power to mete appropriate sentences merely because the lower courts or any other court for that matter are not imposing "sensible sentences" in my view amounts to judicial coup. All the tiers of the judiciary cannot be said to be wrong and if they arrive at the same decision then everyone must live with that decision however unpalatable it might appear since according to the law, that is the right decision.

96. In my view the opinion of the Supreme Court concerning mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.

…………….”

53. The Seychelles Court of Appeal in Poonoo v Attorney-General SCA 38 of 2010) [2011] SCCA 30 (09 December 2011); Media neutral citation [2011] SCCA 30addressing mandatory sentences referred to the textbook, Sentencing Law and Practice35 in which the author aptly stated: -

> " It has been said that while legislatures understand offences, courts understand offenders. No statute or guideline system, no matter how finely tuned, can cater in advance for the unique circumstances of every offender who will come before the courts for sentence."

54. The Court in the above-cited case proceeded to state that "sentencing involves a judicial duty to individualize the sentence tuned to the circumstances of the offender as a just sentence. It cannot be likened to the mere administration of a common formula or standard or remedy."

It again quoted from Thomas O'Malley thus: -

"The proper exercise of discretion required attention to established guiding principles. In a sentencing context, the objective must be to achieve a viable mix of consistency and individualization."

55. In the case of the High Court Constitutional & Judicial Review Division Petition No. 97 of 2021 Justice Mativo (as he was then) stated that: -

56. "……For the avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence…."

Justice Mativo (as he was then) issued further orders that:

"a) A declaration be and is hereby issued that sentencing remains a discretionary power, exercisable by the court and involves the deliberation of the appropriate sentence. To the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said

provisions offend the notion of a fair trial contemplated under Article 50(1) of *the Constitution*.

b) A declaration be and is hereby issued that to the extent that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case, then sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act* deprive an accused person the right to mitigate which is a core component of a fair trial contemplated under Article 50(1) of *the Constitution*.

c) A declaration be and is hereby issued that sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated

on its facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.

e) A declaration be and is hereby issued that the infliction of punishment is pre-eminently a matter for the discretion of the trial court, and to the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act* take away the courts discretion, ignoring the fact that the individualization of punishment requires proper consideration of the individual circumstances of each accused person, then the said provisions deprive an accused person the benefit of judicial distention which is prejudicial to the accused.

f) A declaration be and is hereby issued that courts should, as far as possible, have unfettered discretion about sentencing.

g) A declaration be and is hereby issued that sentencing discretion permits balanced and fair sentencing, which is a hallmark of enlightened criminal justice and the absence of this crucial discretion is potentially prejudicial to an accused person.

h) To the extent that the impugned provisions prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an accused person's circumstances and mitigation, such sentences fall foul of the right of a fair trial guaranteed under Article 50 of *the Constitution* because mitigation and sentencing are part and parcel of a fair trial process.

f) A declaration be and is hereby issued that the impugned mandatory minimum sentences are discriminatory in nature because they give differential treatment to a convict under the impugned provisions distinct from the kind of treatment accorded to convicts under other offences which do not impose mandatory sentences, so, mandatory minimum sentences violate an accused right under Article 27 of *the Constitution*.

g) An order that persons convicted and imprisoned under the said offences are at liberty to Petition the High Court for mitigation and re-sentencing.

g) ………………."

57. From the foregoing analysis, i am unable to see any distinction between the mandatory nature of the sentence for the offence of murder, and the mandatory minimum sentence for the offence of defilement. In my view, what renders the sentence unconstitutional is the fact that the prescribed sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require it.

58. Accordingly, i am minded to interfere with the sentence. I now proceed to give due consideration to the mitigation, and the circumstances in which the offence was committed. In his mitigation, he stated that he has children from baby class to college level and that his mother is 92 years old and that she solely depends on him. He told the Court that his 1st wife underwent surgery and cannot involve herself in any strenuous work. He insisted that his entire family depends on him. It was indicated by the prosecution that the Appellant is a first offender. Ordinarily, the maximum sentence is reserved for the worst offenders or repeat offenders. The Appellant deserves custodial rehabilitation and i accordingly find a sentence of Fifteen (15) years imprisonment is appropriate.

59. In the result, the appeal partly succeeds. The appeal against conviction lacks merit and is dismissed. The appeal against sentence succeeds to the extent that the sentence of Twenty (20) years' imprisonment is set aside and substituted with a sentence of Fifteen (15) years' imprisonment which shall commence from the dated of conviction namely 24th December 2021.

It is so ordered.

Dated and delivered at Bungoma this 19th day

Of July 2024

D. Kemei

Judge

In the presence of:

Cleophas Tindivale Appellant

Miss Kibet for Respondent

Kizito Court Assistant