TIPM v Republic (Criminal Appeal E102 of 2021)
[2023] KEHC 592 (KLR) (8 February 2023) (Judgment)

Neutral citation: [2023] KEHC 592 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E102 OF 2021

DK KEMEI, J

FEBRUARY 8, 2023

BETWEEN

TIPM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable G. Adhiambo-PM dated 19th October 2021 in Kimilili Senior Principal Magistrate's SO Criminal Case No. E005 of 2020)

JUDGMENT

1. The Appellant, TIPM, was charged before the Senior Principal Magistrate's Court at Kimilili in Sexual Offences Case No E005 of 2020 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, at unknown date during the month of March, April and May 2016 at [Particulars Withheld] Village in Bungoma North District within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of MNW, a child aged thirteen (13) 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 were that the Appellant, at unknown date during the month of March, April and May 2016 at [Particulars Withheld] Village in Bungoma North District within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of MNW, a child aged thirteen (13) years.

3. The Appellant pleaded not guilty and the matter proceeded to full hearing. In support of its case, the prosecution called Six (6) witnesses.

4. 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."

5. 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."

6. PW1 was MN. She testified that she was 18 years old and a student. She recalled in February 2016, while a student at M Primary School, class five while heading home, one lady named R, whom she met on the way, gave her some roasted maize to take to a person she referred to as "uncle" and further identified the "uncle" as he was close to them. She took that maize to that uncle's house and on reaching there at around 4.00pm, she got inside and the "uncle" locked the door with her inside. He removed her inner pant and proceeded to defile her. She identified the "uncle" as T, the Appellant herein. She told the Court that the Appellant did her, pointing to her genitals. The Appellant had on a cowboy inner wear and he put his fingers, pointing at her vagina. The Appellant removed his cow boy inner wear and lay on her as she was facing up. He defiled her from 4.00 pm to 6.00pm.

7. According to her, after that ordeal, R advised her to go get tested to see if she was pregnant and on visiting Katimba Tongaren, it was confirmed that she was with child and that the Appellant was responsible. She gave birth to a baby girl named EC who at the time of the trial was aged four years. She told the Court that she knew the Appellant as she used to see him many times and his house was not that far from hers. She told the Court that the incident occurred when she was 13 years old.

8. On cross examination, she old the Court that she knew the Appellant as "uncle" and that his home was a bit far from hers. She insisted that Ruth used to sell roasted maize and is a neighbour.

9. PW2 was EN, who testified that she is the mother of the complainant who was born on 1st May 2003 but she did not obtain any birth certificate. In 2016, the complainant was 13 years old when she was raped and infected with HIV. She recalled in May 2016 the complainant started falling ill and on taking her to Tongaren Health Centre, she was examined and found to be pregnant and HIV positive. The pregnancy was them three months and she informed her that RN had called her as she was heading

home from school requesting her to take some roasted maize to the Appellant who was a customer. The Complainant told her that on arriving at the Appellant's house, he took the maize and defiled her. She knew the Appellant very well as he was a neighbour. She enquired from R who informed her that she only sent the complainant to take some roasted maize to the Appellant.

10. She told the Court that she reported the incident to nyumba kumi women and went to the Appellant to find out why he decided to subject her daughter to such malicious act and that the Appellant informed her that she is only a woman who could not do anything to him, in her presence and that on the nyumba kumi women.

11. The complainant gave birth to a baby girl on November 24, 2016 and named the child SEW but they no longer use the word E. She told the Court that the Appellant defiled the complainant and that she had known him for period of one year prior to the incident. He used to operate a power saw machine that cut his toe nails thus the moniker "Vidole Tatu". She told the Court that the complainant was treated at Tongaren Health Centre and she subsequently reported the incident to Kapchonge (i.e. Kiminini police station).

12. On cross examination, she told the Court that she knew the Appellant very well and that he is the one who defiled her daughter.

13. PW3 was RNS, who testified that the complainant herein is a daughter of a neighbour. She recalled in May 2016 while at the Lukhana market roasting maize for sale, the Appellant instructed her to give the complainant two maize cobs to take to him and then she would bring the money back to her. When she saw the complainant on her way home from school, she called her and gave her the maize and instructed her to take it to the Appellant who would give her money to bring it to her. When M did not bring the money, she did not follow up on that day. However, on a date she could not recall, she received a call from PW2 who informed her that she was needed at Kapchonge Police Station. On arrival, she was asked whether she was the one who had given the complainant maize to which she answered in the affirmative. She informed the police that the complainant was to take the maize to the Appellant who was to give her money that she would bring it back to her and that she had no idea as to what happened to the complainant when she took the maize. She was informed that the complainant had been defiled by the Appellant and that the incident occurred on the day she sent her to deliver the maize to him. Further, she learnt that the complainant got pregnant and eventually gave birth to a child.

14. She told the Court that she knew the Appellant for about two years prior to the incident and that he used to operate a power saw machine and who was popularly known by his moniker "Vidole Tatu"

15. On cross examination, she told the Court that she did not witness anything and that she never told PW2 that the complainant had been raped. She confirmed that she was the one who had given the complainant the maize to take to the appellant and did not know what occurred in his house.

16. PW4 was Simon Simiyu Bwabi, who testified that he is a clinical officer working at Bungoma Referral Hospital but at the time of filling the complainant's P3 form, he was working at Tongaren Health Centre. He told the Court that the complainant aged 13 years was presented at the facility with her mother and she gave a history of having been defiled by a person well known to her. She briefed him about the act which had taken place about three times and that the third time was on June 15, 2016 at around 5.00 pm.

17. On examination, he observed that she was complaining of pain on the lower abdomen as she had a distended abdomen. Laboratory tests were conducted and the pregnancy test was positive and on examination of her genitalia he observed that the hymen was absent and there were no visible injuries being noted. He noted that the complainant got pregnant as a result of the incident. He produced

the filled P3 form dated July 11, 2016 and filed on July 13, 2016 as P. exhibit 2 and the complainant's treatment notes dated July 11, 2016 as P. exhibit 1.

18. He told the Court that an age assessment was conducted on the complainant that deduced that at the time of the incident she was 13 years old and the guiding document was her immunization card. He produced the age assessment report dated December 17, 2016 as P. exhibit 3.

19. The post rape care form was also filled. He observed that there were epithelial cells on a high vaginal swab. The post rape care form dated July 11, 2016 was produced as P. exhibit 5.

20. On cross examination, he told the Court that the complainant visited the health centre one month after the ordeal and it was confirmed that she had been defiled. He stated that a pregnancy cannot just exist without a sexual encounter.

21. PW5 was No 85599 Walter Ojwang, who testified that he is based at Kiminini Police Station and was the investigating officer in the matter. He told the Court that a report was made on July 11, 2016 by the complainant in the company of PW2. She reported that on a date not known in May 2016 the complainant was defiled by the Appellant and that she was already confirmed to be two months pregnant. He issued the complainant with a P3 form after recording her statement and that of the witnesses. He referred the complainant to the health centre where the P3 form was filled and after around two days while in the company of PC Mulinde they proceeded to the house of the Appellant where the complainant identified the house of the Appellant but they did not find him. On July 14, 2016, the Appellant was arrested by members of public and nyumba kumi persons and was brought to the police station where the complainant identified him from the crowd as the person who had defiled her. He proceeded to charge the Appellant with the offence of defilement.

22. He told the Court that the child of the complainant was born in February 2018 and as per Court order, the Complainant, the child and Appellant were escorted to the Government Chemist in Kisumu on July 6, 2021, for a DNA test. The exhibit form received by the Government Chemist on 6th July 2021 was produced in Court as P. exhibit 6.

23. On cross-examination, he told the Court that the Appellant was apprehended by members of the public and the complainant was part of the crowd who identified him as the assailant.

24. PW6 was Godwin Khamala Waliama, who testified that he works with the Government Chemist Department in Kisumu laboratory as a senior chemist. He told the Court that he had three documents one of them was the report of the Government Analyst Report No GCK1xxxx with a unique lab reference number Bxx/2021; the second document was an exhibit memo form from Kimilili Police Station with a register No xxx/86/16 with a unique laboratory reference number Bxxx/2021 and the third document was a Court order from Kimilili Law Court No E005 of 2021.

25. He told the Court that after obtaining the requisite DNA samples, he went ahead and conducted a DNA analysis and came up with the findings that the child inherited 50% of her profile from the complainant and the other 50% from the Appellant. He produced the Government Analyst report serial No GCK1xxxx dated July 9, 2021 as P. exhibit 7a; the exhibit memo form bearing No B151/2021 produced as P. exhibit 7b and the order of the Court issued on April 20, 2021 as P. exhibit 7c.

26. On cross-examination, he told the Court that the DNA analysis was conducted based on the Court order and it was directing him to conduct an analysis on the complainant, Appellant and the child, SEW.

27. 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 opted to remain silent and did not call any witnesses.

28. 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 proceeded to sentence him to fifteen (15) years' imprisonment.

29. Being aggrieved by the aforesaid decision, the appellant filed an appeal and set out six grounds of appeal namely; -

    i. That he pleaded not guilty to the offences.

    ii. That the trial magistrate erred in law and fact in convicting the Appellant on contradictory evidence which was inconsistent and uncorroborated by the witnesses.

    iii. That the trial magistrate erred in law and fact by failing to consider the appellant's mitigation.

    iv. That the case against the Appellant was not proved beyond reasonable doubt.

    v. That the trial magistrate acted with bias and favoured the prosecution side.

    vi. That the trial magistrate erred in law and fact by rejecting alibi defence adduced by the Appellant during defence.

30. The Appellant prayed that the appeal be allowed and the sentence of the lower Court be set aside and substituted with a more lenient one as this Honourable Court may deem fit.

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

32. The Appellant submitted that no birth certificate was produced in Court to prove the exact date when the complainant was born yet age is an essential ingredient when proving the offence of defilement. He further submitted that the evidence adduced by the Respondent was contradictory, inconsistent and had discrepancies and glaring gaps. He urged this Court to allow this appeal and that the sentence be set aside.

33. In response, the Respondent submitted that it proved its case beyond reasonable doubt by establishing that all the ingredients under the offence of defilement were proved. He urged this Court to dismiss the appeal on conviction and allow the same on sentence and substitute that same with the lawful sentence of at least 20 years imprisonment as prescribed under section 8(3) of the *Sexual Offences Act*.

34. 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.

35. 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.

36. 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.

37. 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."

38. The Appellant was put on his defence on September 15, 2021. The court record indicates that the appellant opted to remain silent and that he had no 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. If one takes this functional view of the section, it seems plain that even if it were true that the section was not explained to the Appellant, he suffered no prejudice at all because he was clearly aware of his options and he exercised them. There was no alibi defence availed as alleged in his grounds of appeal for the trial Court to reject the same as none was raised by the appellant throughout the proceedings. In any case, if there was such an alibi as alleged, the appellant opted not to tender evidence in defence. The alibi could only have been presented through his evidence and nowhere else.

39. On the issue of identification of the Appellant, the complainant's evidence is that of recognition. The complainant, PW2 and PW3 referred to him as a neighbour and that they knew him by his moniker, 'Vidole Tatu". They used to relate well before the incident. The incident took place in broad day light. The identification of the appellant was not in doubt.

40. In this appeal, one of the Appellant's major complaints is that the age of the complainant was not proved to the required standard and that no birth certificate was availed. There is no doubt that in an offence such as this one faced by the Appellant, indeed in most of the offences under the Act where

the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt. That has been the consistent holding of this Court and we are content to adopt what the Court sitting at Mombasa stated in *Hadson Ali Mwachongo v Republic* [2016] eKLR;

> " The importance of proving the age of a 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 victim. In Alfayo Gombe Okello v Republic Cr. App. No 203 of 2009 (Kisumu). This Court stated as follows;
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> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the 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. That must be so because dire consequences flow from proof of the offence under section 8(1).?"

41. In the case of *Hilary Nyongesa v Republic* Eldoret Criminal Appeal, No 123 of 2009 the Court stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

42. In the case of *Kaingu Elias Kasomo -V- R Malindi* Cr. App. No 504 of 2010 the Court of Appeal stated that: -

> " the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence..... Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the *Sexual Offences Act*, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial Court heard the minor's evidence and saw her. The Court was convinced that she spoke the truth."

43. In *Musyoki Mwakavi v Republic* Machakos High Court Criminal Appeal No 172 of 2012, the Court was of the view that: -

> " ...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...".

44. From the Court's record, it is clear that the immunization card of the complainant and the doctor's observation of her dental formula played a vital role in determining the complainant's age, the same age given by the minor and her mother. This confirmed that the ordeal did occur when she was 13 years old.

45. I subscribe to this school of thought. This is informed by the fact that in some rural areas and informal settlements in urban areas the importance of birth certificates has not been appreciated and insistence on the same may result in untold injustice. The age assessment form produced by PW4 and the subsequent evidence of PW1 and PW2 did provide enough proof on the current age of the complainant and the exact age at the time of the ordeal

46. Therefore, the only critical element remaining that must be proved to sustain a conviction for the offence of defilement under these provisions of the law is the act of penetration.

47. 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".

48. 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:
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> '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.'
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> The Court proceeded and stated that:
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> '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.'
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> 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."

49. 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. I have considered that under the proviso to section 124 of the *Evidence Act*, evidence of a single sexual offence victim does not require corroboration and a court can convict on such

evidence upon recording reasons for believing such evidence. The trial Court recorded the reasons why it believed the evidence of the complainant. I also take note that the Courts are not trammelled by requirements of corroboration where the victim of a sexual offence is a child. This was reaffirmed in the case of *J.W.A. v Republic* [2014] eKLR, the Court of Appeal observed: -

> "We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory....."

50. In this appeal, the Clinical Officer's evidence on the findings of torn hymen clearly corroborates the complainant's evidence coupled with the fact that she told PW2 what the Appellant had done to her.

51. I am satisfied that evidence of pregnancy of the complainant is sufficient proof beyond reasonable doubt that penetration, whether partial or complete, took place. I am also satisfied that the Appellant is the person who made the complainant pregnant, subject to the DNA analysis evidence adduced by PW6, therefore proving beyond reasonable doubt that defilement took place.

52. It is trite that the benefit of doubt should always go to the accused person. Therefore, in the circumstances it is my finding that the second element of the offence which is penetration was proved beyond reasonable doubt.

53. As regards the contradictions in the prosecution's case, I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555(CA), where the court (Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA) stated as follows: -

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

54. Whereas, I appreciate that there were minor discrepancies in the evidence of the witnesses, it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling.

55. I have subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision. In any event, the contradictions between the evidence of PW1 and PW3 in terms of dates when she was allegedly sent to the Appellant's house were minor and did not prejudice the Appellant as the evidence tendered by PW4 was consistent with hers. Having considered the evidence adduced, I find no reason to interfere with the conviction.

56. On mitigation, it is evident from the lower court records that mitigation was recorded and factored in the appellant's sentencing. The allegations of an unfair trial are thus unfounded and disregarded.

57. The Appellant herein was charged under section 8(1) as read with section 8(3) of the *Sexual Offences Act* which stipulates that 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. However, the trial Court imposed a prison term of fifteen (15) years.

58. The Respondent submitted that the sentence herein was illegal as it did not adhere to section 8(3) of the *Sexual Offences Act* which prescribes a minimum sentence of twenty years. According to the Respondent, the correct sentence is 20 years.

59. Minimum sentences are currently under intense legal debate on the constitutional front. Some postulate that minimum sentences deprive the Courts of discretion to impose relevant and appropriate sentences, thus, inconsistent with the Constitution. Other quarters argue that minimum sentences are merely indicative of the seriousness of the offence and should be imposed. Quite some work needs to be done here; judicial as well as legislative in order to bring provisions of existing law such as *Sexual Offences Act* to conform to the Constitution.

60. I have duly researched how different jurisdictions, including Australia, England, certain states in the USA, and South Africa, have handled the question of mandatory minimum sentences for violent and sexual offenses. From my research, it is apparent that there are no universal rules for dealing with minimum sentences, but it is possible to create a legislative scheme that includes prescriptive minimum sentences without mandating them. This approach preserves the discretion of judicial officers to impose sentences above and below the standard sentence by taking into account a list of aggravating and mitigating factors that are already considered by Courts. Some jurisdictions also provide for prescriptive minimum sentences but allow the Courts to depart and impose an appropriate sentence, with reasons duly recorded by the Courts. The idea behind this approach is that the legislative scheme does not limit the discretion of the sentencing Courts, but it emphasizes the material factors that may justify imposing the minimum sentence. For example, in sexual offenses, the age of the victim, physical injury resulting from the penetration, other permanent effects such as pregnancy, psychological and emotional injury, post-traumatic manifestations, general effects on the person's integrity, and life can be considered.

61. In the case of *R v Way* ((2004) 60 NSWLR 168 at 183, that: -

> " ...the legislative policy ... was not to create a strait jacket for judges ... [and] the amendments were not introduced as a form of mandatory sentencing, but rather were intended to provide further guidance and structure to judicial discretion".

62. The relevant penalty clause is section 8(3) of the *Sexual Offences Act* which provides as follows: -

> (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.

63. I have perused the record of the trial Court. It reveals that the Appellant was convicted for the offence of defiling a child aged 13 years and was sentenced to serve 15 years' imprisonment. As submitted by the Respondent, the punishment prescribed for the offence of defilement where the victim is aged between 12 and 15 years old is a term of not less than 20 years' imprisonment. It is certain that the learned magistrate did apply her discretion but however, discretion in sentencing, like any other discretion, must be exercised upon defined principles; not whimsically or capriciously.

64. The question is therefore whether the trial Court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R., and Wilson Waitegei V Republic* [2021] eKLR)

65. The evidence and the record in this case discloses facts upon which the following are deducible: -

> i. That the victim was aged 13 years at the time of the offence;

ii. That from the testimony of the minor, she was defiled by the Appellant at his house.

iii. That the Appellant had orchestrated the eventual visit of the complainant to his house in the guise of maize delivery. This is where he would engage and defile her.

iv. The complainant became pregnant which as a result affected her ambitions and further studies and career

v. The complainant was also diagnosed to be HIV positive and as per the evidence of PW2, her mother, she is now mentally disturbed and can even go mute for a whole day.

66. The trial magistrate did take into account these elements or factors in passing sentence. Notably, physical as well as psychological effects of the offence on the complainant are long lasting- something a Court should never lose sight of. As the trial court had considered all these factors, I see no reason to interfere with the sentence imposed. In any event, the Court of Appeal in various decisions of this nature has interfered with minimum sentences in sexual offences cases. This Court finds no reason to interfere with the discretion of the trial Court.

67. From the forgoing, the appellant's appeal lacks merit. It is dismissed. The conviction and sentence rendered by the trial Court on the main charge of defilement is upheld.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 8TH DAY OF FEBRUARY, 2023.

D. Kemei

Judge

In the presence of:

TIPM Appellant

Mukangu for Respondent

Kizito Court Assistant