Oluoch v Republic (Criminal Appeal E049 of 2021)
[2023] KEHC 3966 (KLR) (3 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E049 OF 2021

RE ABURILI, J

MAY 3, 2023

BETWEEN

NEWTON OTIENO OLUOCH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction & sentence by the Hon. C.N. Oruo on the 28.10.2021 in the Senior Principal Magistrate's Court in Maseno in Sexual Offence Case No. 06 of 2019)

JUDGMENT

Introduction

1. The appellant herein NOO was charged 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 of the charge were that on diverse dates between February 2017 and January 19, 2019 in Seme sub-county within Kisumu County, willing fully and unlawfully caused his penis to penetrate the vagina of AAA, a juvenile aged 15 years old. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The date, time, place and complainant is the same.

2. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called four (4) witnesses. At the close of the prosecution's case, the accused was placed on his defence and he gave a sworn testimony denying the charges Against him.

3. In his judgement, t he trial magistrate found that the appellant's defence amounted to a mere denial and that the prosecution had proved its case against the appellant beyond reasonable doubt. The trial magistrate convicted the appellant and subsequently sentenced him to serve 20 years' imprisonment.

4. Aggrieved by the trial court's Judgment, conviction and sentence imposed on him, the appellant filed his petition of appeal on the November 10, 2021. The appellant's petition of appeal raises the following grounds of appeal:

    i. That the learned trial magistrate erred in law and facts by failing to appreciate that the prosecution case was not proved beyond reasonable doubt.

    ii. That the prosecution witnesses' evidence was marred with contradiction, glaring gaps and inconsistencies.

    iii. That I was not accorded fair trial hence infringement of my right and fundamental freedoms enshrined in article 50(2) of the *Constitution*.

    iv. That PW1's evidence was incredible.

    v. That my arrest was improper and an afterthought.

    vi. That the learned trial magistrate failed to realize that visual identification brings miscarriage of justice.

    vii. That I was not supplied with witnesses' statements and list of exhibits that the prosecution was to rely upon before the onset of the case.

    viii. That may the Hon. Court be pleased to supply me with the proceedings to prepare well for the hearing of the appeal hereof.

    ix. Those more firm grounds will be adduced during the hearing of the present appeal.

5. The appellant subsequently filed an amended grounds of appeal on the January 13, 2022 in which he raised the following grounds:

    i. That the OB number is missing at the top of the charge sheet. Not case no. at the top of the charge sheet.

    ii. That the charge is indicated as 8 (1)(3) in the charge sheet. The sentence is not specified. The charge as indicated in the charge sheet as 8(1) (3) does not exist.

    iii. That the juvenile is not indicated whether male or female in the main court in the charge sheet. Juvenile is a general term for both sexes.

    iv. That PW1 failed to reveal the identity of the perpetrator hence the real identity of the perpetrator not proved.

    v. That the actual age of the complainant was not proved through age assessment as birth certificate authenticity can be doubtful.

    vi. That PW2, the complainant exonerated the appellant herein by saying that she was impregnated by a villager called Collins not the appellant.

    vii. That the medical evidence showed no penetration hence no defilement took place.

    viii. That the appellant's right to fair as enshrined in article 50 (2) of the *Constitution* was violated as the appellant was never supplied with all documents the prosecution relied upon on their case.

    ix. That the medical evidence did not support the complainant's contentions.

x. That the DNA test was conducted without the presence of any person from the appellant's family. This is prejudice to the appellant.

xi. That PW2 was uncredible witness, untrustworthy and whose testimony is full of contradictions.

xii. That the new born was not the complainant in this matter, DNA test therefore done to the new born cannot be proof for defilement. The new born was not allegedly defiled.

xiii. That PW2 the complainant was not defiled.

xiv. That the learned trial magistrate erred in law and fact by convicting the appellant on a case not proved beyond reasonable doubt.

xv. That the learned trial magistrate failed to realize that the testimony of PW2 ought not to have been used to secure my conviction.

xvi. That the details in the P3 form, PRC form, treatment notes form, DNA do not corroborate at all.

xvii. That the 3 ingredients for offence of defilement were not proved at all.

xviii. That PW4, the clinical officer concluded in the P3 form that no defilement took place.

xix. That the paternity test is not one of the 3 ingredients of defilement and therefore cannot be used to prove the same.

xx. That DNA test is not proof for defilement.

xxi. That the author of the P3 form did not testify in court.

xxii. That the officer who prepared the exhibit memo did not testify in court and did not produce the exhibits himself, in court.

xxiii. That my defence was coherent and truthful enough to warrant my acquittal.

6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that the charge as indicated in the charge sheet as 8 (1) (3) did not exist as it did not support the sentence and therefore it was unlawful for the trial magistrate to convict and sentence the appellant based on the defective charge sheet.

8. It was submitted that the appellant's right to fair trial was violated and infringed as he was innocently arrested, threatened and even tortured by the arresting officers.

9. The appellant submitted that the testimony of PW2 exonerated him as the person who defiled her and blamed one Collins who was never arrested. The appellant further submitted that the DNA test result also exonerated him as it was 99.9% and not 100%. He further submitted that the DNA ought to have been conducted in the presence of the appellant's parents, relatives and a neutral person.

10. The appellant submitted that the P3 form showed no evidence of defilement or pregnancy and that further that charge sheet was not amended.

11. It was submitted that the DNA report signed by Mr Kweyu was contrary to section 36 (5) of the SOA No. 3 of 2006 as the same can only be done by a medical practitioner or designated person if

so requested in writing by a police officer above the rank of constable and thus the DNA test by PC Nzioka Miller was unlawful. The appellant relied on the case of *Ndungu Kimani v R [1979] KLR 283* where the court stated interalia that the witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person.

12. The appellant submitted that the prosecution failed to call a vital witness, Collins, to testify in court and that benefit must go to the appellant as his testimony could have led to the appellant's acquittal. Reliance was placed on the case of *Bukenya & Others v Republic [1972] EA 549.*

The Respondent's Submissions

13. The respondent submitted that the age of the complainant was proved as 15 years as at the time she was defiled and further corroborated by the Birth Certificate produced as well as the evidence of PW1, the complainant's mother.

14. The respondent submitted that penetration was proved by medical evidence and that even though during the trial the complainant was unwilling to testify against the appellant, the resultant pregnancy and subsequent baby whose DNA was found to be 99.99% similar to the appellant showed that the appellant was responsible for the complainant's pregnancy yet the complainant had no capacity to consent to sexual activity.

15. On the identity of the appellant, it was submitted that the appellant and complainant were known to each other even though PW2 tried to protect the appellant as the man responsible for her pregnancy.

16. It was submitted that the charge sheet was not defective in any way for missing the words "as read with" as the sections quoted were proper.

17. The respondent submitted that the DNA result showed that the appellant was the biological father of the baby bore by the complainant. It was further submitted that the report was produced by the Investigating Officer and the appellant had no objection to its production, which DNA report showed that the appellant and complainant were the parents of the baby.

18. Regarding the sentence meted out on the appellant, it was submitted that the sentence was safe and justified and that the appellant should not be given a chance to deflower another young girl.

Role of this first appellate Court

19. I have carefully considered the Appellant's appeal and the submissions, and the proceedings and trial court's Judgment. This being a first appellate court, I have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis, bearing in mind that I had no opportunity to see and hear the witnesses as they testified and so I cannot comment on their demeanour. I have to give due allowance to that. I am guided by the Court of Appeal case of *Okeno v R [1972] EA 32* where the Court set out the duties of a first appellate court as:

> ' 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 Vs 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 Vs 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) EA 434)'

Evidence before the Trial Court

20. The prosecution's case was that sometime in August 2017, PW1 BAO, returned from the market and found her daughter AAO unwell. She testified that she wanted to take her daughter to hospital but when she went to her daughter's school to get her permission, the administration informed her that the minor was pregnant. She testified that while in hospital, the minor refused to reveal the father of the child and that the minor delivered the child in December 2017 and returned to school in January 2019.

21. PW1 told that court that the following weekend, she had gone to the market as usual and her son in-law informed her that the minor had been seen being ridden on a motorcycle with an unknown short boy and that when the minor returned at 6pm and was asked on where she had been, she declined to divulge so PW1 reported the matter to the area Assistant Chief who went to look for the boy. It was her testimony that the appellant was traced and that he told the Assistant Chief that he was the one who took the minor to the clinic. She further testified that the minor was born on May 11, 2003.

22. In cross-examination, PW1 stated that the minor got pregnant in 2017 and that she did not know who was responsible for the pregnancy but that the minor mentioned the appellant when she was asked by the Chief.

23. PW2, AAA testified that she was 17 years old and that when the offence took place, she was 15 years old. It was her testimony that in January 2018 she was unwell so she went to the hospital where two men went and took her to the Chief at Kombewa where she found the appellant being beaten.

24. It was her testimony that the Chief instructed others to beat her on the ground that she had gone to carry out an abortion and that they were subsequently taken to Kombewa Police Station where she recorded her statement. The minor testified that she was forced to say that the appellant was her boyfriend. That by then she was not pregnant. She stated that the father of her baby was a villager called Collins who had since run away.

25. The court stood down the witness on application from the prosecution on the ground that she was testifying contrary to her statement to the Police.

26. PW3 the Investigating Officer testified that on the January 19, 2019, the appellant was taken to the police station at Kombewa by the area Assistant Chief together with PW2 minor where a defilement complaint was lodged and subsequently both the minor and complainant were taken to hospital for examination.

27. It was her testimony that from the information received, a year after the minor had gotten pregnant and given birth to a child, the minor called the appellant and informed him that she had fallen sick and the appellant took her to the clinic at Wangarot where they were both arrested.

28. She testified that the appellant, the minor and the child were taken to the government chemist in Kisumu where a DNA test was carried out to establish the paternity of the child and the findings showed that there were 99.99% chances that the appellant was the child's father. It was her testimony that she never arrested anyone called Collins. In cross-examination, PW3 stated that the appellant was arrested by the Assistant Chief.

29. PW4 Samuel Otieno Ongwen, a clinical officer testified and produced the P3 form filled by Fredrick Ogolla with whom he had worked for 6 years. It was PW4's testimony that both the minor and the

appellant were examined on the January 20, 2019 and it was found that there was no evidence of defilement and a recommendation was made for DNA analysis to determine the paternity of the child.

30. In his defence, the appellant gave an unsworn testimony denying the charges and stating that he was arrested in the house while sleeping by people sent by the Chief. He testified that he was not responsible for the minor's pregnancy.

Analysis and Determination

31. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the applicable law and the written submissions. The issues for determination are:

    a. Whether the charge sheet brought against the appellant was defective

    b. Whether the appellant's constitutional rights were infringed

    c. Whether the prosecution's case was proven beyond reasonable doubt and

    d. Whether the sentence imposed on the appellant was excessive and harsh.

On whether the charge sheet brought against the appellant was defective.

32. The appellant pleaded and submitted that he was convicted over a defective charge sheet. which charge sheet indicated defilement contrary to section 8 (1) (3) which section did not exist as it did not support the sentence and therefore it was unlawful for the trial magistrate to convict and sentence the appellant based on the defective charge sheet.

33. In response, the respondent submitted that the charge sheet was not defective for missing the phrase 'as read with' between (1) and (3).

34. I have perused the charge sheet and note that it states as follows:

> 'Charge: Defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No 3 OF 2006'

35. The complaint by the appellant is that the charge is defective because it does not say 'section 8(1) as read with section 8(3) of the *Sexual Offences Act*. In the case of *Isaac Omambia v Republic, [1995] eKLR* the court considered the ingredients necessary in a charge sheet and stated as follows:

> ' In this regard, it is pertinent to draw attention to the following provisions of S 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.'

36. The Court of Appeal in *Peter Ngure Mwangi v Republic [2014] eKLR*, quoted the Isaac Omambia case with approval and further stated that:

> ' A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in Yongo v R, [198] eKLR that:
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> 'In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

(i) When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) When for such reason it does not accord with the evidence given at the trial.'

37. The Court of Appeal in the Peter Ngure case was further guided by the case of *Peter Sabem Leitu v R, Cr App No 482 of 2007 (UR*) where the Court held thus:

> ' The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.'

38. The trial court record reveals that the charge sheet was read out to the appellant in open court and he pleaded not guilty. He also cross examined the prosecution witnesses and tendered his defence maintaining his innocence.

39. 27. This court has had the occasion to peruse the Charge Sheet and notes that indeed it reads that the accused was charged with defilement contrary to Section 8(1)(2); the appellant contends that the Charge Sheet is defective as there is an omission of the words 'as read with';

40. 28. This court notes that the particulars on the Charge Sheet were set out in clear and unambiguous terms; the record also shows that the appellant followed the entire proceedings and appreciated the evidence tendered against him; and that he was given an opportunity to cross-examine all the prosecution witnesses; and was also invited to defend himself;

41. This court is satisfied that the particulars on the Charge Sheet clearly stated the offence and that the omission of the word 'as read with' did not occasion any miscarriage of justice nor occasion any prejudice to the appellant. The appellant was aware of the charge against him and the essential elements of the offence had been disclosed to him. that defect in my view was curable under the provisions of Section 382 of the *Criminal Procedure Code* which provides that:

> ' Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.'

44. Thus, I find that the defect in the charge was clearly an error that did not prejudice the appellant and did not occasion any miscarriage of justice or violate the appellant's rights. In any case, the appellant

appeared very well aware of the charges brought up against him as was evident from the defence that he tendered.

45. Furthermore, the appellant did not raise any issue with the trial court on the alleged defect in the charge sheet. The Court of Appeal dealt with this issue at length in the case of *Dickson Mboloi Mbithi v Republic [2020] eKLR* and stated as follows:

> ' That leads us to the last ground of appeal, namely whether the charge sheet was defective for failure to refer to the punishment section. In upholding the validity of the charge sheet, the first appellate court reasoned thus:
>
> 'The appellant was charged under section 3(1) of the *Sexual Offences Act*. Although the charge sheet does not state 'as read with section 3(3) of the *Sexual Offences Act*, this is not an error that did not prejudice the appellant. The error is cur-able under section 382 of the Criminal Procedure Code. The sentence is within the law.'
>
> As has been stated time and again, the focus of section 382 of the Criminal Procedure Code is not formal compliance with the rules of framing charges, but on whether any error, omission or irregularity in the manner in which the charge is framed has occasioned failure of justice. The provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless such error, omission or irregularity has occasioned a miscarriage of justice. The appellant is also obliged to raise his complaint at the earliest op-portunity. See *George Njuguna Wamae v Republic, Cr App No 417 of 2009* and *Daniel Lutta v Republic, Cr App. No 141 of 2014*.
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> In *Amondi Omunga v Republic, Cr App No 178 of 2012*, this Court addressed a similar complaint like that raised by the appellant, where the charge sheet cited only the punishment section without reference to the provision creating the offence. The Court held that the defect was curable under section 382 of the Criminal Procedure Code. Similarly, in John Irungu v Republic, Cr App No 20 of 2016, in rejecting an argument like that advanced by the appellant, the Court stated:
>
> As section 137(a)(iv) of the Criminal Procedure Code makes abundantly clear, the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules.'
>
> Ultimately we agree with the first appellate court that the failure to refer to section 8(3) of the *Sexual Offences Act* did not occasion the appellant any miscarriage of justice in view of the clear statement of the offence and the particulars that were provided.'

46. Accordingly, I reiterate that the failure of the charge sheet to state 'as read with' in between section 8 (1) and (3) was an omission that did not occasion a failure of justice upon the appellant as he was aware of the charge against him and was able to carry out his defense before the trial court.

Whether the appellant's constitutional rights were infringed

47. The appellant pleaded and submitted that his fundamental rights were threatened and denied as he was never supplied with all documents the prosecution relied upon on their case. On this ground, I wish to associate myself with the court's observation in *Joseph Ndungu Kagiri v Republic [2016]e KLR* that:

> ' The law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights

(ICCPR).[13]The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.

Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling The *Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

As pointed out above, the right to a fair trial is not one of those rights that can be limited under Article 24 of the *Constitution*. This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in *R v Stinchcombe*[18] where the Supreme Court of Canada observed, 'The obligation to disclose was a continuing one and was to be updated when additional information was received.'

48. While I agree with the above observations, it must be noted that rights go hand in hand with duties and responsibilities. Nowhere in the court record is it revealed that the appellant asked to be supplied with specific documents and was denied.

49. I have perused the trial court record which shows that at the onset of the trial, on the January 25, 2019 the trial magistrate directed the prosecution to furnish the accused with witness statements. Subsequently, when the hearing began on the August 29, 2019, the appellant was herein silent on whether he had been furnished with documents or not. It is unclear why the appellant did not raise any issue at the earliest instance, if at all he did not have the documents which the trial court had directed that he be furnished with.

50. Furthermore, the appellant was released on bond pending trial, which bond was granted to him automatically on the plea day on a first appearance in court.

51. In the circumstances, I find that the appellant's rights were not in any way violated. That ground too fails.

Whether the prosecution proved its case beyond reasonable doubt

52. The appellant was charged 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 ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic [2016] eKLR*, where 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. The prosecution was under a duty to establish or prove all the above elements of

defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses.

53. Regarding the minor's age, the minor testified that she was 15 years old when the offence took place. PW1, the minor's mother testified that the minor was born on the May 11, 2003 and further produced a birth certificate as PExhibit 1 corroborating the same.

54. In the circumstances I find that the Birth certificate was proof beyond reasonable doubt of the complainant's birth date and thus her age. I find that the prosecution proved this element beyond reasonable doubt.

55. As regards the identity of the appellant, the minor turned hostile in court and recanted knowing the appellant. PW3, PC Limo identified the appellant as the suspect who accompanied the minor and the new born child to the Government Chemist for extraction of samples for DNA analysis to establish paternity of the unborn child.

56. Connected with the aforementioned is the issue of penetration. The evidence of PW4, the clinical officer was that the medical examination on the minor and the appellant was conducted on the January 20, 2019 and that there was no evidence of defilement though there was a recommendation for DNA analysis to determine the paternity of the child born by PW2, the minor.

57. In the case of *EE v Republic [2015] eKLR*, it was stated that:

> ' An important ingredient of the offence of defilement is that there must have been penetration. Penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement'.

58. With respect to proof, the Supreme Court of Uganda held in the case of *Bassita vs Uganda SC Criminal Appeal Number 35 of 1995*, that: -

> ' 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 a hard and fast rule that the victim's 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 it is sufficient to prove the case beyond reasonable doubt'.

59. In this case, it was clear that the medical examination was carried almost 2 years after the alleged offence occurred. It is clear that any evidence remaining on the genitalia of the minor or appellant must have been washed away. In any case, the only evidence that was present was that of the child who had been born to the minor in December 2017 thus necessitating the recommendation by the medical officer who examined the minor and the appellant for a DNA analysis.

60. I do note that it is not mandatory that DNA test be conducted whenever there is absence of spermatozoa. Defilement is committed whether the penetration is partial or full. From the definition of defilement under section 2 of the *Sexual Offences Act*, one

need not release his sperms for defilement to be proved this is so because the defilers may use condoms or may not even eject their sperms.

61. On the claims that the P3 form was produced by a person who was not its maker, the trial court record shows that the evidence of PW4 was clear that he had worked with the clinician Fredrick Ogolla who filled the P3 form. In addition, there was indeed nothing significant about the P3 form as defilement could not be established over one year after the event. It is only the DNA which linked the appellant to the offence. Furthermore, the appellant stated that he had no objection to PW4 producing the P3 form which I have stated did not in any way implicate the appellant. Therefore, the lamentation is found to be devoid of merit and is hereby dismissed.

62. On contradictions which were apparent, in this case, the minor turned hostile and recanted her statement. There were indeed competing testimonies of the prosecution and the appellant on the defilement in that whereas the minor had claimed that the child she bore was of one Collins a villager who had since disappeared; and the medical examination carried out on the minor and appellant to ascertain whether defilement had occurred or not happened almost 2 years after the offence had allegedly been committed and thus the only link between the offence and the parties herein was the child that was born sometime after the offence occurred. However, that discrepancy or contradiction was reconciled with the DNA test results which showed that the appellant was 99.9% the father to the child of the minor. In addition, there was no evidence that Collins ever existed and that the prosecution refused to call him as witness or to obtain DNA results on him.

63. The Appellant nonetheless faulted the decision requiring him to undergo a Deoxyribonucleic Acid (DNA) test to ascertain the paternity of the baby conceived as a result of the act of defilement on the minor. He also claimed that the results were not 100% fool proof hence he was not proved to be the child's father. He further claimed that the Government Analyst who carried out the DNA test was not a doctor and that the officer who escorted the appellant for DNA testing was not an Inspector.

64. Section 36 of Sexual Offence Act No 3 of 2006 provides in relation to the 'Evidence of medical forensic and scientific nature as follows:

> ' (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence. (2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial. (3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed. (4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister. (5) Where a court has given directions

under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned. (6) An appropriate sample or samples taken in terms of subsection (5) — (a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and (b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice. (7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against— (a) the State; (b) any Minister; or (c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent. (8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.'

65. The appellant was escorted for DNA testing to the Government Chemist. A government Analyst is a professional and in my view, a designated person for purposes of DNA testing. he needed not be a medical doctor. In addition, as all that the Government Analyst needed was the presence of the relevant persons of interest in this case being the appellant, the complainant who had at one time gone missing during the hearing of the case and the child born out of the defilement, I find that the of taking of samples for DNA testing at the Government Chemist did not prejudice the accused person who, at the hearing did not raise any issue with the process and I find no prejudice to have been occasioned by him being escorted to the Government Chemist by junior police officer.

66. In the case of *Boniface Kyalo Mwololo v Republic (2016) eKLR* the accused therein was charged with defiling a girl aged 11 years. He denied committing the offence and the trial dragged for some time and in the course of the trial, the victim gave birth as a result of the alleged defilement and the prosecution, like in the present case, made an application seeking an order that the applicant be subjected to Deoxyribonucleic Acid (DNA) test to be carried out to ascertain if he was the biological father of the victim's baby. The application was disallowed by the trial court but on review, the High Court allowed the application holding that when an accused person in a sexual offence is required to provide Deoxyribonucleic Acid (DNA) sample, it is not a breach of his Constitutional right. The Court of Appeal upheld the High Court's decision.

67. Having found that the appellant was the biological father of the child borne by the minor, it is my opinion that the trial court did not err when it held that it was the appellant who defiled the minor resulting into the pregnancy.

68. On the allegation that the appellant was not found to be 100% the child's father, or that the Government Analyst was not qualified doctor to carry out the DNA test. I find that the complaint is baseless for reasons that there is no contrary scientific evidence that one must be found 100% to be the biological father for culpability to arise. In addition, DNA testing is a technical specialized field and there was no evidence that the Government Analyst needed to be a medical doctor to qualify for the job. The appellant never asked for any other person whom he considered more qualified to carry out the test or a different test to be applied to get 100% proof or elimination of him as the biological father of the child and was denied the opportunity. In addition, there is no legal requirement that an Inspector of Police is the only person qualified to escort suspects for DNA sampling to the Government Chemist.

69. I have searched on this subject of DNA testing and the results found in science based journals show that there can never be 100% probability of paternity for the reason that:

> ' Why is probability of paternity never 100%?
>
> High probabilities of 99% and above are commonly seen in DNA paternity testing, but never 100%. This is because results are based on statistical calculations. A result of 100% would only be possible if AlphaBiolabs tested every male of the same ethnicity as the biological father. This is why the DNA profiling test report uses the wording 'provides (extremely/moderately) strong support in favour of paternity'. A probability over 99% means there is relatively no chance any other man, other than the tested man, is the father of the child (unless the biological father is a close relative of the alleged father; such information should be divulged when ordering your paternity test).' see AlphaBiolabs accessed at https://www.alphabiolabs.co.uk/learning-centre/paternity-test-percentages-explained/

70. I find no evidence that the DNA results were in any way compromised to the prejudice of the appellant herein hence the appellant's complaints are far-fetched.

71. For the above reasons and taking all the evidence adduced before the trial court in totality, I find and hold that all the ingredients of defilement being of identity of the offender, penetration and age of the minor were proved beyond reasonable doubt.

72. The appellant also raised the issue that the prosecution failed to call crucial witnesses to prove their case specifically. He claimed that Collins should have been called as a witness and that failure to call him was prejudicial to the prosecution's case since the minor had mentioned him as the man responsible for her pregnancy. With the DNA result, I find no merit in the claim by the appellant that Collins was a crucial witness as there was even no evidence that this Collins existed since the minor appeared to have sworn to protect the appellant from the onset by naming someone else after refusing to disclose this same person as the one responsible for her pregnancy and only mentioned him when the appellant was charged.

73. This Court is however alive to the principle espoused in the case of *Bukenya v R (UGC 1952*), where the court stated that:

> ' (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.'

74. However, there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides that:

> ' 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.'
>
> (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.'

75. In the case of *Donald Majiwa Achilwa and 2 other v R (2009) eKLR* the Court stated that:

> ' The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.'

76. In the case of *Keter v Republic [2007] 1 EA 135* the court held inter alia that:

> ' The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.'

77. In the instant case, it was clear that although the minor PW2 tried to exonerate the appellant by saying that it was Collins who impregnanted her and that Collins had escaped, the investigating Officer testified and denied ever arresting a person by the name of Collins. For the above reasons, I find that the prosecution was not obliged to call Collins as a witness in the case yet he was not a person of interest and neither did anybody other than the minor, know who this villager called Collins was as far as the case was concerned. In my view, the minor, quite ignorantly, wanted to exonerate the appellant from culpability, had the DNA test not revealed that he was the biological father of the baby borne by the minor.

78. The trial court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution case. Accordingly, I hold the opinion that this ground of appeal fails.

79. The upshot of all the above is that I find that the prosecution proved their case against the appellant beyond reasonable doubt. I uphold the conviction of the appellant which I find was safe. I dismiss the appeal against conviction. My findings on sentence will follow on May 3, 2023 after hearing the appellant and his counsel who has just been instructed to appear in the course of delivering this judgment.

Dated, Signed and Delivered at Kisumu this 2nd May, 2023

RE ABURILI

JUDGE

Whether the sentence imposed on the appellant was excessive

80. The appellant pleaded that his appeal was against the whole judgement, conviction and sentence. This Court gave him the opportunity to submit on sentence and he was at that stage represented by Mr Okuta Advocate who submitted at length on sentence, urging this court to reconsider the circumstances under which the offence was committed, the naivety of the appellant who was trying to escape justice, his age, remorse and the fact that the baby borne of the defilement needed the appellant to provide care. That the appellant was arrested when he had taken the minor to hospital hence he was a caring person. that the minor is now over 18 years.

81. Section 8(1) as read with section 8(3) of the *Sexual Offences Act* provides that:

> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits am 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.

82. Having been convicted for the offence of defilement, the trial Court considered the Appellant's mitigation that he prayed for leniency. The trial Court after considering the Appellant's mitigation noted that Section 8(3) of the Act provided for a sentence for a term not less than 20 years.

83. However, it is now settled that sentencing is in the discretion of the trial court. In *Bernard Kimani Gacheru v Republic (2002) eKLR*, the Court of Appeal stated that:

> ' It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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.'

84. In the instant case, the appellant, despite the DNA test finding him to have been the father of the child born of the defilement of the minor, he denied the offence and put up a spirited fight on appeal even challenging the competence of the officers who carried out the tests at the Government Chemist claiming that they are not doctors. The Government Analysts are specialised professionals who need not be doctors as alleged by the appellant who is determined to escape justice at all costs.

85. The appellant was however given the opportunity to mitigate on sentence, after delivery of judgment on conviction and through his advocate Mr Okuta advocate, he submitted that he was remorseful for the offence and even admitted that the child born of the defilement was his. That he wanted to go home and see the said child and that the court should consider the circumstances as a whole and give him a non-custodial sentence. This is the first time that the appellant is conceding that the DNA results were correct and that it was out of ignorance and a way of getting away with the offence that he denied the charge. That he had suffered in prison and that the child needed him to provide for it.

86. Therefore, as to whether I should interfere with the sentence imposed by the trial court or not, and having regard to the circumstances of the case herein where the minor appear to have taken an oath of secrecy to protect the appellant to the end that she became a hostile witness claiming that some other villager called Collins was the father of her child and not the appellant, even in the face of a positive DNA result linking the appellant to the offence, and considering that from the P3 form for the appellant, he was just 18 years then, I shall borrow the words of the Court of Appeal Judges in the case of Dickson Mboloi Mbithi v Republic [2020] eKLR where the learned Judges stated as follows:

> ' Regarding sentence, the appellant was sentenced to twenty years imprisonment. Section 8(3) of the *Sexual Offences Act* prescribes a sentence of not less than 10 years, but which may be enhanced to life imprisonment. The trial court did not refer to any factors that justified a sentence of imprisonment double the number of years prescribed by the Act, granted the record indicates that the appellant had no previous record. The basis for exercise of discretion in sentencing should be clear, otherwise the exercise will appear to be arbitrary. On its part the first appellate court merely upheld the sentence of the trial court without considering the basis upon which the 20 years imprisonment was imposed. For that reason, we are justified in interfering with the sentence.
>
> Accordingly we dismiss the appellant's appeal against conviction in its entirety. We however allow his appeal against sentence, set aside the sentence of imprisonment for 20 years, and substitute therefor a sentence of 10 years imprisonment with effect from the date of conviction. It is so ordered.

87. In the same breath, as there was no evidence that the appellant was a recidivist and in view of the circumstances under which the offence was committed and mitigations, taking into account the naivety of the complainant who is now an adult, and bearing in mind the language used in the section implies discretion by the use of the term 'is

liable' and not 'SHALL', I hereby exercise discretion and set aside the twenty years imprisonment imposed on the appellant herein and substitute the same with a prison term of ten (10) years imprisonment. The sentence will take into account any period that the appellant was held in custody during the trial before his release on bond and when bond was temporarily suspended for DNA testing purposes.

88. In the end, I dismiss the appeal against conviction but allow the appeal against sentence to the extent stated above.

89. This File is closed.

90. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF MAY, 2023

R.E. ABURILI

JUDGE