SS v Republic (Criminal Appeal 9 of 2020) [2023] KEHC 17582 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17582 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 9 OF 2020

FR OLEL, J

MAY 18, 2023

BETWEEN

SS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE DELIVERED ON 25TH FEBRUARY 2020 BY HON V. MASIVO (R.M) IN NANYUKI SEXUAL OFFENCE NO 22 OF 2018)

JUDGMENT

Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* of 2006. The particulars were that on diverse dates between December 2017 and March 2018 in Laikipia East District within Laikipia County intentionally caused your penis to penetrate the vagina of MM, a girl aged 11 years.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on diverse dates between December 2017 and March 2018 in Laikipia East District within Laikipia County within the Republic of Kenya intentionally touched the buttocks, breasts and vagina of MM, a girl aged 11 years with penis.

3. During trial the prosecution called three witnesses who testified in support of their case. The appellant was placed on his defence. He gave sworn evidence and called three witnesses to support his case. The trial magistrate did consider all the evidence adduced and found the Appellant guilty of the offence of defilement and sentenced him to life imprisonment.

4. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on 20.02.20 and amended the same on 18.05.2022. The grounds raised were that;

    a. The learned Trial Magistrate erred in matters of the law and fact to appreciate the facts to establish a defilement case in age, penetration and identity were not proved to the required standards of law occasioning prejudice.

    b. That the learned trial magistrate erred in both law and fact in again failing to appreciate that the prosecution failed to avail critical/ essential witnesses not withstanding S 123 of the *Evidence Act*.

    c. The learned Trial Magistrate failed to appreciate that the instant matter was not proved beyond any reasonable doubt as required by law.

Facts at Trial

5. The prosecution called 3 witnesses. PW1 MM underwent Voir Dire examination and testified in camera. She stated that she was 12 years old and goes to [Particuars Withheld] primary School. she was a student in class 5. She recalled that between December 2017 and March 2018 her father gave her out to be married. She did not know her father very well, as he was not her biological father and did not know his names. At the material time, they were staying within Timau area. she was told by her grandfather that the man who gave her out to be married was her father. Before going to stay with her grandfather, she was living with her grandmother. She further testified that her father gave her out to be married to the appellant herein. He took her to the appellants house in [Particuars Withheld] area after they relocated from Isiolo area,

6. It was her testimony that a ceremony was held at their home in [Particuars Withheld] area where a cow was slaughtered; this was when she was given as a bride /wife to the appellant herein. After the ceremony, she was taken to the appellant's home by the appellants mother. In the morning, she was taken to the appellant's elder sister's house. The appellant was present together with his father and his other siblings. At night, the appellant forced her to sleep with him on the same bed. Before the appellant came, she was sleeping alone in a separate house. She said she refused to sleep with him on the same bed.

7. The appellant then started beating her with a stick and the appellant's step mother came and told him to open the door but he refused. The step mother has been attracted by her cries and screams and came to intervene but the appellant threatened to beat her too. PW1 testified that she eventually managed to open the door and run away. That night she slept in a bathroom which was at their home. In the morning, she went and told her father what had happened. He told her that he is the one who told the appellant to beat her. She testified that her father took her back to the appellant's step mother home and when they arrived, the appellant was present and threatened to beat her. Further the appellant told her father that he had not beaten her as she had claimed after which her father started beating her because he thought she was lying.

8. She further testified that when her father was leaving, he told her that she should be sleeping with the appellant. The appellant also told PW1 father that if she refused to sleep with him, he would beat her up. She again attempted to escape but was caught by her father who promised to kill her if she tried to escape again. The appellant also threatened to kill her if she refused to sleep with him at night. She was therefore taken back to the appellant's home.

9. That night, she went to sleep in the kitchen which had a bed. The appellant came to the kitchen where she was sleeping and forced her to sleep with him. He removed all the clothes, she was wearing which

included her trouser, shirt, sweater, panty and boob top. While he was removing her clothes, she told him to stop but he refused. He then tied her hands and legs with a rope to the bed and then he removed his clothes. He inserted his penis into her vagina. She did not like it and felt bad.

10. When the appellant was defiling her, PW1 testified that she screamed and the appellants mother came, called the appellant and he responded. PW1 was able to recognize him from his voice which she knew. She testified the appellant inserted his penis into her vagina several times. In the morning she went to a woman who showed her where the police station was, she told her that she had been beaten by the appellant and her father. She went to the police station alone and told them that the appellant had defiled her. Accompanied by the police they went to the appellants homestead but did not find him. When they were leaving, they met the appellant and he was arrested. They went to her father's home where 3 cows and 2 goats were found. The same had been brought by the appellant as her dowry. The appellant and her father were taken to the police station and she was taken to a children's home called Afraha.

11. PW1 was taken to hospital where she was examined. She also recalled that after defiling her, the appellant untied her hands and legs. It was about morning time. She then took a sack and used it to sleep on the floor. She later opened the window and door while accused was still sleeping on the bed. She identified the appellant as the person on the dock.

12. In Cross examination, she stated that the appellants father was present during the traditional marriage. The appellant had brought three cows to their home and a ceremony was held at their home and a cow slaughtered. Her father had given her out as a as a bride to the appellant and after the ceremony she went to the appellant's home which is made of clay (manyatta). The incident happened in the kitchen which was made of wood. The appellant had initially taken her to his elder mother's homestead because he did not want her to stay in his mother house because the appellant's mother was a drunkard and was violent whenever she drunk. At the end of the cross examination the trial court noted that PW1 was firm while answers questions posed.

13. PW2, testified that she was a clinical officer attached to Nanyuki Teaching and Referral Hospital. She had worked there since 2015 and held a diploma in clinical Medicine, surgery and community health from Kenya Methodist University. She had examined PW1 and filled the P3 dated 24.4.2018. PW1 had a history of having been married to an older man. Her clothing had no tear or stain and she reported that the man she was forcefully married to had sexually assaulted her three (3) times. On examination nothing abnormal was detected on the upper body and limbs. On examination of her Genitalia, her clitoris was absent suggesting that PW1 had undergone female genital mutilation, her hymen was also absent, suggesting sexual intercourse.

14. The patient had discharge which was white in colour from her vagina. Vaginal swap did not reveal anything abnormal and no spermatozoa was detected. They also did pregnancy test, syphilis test and HIV tests, which all returned negative findings. Her conclusion was that there was evidence of defilement. She produced the P3 form and PRC form into evidence. Upon cross examination, she stated the correct month when she examined PW1 was in March 2018 and not April 2018 as indicated in the P3 form.

15. PW3, the investigating officer, testified that she was attached to Umande Police Station performing General duties. She testified that on 24/3/2018, she received a report which had been made on 23/3/2018 to the effect that the appellant had married a young lady aged 11 years. They received an age assessment report dated 26.03. 2018, an X- Ray film and certificate of age which the witness produced into evidence as Exhibit 3(a) to (c). She testified that the complainant was living with the appellant as his wife. Acting on the report received, they went to the home where the appellant was living and

established that PW1 had been living with the appellant since December 2017 and he had paid for dowry in the form of blankets, bed sheets, three cow's and 2 goats. This information was given to her by the complainant.

16. From their investigations, they further established that, the father of the complainant gave her out to be married to the appellant. They arrested the father of the complainant and charged him with child neglect. That case was still ongoing. she then recorded the statement of the child and the lady who rescued the child. The lady who rescued the complainant has not testified because they were not able to locate her because her phone number was not going through and she relocated from her home at [Particuars Withheld] area. Her name was JN. The appellant was arrested by policemen attached to the anti-stock theft unit and they took him into custody. The OB was recorded as OB 5/xx/xx/2018. The report was recorded in the investigation diary as O.B number 3/xx/xx/2018. The initial report was that of PW1 had been forced by her father to get married to the appellant in place of her sister. She further reported that she had been married to the appellant since December 2017.

17. Further PW3 stated that they took the minor to Nanyuki Referral hospital for examination. The P3 form was filled by the hospital doctor on 24.3.2013 and they were given a PRC form 24.3.2019. She produced the Investigation diary and identified the appellant as the person she rearrested.

18. In Cross examination, she stated that the anti-stock police officers arrested the appellant and PW1 father. The complainant had confirmed that she was forcefully married to the accused. The appellant was arrested in March 2018. He was not arrested during the school holiday. She was also not aware that the school were closed at the time. In reexamination the witness stated that they were not able to recover the bride price.

Defence Case

19. The appellant gave sworn evidence and called three witnesses. The appellant stated that he was a herdsman and did not commit the offence. He wanted the case dismissed. He said the complainant was unknown to him. On the day he was arrested, the police were in the company of the complainant. He was asked whether he knew the victim but he denied. He said he was perplexed by the nature of the charges he was facing and did not understand the reasons for his arrest. In cross examination, he stated that he did not run away nor did he failed to attend court severally. He had attended court but failed to hear his name being called out. He therefore thought that his case had been determined.

20. DW2, KO stated that the appellant was his neighbor. They heard of his arrest and charges, and did not see him defile the complainant. In cross examination, he confirmed that he did not stay in the same house with the appellant. He was a neighbor and was not able to tell or know every visitor to the appellant's home.

    DW3 GP stated that he was a neighbor of the appellant and did not see him commit the offence. They did not see the appellant marrying the complainant. Upon Cross examination he confirmed that he does not stay in the same house with the appellant and cannot tell who his visitors were. They was not usually together with the accused wherever he goes.

21. DW4 JS stated that the accused is a neighbor and they were surprised that he was arrested for marrying a small child. They never witnessed such a marriage. Upon cross- examination, she stated that she does not stay in the same house with the accused and is able to tell every visitor who visits the appellant. She further testified that every day she checks to see the appellants visitors as their homesteads are nearby. She confirmed that the appellant received visitors who are unknown to her. She also confirmed that when the appellant leaves his home to attend to his business, she does not follow him.

Appeal Submissions

22. The Appellant filed submissions on 18.05.2022 and alleged that this matter was used being used to blackmail him and obtain property from him in terms of livestock to settle the matter out of court. That there was no proof rendered by the prosecution that he had married the alleged victim, whether dowry had been paid, by who, to whom, and when. He submitted that the chief or assistant chief could easily ascertain whether such a marriage had been conducted or not. The Investigating officer stated that there was no proof of dowry hence no proof of a traditional marriage. It was submitted that such a function could not take place without the village administration taking notice and chipping in. This case was instituted due to cheap vendetta aimed at obtaining the appellant's property by the complainant's family or clan and for them to gain from such extortion.

23. It was submitted that critical elements of defilement were not proven. The Appellant relied on the case of *Fappyton Mutuku Ngui v Republic* [2010] eKLR it was submitted that if one of the elements of defilement being age, penile penetration and identity of the perpetrator are not proven then the whole case crumbles. It was submitted that PW1 stated that she was 12 years by the time of adducing evidence and did not prove her age and the fact that she could not tell the name of her real father or the names of the grandmother or mother shows that she could not comprehend her age.

24. The Appellant further submitted that the proof of age provided by PW3 was not credible as the victim could not state when she was born and no oral evidence was obtained from the parents or guardians or any relative that she was actually 11 years at the time of the alleged offence. It was also submitted that the production of the age assessment report was un-procedural and contrary to section 33,48 and 77 of the *Evidence Act* . The age assessment report could only be produced by an expert. Reliance was placed on the cases of *Edwin Nyabaso Onsongo v Republic* [2016] eKLR and *Emmanuel Mwandime v Republic* [2016].

25. The Appellant submitted that upon examination of the complainant's genitalia, it was normal and there were no spermatozoa which would come in handy as proof of a recent sexual activity in light of the absence of the hymen. That it can be assumed that the child had been born without a hymen or the same had been broken through other sexual activity and therefore raised doubt of penile penetration. He relied on the case of *Langat Dinyo Domokonyang v Republic* [2017] eKLR.

26. It was submitted that it would be impossible to defile the victim having tied her hands and legs. Secondly, that it is not possible to enter a manyatta through the window for they are very small, he questioned why he would enter through the window and not the door if he had paid bride price. He further stated that PW1 did not demonstrate that the person she identified in the morning was the Appellant.

27. On the issue of the alleged marriage, the Appellant submitted that there was no proof of the same and questioned why his mother, step mother and the parents were not charged. He contends it is because it is not true. In addition, he submitted that the prosecution did not provide proof that PW1's father had been charged with child neglect. The evidence on forceful marriage was hearsay evidence and no concrete, credible and reliable evidence was tendered to that effect. That it was a taboo in the Appellant's culture and traditions for a man to have sexual activity in the house of the elder sister or in her compound. That some critical witnesses were not summoned to prove existence of the elder sister's compound. He relied on the case of *J.O.O v Republic* [2015] eKLR and *Juma Ngundia v Republic* (1982-1988) KAR 454.

28. Lastly, while relying on the cases of *Alivy Yanchanya v the state* (E.A) 652 and *Gachago Nganga v Republic* CrA 98 of 1995 E.A, it was submitted that the prosecution did not prove their case beyond

reasonable doubt to warrant a conviction. That is cannot be assumed that the person who entered through the window was the one who was later found asleep on the bed and whose identity was not ascertained. He questioned why he was not charged with beating the child if the same was true.

29. The Respondent did not file any submissions.

Analysis and Determination

30. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of *Okeno v Republic* (1972) EA 32 where it was stated as follows: -

> " An appellant 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. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

31. Also in *Peter's v Sunday Post*(1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

32. In the case of *Republic v Edward Kirui* (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & another v State by Prosecutor, Tamil Nadu & another* (2008) INSC 1688 where the case of *Bhagwan Singh v State of M. P.* (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

33. Having considered the lower court record, the grounds of appeal and the submissions of the parties, I find the following as issues for determination;

    a. Whether the prosecution proved the case beyond reasonable doubt

    b. Whether the sentence should be reviewed

34. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of

a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

35. In this case, the Appellant was charged and sentenced under Section 8 (1) and (2) of the *Sexual Offences Act* which provide as follows:

(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.

36. The ingredients for the offence of defilement can be summarized as follows;

a. Age of the victim (must be a minor),

b. penetration and

c. proper identification of the perpetrator.

37. On the age of the victim, The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

38. Similarly, in 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;
>
> "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)."

39. Also, in the case of *Joseph Kieti Seet v Republic* [2014] eKLR the court held that;

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No 2 of 2000, it was held thus:
>
> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim

in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

40. Rule 4 of the *Sexual Offences Rules, 2014* which provides that:-

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

41. In this case, PW1 stated that she was 12 years at the time she was testifying in court, which was on 07.02.2019. PW3 produced a Certificate of age assessment dated 26.3.18 , which report stated that that the complaint was 11 years. It was not a must for the parents of the child to testify as to the age. The age assessment report was produced based on the x-ray done to assess the age of the child and it was sufficient to prove the victim's age. The Appellant did not raise any objection as to the production of the said document at the hearing and cannot raise the objection on appeal when this issue in not expressly taken up in the petition of appeal.

42. Further Section 38 of the *Evidence Act* allows the court to admit into evidence of any record, book, or register made by a public servant in discharge of his official duty or by any other person in performance of a duty specifically enjoined by law to do so.

43. Section 77 of the *Evidence Act* provides that;

(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner,medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

44. The age assessment report was produced by the police officer. It was a document prepared by a medical doctor working at Nanyuki county referral hospital, who was a public officer and prepared by him in the cause of his duty and was thus admissible. The appellant had the opportunity to cross examine on the same or insist on the maker being called. But opted not to do so at trial and thus is estopped from doing so at this stage on appeal, I find that the age of the victim proven to be 11 years at the time of the incident.

45. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

45. The victim stated that the Appellant penetrated her several times and also reported to PW2 that she was penetrated 3 times. She resisted the first time the appellant attempted to defile her and ran away back to their home. she was beaten by her step father, who returned her to the appellants home and threatened to kill her if she ran away. The Appellant also threatened to kill her if she refused to sleep with him at night.

46. PW1 was very clear that the defilement incident took place at night after she had gone to sleep in the kitchen which had a bed. The appellant came to the kitchen where she was sleeping and told her to sleep with him. He then removed all her clothes, that she was wearing; her trouser, shirt, sweater, panty and boob top. While he was removing her clothes, she told him to stop but he refused. He then tied her hands and legs with a rope to the bed and then he removed his clothes. He inserted his penis into her vagina despite her objection.

47. When the appellant began to defiling her, she screamed and the appellants mother came, called him and the appellant responded. She was able to recognize him from his voice which she knew. She further testified that he inserted his penis into her vagina several times. After the incident PW1 slept on the floor and in the morning woke up, opened the door and windows while the appellant was still asleep on the bed.

48. PW2 produced a PRC Form dated 24.3.3018. it was her testimony that upon examination of the patient, she was not under any obvious influence of drug, head and neck had nothing abnormal was detected; on the thorax and abdomen, lower and upper limbs nothing abnormal was detected; there was no injuries on her body. On her genitalia, her clitoris was absent suggesting that she has undergone female genital mutilation. Her hymen was absent suggesting sexual intercourse. There was discharge white in color from the vagina.

49. PW2 took a swab of the vagina and found that there was nothing abnormal detected, there was no spermatozoa. The laboratory also did a grain stain of the swab which showed that there were gram positive bacilli. She said this indicated infection in the vagina of the patient. The pregnancy test was negative, syphilis test, VDRL was negative and HIV test was negative. This information is also indicated on the P3 Form dated 24.3.2018. She concluded that there was penetration.

50. The victim made the complaint the same day she was defiled as she ran away and was shown a police station where she reported the matter on 23.3.2018 while PW2 confirms that the victim was examined on 24.3. 2018.

51. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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."

52. While addressing the issue of timing in defilement cases. The court in *George Hezron Mwakio v Republic* [2010] eKLR stated as follows;

> " Rape and defilement are both crimes which are perpetrated under the cover of darkness. There is unlikely to be an eye witness. In many cases the only corroboration is medical."

53. The evidence of penetration was sufficiently proved based on the victim's testimony which was corroborated by that of the clinical officer (PW3) who testified that there was penetration of the child's genitalia. The complainant by her evidence showed that she actively resisted the forceful marriage and

detested the appellants advances on her, but she eventually succumbed to his forceful invasion of her privacy. When she got an opportunity the following day, she did not hesitate to report the incident to the police. PW1 evidence was forth right and the court too noted that she was firm in the answer's she gave. Her evidence was thus believable and the trial court was right in accepting the same.

54. On the issue of identification, the Court of Appeal in the case of *Peter Musau Mwanzia v The Republic* 2008 eKLR expressed itself as follows:-

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

55. The Appellant contends that it is not clear whether he is the one who entered from the window and was found on the bed the next morning. That a manyatta is small and it is impossible to enter through the window. The victim stated that the incident took place in the kitchen which is made of wood. The Appellant did not respond to this allegation. She stated that she recognized him from the voice and in the morning while he slept on the bed she woke up and opened the window and door, clearly seeing the person who defiled her. The Appellant again did not respond to this allegation. This court also bears in mind that this was not the first time the Appellant was attempting to defile the minor. She ran away the first time and was returned and was a person known to her. This was a case of undeniable positive recognition.

56. On the issue of the number of witnesses called, this court is alive to the fact that there is no legal requirement in law on the number of witnesses to be called to prove a fact. Section 143 of *Evidence Act* (cap 80) Laws of Kenya provides: -

> "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."

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

> "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."

58. The Appellant contends that some witnesses were not called and that the parents of the victim, his mother and elder mother were not charged with any offence. The court can only deal with the issue that is placed before it, in this case, the issue was defilement. The issue of early marriage and whether there was a wedding, the circumstances thereto are not the issues that had to be placed before this court to determine.

59. Considering the totality of the evidence presented and after considering the appellants defence there is no doubt that the prosecution proved their case beyond reasonable doubt based on the cogent evidence presented especially the evidence of PW1. The appeal as against conviction therefore fails.

60. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

> " 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."

61. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of *Athanus Lijodi v Republic* [2021] eKLR

> " On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic* [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

The same court in the case of *Dismas Wafula Kilwake v Republic* [2019] eKLR stated as follows;

> " Being so persuaded, 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 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."

62. In *Maingi & 5 others v Director of Public Prosecution & another* (Petition NoE117 of 2021) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17th May, 2022 did find that –

> " to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of the *Constitution*. However, the courts are at liberty to

impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences."

63. The provision of section 8(1) as read together with provisions of section 8(2) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of the *Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of the *Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases . See *Christopher Ochieng v Republic* Kisumu CA Criminal Appeal No 202 of 2011 and *Jared Koita Injiri v Republic* Kisumu CA Criminal Appeal No 92 0f 2104.

64. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi v Republic* (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira v The state of Maharastra* at paragraph 70 – 71 where the court held;

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

65. In *Francis Karioki Muruatetu & another v Republic* the Supreme Court did provide guidelines and mitigating factors in re-hearing of sentence. The Judiciary sentencing policy guidelines list the objective of Sentencing At. Paragraph 4.1 they include the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the applicants to inflict harm.

66. What are the relevant circumstances herein? The Appellant did take advantage of a young girl and forcefully defiled her, while holding out that she was his wife as he had paid dowry. While in the context of Maa culture early marriage is practiced, such practice is barbaric and are not in tandem with societal norms and constitutional provisions currently place the appellant ought to have known better.

67. The Appellant in his petition of appeal did indicate that he had appealed against sentence but never made submissions thereon. It can only be assumed that he felt that the same was excessive and/or harsh. Section 8(2) of the *Sexual Offences Act* No3 of 2006 has been declared unlawful for not giving the trial magistrate the latitude in sentencing. While this complaint of sec 8(2) of the *sexual offences Act* No 3 of 2006 may be true, it by itself does not invalidate the sentence as the trial court had sentencing discretion having considered all factors and circumstances of the case.

68. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 8(2) of the *sexual offences Act* No 3 of 2006 fettered the courts discretion in sentencing, I do find that the sentence was manifestly high given a reasonable proportionality between

the sentence passed and the crime committed. In *Republic v Scott* (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

Disposition

69. Having considered the facts in this case, I hereby set aside the sentence of life imprisonment imposed on the Appellant In Nanayuki Chief Magistrate criminal case (SO) Number 22 of 2018 vide the sentence dated 29th January 32020 and substitute it therefrom with a sentence of twenty (20) years imprisonment to run from the date of sentence in the lower court. This sentence will however be inclusive of the period he was in custody pursuant to provision of Section 333(2) of the *Criminal Procedure Code*.

70. The appellant had absconded court and was brought under warrants of arrest on 5th November 2019 and sentenced on 29th January 2020. The period in custody was therefore 3 months.

71. For avoidance of doubt the appeal as against conviction is dismissed.

72. Right of Appeal 14 days.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 18th day of May, 2023.

In the presence of;

Appellant

.....for DPP

.....Court Assistant