Kamau v Republic (Criminal Appeal E48 of 2021)
[2023] KEHC 20448 (KLR) (19 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E48 OF 2021

FR OLEL, J

JULY 19, 2023

BETWEEN

ROBERT NJUNGUNA KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to the provisions of Section 8(1) as read with 8(2) of the *sexual offence Act* no. 3 of 2006. The particulars of the offence were that on the 7th day of July 2020 in Athi River Sub County within Machakos County, the appellant intentionally and unlawfully caused his male organ to penetrate the female organ of one YBB a child aged 3 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 *Sexual Offence Act* No.3 of 2006. The particulars of the offence were that on the 7th day of July 2020 in Athi river sub county within Machakos County, the appellant herein did an unlawfully intentional act which cause contact of his hands with the breasts of YBB a child aged 3 years.

3. During trial the prosecution called five (5) witnesses. The appellant was placed on his defence and opted to give sworn evidence. Upon considering the entire evidence presented the trial magistrate did find the appellant guilty of the offence of defilement contrary to provision of Section 8(1) as read with 8(2) of the *Sexual offence Act* No. 3 of 2006.The appellant was convicted and sentenced to life imprisonment.

Brief Facts

4. PW1 MAO testified that she resides in Syokimau and was a business woman. On 07.07.2020, she went to work and returned home at 7.30pm. She took her child YBB and started to give her a bath. While she was wiping her private parts, she started crying and stated that she was feeling pain on her 'dudu'.

She asked the minor who touched her and she stated it was 'Njuguna'. She asked the child what he did and the child retorted and said 'alinidinya'. She further asked the child specifically what happened and he child said 'Njuguna' had placed his "dudu" into her private parts. The minor used her hands to show her what transpired.

5. PW1 stated that she waited for her husband to come home and informed him of what had transpired. He husband called the other children B and E and demanded to know what happened. B told them that, after they had left to go to work, they had stayed in the house for a while and left to go outside at the stairs. After a while B said he went back to the house to look for book to teach her sister how to draw. When he came back, his sister (YBB) was not outside at the staircase where he had left her. PW1 explained that they stay on the 1st floor. B went to the ground floor to look for the minor and did not find her. He then decided to look for her on the 2nd floor where there is only one house. He saw the child's shoes outside the door of the said house. He knocked and nobody responded. When he opened the door and entered, he found YBB had her panties and trouser removed. Njuguna had no trouser and was doing bad manners on minor YBB. He had placed his dudu on YBB private part. B took YBB and dressed her up. The appellant said he was sorry but B brushed him off.

6. PW1 and her husband decided to go to where the appellant resides. They both resided on the same plot and the appellant resides with his parents on the 2nd floor. They met the appellant's mother and informed her of what transpired. She told them to take any action they deemed fit. The following day they reported to the police and were escorted to Nairobi women hospital, where minor YBB was treated. They wrote their statement at the police station and the appellant was arrested at the barber shop. The minor was born on 08.07.2017 and her birth notification was produced as exhibit 1. PW1 further stated that she was blessed with three children aged 10 years, 6 years and 3 years. The first two were male children and YBB was her last born. She also testified that she worked at Mlolongo selling food stuff. She identified the appellant on the dock.

7. In cross examination, PW1 stated that when she washed her baby she cried and she took her to hospital the following day. She was not aware if neighbours heard her baby cry while they were looking for her but ordinarily neighbours were not at home during the day. Her son B had told her he found the appellant red handed defiling the minor and initially when they went to report to his parents the appellant was not at home but came later on. PW1 had gone to the appellant home with her husband and her three children. She also never told her daughter about 'kudinya' and was surprised to hear her say that.

8. PW2 BO underwent voire dire examination and the court deemed that he did not understand the meaning of oath. He thus gave unsworn evidence. He stated that he was a pupil in grade 4. On 07.07.2020, PW1, his mother had left him to take care of his younger sister YBB at about 2.00pm. They stayed within the house and later went outside at the stairs. PW2 said after some time he told his sister YBB to stay at the stairs, while he went back to the house to pick some books, which he intended to use to teach her (Y.B.B) how to draw. When he came back he was surprised to find that she was not there. He started looking for her but could not find her anywhere.

9. PW2 decided to go look for his sister at the house where the appellant resides, which was upstairs on the upper floor. Outside the appellant's family house, he saw his sister's clothes. He knocked the door and nobody opened. He decided to open the door and found the appellant had removed YBB's trouser and panty, she was in the sitting room on the couch. The appellant had also removed his trouser and was doing bad manners on YBB. PW2 stated that 'alikua anamdinya' he saw him place his dudu on his sister's susu. When the appellant saw him, he quickly dressed, PW2 dressed up his sister and left with her. The appellant offered his apologies for what had done.

10. In the evening while PW1 was washing the minor YBB, she complained of pain in her 'susu' and reported that the appellant had touched her. He was asked what transpired to his sister by his mother and initially he did not say anything, but on prodding by his brother, he confessed to his mother what he saw transpire. He told his parents that truth, after which they all went to see the appellant parents. PW2 father reported to the appellant's mother what had transpired and the appellant's mother started to cry. She carried YBB and asked her what happened and YBB said that the appellant 'alinidinya'. The appellant was arrested and PW2 identified him on the dock.

11. In cross examination PW2 stated that he knew the appellant as Njuguna and that there was nobody else on the plot at the time of the incident. When he went to the appellant family house, there was no music playing and did not hear YBB cry, but while carrying her away on the stairs, she cried but he made her stop crying. Initially when PW1 came home, he did not volunteer the information as he was afraid/scared he would be punished. After divulging what he saw, his parents talked to the appellant's parents and they later went to hospital.

12. PW3 John Njuguna stated that he was a medical doctor and had a Bachelor degree in clinical medicine and surgery, pharmaceutical technology from (MKU). He worked at Nairobi Women hospital and had also been trained in GBU management. He had four (4) years work experience. He stated that he worked with one Dr. Robert Milimo who was on leave, but was familiar with his handwriting and signature. He was allowed to produce medical documents, authored by his colleague under Section 33 and 77 of the *Evidence Act*.

13. PW3 stated that he had before him, the P3 form, GVRC treatment notes and PRC form for minor YBB filled on 09.07.2020. He also had laboratory report of the said minor. She had been brought to the hospital with a history of being defiled and was found by her elder brother in a neighbour's house, while being defiled. On examination she had not injury on her body. On her vagina she had no injuries. Upon examination of external gentilia, it was normal, no injuries was noted. The hymen was bruised and inflamed with pain. She also had whitish discharge on her external genitilia. The laboratory report showed that her urinal track was normal. PW3 produced the medical P3, & PRC form as exhibit 2 and 3, while the laboratory report and GVRC treatment notes was produced as exhibit 4(a) and 4(b). In cross examination PW3 stated that no spermatozoa or yeast cells were seen. The bruises noted were recent.

14. PW4 YBB underwent voire dire examination and was found not to be sufficiently intelligent to understand oath. She gave unsworn evidence. She was asked questions and mostly shook her head in affirmation or negative. She stated that she did not know the appellant and had not seen him, but affirmed that she was defiled. She initially stated she did not know who defiled her but later stated it was the appellant, she did not know his name but confirmed he removed her panty in the house and made her sleep on the bed 'kwa kitanda'. When asked if the appellant slept on top of her she shook her head to signify 'no'. When asked if he placed his 'dudu' on her she shook her head in confirmation and pointed her private part. In cross examination she said she did not know the appellant.

15. PW5 Cpl Dorcas Moraa stated that she was attached to Syokimau police post and was the investigation officer. On 08.07.2020 she was assigned this case. PW1 and her husband had made a report that their child Pw4 had been defiled. The child was aged 3 years. She booked the incident in the OB and referred them to hospital where the P3 form was filled on 10.07.2020. She wrote the witness statements and visited the scene of evidence of crime at a place called Third born apartment house no 28. They later arrested the appellant at a barber shop. At the scene, she established that complainant resided on the 2nd floor, with her parents and other siblings, while the appellant resided on the top floor. The appellant

stayed with his mother and seven (7) siblings. When effecting arrest, she was with Cpl Njuguna and PC Wahome. The appellant was booked and charged in court.

16. In cross examination PW5 stated that she received the report on 08.07.2020 and later arrested the appellant at barber shop. The house when the incident occurred was house No.28 on the 3rd floor and she did not interrogate anyone. She also had produced all the evidence she had.

17. The appellant was placed on his defence and gave sworn evidence. He stated that he resides in Syokimau and was a student at [Particulars Withheld] school in form 3. He was 20 years old and during corona pandemic engaged in casual construction jobs so that he would not depend on his parents when school re-opened. On 08.07.2010 he was at a barber shop, when PW1 and 3 police officers came and arrested him. At the police station he was told he had defiled a child which allegation was not true. He was remanded at the police station for a week and later charged in court. It was not true that he had defiled the minor and never had any intention of committing such a crime.

18. In cross examination he stated that he was arrested on 08.07.2020. Earlier on 07.07.2020 he had left for work and returned at 7.30pm, though he did not have a witness, his mother could come and confirm the same. On 07.07.2020 he was not at home at 1.00pm. He knew PW2 as he used to see him within the plot where they reside. PW2 had not seen him defile PW4 and he never had such intentions. On 07.07.2020 he reiterated that he never saw PW2 nor did he speak to him. The appellant further stated that he had a bad relationship with PW1 because he had beaten up PW2 and his brother E for making the clothes on the hanging lines dirty. As a result, PW1 had warned him that she would make sure she would hide him where men are hidden and never come out.

19. It was the appellant contention that this case was a setup because he had beaten the two brothers. He again denied defiling YBB nor was she in their house. In his assessment the prior incident (of beating up PW2 and his brother E) is what triggered this case and caused PW1 to frame him up. There was no way a child YBB would know the word 'kudinywa'. She was coached by her mother.

20. The appellant did not call any other witness and his case was closed. The trial court considered the entire evidence presented and proceeded to convict the appellant and sentenced to life imprisonment. Before this appeal was heard, the appellant did make an application to be allowed to adduce additional evidence vide his application dated 22.10.2021 the same was considered and disallowed on 20.05.2022.

21. The appellant was allowed to file his appeal out of time and raised the following grounds of appeal namely that;

    a. The trail court convicted and sentenced the appellant of the offence charged notwithstanding, prosecution failed to prove case beyond reasonable doubt.

    b. The trial court convicted and sentenced the appellant of the offence charged notwithstanding the crucial prosecution witnesses were not availed.

    c. The trial court convicted and sentenced the appellant of the offence charged notwithstanding the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgement.

    d. The trial court convicted and sentenced the appellant of the offence charged notwithstanding the plausible defence of the appellant was not given due consideration.

    e. The trial court convicted and sentenced the appellant of the offence charged notwithstanding the appellant was not identified by the complainant.

f. The trial court convicted and sentenced the appellant of the offence charged notwithstanding the vital ingredients of the offence charged were not proved as stipulated in law.

Appellants Submissions

22. The appellant counsel filed his submission on 27.06.2022 and in introduction gave a brief background of the crime and stated that it was the solemn duty of the court to re-evaluate the evidence on record and make its own conclusions as aptly pronounce in *Okeno versus Republic* (1972) EA 32 at 36.

23. The appellant submitted in his defence that on the material day (07.07.2020) he was away from home, engaged in construction work the whole day until 7pm in the evening and thus could not have had the opportunity to defile the minor and had intended to call witnesses to confirm his alibi defence, but the trial magistrate ignored the appellant request to call them. This was in breach of Section 211(2) of the Criminal Procedure Code and by extension the appellants right to fair trial as provided for under Article 50(2), (c) of the *Constitution* of Kenya 2010. Reliance was placed o*n George Ngodhe Juma and 2 others versus Attorney General* (2003)eKLR and *Ebale Ok0ye versus Cop* (2016) SC 279/2011.

24. Failure of the magistrate to assist facilitate and/or compel attendance of the said witness, resulted in an injustice being occasioned as the court proceeded to dismiss the appellant's alibi defence for want of corroboration classifying the same as an afterthought. Further as regards the alibi raised, the appellant averred that it was never disproved by the prosecution. The defence was raised in cross examination of PW1, PW2 and PW4 where he denied having anything to do with complainant. This alibi defence thus was not an afterthought as alleged and should have been considered by the trial magistrate. Reliance was placed on *Benard Odongo Okutu versus Republic* (2018)eKLR Criminal Appeal no.10 of 2017.

25. The appellant also faulted the trial magistrate for basing a conviction on uncorroborated evidence/ testimony of a child of tender years. PW2 gave evidence without conducting voire dire examination and there was failure by the court to rely on evidence of the said witness, which was not corroborated and unfairly used it to convict the appellant, which action was contrary to provisions of the law and prejudiced the appellant.

26. The appellant also submitted that the trial court did err by disregarding his contention that PW1 had a bad relationship with him. This was raised while he was being cross-examined during defence hearing and he clearly stated that the bad relationship started when he beat up PW1 son's for making clothes that were hanged on the hanging line dirty. The charges pressed in court were falsely brought/ pressed against him to effectuate PW1 promised to send him, where men are hidden and never to come out again. Unfortunately, the trial magistrate in her analysis ignored the appellant's testimony and proceeded to wrongfully convict him. Reliance was placed on *Stanley Munya Githunguri versus Attorney General* High court Criminal Appeal no 271 of 1985 Nairobi and *New Common Wealth and its Constitution Sa Landen Stevens and sons* (1964) at paragraph 144 – 145.

27. The appellant further also submitted that on a proper analysis of the evidence tender, the ingredient of the alleged offence was not proved. PW4 evidence was unsworn and she gave contradicting evidence in court as to what transpired on the material day. She was even not even clear if the alleged offence occurred, on the couch as alleged by PW2 or on the bed as she alleged. During questioning, she mostly shook her head when leading question was posed to her. PW2 also was not sure where PW4 clothes were and what transpired. Further PW4 denied when asked if the appellant slept on top of her. She also denied knowing the appellant even though she knew the name Njuguna. This showed serious material contradiction in the evidence of PW2 and PW4.

28. The appellant posited that it was clear that no prosecution witness corroborated the other and the prosecution evidence failed to prove vital ingredient's necessary to convict the appellant. Reliance was placed on *Titus Mutuvi versus Republic* (2017)eKLR, Criminal Appeal no 116 of 2017and *John Otieno Otoo versus Republic* (2009) eKLR Criminal Appeal no 350 of 2008 *Fappyton Mutuku Ngui versus Republic* Criminal Appeal no 296/2010.

29. As regard the medical evidence the appellant submitted that it was inconclusive and the minor's hymen was bruised and inflamed but the child had no physical injury. Penetration was thus not proved and it remained an unproved fact. Reliance was placed on *John Ruto versus Republic* (2018)eKLR.

30. On sentencing the appellant submitted that the sentence melted out was excess, harsh and inappropriate. Given the age of the appellant (20 years) he being a 1st offender he sought to have been sentenced to a lesser term of imprisonment. Reliance was placed on Petition E017 of 2021 *Philip Mueke Maingi and 6 others versus ODPP and AG*, *Francis Matunda Ogeto versus Republic* (2019) eKLR, *Yasmin versus Mohammed* (1973) EA 370 and *Omari versus Ali* (1987)KLR 616 *Charo Ngumabu Gugudu versus Republic* (2011)eKLR, *Republic versus Scott* (2005) NSWCCA 152, *Republic versus AEM*(2000) and *Republic versus Harrison* (1997) 93 Crim R 314.

31. In conclusion, the appellant submitted that he had sufficiently shown that the burden of proof was not discharged, there were serious inconsistences and contradiction in the evidence and if properly re-evaluated this court would find in his favour.

32. The respondent did indicate in court on 14.03.2023 that they would file their submission by close of business on that day but the same not had not been filed as at the time this court retired to consider this appeal.

Analysis and Determination

33. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno-Vrs- Republic* 91972)EA 32 & *Pandya v. Republic* (1975) EA 366.

34. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala-Vrs-R* (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court 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 made the advantage of hearing and seeing the witnesses.

35. In *Peter's vrs Sunday Post* (1958) E.A. 424 it was said that it is not the function of the first appellant court to merely 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.

36. The main issues raised in this appeal by the appellant as gleaned from his petition of appeal and the submissions filed can be summarized as follows;

    a. Did the prosecution discharge the burden of proof to the required standard?

b. Did the trial magistrate err in failing to allow the appellant to call his witnesses thereby contravening provisions of Section 211(2) of the *criminal procedure code* and his rights to fair hearing under Article 50(2),(c) of the *Constitution* of Kenya 2010.

c. Did the trial magistrate err in convicting the appellant on uncorroborated evidence of a child?

d. Did the trial magistrate fail to consider the defense raised by the appellant that he had bad relation with PW1 and that she had motive to fix him and did the court also fail to consider his Alibi defence

e. Was the sentence passed harsh and/or excessive and should this court interfere with the same.

Burden of Proof

37. It is trite law 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."

38. The conceptual framework for burden of proof to be discharged by the prosecutor consists of two components i.e the burden of proof and evidential burden which duty is clearly enunciated by Fidelis in his book *Modern Nigerian Law of Evidence*, University of Lagos Press, Lagos (1999) 379 when he stated that;

> " The term burden of proof is used in two different sense. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact of issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.

39. The enormous task of proof beyond reasonable doubt by way of direct or circumstantial evidence rests with the prosecution and the fact the accused is put on his defence does not shift that burden and standard of proof in any way.

40. Section 8 (1) and (2) of the *Sexual Offences Act* provides as follows:

> (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 an offence of defilement with a child between the age of eleven years or less shall upon conviction be sentenced to life imprisonment.

41. 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.

    (see *Wamukoya Karani v. Republic* Criminal Appeal No 72 of 2013 and George Opondo Olunga v. Republic [2016] eKLR)

    a. Was the Age of the complainant proved?

        1. PW1 was the mother of the minor. she testified that the minor was 3 years old, having been born on 09.07.2017. She produced the minor's birth notification serial No xxxx as Exhibit P1. As held in *Edwin Nyambogo Onsongo v. Republic* (2016) eKLR

> " ... 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).

43. The documentary evidence produced sufficiently established that age of the child.

    b. Was Penetration proved

44. Section 2 of the *sexual offences Act* defines penetration as follows;

    Penetration; "means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

45. PW2 BO testified that on 07.07.2020, his mother PW1 left him to take care of his baby sister YBB, they were initially within the house but at some point decided to go outside and play at the staircase area. After sometime he told his sister to remain where she was at the staircase as he went back to the house to pick a book which he wanted to use to teach her to draw. When he came back, the minor was nowhere to be seen. He searched for her and could not seem to find her anywhere. He decided to search for her on the upper floor, where the appellant's family resides. Outside the appellant's family house, he saw his sisters' cloths. He knocked the door and nobody opened.

46. PW2 decided to open the door and was shocked to find that the appellant had removed the minors trouser and pant, he found her sister in the sitting room on the couch. The appellant had also removed his trouser and was doing bad manners on his sister. PW2 stated that; "Alikuwa anamdinya I saw his place his dudu on my sister's susu." When the appellant saw his, he quickly dressed up and said he was sorry. PW2 picked up his sister, dressed her up and left with her. In the evening when PW1 was washing the minor she started crying when her mother (PW1) was washing her private part and stated that it was painful. She was asked who touched her and after some hesitation she reported that it was the appellant who had touched her.

47. PW1 called her other children PW2 and E, and questioned them on who touched the minor. Initially PW2 was hesitant to respond but on prodding from his brother he told PW1 the truth and said what he saw happened. They thereafter went to the appellant's house to talk to his parents.

48. The minor was taken to Nairobi women hospital in Kitengela. PW3 Dr John Njuguna testified and produce the P3 form, PRC form, GVRC form and Laboratory results as Exhibits. The result of the examination was that the external genitalia was normal. No injury was noted. The hymen was bruised and inflamed with pain. The urinary track was normal. In cross examination he confirmed that the appellant was not examined and no spermatozoa or yeast cells were seen on the child but the bruises were recent.

49. The P3 form indicated that the libia Majora and labia minora were normal but the child had an inflamed and bruised hymen. Whitish discharge was also noted on the external genitalia. The PRC form had the same findings and further, the treatment notes from Gender recovery centre also indicated that the hymen was inflamed and tender on touch. The diagnosis was "penovaginal penetration".

50. The minor testified as PW3, and it must be noted at this point that her testimony was inconsistent and so where her answers to the questions put forward to her. She was unable to communicate or effectively respond to the questions put forward to her and all she did was to nod to in affirmative or to deny a question put forth. She did not testify in the real sense. In retrospect the court ought to have appointed an intermediary as allowed under provisions of section 31 (2), (3) & (4) of the *sexual offences Act* to assist her. For that reason, this court will not rely on her evidence.

51. From the evidence of PW1, PW2 and PW3, and the medical reports produced it was proved that there was penetration, though as stated in the medical evidence it was "penovaginal penetration". A child of 3 years cannot feign injuries and her reaction when being bathed was instinctive and her injuries were confirmed by medical examination. Penetration as defined by section 2 of the *sexual offences Act* mean that means the partial or complete insertion of the genital organs of a person into the genital organs of another person." Based on the evidence adduced I do find that there was partial penetration of the minor vagina and therefor penetration was proved. { see *Erick onyango Ondeng v Republic* CRA No. 5 of 2013 (2014) eKLR.

Positive identification of the Offender

52. PW1 did testify that on 07.07.2020 at about 7.30pm she was bathing her child and while wiping her private parts she started crying that it was painful. She asked the child who had touched her and initially she was hesitant to say but after some prodding she rolled her eyes and said that it was the appellant who had touched her. She said "alinidinya" she asked her what the appellant did and she demonstrated that he had placed his dudu into her private part. She used her hands to demonstrate the same.

53. PW2 when confronted by PW1. Initially he was hesitant to say what transpired as had been left to take care of the minor. But he was urged to say the truth by his brother and he confessed to his mother as to how he found the appellant red handed abusing the minor in the sitting room on the same block where they stay. The medical evidence also confirmed that indeed the minor was defiled.

54. The evidence of PW2 was unshaken as the appellant was a person well known to him. They resided on the same apartment block. The victim family resided on the 1st floor, while the appellant's family resided on the 2nd floor. This was a case of recognition by persons known to each other and thus the identification of the offender too was sufficiently proved by evidence.

Did the trial magistrate err in failing to allow the appellant to call his witnesses thereby contravening provisions of Section 211(2) of the *criminal procedure code* and his rights to fair hearing under Article 50(2),(c) of the *Constitution* of Kenya 2010

55. The appellant was placed on his defence and opted give sworn testimony and was cross examined by the prosecutor. After he had finished the court proceeding both handwritten and typed bears out what transpired as follows;

Accused: I wish to call a witness my mother. I had not told her.

Prosecutor: we can give him another date for him to call his mother.

Accused: The case can proceed as it is. I will not be filing submissions.

Prosecutor: we shall rely on the evidence on record.

Court: Judgment on 21.07.2021. Mention on 02.07.2012

56. This ground of appeal is clearly devoid of merit as the proceeding clearly show that the prosecution and court were ready to accommodate the appellant after he had testified, but on his own volition decided not to call his mother as a witness. His rights as conferred by section 211 (2) of the criminal procedure code and provisions of Article 50,(2),(c) of the *Constitution* were not violated as alleged.

Did the trial magistrate err in convicting the appellant on uncorroborated evidence of a child?

57. The appellant submitted that while section 124 of the *Evidence Act* stipulated that the accused shall not be liable to be convicted on the evidence of the victim unless it is corroborated by other material evidence in support thereof implicating him. That may be so but the appellant conveniently left out the last proviso of the said section which clearly states that "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth."

58. The appellant further submitted that both PW2 and PW4 were minors. The court erred when it failed to conduct voire dire examination before PW2 testified and his evidence was not corroborated by any other evidence. The appellant also submitted that PW4 was an unreliable witness who gave contradictory testimony of what transpired.

59. This court has indeed found (in paragraph 50 above that, the evidence of the minor PW4 could not be relied on and she should have been declared as a vulnerable witness and an intermediary appointed to assist her). Be that as it may it is not correct for the appellant to allege that no voire dire examination was carried out before PW2 testified. The proceedings of 19.08.2020 clearly show that the witness underwent voire dire examination and the court did find that," The witness does not understand the meaning of oath. He will thus give unsworn evidence."

60. Further the evidence of PW2 was corroborated by the evidence of the PW1 his mother, who was the first to notice that there was something amiss, while wiping the child and she complained of pain on her private parts. Furthermore the medical evidence adduced also sufficiently proved that the child had been sexually assaulted. The conviction was thus safe and based on corroborated evidence.

Did the trial magistrate fail to consider the defense raised by the appellant that he had bad relation with PW1 and that she had motive to fix him and did the court also fail to consider his Alibi defence

61. The appellant did give sworn evidence and stated that he was a student at [Particulars Withheld] school and was in form two. During the pandemic, he would engage in casual construction works to get money so that when school reopen, he would not depend on his parents to sustain him for everything. On 08.07.2020 he was at the barber shop for a haircut, when his neighbour Ouma and 3 people claiming to be police officers came and arrested him. He was taken to the police station and told that a report had been made that he had abused a child. He was in custody for a week and eventually charged before

court with the offence of defilement. He was shocked and denied and continued to deny ever assaulting the minor nor had he any such intention of committing such an act.

62. In cross examination for the first time he raised the issue that, "I had bad blood with B mother because I had even beaten B and his brother E for dirtifiying cloths on the hanging line. B mother came and told me that she would hide me where men are hidden and never to come out. I informed my mother who asked B mother about it but I don't know how the conversation went."

63. The trial court in the proceedings noted that his line of defence was an afterthought. Be that as it may what is clear and undeniable is the fact that this issue was first raised in cross examination while the appellant was testifying in his defence. The appellant while cross examining PW1 and PW2 never raised any issue of there being bad blood between them so as to afford them an opportunity to want to fix him. This line of defence as clearly noted by the trial court was afterthought. There was no ulterior motive shown to exist, which the complainants family had, so as to maliciously act as against the appellant.

64. As regards the alibi defence raised, the appellant testified that on the material day of the incident, he was at a construction site at Airport road in Syokimau as a casual worker, where he worked all day and left the site at 7pm in the evening upon receipt of his wages. The appellant submitted that during trial he was in custody and had no means of tracing his two witnesses one Carlos Kamadi and Hezron Ogola who would have corroborated his alibi defence. It was the appellants submissions that the learned magistrate erred in ignoring and/or failing to compel attendance of the said witnesses in contravention of section 211 (2) of the *criminal procedure code.*

65. Unfortunately, the appellant's submissions on this score is not supported by the evidence on record. The defence alibi was again raised during cross examination during defence case and was never raised in evidence in chief. Further at no point did he state that he would call one Carlos Kamadi and Hezron Ogola to corroborate his alibi defence. After the close of the defence case he sought to call his mother but changed his mind and stated that the case can proceed as it is.

66. In the court of Appeal case of *Erick Otieno Meda v Republic* (2019)eKLR the court stated that the critical issues to consider regarding a defence of alibi was that ;

    a. An alibi needs to be corroborated by other witnesses', and not just a mere regurgitation of the events from the accused's point of view.

    b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross examination of the trial.

    c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

    d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond reasonable doubt so as to allow the alibi to fail.

67. The appellant alibi defence is not corroborated, it was not introduced early in the proceedings and it came as an afterthought during cross examination of the appellant. It did not displace the cogent evidence placed before court by the prosecution.

    Was the sentence passed harsh and/or excessive and should this court interfere with the same.

68. The appellant was sentenced to serve life imprisonment as is mandatorily provided for under section 8(2) of the *Sexual offences Act* No 3 of 2006.The Appellant urged the court to reconsider the sentence imposed as it was harsh and/or excessive.

69. The provision 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*.& In *Maingi & 5 others v. Director of Public Prosecution & Another* (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR)

70. This court does appreciate the gravity and nature of the offence committed and does not condone offences against minors and vulnerable persons. This was appreciated by Madan J as he was then in *Yasmin v. Mohammed* (1973) EA 370 –

> " The High Court is specially endowed with jurisdiction to safeguard interest of infants, as the court is the parent of all infants. The welfare of the infant is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infant in Kenya of whatever community tribe, sect fall within the ambit of guardianship of Infant Act and the court is charged with the sacred duty to ensure that their interest remain paramount and can duly preserve."

71. In the case *R v. Scott* (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –

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

72. In this case the appellant unlawfully violated an innocent child who was obviously in need of care and protection. This court notes that the trial magistrate took into consideration the appellant's mitigation and noted the aggravating factor to be the age of the complainant.

73. In the particular circumstance of this case, the trial magistrate correctly exercised her discretion while sentencing the appellant. But there was need for the trial court to further consider the judiciary sentencing policy guidelines especially section 23.7 thereof to note that while there might have been aggravating circumstances, she would have further considered the age of the appellant and considered a more rehabilitative sentence and punishment which is proportional to circumstances of the crime. The appellant was 2o years old. A life sentence as melted out is harsh and excessive thus disproportionate to the crime committed.

Conclusion

74. Having considered all factors in this case, considering the gravity of the offence against an innocent minor and Appellants mitigation and also bearing in mind the persuasive finding in. In Maingi & 5 others v. Director of Public Prosecution & Another (Petition No.E117 of 2021) (2022) KEHC 13118 (KLR) as well as the dicta in *Francis Muruatetu case* and the judiciary sentencing policy I do hereby set aside the sentence of life imposed on the Appellant in Mavoko Chief Magistrate court Criminal Case SOA No.29 o20 vide judgment / sentence dated 28th July 2021 and substitute it with a sentence of Fifteen (15) years imprisonment.

75. The appellant was arraigned in court on 13 July 2020 and was held in custody until 28th July 2021 when he was sentenced. He spent One year in custody. Pursuant to provisions of Section 333(2) of the

criminal procedure code, I do direct that this period he spent in remand be included in tabulating his sentence. The sentence of fifteen (15) years will run from date of judgment 28th July 2021

76. For avoidance of doubt the appeal on conviction is dismissed.

77. Right to Appeal 14 days.

Judgement accordingly.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN MACHAKOS THIS 19TH DAY OF JULY, 2023

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of July, 2023.

In the Presence of

Appellant

----------For ODPP

----------Court Assistant