Kiprotich v Republic (Criminal Appeal 17 of 2020)
[2024] KEHC 15464 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15464 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 17 OF 2020

E OMINDE, J

DECEMBER 5, 2024

BETWEEN

ABEL KIPROTICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction and sentence in Eldoret Chief Magistrate Criminal Case (Sexual Offences) No. 181 of 2018.

2. 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 particulars of the offence were that on the 23rd day of August 2018 at (particulars withheld) in Eldoret West District, within Uasin Gishu county, the Appellant unlawfully and intentionally caused his genital organ (Penis) to penetrate the genital organ (vagina) of C.C a girl aged 12 years old.

3. In the alternative he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on the 23rd day of August 2018 at (Particulars withheld) in Eldoret West District within Uasin Gishu County, the Appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ(vagina) of C. C a child aged 12 years old.

4. The Appellant pleaded not guilty and the matter proceeded to full hearing. The prosecution called six witnesses in support of its case. Upon establishing that the Appellant had a case to answer, the Appellant was placed on his defence. He opted to give sworn testimony and called one witness. Upon considering the evidence tendered in court and the testimonies of the witnesses, the trial magistrate convicted the Appellant of the main charge. After he was given an opportunity for mitigation, the trial magistrate sentenced the Appellant to 20 years imprisonment.

5. Being aggrieved with the conviction and sentence, the Appellant instituted the present appeal vide a Petition of Appeal dated 10/02/2020. The appeal is premised on the following grounds;

   i. The trial magistrate erred in law and fact as it failed to hold that the charge sheet was defective.

   ii. The trial magistrate erred in law and fact by failing to observe that the witness evidence was inconsistent and contradictory.

   iii. The trial magistrate erred in law and fact as it failed to adhere to Section 200(3) of the Criminal Procedure Code

   iv. The trial magistrate erred in law and fact as he failed to observe that the medical evidence did not link the Appellant to commission of this offence.

   v. The trial magistrate erred in law and fact as he failed to observe that the circumstantial evidence did not link the Appellant to commission of this offence.

   vi. The trial magistrate erred in law and fact as it failed to hold that there existed family differences between the complainant's family and the Appellant's family

   vii. The trial magistrate erred in law and fact by failing to consider the Appellant's defence evidence in conclusion of its decision.

Prosecution Evidence at the Trial Court

6. PW1 was Magdalene Chepkasi. She testified that the Complainant is her daughter in law and the Appellant is her brother. On 23/08/2018 at around 7pm the Appellant came to her house and knocked on the door. She heard him talking to her husband who later allowed the Appellant to go with the Complainant and another one of their children to go help him take care of his young children as his wife had reportedly left. Later that night, after it rained, PW1 went to check on her children at the Appellant's home but they met on the way as the Appellant was returning with the children. That the Appellant slept at their home and in the morning he borrowed PW5's bicycle and left. After he left, the complainant told PW1 that the Appellant had defiled her and that he had slapped her when she tried to scream. PW4 said that she had also heard the complainant cry and when she asked she had been informed that she was crying because she wanted to go home. The child was taken to Moi teaching and Referral Hospital where she was treated and after going to the police station she was issued with a P3 form. She testified that the complainant was born on 16th April 2006. In cross examination she denied having a grudge against the Appellant.

7. PW2 was the Complainant. The trial magistrate conducted a voire dire and upon being satisfied that the minor understood the nature of the oath, she was allowed to testify. The complainant stated that she was 12 years old and recalled that on 23/08/2018, at around 7pm she was at home with her sister Mercy and her other siblings Michael and Ashley together with her parents. The Appellant came home and asked her parents to allow her and her sister (PW4) to go with him to his home. They later went to his home and he placed beddings on the floor where they slept. As they were sleeping, the Appellant slept beside her and started pulling her towards him. The lights were off and he tried pulling her to face him and she started crying. When she cried he slapped her and removed her clothes and inner clothes as she was crying. That he did bad manners to her and after he was done picked a cloth and wiped her vagina. He told her that he would have her hair plaited and buy her books. He also told her that it was a secret and she should not tell anyone. Her parents came for them later and when she got home her sister told her mother. When her mother asked her, she declined to tell her but her sister informed her father

and he started looking for the Appellant. Her grandfather, after being told what happened, took her to Moi Teaching and referral hospital and when they returned home she told her mother everything.

8. PW4 was MC, a minor. The court conducted a voire dire and was satisfied that she understood the nature of an oath. She testified that on 23/08/2018 at around 7pm the Appellant came to their home and told their parents that his wife had left and he wanted to pick their children and bring them to his home. She accompanied him and PW2 to his home. When the time came for sleeping he spread a mattress on the floor and they slept. He slept beside them and started pulling PW2 towards him. She testified that she heard her cry and tell the Appellant that what he was doing to her was painful. She knew that what he was raping her and she heard him promise to plait her hair and buy her books. He warned them against telling anyone and threatened to kill them. They met their parents on the way back home as they were going back with the Appellant. The following morning, she told PW2's mother what had happened and she also told PW2's father.

9. PW4 was Abel Kimaru Koskei, brother in law to the Appellant. He testified that on 23/08/2018 he was at home when the Appellant informed him that he had issues with his wife and requested that his children go help him at home. He allowed them to go with him and then it started raining. They then went to check on the girls but they met the Appellant and the children on the way back. They went back home and the Appellant shared a room with his sons. In the morning the Appellant borrowed his bicycle and said he was taking his children to his parents' home. He later on went to fetch his bicycle from the Appellant's home but he was not there. PW1, his wife, then came and informed him that the Appellant had defiled the complainant and they then began looking for him. They found him at Enkoi area and they later on ferried him to Baharini police station. They took PW2 to hospital and a P3 form was filled. He stated that the complainant was 12 years old.

10. PW5 was Dr Lilian Taban Tokosang who produced the P3 form and testified that she examined the Complainant on 24/08/2018. She had multiple fresh hymenal tears and a clear discharge in the vagina. The HIV tests were negative and on urinalysis she had a bacterial infection. VDLR and pregnancy tests were negative. The findings were consistent with Defilement. She also examined the Appellant and produced a P3 form to that effect. She state that his penis was normal and had no bruises and no injuries. His urine was okay and HIV test was positive.

11. At this point of the hearing, the Appellant asked that the court start the hearing afresh as he was not happy with how he conducted his case. His application was dismissed and on 08/07/2019 when a new magistrate took over the hearing of the suit, Section 200 of the Criminal Procedure Code was explained to the Appellant and upon consideration of the reasons given, the trial court opted to continue with the hearing of the matter as it was.

12. PW6 was PC Mildred Mulepu who was the Investigating Officer. She testified that she received a report at Soy Police station in August 2018. The report was that a girl named CC had been defiled. Upon being assigned the case she escorted the complainant to Moi Teaching and Referral Hospital. The suspect had been arrested by members of the public and escorted to Baharini police post. She took the suspect and escorted him to hospital for examination. She later took statements from the witnesses and charged the suspect. She issued the complainant with a P3 form which was later filled. She confirmed that the complainant was born on 30.04/2006 and produced her clinic card as an exhibit.

Defence Evidence

13. The Appellant testified in Kiswahili as DW1. He stated that on 19/08/2018 they had a meeting to distribute his father's property and he fought with his sister in law over the same. He stated that PW1 and PW4 colluded with police officers to frame him. On cross examination, he stated that after

the family meeting he was given 2 acres of land and PW1 was given ½ acre which displaced her. She complained and he boxed her when she spoke negatively about his wife. Further, that at the station he was given a pre-recorded statement and was assaulted by a police officer.

14. DW2 was a brother to the accused aged 14 years. He stated that he remembered the fight during the family meeting but did not know what happened on 23/08/2018.

15. As aforestated, the trial court considered the evidence and testimonies and convicted the Appellant of the main charge. He was sentenced to 20 years' imprisonment.

Hearing of the Appeal

16. The parties were directed to file written submissions on the appeal. Counsel for the Appellant, Mr. Ayieko was granted 21 days to file submissions on 24/09/2024. When the matter came up for mention on 29/10/2024 he had not filed submissions and at the moment there are still no submissions on record for the Appellant. The state filed submissions through Prosecution Counsel Patricia Kirui.

Respondents' submissions

17. Counsel submitted that the on the ground of the charge sheet was defective, the Appellant has not strictly enumerated the defect in the charge sheet. She urged that it is trite law that a charge sheet can only be defective if it does not state the essential ingredients of the offence. She cited Section 134 of the Criminal Procedure Code and the case of Sigilani v Republic [2004] 2 KLR 480 in support of her submissions. Additionally, she submitted that in the case of Isaac Omambia v Republic [1995] eKLR the Court of Appeal held that the key ingredients of a charge sheet are;

> " 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."

18. Counsel urged that 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 and the statement of the offence clearly states an offence known in law that he was charged with. The charge sheet also contained the particulars of the offence. It was clear from the charge sheet what charge the Appellant was supposed to plead and he confirmed to the trial court that he understood. There was no ambiguity in the particulars as to the action he did on the material day. She urged that the Appellants' submission that the charge sheet is defective lacks merit and should be dismissed.

19. Counsel submitted that there were no contradictions or inconsistencies in the prosecution's case. That the proceedings of the trial court clearly reflect that the prosecution witnesses were truthful and consistent.

20. Counsel urged that the provisions of Section 200 of the Criminal Procedure Code were never violated and the Appellant's conviction was safe and proper. She stated that it is not in dispute that the matter was handled by Honourable H. Barasa (PM) and was thereafter taken over by the Honourable R. Odenyo (SPM) on 8th July 2019. The court noted that the matter was part-heard and one witness, the Investigating Officer, was the remaining witness. Section 200 was explained and the Appellant who elected to have the matter start de novo which election was opposed by the Prosecution.

21. That a reading of Section 200(3) of the Criminal Procedure Code reveals that it is not mandatory that every case where the Judicial Officer is transferred should start de novo: the succeeding magistrate is not bound to oblige the request which may thereupon be made by the accused person. The only requirement is that the accused is made aware of the right to have the witnesses recalled for hearing but the discretion to have the witnesses recalled and matter reheard upon the request/application by the accused person rests with the court upon consideration of each case on its merits.

22. Counsel submitted that it is clear from the response by the Appellant that directions under Section 200(3) had been explained to him. Counsel cited the Court of Appeal's decision in Mombasa, Criminal Appeal No. 1 of 2017: Abdi Adan Mohamed v Republic (2017) eKLR in support of her submission. She additionally cited the decision in Ndegwa v. Republic [1985] KLR and the finding of the Honourable J. A. Makau in; Constitutional and Judicial Review Division Petition No. 2 of 2015 – Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others [2015] eKLR in support of this submission.

23. On the medical evidence, counsel urged that the evidence of penetration was corroborated by PW3 who was at the scene on the night of 23rd August 2018 and heard PW2 crying as she was being defiled. She gave direct evidence and testified that they all slept on the same mattress with the Appellant, PW2 slept besides the Appellant. She narrated how she heard PW2 cry and tell the Appellant that whatever he was doing was painful. She also testified that when the Appellant was done doing the act, he promised to help the complainant have her hair plaited and buy her books. He also warned both PW1 and PW2 not to tell anyone about the incident otherwise he would kill them. She urged that the findings of PW5 were consistent with Defilement. Dr Taban examined PW2 on 24th August 2018 immediately after the incident and noted multiple fresh hymenal tears and tests confirmed that she had bacterial infection. This evidence was overwhelming and clearly linked the accused to the offence. The conviction and sentence by the trial court was therefore safe.

24. Counsel urged that the Appellant attempted to bring out the differences he had with the complainant's mother and father in his defence but the prosecution's case was strong and could not be shaken by the defence of the Appellant. She stated that the trial court correctly noted in its Judgment that the evidence of DW2 was not relevant as he was not with the Appellant on the day the Appellant is said to have defiled PW2. Further, the trial magistrate dismissed the Appellant's defence as it could not displace the well corroborated prosecution's case. She urged the court to dismiss the appeal for lack of merit.

25. It is the respondent's case that the standard of beyond reasonable doubt was met as envisaged by the law. She laid out the elements to be established in determining the offence of Defilement pursuant to Section 8(1) of the *Sexual Offences Act* as follows;

    a) The Identification of the perpetrator;

    b) The age of the complainant;

    c) Penetration

26. On identification, counsel submitted that the Appellant was well known to the complainant as he was her uncle and therefore, there was no chance of mistaken identity. On age, PW1 testified as to the age of the complainant, and produced PW2's Immunization Card that confirmed PW2 was born on 16th April 2006. The P3 form of the complainant also indicated that the minor was 12 years as such the court rightly found that the complainant was a minor the aged 12 years. Counsel urged that other than the evidence of PW2 and PW3 which was corroborative of Defilement, the findings of PW5 confirmed proof of penetration. In her findings she testified that upon examination of PW2's genitalia

she confirmed fresh hymenal tears consistent with Defilement and therefore, this element was proved beyond reasonable doubt.

27. Counsel urged the court to uphold the conviction and sentence accordingly.

Analysis & Determination

28. A first Appellate court has a duty to carefully examine and analyze afresh the evidence presented from the lower court and draw its own conclusions. It must not necessarily agree with the findings of the trial court and must bear in mind that it lacks the privilege of seeing and examining the demeanour of the witnesses first hand. (See Okeno vs. Republic [1972] EA, 32 and Kiilu & Another vs. Republic [2005] 1 KLR, 174])

Defective Charge Sheet

29. On the issue raised by the Appellant that the Hon Trial Magistrate failed to hold that the charge sheet was defective, Section 134 of the Criminal Procedure Code provides as follows:

> " 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 charged."

30. In Sigilani vs Republic, (2004) 2 KLR, 480 that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

31. I have perused the pleadings in this case. I note that apart from making this allegation the Appellant has not at all demonstrated to Court what the defect in the Charge was that the Hon Magistrate ought to have upheld. Further, in light of the provisions of Section 134 above cited as well as the law as enunciated in the above case, I have perused the said charge sheet. The same has clearly laid out the offense and the provision of the law under which it has been brought, the identity of the accused and the complainant which later provisions required be redacted, as well as the date time and place of the commission of the offence.

32. The said charge sheet also has all the parameters required to be filled correctly so filled and the necessary rubber stamps by all the agencies that handled the said Charge sheet viz the Police, the ODPP and the Court affixed as appropriate. In this regard, I am satisfied that the said Charge had no defect at all that needed that the Trial Magistrate finds and upholds the same to be defective. I therefore find no merit on this ground of Appeal and I accordingly dismiss the same.

Offence of Defilement

33. In the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 the Court was stated that:

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

34. It is upon these three main ingredients that offence of Defilement is rooted therefore. These ingredients are provided for under Section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. See George Opondo Olunga vs. Republic [2016] eKLR.

35. Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed Defilement.
>
> (2) .....
>
> (3) A person who commits an offence of Defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

Age of the Victim

36. The importance of proving age in a Sexual Offences was underscored in the following cases below:

In Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

37. In the case of Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010, the Court of Appeal on how the age of a victim can or ought to be proved stated as follows:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and Defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

38. And in the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, the Court was explicit on what evidence is acceptable on the proof of the age of the sexual victim. The Court stated that:

> " 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..."

39. In the instant case, on the age of the victim at, PW1 who is the victim's mother testified that she was twelve years old at the time the offence was alleged to have been committed. She also produced the victim's Immunization Card that confirmed PW2 was born on 16th April 2006. The P3 form of the complainant also indicated that the minor was 12 years.

40. Looking at the defence of the Appellant, I note that the issue of the victim's age as proffered by the Prosecution witnesses and the documents in support of the same was not at all challenged, controverted and/or contradicted during the trial. Even at this Appeal stage, the said evidence still

remains unchallenged. In this regard, I find no reason to disturb the Hon Magistrate's finding that the victim was a minor aged 12 years at the time the offence was committed.

Identification by recognition

41. In the case of *Kariuki Njiru & 7 others vs Republic, Criminal Appeal no. 6 of 2001* (Unreported) the court held as follows:

> "Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

42. In the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
>
> We consider that in the present case the recognition of the Appellants by Wanyonyi and Joyce to whom they were previously well known personally, the first Appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the Appellants kept flashing about in Wanyonyi's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyonyi reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three Appellants to the police as the robbers who had robbed him.
>
> We are satisfied that there was no mistake as to the identity of the three Appellants and they were properly found guilty of the offence with which they were charged in count 1."

43. In the instant case, the prosecution evidence is to the effect that the accused person was an uncle to the victim since he was a brother to her mother. She testified that she knew him very well and including her younger sister with whom they went with the accused to his house upon the request of the accused and with the permission of their parents.

44. This is therefore evidence of recognition as opposed to evidence of identification. As observed in the Court of Appeal decision above this kind of evidence is more satisfactory, more assuring, and more reliable because it depends upon the personal knowledge of the assailant in some form or other. Being satisfied that the Hon Magistrate satisfied himself that the accused was properly identified based on this evidence, again I see no reason to disturb the trial Court's finding on this aspect.

Penetration

45. Section 2 of the *Sexual Offences Act* defines penetration as:

> 'The partial or complete insertion of the genital organs of a person into the genital organ of another person."

46. In the case of Bassita vs. Uganda S.C. Cr*iminal Appeal No. 35 of 1995*, the Supreme Court of Uganda had the following to say in respect of proving penetration:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not 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 is sufficient to prove the case beyond reasonable doubt."

47. Further, in the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

48. As already herein above summarised, in the instant case, the evidence of penetration as was adduced by the complainant was supported by the evidence of PW3 who was at the scene on the night of 23rd August 2018 when the complainant was defiled. In considering the evidence of Pw3, I find that it corroborates the evidence of the complainant in every detail.

49. Further, the findings of PW5 Dr Taban who examined PW2 on 24th August 2018 immediately after the incident indicated in the P3 Report of the complainant dated 25th August 2018 and which was produced as Pexh2 that he noted multiple fresh hymenal tears on her genitalia as well as a clear discharge and tests confirmed that she had bacterial infection. PW5 concluded that these findings were consistent with Defilement.

50. In my considered opinion, I find that the said evidence is sufficient to support proof of penetration, it is direct and not circumstantial evidence ad directly links the accused person to the commission of the offense. Again, based on this evidence, I find no reason to disturb the Hon Magistrates finding in this regard.

Adherence to Section 200(3) Of the Criminal Procedure Code

Section 200(3) of the Criminal Procedure Code provides as follows;

> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

51. In the case of Ndegwa V. Republic [1985] KLR at 534 the Court of Appeal stated:-

> " Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial."

52. In the case of Joseph Kamau Gichuki vs. Republic (2013) the Court of Appeal stated that:

> " This Court has previously held that Section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking Section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused"

53. It should be noted from the decisions of the Court in the cases herein above cited that it is not a mandatory requirement that every time a succeeding Magistrate takes over a case, then the case must start afresh. The only requirement is that the accused is made aware of the right to have the witnesses recalled. The succeeding magistrate is not bound to oblige the request which may thereupon be made by the accused person because the discretion to have the witnesses recalled and the matter reheard upon the request/application by the accused person rests with the court upon consideration of each case on its merits.

54. In the instant case, the record shows that the hearing was taken over by the Honourable R. Odenyo SPM from Hon H. Barasa PM and on 8th July 2019, Hon Odenyo in noting that the matter was part-heard explained Section 200 of the CPC to the accused and he requested that the matter starts de-novo and the reasons he gave for this request are on record. The prosecution objected to the request and also gave their reasons in support of the objection. The Hon Magistrate then reserved the matter for Ruling whose import was that the case proceeds from where it had reached was subsequently delivered. In this regard then, the ground of appeal to the effect that Section 200 of the CPC was not adhered to has no merit.

55. Lastly I am well satisfied that the Hon Magistrate in his decision considered and applied his mind appropriately to the Appellant's defence and all that appertains to it and dismissed the same in its entirety "as mere excuses that cannot displace the strong and well corroborated prosecution case".

56. Further, the prosecution evidence cannot be said to be circumstantial evidence by any stretch of the imagination to warrant the ground of appeal that "the trial magistrate erred in law and fact as he failed to observe that the circumstantial evidence did not link the Appellant to commission of this offence'. I am very well satisfied that the said evidence was direct evidence in all aspects and respects and including the three crucial parameters that are crucial to the finding of Guilt in a defilement case which are identification, age and penetration.

57. Given my above findings I am satisfied that the conviction of the accused person is anchored on a very well-considered finding of guilt by the Hon Magistrate and I now hereby uphold the same. On the sentence of 20 years imprisonment imposed upon the appellant, the recent decision of the Supreme Court in Petition No. E018 of 2023, Republic V Joshua Gichuki Mwangi & Others is relevant.

58. In the said case, a decision of the Court of Appeal wherein an imprisonment term of 20 years imposed by a Magistrates' Court upon an Appellant who was convicted for defilement was commuted to 15 years was set aside by the Supreme Court and the 20 year imprisonment term reinstated. In setting

aside the Court of Appeal decision, the Supreme Court stated as follows with regard to the minimum and mandatory sentences imposed by the *Sexual Offences Act* 2006;

> " .....the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence"

59. In this regard then being satisfied that the victim was 12 years old, the applicable sentence is that which is provided under Section 8(3) of the *Sexual Offences Act* and that is a term of imprisonment of not less than 20 years. The Hon Magistrate sentenced the Appellant to 20 years imprisonment and I am satisfied that the sentence is lawful and legal and I accordingly uphold the same.

60. The upshot then is that I uphold both the conviction and the sentence by the lower Court, and find that the Appellant's Appeal lacks merit and the same is accordingly dismissed in its entirety. The Appellant has the right to appeal against within 14 days.

READ DATED AND SIGNED AT ELDORET ON 5TH DECEMBER 2024

E. OMINDE

JUDGE