REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 37 OF 2018

JACOB NGARI GATHOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and the sentence of Honourable R. Kefa SPM, in Nyeri CM, SOA Case No. 1 of 2016 delivered on 2nd May 2018)

JUDGEMENT

Brief Facts

1. Before the Senior Magistrates' court, 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 No. 3 of 2006 with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 1st day of January 2016 in Nyeri county, he intentionally caused his penis to penetrate the anus of KKM [full name withheld], a child of six years. The appellant was convicted on the main charge and sentenced to serve life imprisonment.

2. Being dissatisfied with the said judgement the appellant lodged an appeal on grounds summarised as follows:-

a. That the learned trial magistrate erred in law and in fact in finding that the prosecution proved its case beyond reasonable doubt;

b. That the learned trial magistrate erred in law in not finding that the charge was incurably defective;

c. That the learned trial magistrate failed to consider the defence raised by the appellant;

d. That the appellant is suffering an unjust sentence.

3. Parties exchanged written submissions in support of their arguments.

Appellant's Submissions

4. The appellant submits that the charge on the 1st count was incurably defective and should not have been allowed in the first place. The trial court noted that the words "as read with" had been omitted but proceeded to amend the same which was unprocedural. The appellant submits that the Sexual Offences Act does not have section 8(1)(2) and therefore the charge is incurably defective. He further argued that a person shall not be charged with an offence unless it is known in law and the penalty prescribed. The state counsel never sought to amend the charge and the court doing it on its own motion breached its duty as arbiter and becomes partial in assisting the prosecution to sanitize a dead case thus causing prejudice on the appellant. The trial court used section 382 of the Criminal Procedure Code to justify its amendment of the charge. In doing so, the court did not consider whether miscarriage of justice would occur contrary to what section 382 provides. In the circumstances, the appellant submits that the court failed in not considering that invoking section 382 caused injustice to the appellant and proceeded to convict the appellant on a defective charge.

5. The appellant further submits that according to PW1's testimony, the incident occurred on 1st January 2015 which is contrary to the trial court's finding and date in the charge sheet. The evidence of PW1 is thus irreconcilable and the trial court ought to have noted the same as a major discrepancy. Hence the court by making a decision outside the ambit of the evidence presented makes the entire judgment untenable.

6. The appellant further submits that the prosecution did not prove its case beyond reasonable doubt. He argied that the entire trial was a nullity as he was convicted on an incurably defective charge. Secondly, that section 8(1) of the Sexual Offences Act requires as an ingredient

of the offence of defilement, the prosecution ought to prove penetration. The appellant submits that the evidence of PW4, was misconstrued by the court as the evidence did not show any evidence of penetration because there was a healed bruise; the medical records did not show that the sphincter was hanging out; there was a healed bruise on the anal area yet bruises cannot heal completely within 5 days; sexual assault on the anus shows on the schipnter; an anascopy was not done on the anus which would have shown internal injury on the anus; the age of the injuries was shown as "hours" and there was no indication of penetration. On re-examination, the witness stated that the shaped healed bruise is an indication of penetration, but on cross examination the witness explained that the healed scar was on the anal region, it was the external region. This together with the medical expert's words that there was no indication of penetration wholly displaces the court's finding.

7. The appellant further submits that the trial court contravened section 200 of the Criminal procedure code by allowing the matter to proceed with the matter from where the previous court had reached. The appellant contends that the trial court ought to have given the appellant a right of election and relied on the case of **Nabutolah (no citation given)** which held that as per section 200, the right of election was for the accused and not his advocate.

8. The appellant further submits that he raised a defence of alibi and that no reference of it was made in the judgement and neither did the trial court consider it. The appellant contends that the trial court analysed and considered the prosecution case however it only gave a cursory look at the defence case. Further that the the trial court imposed a higher duty on the appellant to prove his innocence contrary to Article 50 of the Constitution. The trial court did not consider that the appellant was at Beavers and not at Chaka. The trial court in demanding for "convincing" evidence it flouted the well-established facts that "in an alibi defence the accused did not have any burden to proof so." The appellant relied on the cases of **Victor Mwenda vs Republic CA 357 of 2002 and Thuranira vs Republic CA 127 of 2009 and Sam Maseru vs Republic (no citation given).**

9. The appellant further submits that on the fateful night he spent the night at Beavers Hotel due to some problems with PW2 arising out of a sexual escapade. He further alleged in his sworn statement that he had a sexual relationship with PW2 and when it ended she demanded more money than what he had given her. Due to this reason he moved to Beavers Hotel. He stated that PW2 followed him to the hotel and at the time of arrest, she took civilians who were about to lynch him as she stated that he had robbed her. The appellant submits that the trial court did not indicate this and that it failed to fully investigate this issue leading to a failure of justice. The appellant relied on the case of **Peter Kariuki Wachira vs Republic CA Nyeri Case No. 186 of 2010** and further added that the trial court ignored the sour relationship between the appellant and PW2 yet it was crucial.

10. The appellant further relied on the case of **Alfeo Valentino vs Republic Court of Appeal for TZ No. 92 of 2006 at Arusha** to support his contention that the court frowned upon a matter that was reported after 5 days similar to this one which was reported after 4 days. Additionally, the appellant submits that he could not have defiled PW1 in two minutes when PW2 was out of the premises. The story defies any comprehension and the time element makes it fully implausible.

11. The appellant contends that the prosecution case has material contradictions. For instance PW1 testified that the appellant went to the minor's room and on his bed he defiled him. However on cross examination, PW1 stated that the appellant took him to the appellant's room referred to as [Particulars withheld] and defiled the minor. The appellant submits that PW1's evidence was materially contradictory which created doubts which ought to have persuaded the trial court to make a finding that it was fatal to the prosecution case.

12. The appellant submitted that the sentence is manifestly excessive. He relied on the case of **Muruatetu (no citation given)** and submitted that the Supreme Court Abolished the mandatory the nature of sentences.

13. The appellant concludes his submissions by stating that the trial court's judgement was erroneous and failed to meet the ends of justice and as such occasioned a miscarriage of justice. The appellant humbly prays that this Honourable court corrects the manifest injustice and allows the appeal.

Respondent's Submissions

14. The respondent in opposing the appeal submits that the prosecution proved the ingredients forming the offence of defilement. Relying on the case of **Kyalo Kioko vs Republic (2016) eKLR**. On the issue of penetration, the respondent submitted that this was confirmed byPW1, the victim and also PW4, the medical expert. According to PW1's testimony, the accused removed his clothes and lowered them, and then he unzipped his pants and out his thing for urinating into his anus. PW4 produced a P3 Form which showed that PW1 had been defiled and testified that PW1 had a healing "Y" shaped bruise on his anus. As such PW4 corroborated the evidence of PW1 on penetration. Furthermore, PW2, mother to PW1, noticed that her son was not okay as he could not walk or sleep properly. When she asked him what had happened, PW1 opened up and told his mother what had transpired. PW1 stated that he was initially afraid to tell her what had occurred because the appellant had threatened him. The respondent submitted that this ingredient was proved beyond reasonable doubt.

15. On the age of the complainant, PW2 testified that PW1 was born on February 2008. PW1 would be 7 years of age at the time the offence was committed on 1st January 2016. PW3, the investigating officer, produced PW1's immunization card in evidence showing that he was born on 29th February 2008 which was not objected to. The respondent submits that it also proved this ingredient and relied on the case of **Mwalango Chichoro Mwanjembe vs R (2016) eKLR.**

16. On the identity of the perpetrator, the respondent submitted that the appellant was well known by both PW1 and PW2 having stayed in the hotel for several days. PW1 had interacted with the appellant severally and they even knew each other's names. This contention was confirmed by DW1, the appellant and his witness DW2 who said that the appellant, himself and other members of the team had stayed in the hotel from 19th December to 1st January 2015 when the offence was committed. DW2 further added that they would sleep in the guesthouse where PW2 was the caretaker and that they would play with PW1 whom they all loved and that PW1 would also go to their rooms.

17. As such, the evidence on identification was that of recognition. The respondent relied on the case of **Peter Musau Mwanzia vs Republic**

[2008] eKLR and stated that evidence of recognition carries more weight as the risk of mistaken identity is very minimal.

18. The respondent further submitted that the charge sheet was not defective. The charge sheet reads: "defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006." The respondent admits to omitting the words "as read with" between (1) and (2), but submits that such an omission is not fatal and does not make the charge defectively incurable. The charge sheet as in this case, disclosed all the ingredients of an offence and further the appellant knew the charges he was facing. No justice was occasioned to the appellant by the omission of those words. In saying so, the respondent relied on the case of **Peter Ngure Mwangi vs R (2014) eKLR.**

19. The respondent further submits that at no point did the medical evidence exonerate the appellant nor did it state that there was no penetration. The medical evidence showed that they found a healing "Y" bruise on the anus of PW1. On cross examination, the medical expert stated that PW1 was still healing and that's why he used the term bruise, as opposed to a scar. The medical expert further explained that the anal sphincter may or may not become loose on defilement. As such, the medical evidence did not exonerate the appellant nor did it rule out penetration. It corroborated the evidence of PW1 who told the court how the appellant defiled him.

20. The respondent submitted further that all the four prosecution witnesses were very consistent and did not contradict each other, even on cross examination. If there were any contradictions at all, they were very minor and trivial and did not go to the substance of the matter nor did they occasion any prejudice and injustice to the appellant.

21. The appellant in his defence, gave sworn evidence whereby he stated that he had a romantic relationship with PW2. The first time they were intimate, he gave her money but she complained that it was a little and she demanded more but the appellant refused. The respondent submits that this issue of a relationship was only brought out at the defence stage. Further PW2 had testified that she was married, a fact that was confirmed by PW1 who said that he lived with his father also.

22. The appellant further alleged that on the date of the offence, he was not at the scene but they were spending the night at a different guest house. DW2 gave evidence in court that he was not sure where they spent the night on the day in question. His testimony however confirmed that they used to spend the night where PW1 lives and that they all knew PW1 and PW2 well. The respondent submits that the trial court did consider the evidence tendered by the defence but found that the issue of a relationship between the appellant and PW2 was not concrete. Further that the appellant and DW2 contradicted themselves when it came to where they spent the night on the day in question.

23. The respondent submitted that in the present case, the prosecution called witnesses who sufficiently proved the charges the appellant was facing. In any event, the prerogative on witnesses to be called in a case lies purely on the prosecution.

24. The respondent submitted that the prosecution had proved its case beyond reasonable doubt and that the appellant was rightly convicted. As such, she prayed that this Honourable court dismiss the appeal.

Issue for determination

25. After careful analysis, we humbly submit that the main issues for determination are:

(a) Whether the charge was incurably defective;

(b) Whether the prosecution proved its case beyond any reasonable doubt

(c) Whether the trial court considered the defence evidence;

(d) Whether the sentence imposed on the appellant is harsh and excessive.

The Law

26. This being a first appeal, this court is guided by the principles set out in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal stated:-

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.***

27. Similarly in the case of **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of the appellate court as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424."*** *This was also set out in the case of* ***Kiilu & Another vs Republic [2005]KLR 174.***

A. <u>Whether the charge was defective</u>

28. The appellant herein contends that the charge is defective because the charge sheet reads "defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006."

29. The respondent admits to having omitted the words "as read with" to be inserted between section 8(1) and (2) but submits that such an omission was not fatal and did not make the charge sheet defectively incurable.

30. **Section 134 of the Criminal Procedure Code** provides:-

> ***"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."***

31. Keeping that in mind, in this particular case herein, the wording of the charge sheet sufficiently communicated the nature of the charge and provided particulars necessary for the appellant to comprehend the charge and the offence that he faced. From the record, it is clear that the appellant was throughout the trial aware of the charge facing him. He was represented by a counsel who cross-examined the witnesses and who had explained the charge to him in addition to the explanation by the court during plea. Neither the accused nor his counsel raised the issue of the defect during the trial. It was raised at submissions stage and the trial magistrate dealt with it in her judgement.

32. **Section 382 of the Criminal Procedure Code** provides:-

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

In my considered view, the omission of the words "as read with" was not prevalent to occasion miscarriage of justice or violate his right to a fair trial. The said defect was minor and is curable under section 382 of the criminal Procedure Code and that no miscarriage of justice was occasioned by the omission.

B. <u>Whether the prosecution proved its case beyond reasonable doubt.</u>

33. On the issue of whether the prosecution proved its case beyond a reasonable doubt, I wish to address the following issues as raised by the appellant:-

i. Whether there was conclusive evidence of penetration;

ii. Whether there was inconsistency on the date in which the alleged defilement occurred;

iii. Whether the prosecution evidence was riddled with material contradictions;

iv. Whether the prosecution failed by not calling crucial witnesses;

i. <u>Whether there was conclusive evidence of penetration</u>

34. **Section 8(1) of the Sexual Offences Act, 2006** provides as follows:-

> **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

35. **Section 2(1) 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."**

36. In regard to the issue of penetration, I do not buy the argument of the appellant that the trial court misconstrued the evidence of PW4, Dr. Nderitu to eventually find that it was proof of penetration.

37. Relying on the case of **<u>Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013</u>** where it was stated that:- **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

38. Dr. Nderitu testified as PW4 and produced the P3 Form and the Post Rape Care Form (PRC Form) in evidence. According to the the P3 Form, PW1 had a Y healed bruise in the anal region which fact was confirmed by the PRC Form which indicated that there were healing bruises on the anus. The witness further testified that although there was a healed bruise on the anus, the healing process was not complete

and that the healed scar was on the external anal region. He went on to explain that a laceration is a soft tissue injury which has breakage of skin whereas a bruise is a later manifestation of the healing of the laceration. He concluded by stating that the Y healed bruise tallies with the history which is indicative of penetration.

39. The doctor was very clear that penetration did occur. Notably since the incident was reported late, a specimen was not taken to show that the sphincter was hanging out. However this does not rule out penetration. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I accordingly find so and reject the appellant's argument that the healed bruise was not proof of penetration.

ii. Whether there was inconsistency on the date in which the alleged defilement occurred

40. The complainant PW1, testified in court that on 1/1/2015, the appellant came at midnight and knocked the door of his room. However PW1 further testified on cross examination that "on 31/12/2015 there were people. On 2/1/2016, there were many people." He further added that "it was the day of the new year."

The charge sheet indicates that the offence occurred on the 1st day of January 2016 which the appellant argues creates a discrepancy regarding the date the offence occurred. The court has to look at other evidence in order to establish the date of the offence. During cross-examination, the complainant said that the appellant came knocking on his door at midnight and the incident occurred on 1/1/2016. This is the date on the charge sheet and from the entirely of the evidence including the defence, it is clear that the offence occurred at midnight on 01/01/2016 and not 0n 31/12/2015. The discrepancy on the year of the offence does not hold water because from PW1's testimony it is clear that the incident occurred on 1/1/2016. I rely on the case of **Joseph Maina Mwangi vs R(2000)eKLR** it was held that:-

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."***

41. Similarly in the case of **Willis Ochieng Odero vs Republic [2006]eKLR,** where the Court of Appeal held that:-

> ***"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 Form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code."***

42. In conclusion the minor discrepancy does not affect the case of the prosecution and I do find that the offence was committed on 1/1/2016 and not 01/01/2015 and the prosecution so proved.

iii. Whether the prosecution evidence was riddled with material contradictions.

43. The appellant referred to the evidence of PW1 which this court has already dealt with in regard to the date of the offence. However, the other aspect concerns whether it was correct that the appellant went to the room of PW1 or that PW1 went to the appellant's room. From the evidence, in chief I gather that the appellant went to the room of PW1 and defiled him there. It is in cross-examination that he talked of being taken to the appellant's room. This could have been a second round of defilement which did not come out clearly in the evidence. Furthermore, the complainant was of tender age of seven (7) years at the time of the offence. He may have been mixed up or was confused due to the trauma that he had experienced as a result of the incident. This discrepancy notwithstanding, the evidence of PW1 and PW2 as to what transpired that night remained solid though the exact room where the offence took place may not have been established bearing in mind that the Hotel had many accommodation rooms.

44. In **Philip Nzaka Watu vs Republic [2016] eKLR** the Court of Appeal held that:

> ***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported witness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

45. Similarly in the **Court of Appeal Tanzania in the case of Dickson Elia Nsamba Shapwata & Another vs The Republic Cr App. No. 92 of 2007,** addressed the issue of discrepancies in the evidence and concluded as follows:-

> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

iv. Whether the prosecution failed by not calling crucial witnesses;

46. The prosecution is required to avail to the court all relevant evidence to enable the court make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. **Section 143 of the 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.**

47. In the case of **Bukenya & Others vs Uganda [1972]EA 549** the court addressed itself thus:-

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

48. Similarly in **Keter vs 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."***

49. It is evident here that the prosecution did in fact call the material witnesses whose evidence as a whole it assessed to be sufficient. The appellant on the other hand is entitled to call his defence witnesses without direction from the prosecution. I therefore opine that the prosecution are an independent entity and ought not to consult any one as to who to summon as a witness.

C. Whether the trial court considered the defence evidence

50. The appellant submits that the trial court acted in contravention of **Article 50 of the Constitution** by not according the appellant a fair trial. Particularly, the mandatory rights under **section 200 of the Criminal Procedure Code** were not complied with; the trial court did not grant the appellant audience after the close of the prosecution case; the trial court granted the appellant 7 days to file a defence after the close of the defence case on 27th March 2018; there is no record as to whether the submissions were filed and there is no reference to the same; failure by the trial court to give the alibi defence any consideration and the trial court only considered the evidence of the prosecution and completely failed to consider the alibi defence. Consequently, no miscarriage of justice occurred in the case for failure to call all the witnesses, if any

51. Three more issues arise from the appellant's submissions as follows:-

> a. Whether the trial court considered the defence evidence
>
> b. Whether the defence of alibi was cogent;
>
> c. Whether the appellant was accorded a fair trial

52. In its judgment, the trial court first set out the prosecution's case followed by the defence case. Thereafter, the learned trial magistrate outlined the issues for determination then proceeded to carry out an analysis of the evidence. It is quite clear from the analysis of the learned magistrate that she scrutinized both the prosecution case and the defence case.

53. It is evident on record that when the defence closed its case, the appellant's counsel asked the court to grant him seven (7 days) to enable him file his submissions which the court allowed him. However, there are no submissions on record which means that the same were not filed. This does not infringe on the right to a fair trial as per Article 50 of the Constitution because the appellant was represented by a counsel who was given sufficient time to file submissions but failed to do so. The court accorded the appellant the opportunity to file submissions and he failed to do so and as such there was no infringement to his right to fair trial.

54. The appellant claims that his alibi defence was not considered by the trial magistrate. Paragraph 77 In the case of **Charles Anjare Mwamusi vs R CRA No. 226 of 2002 the Court of Appeal** stated:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie vs Republic (1984) KLR 739 at page 745 paragraph 25."***

55. Thus by setting up an alibi defence, the accused does not assume the burden of proving the alibi. However, this defence should also be raised at the earliest opportune time as was held in **R vs Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145** that :-

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***

56. And in the case of **Victor Mwendwa Mulinge vs Republic [2014]eKLR** the Court of Appeal rendered itself on the issue of alibi thus:-

> **"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs Republic, this court held that in a proper case, a trial court may, testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."**

57. According to the appellant, he alleges that he made a sworn statement in which he raised an alibi defence but it was not referred to in the judgment nor recorded in the court proceedings. The record shows that the appellant gave his defence on 27/03/2018, which was quite length. He then called one defence witness who was also heard by the court. Both the accused and his defence witness were cross-examined by the prosecution.

58. The appellant stated that on 31st December 2015, he spent the night at Beavers Hotel. That his supervisor paid for their accommodation to stay at Beavers Hotel from 31st December 2015 to 3rd January 2016. He further states that 23/12/2015 is the only day he slept away from his colleagues.

59. DW2, a colleague of the appellant, testified that they met at Chaka on 19th December 2015 and their supervisor paid for their rooms. The two stayed at Beavers Hotel from 19th December – 22nd December, then went for a Christmas break and resumed work on 27th December 2015 and slept at Beavers Hotel where they remained until 31st December 2015. On 1st January 2016, they were instructed to sleep at Chaka, PW2's lodging, but some of them refused and returned to Beavers Hotel. However on cross examination he stated that he would not have known where the accused was on the material night because he was in his own room. Further the appellant stated that on 23/12/2015is the only day he slept away from his colleagues. However he and his witness said that on 1st January 2016, some of workers in their team slept at Beavers while others spent the night at Chaka Guest House. It is evident that the testimony of DW2 contradicts that of the appellant as to his whereabouts on the night in question. This contradiction in my view renders the defence of alibi incredible. The evidence of PW1 and PW2 as to the presence of the appellant at the scene of crime on the material night was in my view credible and reliable and was not shaken by that of the defence.

60. The learned magistrate analysed the defence of the appellant in detail in her judgement and came to the conclusion that " the defence tendered was inconsistent" It is therefore not correct to say that the alibi defence was not considered by the trial court.

i. <u>Whether the appellant was accorded a fair trial.</u>

61. **Section 200 of the Criminal Procedure Code** provides:-

> **(1) Subject to sub section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial cases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-**
>
> > **(a) Deliver a judgment that has been written and signed but not delivered by his predecessor or……**
>
> **(2) ……**
>
> **(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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.**
>
> **(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate the High Court, if it is the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.**

62. The record shows that the first two (2) prosecution witnesses were heard by Hon. Aringo, Resident Magistrate who later left the station. The case went before Hon. Wambilyanga Senior Resident magistrate. Directions were given on 13/09/2016 that the case proceeds from where it reached as prompted by the defence counsel. The succeeding magistrate only heard one witness PW3 the investigating officer and proceeded on transfer.

63. On 30/05/2017 Hon. Kefa took over the case and took directions guided by the appellant as shown by the record. He said "I wish the case proceeds from where it had reached". These directions were taken in strict compliance with Section 200(3) of the Criminal Procedure Code. Hon. Kefa proceeded to hear the rest of the witnesses and the defence thus concluded the case.

64. It is in regard to the hearing of the investigating officer PW3, that the appellant is alleging that the law was not followed because it is his counsel who told the court that the appellant wished to proceed with the case from where the preceeding magistrate reached.

65. ***Section 200(3) provides in part that "the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused of that right"***

In my view the defence counsel must have consulted the appellant on how he wanted his case to proceed. The accused person was present in court on 19/05/2016 when directions were taken. If this is not what he wanted or if he wished to have any of the two witnesses who had

testified re-summoned, he would have said so. On 30/05/2017 when Hon. Kefa took directions in strict adherence to Section 200(3), the accused himself said he wanted the case to proceed from where the preceeding magistrate had reached. This confirms the intention of the accused even on 19/05/2016 that he wanted the case to proceed from where it had reached. In my view, whatever the defence counsel said on 19/05/2016 was communicated to him by the appellant in the course of him taking instructions to represent him.

66. It is imperative to note that only one witness PW3 was heard under the impugned directions. I reach a conclusion that there was no miscarriage of justice occasioned by the directions taken on 19/05/2016 by Hon. Wambilyanga. Furthermore, the failure to strictly adhere to the provisions of Section 200(3) of the Criminal Procedure code is not sufficient to render the proceedings defective.

D. Whether the sentence was harsh and excessive.

67. As regards the sentence, **Section 8(2) of the Sexual Offences Act No. 3 of 2006** provides that:-

> **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.**

68. The question then begs as to what sentence would serve the ends of justice in this case. The Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** and subsequent decisions by the Court of Appeal have ruled that the mandatory minimum sentences no longer have a place in our jurisdiction because they deprive the trial court of its discretion to mete out a sentence that is commensurate with the gravity of the circumstances surrounding the commission of the offence. **Kevin Otieno Owino vs Republic [2020] eKLR.**

69. The Court of Appeal applied the same principle in **Evans Wanjala Wanyonyi vs Republic [2019] eKLR and Christopher Ochieng vs Republic [2018] eKLR** in holding that **the mandatory minimum sentences deprive courts of their legitimate jurisdiction to exercise discretion not to impose these sentences where circumstances dictate otherwise. The only caution to be taken by the court is that such discretion must be exercised judiciously and not capriciously. The trial court must subject its mind to sound legal principles and take account of all the relevant factors while eschewing extraneous or irrelevant factors. An appellate court will therefore only interfere with the sentence where it is shown that the sentence imposed is either illegal or is either too harsh or too lenient in the circumstances of the case.**

70. There are numerous Court of Appeal decisions which hold that the provisions of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Some of these cases include **Dismas Wafula Kilwake vs Republic Criminal Appeal No. 129 of 2014 [2018]eKLR; Christopher Ochieng vs R [2018]eKLR (as cited above); Jared Koita Injiri vs R [2019]eKLR; Evans Wanjala Wanyonyi vs R [2019]eKLR.**

71. The aggravating factors in this case are that, the minor was a child of tender years and the impact of the offence must have hit him hand. I have weighed this against the fact that the appellant was a first time offender, had a young family and was remorseful according to his mitigation. Bearing in mind the decisions of the Court of Appeal on comparative cases, I hold the opinion that the court ought to consider a lesser sentence of life imprisonment and substituting it with a sentence than the maximum prescribed by the Act. I rely on the decisions in **Christopher Ochieng vs R [2018]eKLR; Jared Koita Injiri vs R [2019] eKLR and Peter Nyakundi Omariba vs R [2020]eKLR.**

72. However, this court cannot lose sight of the seriousness of the offence especially where the complainant was of a tender age of seven (7) years. The trauma that goes with the offence of defilement is detrimental to the child's mental and physical health and may even affect the future of the child on performance in life generally and finally define who the said child will be**.**

73. It is my finding that the conviction was based on cogent evidence and is hereby upheld.

74. All considered, I hereby set aside the sentence of life imprisonment imposed by the trial court and sentence the appellant to serve thirty (30) years imprisonment.

75. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 6TH DAY OF MAY, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 6th day of May 2021.