REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 120 OF 2019

PKR.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence dated 18th day of July 2019

in Eldoret Chief Magistrate's Criminal Case No. 68 of 2019

by Hon. R. Onkoba, SRM)

JUDGMENT

[1] This appeal arises from the conviction and sentence passed against the appellant, **PKR**, by the Resident Magistrate's Court in **Eldoret Chief Magistrate's Criminal Case No.69 of 2019: Republic vs. PKR**. The appellant was charged, in Count I, with the offence of defilement, contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the charge were that on **27 January 2019** at [Particulars withheld] Village in Kesses Sub-County within Uasin Gishu County, he unlawfully and intentionally caused his penis to penetrate the vagina of **JJL**, a child aged 15 years.

[2] In the alternative, the appellant was charged with indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**. It was alleged that on the on **27 January 2019** at [Particulars withheld] Village in Kesses Sub-County within Uasin Gishu County, he unlawfully and intentionally touched the vagina of **JJL**, a child aged 15 years, with his penis. The appellant was also charged, in Count II, with the offence of assault causing actual bodily harm, contrary to **Section 251** of the **Penal Code, Chapter 63 of the Laws of Kenya**. The particulars of that charge were that on **18 February 2019** at [Particulars withheld] Village in Kesses Sub-County within Uasin Gishu County, the appellant wilfully and unlawfully assaulted **RJL**, thereby occasioning her actual bodily harm.

[3] The appellant denied those allegations and had all the issues in contest tried before the court of the Resident Magistrate. At the conclusion thereof, the trial court found him guilty of the substantive counts of defilement and assault. He was accordingly convicted thereof and sentenced to 20 years' imprisonment on Count I; and fined **Kshs. 5,000/=** in default to serve 6 months' imprisonment, in respect of Count II. The sentences were passed on **18 July 2019** and an order made that the imprisonment terms were to run concurrently.

[4] Being dissatisfied with that decision, the appellant filed this appeal on **22 July 2019.** He raised the following Grounds of Appeal:

[a] That the learned trial magistrate erred in law and fact by failing to hold that the charges were defective;

[b] That the trial court erred in law and fact by failing to accord him a fair trial;

[c] That the trial court erred in law and fact by failing to hold that the Prosecution evidence was inconsistent and uncorroborated;

[d] That the trial court erred in law and fact as it shifted the burden of proof from the Prosecution side to the appellant; and,

[e] That the learned trial magistrate erred in law and fact by failing to hold that the doctor's finding did not meet the threshold of penetration.

[5] It was, accordingly, the appellant's prayer that his appeal be allowed, his conviction quashed and the sentences set aside. Thereafter on **8**

November 2019, an Amended Petition of Appeal was filed herein by the law firm of **M/s J.K. Bosek & Company Advocates**, setting out the following expanded Grounds of Appeal:

> **[a]** That the learned magistrate erred in law and fact in convicting the appellant on a plea that was equivocal.
>
> **[b]** That the learned magistrate erred in law and fact by failing to hold that the charges were defective.
>
> **[c]** That the learned magistrate erred in law and in fact in finding that the Prosecution had established a *prima facie* case against the accused in all the offences and therefore the accused had a case to answer.
>
> **[d]** That the learned magistrate erred in law and fact by convicting the appellant based on insufficient and uncorroborated evidence hence the conviction is erroneous.
>
> **[e]** That the learned magistrate erred in law and fact by relying on the unsworn evidence of a child in entering a conviction whereas the same was not corroborated.
>
> **[f]** That the learned magistrate erred in law and fact by failing to hold that the Prosecution evidence was inconsistent and uncorroborated.
>
> **[g]** That the learned magistrate erred in law in convicting the appellant on the unreliable evidence of the Prosecution witnesses without evaluating it and making a finding on it.
>
> **[h]** That the learned magistrate erred in law in not considering the reasonable doubts in the Prosecution case and in not giving the appellant the benefit of those doubts.
>
> **[i]** That the learned magistrate erred in law in convicting the appellant without the Prosecution having proved all the ingredients of the offence.
>
> **[j]** That the sentence imposed on the appellant was harsh, excessive and punitive.

[6] The appeal was urged by way of written submissions, pursuant to the directions given herein on **2 September 2020**. In the appellant's written submissions, filed herein on **4 September 2020** by **Mr. Ongeri,** it was contended that Count I as presented is defective and ought to have been rejected by the lower court. Counsel took the view, and urged the Court to find as much, that there was a variance between the evidence and the particulars of the charge; and therefore that the trial magistrate failed to exercise her duty under **Section 214** of the **Criminal Procedure Act.**

[7] Counsel further submitted that the age of the complainant was not conclusively proved, given the discrepancy as to whether she was 14 years or 15 years at the time of the alleged offence. He relied on **Omar Nache Uche vs. Republic** [2015] eKLR in which the court followed **Alfayo Gombe Okello vs. Republic** [2010] eKLR, to support his argument that proof of the age of a victim is a crucial factor in cases of defilement; and that where the burden is not discharged the offence cannot be said to have been proved beyond reasonable doubt.

[8] Counsel further submitted that penetration, another critical aspect of Count I was, likewise, not proved. He urged the Court to note that the complainant was examined over one month after the alleged incident; and therefore that in the doctor's observation, the complainant had old genital tears, which could not qualify as corroboration of her allegations of defilement for the purposes of **Section 124** of the **Evidence Act**. He further pointed out that crucial exhibits, notably the complainant's blood-stained inner wear, was neither availed for examination nor produced and no explanation given for that omission; and therefore that there was no nexus between the appellant and the alleged crime.

[9] Mr. Ongeri urged the Court to find that no sufficient attention was given by the trial magistrate to the appellant's defence, which in his view was entirely unchallenged by the Prosecution. He particularly mentioned the appellant's contention that there was discord at the time between him and his wife, who is the complainant's older sister; and that the Court failed to fully interrogate the possibility that his wife was the instigator of the charges against him. He particularly took issue with the fact that the complaint was made to the Police on **24 February 2019**, after an unexplained delay of over one month.

[10] Lastly, counsel faulted the learned trial magistrate for sentencing the appellant to 20 years' imprisonment in the face of a positive Pre-Sentence Report and the prevailing jurisprudence springing from **Francis Karioko Muruatetu & Another vs. Republic** [2016] eKLR. He therefore submitted that the sentence in respect of Count I is therefore harsh, excessive and punitive. For the foregoing reasons, counsel prayed that the appeal be allowed, and the conviction and sentence imposed on the appellant be set aside. No attention appears to have been directed at Count II in which the complainant is the appellant's wife.

[11] On behalf of the State, learned counsel **Mr. Kwame Chacha** opposed the appeal. He relied on his written submissions dated **10 March 2021**, wherein he took the stance that the charges were well-proved by the Prosecution. In respect of Count I, counsel submitted that the key elements thereof, namely: age of the complainant, penetration and the identification of the appellant, were proved beyond reasonable doubt. He cited **Rule 4** of the **Sexual Offences (Rules of the Court) Rules, 2014** and urged the Court to find that the clinic card exhibited before the lower court was a **"similar document"** for the purpose of **Rule 4** aforementioned. He added that the said document proved the complainant's date of birth and placed her within the age bracket provided for under **Section 8(3)** of the **Sexual Offences Act.**

[12] On penetration, **Mr. Chacha** urged the Court to take into consideration that the complainant's bloodstained inner clothes were found under the appellant's bed by her sister when she returned to her matrimonial home; and were produced before the lower court as exhibits. According to him, this piece of evidence along with the P3 Form sufficiently proved penetration. On the identification of the appellant, the

Court was urged to note that the appellant was well known to the complainant; and that she had gone to his house to assist him with household chores at a time when his wife had travelled to Mombasa. It was thus, the submission of **Mr. Chacha** that the appellant took advantage of the absence of his wife to defile the complainant in their matrimonial home.

[13] While conceding that the incident was reported to the Police after about 3 weeks, **Mr. Chacha** urged the Court to find that the delay was well-explained; in that the appellant had threatened the complainant and warned her not to ever report the incident to anyone. He further explained that it took the intervention of the appellant's wife, after she stumbled on the complainant's blood stained clothes, that the matter came to light. He also pointed out that it was that action that precipitated the assault that is the subject of Count II. Thus, according to **Mr. Chacha**, the two substantive counts were proved beyond reasonable doubt before the lower court. He, accordingly, urged for the dismissal of the instant appeal; and for the conviction and sentence imposed on the appellant to be upheld and confirmed.

[14] I have given careful consideration to the appeal in the light of the evidence presented before the lower court as well as the written submissions filed herein. I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon; this being a first appeal. This principle was well discussed in **Okeno vs. Republic** [1972] EA 32, by the Court of Appeal for East Africa, thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[15] With the foregoing in mind, I have carefully considered the lower court record and note that the complainant testified on **19 March 2019** as **PW1.** In an unsworn statement, she told the lower court that the appellant is her brother-in-law; the husband of her sister, **RJ (PW2).** It was her evidence that she used to stay with her sister at her matrimonial home; and that she started staying with her from the time she joined class one until **November 2018** when schools closed. **PW1** further testified that, at the instance of the appellant, she went to the appellant's home on **27 January 2019,** to help him with household chores; and that as the day drew to a close, the appellant, a *boda boda* operator, assured her that he would take her home. She explained that her sister, **PW2**, was away at the time, having travelled to Mombasa; leaving the appellant with their two young children.

[16] It was therefore the evidence of **PW1** that, instead of taking her back to her parent's home, the appellant turned back on the way; saying that his motor cycle had developed a mechanical problem and; as it was 8.00 p.m. already, she was persuaded to spend the night at the appellant's home, on the understanding that she would sleep in his mother's house. She told the lower court that, upon return to the appellant's house, he dragged her into his bedroom and defiled her at a time when she was having her menses. The appellant then took her to her parents' home early the next morning, leaving her inner clothes under the appellant's bed. She further told the lower court that, because the appellant had threatened her, she did not report the incident to her mother or anybody else.

[17] The complaint further testified that, when her sister returned from Mombasa on **2 February 2019**, she found her bloodstained inner clothes under her bed and asked her about them; and that it was then that she revealed that the appellant had defiled her on **27 January 2019**. Her sister took action and reported the matter to the Police. She was then issued with a P3 Form which was filled at **Moi Teaching and Referral Hospital** on **26 February 2019;** after which, the appellant was arrested and charged. The complainant gave her date of birth as **7 September 2004** and told the lower court that she was in class 7 when the incident happened.

[18] RJ (PW2) told the lower court that due to marital differences between her and her husband, the appellant, she left her matrimonial home on **26 October 2018** and went with her two children to her parents' home at Kesses. She further stated that she thereafter got a job in Mombasa and left her children under the care of her mother; but that the appellant went and took away the children on **25 December 2018**. Then on **27 January 2019**, the appellant called her on the telephone to requesting for the complainant's assistance with the children's laundry; and for her to intervention in that regard. Thus, she spoke with her mother and obtained her permission for the complainant to go to the appellant's home for the purpose of doing the laundry.

[19] PW2 further testified that she returned from Mombasa on **2 February 2019** and went to her parents' home; and that the following day on **3 February 2019**, the appellant went there for reconciliation talks; after which they reconciled and she returned to her matrimonial home on **4 February 2019.** She added that later that night, she noted that the bedding had been stained with blood; and, in the morning, while mopping the floor she found a pair of shorts and a blood-stained inner wear under her bed. Upon making inquiries from her children, she got to learn that the clothes belonged to her sister, the complainant. She explained that the complainant grew up with her children and had stayed with her since she joined class one. She accordingly went to her parents' home and talked to the complainant and thereupon got to learn what had transpired between her and the appellant; and in particular that the appellant defiled the complainant on **27 January 2019** during her menses.

[20] PW2 further stated that she brought the matter to the attention of the appellant's parents, but they took no action; and that the appellant assaulted her on **18 February 2019** when he learnt that she had complained about the incident to his parents. She reported both the defilement and assault incidents to Kesses Police Station and they were issued with P3 Forms which were filled at **Moi Teaching and Referral Hospital**. She duly identified the documents, including the complainant's clinic card, as well as the complainant's blood stained clothes before the lower court.

[21] Dr. Jighesh Kanji Jesana (PW3) testified before the lower court on **2 April 2019** on behalf of **Dr. Tabaan** who examined and filled the P3 Forms for both the complainant and **PW2.** He testified that upon the examination of the complainant, a girl aged 15 years, she was found with healed hymenal tears which were indicative of defilement. **PW3** added that HIV, pregnancy and Hepatitis B tests were also conducted in respect of the complainant; and that the results were negative. **PW3** also testified about the P3 Form that **Dr. Taban** filled and

signed in respect of **PW2**. He confirmed that she had a cut wound of 6 cm long on her forehead and a dark mark on the posterior aspect of her right forearm of about 5 cm. In the doctor's view the injuries were consistent with assault by a stick; and the degree of injury was classified as **"harm".** He produced the P3 Forms for the complainant **(PW1)** and **PW2** as exhibits before the lower court.

[22] The complainant's mother, **E L (PW4),** confirmed that she gave the complainant permission to go and assist her son-in-law, the appellant, with household chores. She further confirmed that the appellant's wife was then away in Mombasa. She expected the complainant to return home on the same day but she did not. Instead she came back very early the following morning. **PW4** further stated that, although the complainant appeared disturbed, she did not open up to tell her what was troubling her. She added that when **PW2** returned from Mombasa, she stayed with her for two days before going to her matrimonial home. She later learnt from **PW2** that she had found the complainant's inner clothes in her bedroom. She added that the matter was reported to the Police for action. **PW4** also identified the complainant's clinic card before the lower court and confirmed that the complainant was born on **6 September 2004**.

[23] The last prosecution witness was **Cpl. Michael Atsango (PW5).** His testimony was that he was on duty at Kesses Police Station on **20 February 2019** when **PW2** went there and reported that she had been assaulted by her husband on **18 February 2019**, because she had complained to her parents that the appellant had defiled her younger sister while she was away in Mombasa. It was the evidence of **PW5** that he recorded the statements of the witnesses, who included the mother of both the minor and **PW2**; and obtained a clinic card for the minor from her mother **(PW4). PW5** also confirmed having received bloodstained clothes belonging to the complainant from **PW2**; and that he thereafter, on **2 March 2019,** arrested the appellant and caused him to be charged with the offences of defilement and assault. He produced the clinic card and the complainant's blood-stained inner clothes as exhibits before the lower court.

[24] In his defence, the appellant denied having committed the offence of defilement. He stated that he returned home one evening and found his wife and children missing. That upon visiting his mother in law, after three days, she found the children there but not his wife; and that his mother in law denied any knowledge of his wife's whereabouts. He later learnt from his wife that she was in Mombasa. He consequently persuaded her to return home and sent her the fare; and that upon her return, a reconciliation meeting was held with the aid of the village elders. He concluded his statement by adding that although his wife returned to her matrimonial home, it was only short-lived; for she again left without saying a word. What followed was that he was required to report to Kesses Police Station; and on arrival there was placed in custody on allegations of defilement; an offence he still denies.

[25] I have carefully considered the appellant's Grounds of Appeal in the light of the written submissions filed herein and the record of the lower court. First and foremost, it is noteworthy that, whereas in the first ground of appeal (per the appellant's Amended Grounds of Appeal) it was contended that the learned magistrate erred in law and fact in convicting the appellant on a plea that was equivocal, the appellant was not convicted by the lower court on the basis of a plea of guilty. Hence that assertion is a misnomer. It is, similarly, misconceived that the appellant should, in the third Ground of Appeal, complain about the learned magistrate's finding that a *prima facie* case had been made out against the accused. The case having proceeded to defence, that issue had been superseded by the fact of conviction and sentence, about which the appellant has justifiably complained.

[26] That said, it is manifest from the remaining grounds of appeal and the written submissions filed herein by learned counsel, that the object of the appeal is Count I, in respect of which the appellant was convicted and sentenced to 20 years' imprisonment. That charge was laid pursuant to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act,** which provision stipulates that:

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

[27] In the premises, the issues for my reconsideration and determination are:

> **[a]** Whether the Complainant was, at the material time, a child for purposes of **Section 8(3)** of the **Sexual Offences Act**;
>
> **[b]** Whether there was penetration of the complainant's genital organ;
>
> **[c]** Whether the penetration was perpetrated by the appellant.
>
> **[d]** Whether the sentence passed by the lower court against the appellant is excessive in the circumstances.

[a] <u>On the age of the Complainant:</u>

[28] It is now trite that the age of a minor is a critical component of a defilement charge such as was laid in Count I; and that it is an element which must be proved by the Prosecution beyond reasonable doubt. In **<u>Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010</u>** the Court of Appeal made this point thus:

> ***"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".***

[29] At to what amounts to credible evidence, **Rule 4** of the **Sexual Offences Rules of Court Rules** provides that:

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

[30] Needless to say that, in addition to the documents set out in Rule 4 above, the age of a minor for purposes of the **Sexual Offences Act** can also be proved by the oral evidence of the minor's mother, by way of age assessment as well as by observation and common sense. Hence, in **P.M.M. vs. Republic** [2018] eKLR, it was held thus:

"…whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant…"

[31] Accordingly, the complainant testified before the lower court that she was born on **7 September 2004.** Her evidence in this regard was buttressed by the evidence of her mother, **PW4,** who also availed the minor's clinic card. That card was produced by the investigating officer, **PW5,** and marked as **the Prosecution's Exhibit 1.** It gives the minor's date of birth as **6 September 2004.** In addition, the complainant's sister **PW2** also lent credence to the assertion that the girl was a minor; having stayed with her from the moment she joined class one. Thus, going by the Child Health Card produced before the lower court, the complainant was aged 14 years and 4 months as at **27 January 2019** when she was allegedly defiled; and was therefore within the age bracket provided for in **Section 8(3)** of the **Sexual Offences Act.**

[32] It is true, as was pointed out by learned counsel for the appellant, that in the particulars of Count I the age of the complainant was given as 15 years; which appears to contradict the evidence of the complainant's mother, **PW4**. It could be that the fact that the complainant had passed her 14th birthday was responsible for the variance. Be that as it may, in **Hadson Ali Mwachongo vs. Republic** [2016] eKLR, the Court of Appeal made it clear that:

"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."

[33] In the premises, the complainant herein was, for all intents and purposes aged 14 years; and therefore a child for the specific purposes of **Section 8(1) and Section 8(3)** of the **Sexual Offences Act.** Indeed, in **Section 2** of the **Children Act, No. 8 of 2001,** the word **"child"** is defined to mean any human being under the age of eighteen years. Clearly therefore not much turns on the perceived variance as to whether the complainant was 14 or 15 years. The bottom line is that she was under the age of eighteen years and her age fell within the age group envisaged by **Section 8(3)** of the **Sexual Offences Act.**

[34] In the light of the foregoing, the 2nd ground of appeal, namely, that the learned magistrate erred in law and fact by failing to hold that the charges were defective on account of the variance aforementioned, is untenable. Indeed, **Section 134** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, is explicit that:

"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 particulars as may be necessary for giving reasonable information to the nature of the offence charged."

[35] Accordingly, having looked at the Charge Sheet, at page 6 of the Record of Appeal, it is clear that the Charge along with the applicable provisions of the law have been explicitly set out. It is manifest too that the particulars set out therein are in accord with the charge. Hence, having found that the evidence adduced before the lower court placed the age of the complainant within the age bracket provided for in **Section 8(3)** of the Sexual Offences Act, I find no merit in this argument. Moreover, in **Obedi Kilonzo Kevevo vs. Republic** [2015] eKLR, the Court of Appeal made it clear that:

The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of JMA v. Republic (2009) KLR 671, it was held inter alia that:

"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

[36] Hence, as pointed out hereinabove, there is no defect in the charge; and, therefore the question of prejudice did not arise before the lower court. Indeed, the appellant was well aware that the complainant was a minor, having stayed with her and seen her grow with his own two children. No prejudice was occasioned to him by the variance. I therefore find no merit in the argument that Count I, as framed is defective, simply on account of the perceived variance as to the age of the complainant.

[b] <u>On Penetration of the Complainant:</u>

[37] The complainant testified that, after she was done with the chores, the appellant offered to take her home on his motor cycle; but that he turned back on the way; feigning a mechanical defect. It was already 8.00 p.m. and the appellant persuaded to spend the night; assuring her that she would sleep in his mother's house. She further testified that, upon return to the appellant's house, he dragged her into his bedroom and defiled her notwithstanding that she was having her menses.

[38] The evidence of the complainant was lent credence by the evidence of **Dr. Jighesh Kanji Jesana (PW3)**, whose evidence was that the complainant was found with healed hymenal tears at positions 3, 6 and 9 o'clock, which were consistent with defilement. He produced the P3 Form for the complainant as the **Prosecution's Exhibit 2** before the lower court. Also produced before the lower court were the complainant's inner clothes that had remained at the appellant's house. They were duly identified by **PW1** and **PW2** and produced by **PW5**. The trial court observed that they were blood-stained; thus confirming the complainant's evidence that she was in her menses at the time.

[39] Thus, the sum total of the evidence of the five Prosecution witnesses amounted to credible proof of penetration to the requisite standard. This is notwithstanding that the clothes aforementioned were never taken for analysis. This was entirely unnecessary, since it was not the Prosecution case that clothes were stained by the appellant's blood. It is likewise immaterial that the P3 Form was filled about one month later, for this delay was convincingly explained by **PW1, PW2** and **PW3**. In particular, the complainant explained that the appellant had threatened her with harm. I am convinced, therefore, that penetration was proved beyond reasonable doubt.

[c] <u>On whether the penetration of the complainant was perpetrated by the appellant</u>:

[40] The evidence presented before the lower court pointed unerringly towards the appellant. He asked that the complainant visit and held him with household chores. He first approached his wife, **PW2** over the issue; and **PW2** referred him to **PW4**. Both testified that it was upon that request that the complainant was released to go to the appellant's home. Indeed, the appellant conceded in cross-examination that:

> **"…My wife was not around on 27th January 2019. She had left our matrimonial home. I used to stay with [the complainant] …I called Rose and asked her to request [the complainant] to come and wash clothes. I escorted [the complainant] to her home…"**

[41] As the above excerpt confirms, the complainant had been living with the appellant's family and therefore knew him well. She accordingly had no reason to lie to the court against him.

[42] In the premises, the lower court cannot be faulted for coming to the conclusion that credible evidence was presented before it that proved beyond reasonable doubt that the offence charged in Count I was committed by the appellant. In arriving at this conclusion, I have not lost sight of the argument, by counsel for the appellant that the complainant's evidence required corroboration on the basis that the complainant was then a child of tender years. This argument was predicated **Section 124** of the **Evidence Act;** which provides that:

> **Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him…"**

[43] It is significant however that the proviso to that provision also 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.**

[44] Thus, whereas a ruling was made for the complainant to give an unsworn statement, this was unwarranted, for, she was not a child of tender years for purposes of **Section 19** of the **Oaths and Statutory Declarations Act,** to the extent that she was above 14 years of age as at **19 March 2019** when she testified before the lower court. In **<u>Maripett Loonkomok vs. Republic [2015] eKLR</u>**, the Court of Appeal posed the question as to who is a child of tender years and held thus:

> **The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of <u>Kibageny Arap Kolil v R (1959) EA 82</u> the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in <u>Patrick Kathurima v R,Criminal Appeal No.137 of 2014</u> and in <u>Samuel Warui Karimiv R Criminal Appeal No.16 of 2014</u> stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for** *voir dire* **examination..."**

[45] Moreover, although the complainant's evidence did not require corroboration from the standpoint of the proviso to **Section 124**, there was ample corroboration thereof in the evidence of **PW2, PW3** and **PW4**. Thus, in my re-evaluation of the evidence, I am satisfied that the evidence presented before the lower court sufficiently proved the elements of Count I and that the appellant's conviction in that regard was well-founded. Accordingly, Grounds 4 to 9 of the appellant's Amended Grounds of Appeal are untenable.

[46] In the last ground of appeal, the appellant complained that the sentence imposed on him was harsh, excessive and punitive. There is merit in this assertion, granted the approach adopted by the learned trial magistrate. She took the view that the penalty for Count I was a mandatory 20 years' imprisonment. That approach was clearly erroneous, granted the decision of the Supreme Court in **<u>Francis Karioko Muruatetu vs. Republic</u>** [2017] eKLR. The Court of Appeal has since applied the decision to the mandatory sentences provided for in the Sexual Offences Act. For instance, in **<u>Jared Koita Injiri vs. Republic</u>** [2019] eKLR**,** the Court of Appeal held that:

> **Arising from the decision in** *<u>Francis Karioko Muruatetu & Another vs Republic</u>, SC Pet. No. 16 of 2015* **where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by** *section 204* **of the** *Penal Code* **was unconstitutional. The Court took the view that;**

> *"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."*

> **In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by** *section 8 (1)* **of the** *Sexual Offences Act***, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."**

[47] The Court of Appeal proceeded to set aside the sentence of life imprisonment in favour of imprisonment for 30 years in the matter, in which the complainant was a 9-year-old minor. In the instant case, the learned trial magistrate called for a pre-sentence report which showed that the appellant was a remorseful first offender; and that he was otherwise of good character and regretted this one act of imprudence. That being the case the correct approach ought to have been that which is suggested at **Paragraph 23.9;** namely, that:

> **"The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."**

[48] Thus, since 20 years' imprisonment is the penalty for the subject offence, and the appellant having been a first offender, imprisonment for a term of 12 years would have been reasonable in the circumstances, considering that he betrayed the trust of a minor under his charge. Accordingly, I would reduce the sentence imposed on the appellant to 12 years' imprisonment; to be reckoned from **18 July 2019** when the appellant was sentenced by the lower court. The conviction and sentence in respect of Count II, having not been challenged substantively, are hereby confirmed and upheld.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF JUNE, 2021

OLGA SEWE

JUDGE