REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 41 OF 2020

GERALD MURIUNGI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGMENT

1. Gerald Muriungi, the Appellant was charged with the offence of 'Defilement under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act' with the alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006' in Isiolo Criminal Case No. 12 of 2018.

2. The particulars of offence for the offence of Defilement were as follows: -

> *'On the 13th day of June 2018, in Isiolo County within Eastern Region, he intentionally and unlawfully caused his penis to penetrate into the vagina of PE a child aged 10 years.'*

3. The particulars of offence for the offence of Committing and Indecent Act with a Child were as follows: -

> *'On the 13th day of June 2018 in Isiolo County within Eastern Region, he intentionally and unlawfully touched the private parts namely breast and vagina of PE, a child of 10 years.'*

4. He pleaded not guilty to both charges and the matter proceeded for trial. By Judgement delivered on 18th May 2020 by Hon E. Ngigi PM, he was convicted for the offence of Defilement and was sentenced to life imprisonment. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal. He initially filed grounds of appeal but in his submissions made amended supplementary grounds of appeal. He raises the following grounds of appeal: -

> ***i) That the Learned Trial Magistrate erred in law and fact by failing to note that there was contradiction in the evidence of the Complainant and her mother.***
>
> ***ii) That the Learned Trial Magistrate failed to note that the life sentence meted out to the Appellant was arbitrary harsh and excessive and is not an effective deterrent to crime.***
>
> ***iii) That the Learned Trial Magistrate erred in law and fact by failing to note that there was no evidence of blood after the examination of the Complainant.***
>
> ***iv) That the Learned Trial Magistrate erred in both law and fact by failing to note that the defense of the Appellant was not shaken by the evidence adduced by the prosecution side.***
>
> ***v) That the Learned Trial Magistrate failed to note that the vital witness (the uncle of the complainant) was not availed before Court to clear doubts.***
>
> ***vi) That the Learned Trial Magistrate erred in matters of law and fact by failing to note that the Prosecution did not prove their case to the required standards of proof as required by the law.***

5. The appeal was canvassed by way of written submissions. The Appellant filed written submissions which were filed on 8th February 2021. He submits that the Prosecution evidence was marred with contradiction since PW1, the Complainant stated that the incident occurred on 8th June 2018 and the charge sheet indicated that the incident occurred on 13th June 2018 and her mother told the Court that she was informed about the incident on 4th June 2018. He submits that the complainant told the Court that she was coming from her aunt's place in

Kiwanjani and she was going to Bula Pesa and that when she arrived, she found her mother and she went to play but her mother told the Court that, *"I called her aunt and she told me that the child had left her place about four days earlier and the child had not come home."* He submits that although the complainant alleged to have been locked in the house for two days but let go on the third day by the Appellant, he questions why after the ordeal the Appellant left her in the house and why she did not scream to alert people surrounding that place. He also submits that another issue is that while the complainant was taken to hospital on 14th June 2017, the general outpatient record shows that she was defiled for 2 months.

6. He submits that the contradictions and *uncollaborated* testimonies are untrue and not capable of securing a safe conviction and that this is contrary to Section 163 (1) of the Evidence Act. That the contradictions and discrepancies made by PW1 and her mother proves that those were non-credible witnesses and that the Magistrate was misdirected in relying on paradoxical evidence. He relies on the cases of *John Barasa v R, Kitale Criminal Appeal No. 22 of 2005* and *Bunhrish Padya v R E-LOK (20) 1983 E.A.C.A* for the proposition that when evidence is contradictory or un-collaborated the Court should not rely on the same.

7. He submits that the evidence tendered by the Prosecution does not prove that he is the one who defiled the complainant and that the evidence of the clinical officer does not indicate any injuries in the private parts of the complainant which could indicate that the complainant was defiled. He submits that the evidence tendered by the clinical officer does not link him with the offence since the clinical officer did not tell the Court if the hymen was freshly broken or not and that there was no injury seen by the clinical officer. That the clinical officer told the Court that the complainant had no torn clothes which shows that if the complainant was defiled by a person like him, by parity of reasoning, what could be observed? He submits that if this was so, blood could have been seen in the private part of the complainant. Relying on the case of P. K. W. v R he urges that a broken hymen could result due to other factors.

8. He submits that the Court accepted his request for the Court to do a site visit but that during the visit, the complainant did not show the Court his (Appellant's) house. He quotes the complainant's statement that, *"I am unable to locate the house as I was brought at night."* He thus urges that the compliant was not able to know the person who defiled her. He submits that since the complainant had said that she went to play, who was she playing with at that time of the night?

9. He also submits that the complainant's uncle, who was the one apparently informed by the complainant about the defilement did not appear as a witness and that this omission was fatal to the Prosecution's case. Relying on the case of *Bukenya v Uganda (1972)* he submits that a court of law has a right to summon all important witnesses whose testimonies may seem essential and the Prosecution must avail the necessary witnesses. He also relies on the case of *John Kenga v R, Nairobi Criminal Appeal No. 1171 of 1984*.

10. He highlights how the Prosecution applied for adjournment to be able to avail PW2's the complainant's mother's statement but that this statement was never at all supplied to him and that the Court erred in finding that he had been supplied with the statement. He submits that he cross-examined PW2 without having her statement and that this was contrary to Article 50 (2) (j) of the Constitution.

11. He submits that the Prosecution failed to prove their case beyond reasonable doubt. He relies on the case of *Philip Muiriri Ndaruga v R, Criminal Appeal No. 76 of 2012 (2016) eKLR.*

12. On the question of sentence, he submits that the life sentence meted upon him was harsh, excessive and unconstitutional. Relying on the cases of *Christopher Ochieng v R, Kisumu Criminal Appeal No. 202 of 2011 (2018) eKLR* and *Jared Koita Injiri v R, Kisumu Criminal Appeal No. 93 of 2014* and *Francis Kariokor Muruatetu & Another v R, Petition No. 16 of 2015* he urges that the mandatory nature of the minimum sentence is unconstitutional as it deprives the Court of its legitimate jurisdiction to exercise discretion and it thus fails to conform to the tenets of fair trial under Article 25 of the Constitution. He urges the Court to consider all his arguments and disturb the finding of the trial Court.

Prosecution's Submissions

13. The Prosecution filed submissions dated 17th June 2021. They urge that they proved their case beyond reasonable doubt. They urge that the age of the child was proven to be 11 years as per PExhb 5 which stated that the child's date of birth was 14th July 2007 and also by PW1's own testimony as well as the P3 form which estimated the child's age as 10. They rely on the case of *Joseph Kieti v R (2014) eKLR* on what may be used to determine the age of the victim in defilement cases.

14. They also urge that penetration was proven by the evidence of PW1 and medical evidence of PW2, the clinical officer who examined the minor. That PW1 clearly stated that on 8th June 2018 at around 7.00pm, she was coming from her aunt's place in Kiwanjani heading towards Bula Pesa and that once she got to Bula Pesa, she went to play and that is when the Appellant called her where he was repairing shoes and that he, the Appellant told her to follow him which she did up to his house and defiled her 3 times. That PW1 testified that the Appellant kept her at his house for 3 days and it was after the third day that he let her go after which she went home but did not find her mother and that Pw1 later went and informed Uncle S who later informed PW3 who then reported the matter to the police.

15. They submit that upon examination of PW1, PW2 found that PW1's hymen was perforated and she had a whitish discharge which had a foul smell and that there was a mild swelling on the vulva. That there was no bleeding but a swelling which was because of repeated defilement. They submit that in sexual offences, the evidence from one witness, even a minor would be sufficient to sustain a conviction as long as the Court is satisfied with the veracity of the testimony of the complainant. They rely on the case of *P. M. M. v R (2014) eKLR*.

16. They submit that PW1 knew the Appellant prior to the incident who was working as a cobbler within Bula Pesa which fact was confirmed by the Appellant himself. That PW1 and the Appellant stayed in the same house for a period of 3 days and she was therefore able to positively identify him. That the Court also took note of the fact that there was a site visit which revealed that the place was an informal settlement with numerous congested houses and the Court found (pg 48 of Judgment) that the place they had gone to visit would be extremely difficult for a child of a young age to point out the exact house in such a setting which she was yet to familiarize herself with. That failure by PW1 to point out the exact house did not at all affect the Appellant's identification by PW1.

17. On sentencing, the they urge that the Court did take into consideration the mitigation of the Appellant and also did consider the decision of *Francis Muruatetu & Wilson Thirimbu v R Petition No. 15 and 16 of 2015* and that in sentencing, the Court stated that defiling a 10 year old for a period of 2 days is cruel, inhuman and a betrayal of the trust that society bestows upon the Appellant.

Determination

18. This being a first appeal, this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings, of course bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See ***Okeno v Republic (1972) EA 32.***

19. The Appellant's grounds of Appeal can be condensed into 2 points which form the gravamen of the Appellant's Appeal as per the issues hereunder: -

i) Whether or not the Prosecution proved their case beyond reasonable doubt.

ii) Whether or not the sentence meted out was excessive in the circumstances of the case.

Whether or not the Prosecution proved their case beyond reasonable doubt.

20. To begin with, this Court shall consider the necessary ingredients for the offence of 'Defilement Contrary to Section 8 of the Sexual Offences Act.' The said section provides as follows: -

8. Defilement

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(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.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this Section if –

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(c) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(6) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act (Cap. 92) and the Children Act (No. 8 of 2001).

(7) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

21. Defilement occurs when a person commits the act of ***penetration*** with a child. Penetration under Section 2 of the Sexual Offences At is defined as follows: -

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

22. Genital organs under the very Section 2 of the Sexual Offences Act is defined as follows: -

"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

23. Child under the very Section 2 of the Sexual Offences Act is defined as follows: -

"child" has the meaning assigned thereto in the Children Act (No. 8 of 2001);

24. Child under Section 2 of the Children's Act is defined as follows: -

> ***"child" means any human being under the age of eighteen years;***

25. The above provisions of law form the essential factors and elements which must be present for a positive finding that there was defilement. This Court is thus tasked with analyzing whether the above elements were present in the evidence adduced at the trial Court. The key questions are whether the complainant was a child and whether there was penetration of the Appellant genitals into the complainant's genitals.

Evidence adduced at trial Court

Prosecution's Case

PW1

26. This Court has had a chance to examine the evidence led at the trial. The Prosecution adduced evidenced from a total of 3 witnesses. PW1, the complainant testified first. She said that she was in class three at Bula Mpya. She testified that on 8th June 2018 at 7:00pm she was coming from her aunt's place in Kiwanjani and was going to Bula Pesa, which is their home. That at home, she found her mother and then went to play. That the accused person (she pointed at the Appellant) called her and he was repairing shoes at Bula and told her to accompany him to his place. That she went with him to his home and he told her to wash his clothes but she refused and he told her to sit on the bed and she sat and then he removed her clothes and *'raped'* her. That he also removed his clothes.

27. That he locked her in the house that night and in the morning he again *'raped'* her and left her and went. That he locked her in the house and came back at 7.00 pm and again '*raped'* her. That all this time he was *raping* her, she could not scream as he would close her mouth and that she was feeling a lot of pain. That on the third day, he let her go. That she went to her mother's place but she was not there and that she went and told Uncle S what had happened and he went and told a market woman who in turn telephoned her mother. That her mother came immediately and she told her what had happened and they went to the police station. That the police took her to hospital and she was given some drugs and that Onyango is the officer who took them (with her mother) back home. She said that the person who raped her is called Kalulu and he works at Bula as a cobbler. She pointed to the Appellant. On cross-examination, she reiterated that they slept together twice and she was bleeding and that they went to the Appellant's house at night and that there was no one who saw him (the Appellant) calling her when she was playing. She said that she had never had sex with a man before. In re-examination, she said that it is the Appellant who locked her in his house.

PW2

28. PW2 was Daudi Dabaso. He testified that he is a Sub-County Clinical Officer Isiolo County Referral Hospital and that he has a Diploma in Clinical Medicine and a Degree in Environmental Health from Kenyatta University and that he has worked as a clinical officer for the past 17 years. He said that she examined PW1 who had been brought by the OCS with a history of having been defiled by a person well known to her. That she had no torn clothes but she was unkempt with dirty hair. That she said that the assailant forcefully dragged her as she was playing. That she was in a fair general condition when she went and upon examining her, the hymen was perforated and the discharge was whitish and there was a foul smell on the vagina. That there was no wound or bleeding. That there was a mild swelling on the vulva, a case of repeated defilement. That there were pus cells with mouth bacteria but no spermatozoa. That there were epithelial cells and no spermatozoa as spermatozoa only lasts for 72 hours. That they concluded that there was evidence of penetration as the hymen was perforated and there was a foul discharge. He produced the lab request form and the medical treatment notes. On cross-examination he said that he had only examined the child.

PW3

29. PW3 was AWE, the mother to the complainant. She said that the child is currently in Standard 3 and is 12 years old now. She produced her birth certificate which showed that the child was born on 14th July 2007. She said that on 4th June 2018, she had taken charcoal to a customer when she received a call from Alice and went to the market where she found the accused with PW1. She said that she knew that her child was at her aunt's place and she called PW1's aunt who told her that the child had left her home four days earlier. She said that the child had not come home and they went to the police and made a report. She said that the child was taken to hospital and found to have an infection. That the child told them that she was at the accused person's house and she had sex with the accused.

PW4

30. PW4 was No. 113801 PC Linus Onyango from Isiolo Police Station. He said that he was the Investigating Officer and confirmed that he knew PW1 from the case. He said that PW1 was brought together with the accused on 13th June 2018 by market women from Isiolo Township and they reported that the accused had defiled the child and converted the child into his wife. That he took the child together with the accused to hospital and the child was confirmed to have been defiled. That they visited the scene and the child reported that the accused used to give her tea and mandazi and that at one time the accused took the child to his home and stayed with her for four consecutive days. The crowd said that they had found the child inside the accused person's home. On cross-examination he said that the child was able to converse and that the accused person's house is close to the market and it is surrounded by street children structures. That the child showed them the house where she was in. *The accused applied for a site visit which was done on 11th March 2020. PW1 said that she was unable to locate the house because she was taken at night.* This was the close of the Prosecution's case.

Defence Case

31. The Appellant was placed on his defence. He stated that he lives in Bula Pesa and is a cobbler and he also does construction work. His defence was that he was framed up because the complainant, the investigating officer and the mother of the complainant were not able to identify his house during the site visit.

Analysis

Age of the Complainant at the time of Offence

32. Concerning the complainant's age, her birth certificate was produced during hearing which indicated that she was born on 14th July 2007. The authenticity of this birth certificate was not an issue in the trial Court. A birth certificate is conclusive proof of the date of birth, from which the age of person can be derived. This means that at the time of the offence, on 8th June 2018, the complainant was approximately 11 years old. A person of 11 years old falls under the definition of a child, both under the Sexual Offences Act and the Children's Act as discussed above.

Act of Penetration by the Accused

Identification

33. On the matter of identification of the accused person, this Court observes that during hearing at the trial Court, the complainant was able to identify the Appellant as the assailant. She also testified that she knew him before as he used to repair shoes at Bula Pesa. She referred to him as *'Kalulu'* PW4, the Investigation Officer testified that PW1 confirmed that the Appellant was in the habit of buying her tea and mandazi. PW3 confirmed that she knew the Appellant as Muriungi or *'Kalulu.'* The Appellant himself confirmed the fact that he works as a cobbler at Bula Pesa. PW1's evidence in examination-in-chief was consistent as her evidence in cross-examination that the Appellant called him while she was playing and told her to accompany him to his house. To use her exact words, the Court reproduces the evidence of PW1 during cross-examination by the Appellant as follows: -

> ***"I went with <u>you</u> to <u>your</u> house at night. We met people on the way. There is no one who saw <u>you</u> calling me when I was playing."***

During re-examination she again confirmed as follows: -

> ***"The person who locked me in his house is the one in court."***

This Court is satisfied that PW1's identification of the Appellant was positive.

Penetration

34. On the matter of penetration, this Court observes that PW1 confirmed to have been *'raped.'* She used the term *rape* which this Court imports as her intention to indicate the act of penetration much as the term *'rape'* does not fit the circumstances of the case going by the fact that PW1 was a child at the time of the offence and the word to be used here is defilement. She said that the Appellant told her to sit on the bed, which she did, and he then removed her clothes and he also removed his clothes and *'raped'* her, which act, he repeated the following morning and evening. She testified to have been in a lot of pain and that she was bleeding.

35. Furthermore, the clinical officer, PW2 testified that from the examination done, a conclusion was made that there was repeated defilement by reason of the perforated hymen and foul discharge. He produced a lab request and treatment notes and testified that upon examining PW1, the hymen was perforated and the discharge was whitish and there was a foul smell on the vagina. He said that there was a mild swelling on the vulva confirming a case of repeated defilement. He also said that there were pus cells with mouth bacteria but no spermatozoa and that spermatozoa only lasts for 72 hours. He said that there was no blood or wound. He said that the perforation of the hymen was evidence of penetration. This evidence was not challenged.

36. The Appellant has urged that no blood was found during the clinical examination and this should be used in his favour. This Court finds that the absence of blood cannot be an excuse good enough to impute doubt on the act of penetration. To begin with, the offence occurred repeatedly in a span of 3 days. There was no one who examined PW1 on the first day the offence took place. PW1, an eye witness was on record that she was bleeding. Her evidence to this end was not challenged. Although the clinical officer PW4 testified that there was no blood, this was upon examination on the third day.

37. This notwithstanding, this Court finds that the test for proving penetration in the context of defilement is not determined by the presence or absence of blood, but rather by the act of penetration itself. Penetration is defined as the insertion of the whole or part of a penis of one to the vagina or anus of another. This Court reproduces what it had indicated above on the definition of penetration and genital organs as per Section 2 of the Sexual Offences Act as follows: -

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

> ***"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;***

38. This Court is therefore not convinced that the absence of blood can be interpreted to mean that there was no defilement because the test

of defilement is penetration.

39. The Appellant also submitted that a broken hymen could result from other factors. While this may be true, once again, the test for determining penetration is not whether or not the hymen was broken, but whether there was penetration. It is immaterial whether the complainant was a virgin although this Court observes that she testified that that was the first time she slept with a man. Similarly, the absence of torn clothes is not material. PW1 was on record that the Appellant removed her clothes. It is not therefore unreasonable that the clothes she had on at the time of examination were not torn. This Court finds that the evidence of PW1, an eye witness, corroborated the expert evidence of PW2 and there was therefore a proper basis to conclude that the act of penetration took place. This is notwithstanding the fact that Section 124 of the Evidence Act permits a court to rely on the uncorroborated evidence of a victim of sexual offence even if this would have been the only evidence.

Analysis of other issues raised by Appellant

Purported Framing

40. The Appellant has also urged that the failure to identify his house during the site visit means that he was framed up. This Court however observes that the Appellant did not deny being at his house on the date of the offence. PW1 reasonably explained the she could not remember the house because she was taken there at night. It is not in dispute that she was indeed taken at night past 7.00pm. As a Court sitting on appeal, this Court did not have the benefit of noting down observations from the site visit, but this Court observes that the trial Court addressed this issue as follows: -

> ***'The accused in his defence has relied strongly on the failure of the complainant to identify to the Court the house which was the scene of the crime. On this the Court has considered the fact that the complainant was taken to the house at night and not allowed to leave the house for the days she was there. The complainant did not therefore have an opportunity to familiarize herself with the surroundings of the house or the neighbourhood.***
>
> ***The Court had also the benefit of visiting the locality where the incident occurred. The place is an informal settlement difficult for a child of such young age to point out the exact house in such a setting which she was yet to familiarize with. Accordingly, the Court finds that the failure to point out the exact house by the complainant as not affecting the accused identification.'***

41. This Court agrees as much that the circumstances of the case, in that PW1 was taken to the house at night, and going by the age and intellectual ability of the child of 11 years, it is not unreasonable that she could have genuinely been unable to recognize the house.

42. Furthermore, the Appellant did not in his defence allude to any reasons why he could have been framed. There was no indication of bad blood between the Appellant and any of the prosecution witnesses. Indeed, where an accused person claims to have been framed in a sexual offence matter, it is material as to whether the circumstantial evidence may infer any bad blood between the accused and any of the prosecution witnesses. In ***Archbold 2017 by Sweet and Maxwell, pg 1455*** it is established as follows: -

> ***'It is permissible, in a case of an alleged sexual offence, for the defendant to be asked in cross-examination whether he knows of any reason why the complainant might be lying; the existence or non-existence of a motive for lying was relevant to the credibility of the complainant;'***

In the present case, no such motive for lying was indicated.

Date of Offence

43. The Appellant has raised an issue concerning inconsistencies on the date when the offence took place. The charge sheet indicates 13th June 2018 as the date of the offence. PW1 testified that the first incident happened on 8th June 2018. PW3 her mother claimed to have been called by Alice to be notified of the fact on 4th June 2018. PW4 the Investigating Officer however testified that the complainant was brought to the police on 13th June 2018. This Court appreciates that there was some apparent inconsistency on when the offence took place.

44. However, this Court also observes that the acts of defilement was not a hit and run incident but it occurred in consecutive days totaling 3. PW1 testified that the Appellant locked her in the house and only let her go on the third day. This Court finds that the offence took place between 8th June 2018 and 13th June 2018. This notwithstanding, the standard of determining whether this apparent inconsistency is enough to overturn a conviction lies in the question on whether this affected the essential elements of the charge in issue. This Court would have been inclined to accept this as an issue had the incident been a hit and run. To the contrary, the incident took place in a couple of days and this Court does not therefore find that this inconsistency is material enough to impute doubt on the Prosecution's case, based on the unchallenged evidence of PW1 and PW4. This Court must however add that these emerging issue is subordinate to the main issue of whether or not there was penetration which is the essential ingredient of the offence of defilement.

Order of Events

45. The Appellant claims that there was some inconsistency in the evidence of PW1 and PW3. He submitted that while the child testified that after she came from her aunt's house, she went home and found her mother before going to play this fact was contradicted by the mother. This Court has observed this apparent inconsistency.

46. However, it is also observed that this was not raised by the Appellant during cross examination. This Court finds that this ought to have been raised at an earlier stage. In any event, this inconsistency on the order of events is not material enough to disqualify the unchallenged

evidence of the other key witnesses (PW1, PW2 and PW4) in the matter and this Court does not therefore find that the finding of the trial Court occasioned a failure of justice as would be required by Section 382 of the Criminal Procedure Code to overturn the trial Court's finding.

Failure to Scream

47. The Appellant further urges that the failure by the child to scream raises doubt as to whether the offence was committed. Quite an arrogant submission. Screaming for help is not the test for penetration or attempted penetration for that matter. Further, the power dynamics of an elderly senior citizen forcing himself on a child of 11 years would reasonably infer a sense of fear on any such child. Failure to scream has never been an indication of absence of danger. In any event, PW1 testified that she could not scream because the Appellant had covered her mouth. This Court is not convinced that failure to scream can be successfully urged to impute doubt on the Prosecution's case.

Right to Fair Trial

48. Another key issue that the Appellant raised was that he cross-examined PW2 without having her statement, and this violated his Constitutional right to a fair trial. It is true that it is required of the Prosecution to supply an accused person with all the evidence they intend to rely on. This is the hallmark of a right to a fair trial.

49. This Court observes that the complainant's mother was not PW2 as indicated by the Appellant but was PW3. This Court has looked at the record and observed that indeed, the Appellant on 11th September 2019 claimed that he was not ready to proceed because he did not have the statements. The Court however reacted to his assertion and said that the Appellant had previously admitted to have received the statements. This Court reproduces the record as follows: -

> ***11/9/19***
>
> ***Before: Hon. E. Ngigi-PM***
>
> ***C/P: Ogutu***
>
> ***C/Asst: Adano***
>
> ***Accused: Present***
>
> ***Mr. Omwenga (PC): We are expecting two witnesses.***
>
> ***Accused: I am not ready to proceed as I do not have the statements.***
>
> ***Court: On the 5/9/2018 the accused was supplied with the statement and he would appear on the same day in court and confirmed this fact. On 11/10/2018 the accused was supplied with a P3 form and which fact was captured on the record.***

50. Turning to the proceedings of 5th September 2018 this Court reproduces the same as follows: -

> ***5/9/18***
>
> ***Before: Hon. E. Ngigi-SRM***
>
> ***C/P: Wasike***
>
> ***C/A Balozi/Hawa***
>
> ***Accused: Present***
>
> ***Mr. Wasike (PC): I am praying for an adjournment as we do not have a birth certificate or age assessment. The mother had promised to avail the same but she had not done so. We also pray for an order for age assessment.***
>
> ***Accused: I am praying for statement and for P3.***
>
> ***Court: I will grant an adjournment. The minor shall also be escorted for age assessment at Isiolo TRH. Matter also placed aside to enable the accused to be supplied with statements at state costs.***
>
> ***Later at 11:15am***
>
> ***Coram as before***
>
> ***Mr. Wasike: The statements have been supplied.***

Accused: <u>I confirm I have been supplied with the statements</u>

Court: Adjourned to 10/12/2018. Mention on 19/9/2018.

51. From the above, this Court finds that the statements were indeed availed to the Appellant. The trial Court was at least satisfied that this was the case going by the Appellant's very own words confirming that he had received the statements.

52. Further, on 5th October 2018, the record bears a lengthy ruling by the Court urging the importance of availing all evidence and documents to the accused person in fulfilment of the accused person's rights as per Article 50 of the Constitution. At this point in the proceedings, the only issue was on failure to supply the Appellant with a PR form and the PRC form. The Appellant had specifically requested for these documents, i.e the P3 form and the PRC form on 19th September 2018. This was on the next court attendance following the one of 5th September 2018 when he had confirmed to have been supplied with all the statements. The assertion by the Appellant in his submissions that he was made to proceed with cross-examination of PW2 without having a statement appears to be an afterthought because the record does not support this allegation.

Failure to call crucial witness

53. Another issue raised by the Appellant is that the Prosecution failed to call the complainant's uncle, Uncle S as a witness yet his evidence was crucial. Uncle S is said to have been the person the complainant reported to about the offence when she first got home after being released from the Appellant's house on the third day. This Court finds that it is not for an accused person to determine which witnesses the Prosecution should have called. That is the sole prerogative of the Prosecution upon consideration of the evidence supplied by the investigating officers. Further, Section 143 of Evidence Act (Cap 80) Laws of Kenya provides as follows: -

<u>143. Number of Witnesses</u>

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.

54. This issue was also discussed by the High Court in the Court of Appeal case of ***Keter v Republic [2007] 1 EA 135*** where Bosire, Githinji and Onyango-Otieno JJA held as follows: -

"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."

55. In the instant case, having found that the evidence of PW1, the complainant corroborated by the expert evidence of PW2, the clinical officer and that of PW4, the investigating officer was sufficient to prove beyond reasonable doubt that the Appellant committed the offence of defilement, this Court does not agree that it was necessary to have the uncle testify.

56. This Court ultimately finds that all the essential ingredients of the offence of defilement were proven beyond reasonable doubt and the Court upholds the conviction of the trial Court.

Whether or not the sentence meted out was excessive in the circumstances of the case.

57. The leading authority on the question of interfering with sentence is that of ***Wanjama v Republic Criminal Appeal No. 204 of 1970 (1971) EALR 493, 494,,*** where Trevelyan J held as follows:-

'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'

58. The penalty section for the offence of defilement under the Sexual Offences Act is categorized according to the ages of the child. Section 8 (2) provides as follows: -

A person who commits an offence of defilement with a child aged <u>eleven years</u> or less shall upon conviction be sentenced to <u>imprisonment for life</u>.

59. It was proven that the complainant child herein was about 11 years. To be precise, the child was about a month shy of 11 years. The life sentence imposed was therefore within the confines of the law.

60. The Appellant has urged that the mandatory nature of the sentence for the offence of defilement takes away the discretion of the Court and this was abhorred in the *Francis Muruatetu* Case. This Court takes judicial notice of the recent clarification by the Supreme Court by their directions issued on 6th July 2021 that the holding in *Francis Muruatetu* was with respect to the offence of murder and was not intended to have a blanket application to all other offences.

61. However, even if this Court were to agree with the submission by the Appellant, that the mandatory nature of sentences with respect to other offences other than murder takes away the discretion of the Court and is therefore unconstitutional, this Court finds that the context of discretion herein is not to say that a Court cannot exercise its discretion in giving the sentence prescribed for in the statute. If, after an

analysis of the facts and the circumstances of the case, the Court is of the view that imposition of such mandatory sentence as prescribed for in statute would best serve the interests of justice, then it could rightfully impose such sentence. What the *Francis Muruatetu* case sought to address is situations where despite the view that a lesser sentence would be appropriate in the circumstances, the Court is compelled to give the mandatory sentence prescribed for in the statute by reason of its mandatory nature.

62. This Court has looked at the Ruling of the trial Court on sentencing and is satisfied that the trial Court, upon analysis of the circumstances of the case and upon consideration of the mitigation by the Appellant, was of the view that a life sentence would best serve the interests of justice. The Magistrate did not allude to having been tied down by the mandatory nature of the penalty section for the offence of defilement. To use the Court's exact words, the Court held as follows: -

> ***'This Court therefore opines and subscribes to the school of thought that mitigation is part and parcel of trial process and should thus be taken into account in arriving at sentence.***
>
> ***In Meru HC Criminal Appeal No. 59 of 2019 Raphael Mutea Mwambia v R, the Court held that. 'Courts should be in a position to impose sentences they deem to be booth appropriate and proportional in any given case.'***
>
> ***Coming back to the present case, the Court has considered the accused persons' mitigations. However, the Court finds that defiling a ten year old child for 2 days is cruel, inhuman and betrayal of the trust that the society bestows upon the accused as a senior citizen to provide moral and physical protection to such young children.***
>
> ***In appropriate cases such as those of 'Romeo and Juliet' the Court will not hesitate to exercise its discretion and impose a less sentence or prescribe counselling through a probation order. However, this is a case that calls for a deterrent sentence to alter such predatory vices against our young and vulnerable girls.'***

63. The above reveals that the Court fully exercised its discretion without influence by the mandatory couching of the words in the penalty section. This Court observes that the offence of defilement has far reaching physical, social, psychological and emotional consequences to the victim. Recovery from the effects of sexual abuse is an arduous task and it is indeed possible for victims to carry the trauma of sexual abuse for their entire lifetime. This is tragic for any victim regardless of their age but worse still to those of tender years, case in point an 11 year old who is not even close to her prime years.

64. This Court agrees that the circumstances of the case not only calls for punitive measures but also deterrent measures so as to warn other predators in society. In his mitigation, the Appellant claimed to have small children. The safety of these small children is also of concern to this Court. This is a matter which calls for protection of the young, the vulnerable and the future generations. This Court finds that indeed, a custodial and life sentence would best serve the punitive, deterrent and retributive functions of sentencing. This Court does not find that the trial Court overlooked any material factors neither does it find that the sentence was manifestly excessive in the circumstances as espoused in ***Wanjama v Republic Criminal Appeal No. 204 of 1970 (1971) EALR 493, 494,,*** to warrant an interference with the discretion of the Court.

Conclusion

65. The complainant, a young school going girl of 11 years who was familiar with the Appellant testified to have been led by the Appellant to his house in the evening of 8th June 2018. She testified to have been defiled repeatedly by the Appellant having been locked in the house for 3 days. Her disappearance for these 3 days was confirmed by her mother who testified that she had all along known that the child was at her aunty's house. It cannot be true that the child was mistaken as to the identity of the Appellant because they spent 3 days in the house together in addition to the prior knowledge she had of the Appellant and she thus had ample opportunity to identify her assailant. Despite the inability to identify the house of the Appellant where the offence took place during the site visit, the intellectual ability of the child and the fact that she was taken in at night and locked inside for 3 days is a reason credible enough to explain her omission to so identify the house. The unchallenged expert evidence of the clinical officer who examined the child confirmed that she had a perforated hymen evincing defilement. The Appellant did not give any reasons as to why he could have been framed and who could have framed him as he claims. This Court finds that a weighing of the evidence adduced by the Prosecution and the Defence as a whole establishes all the elements of the offence of defilement beyond reasonable doubt, and the charge of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act against the Appellant was indeed proven. This Court also finds that the trial Court exercised its discretion within the law in meting out the sentence it so did.

ORDERS

66. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The Appeal on conviction is hereby declined and the finding of the trial Court on conviction is hereby affirmed.

ii) The Appeal on sentence is hereby declined and the finding of the trial Court on Sentence is hereby affirmed.

Orders accordingly.

DATED AND DELIVERED THIS 21ST DAY OF JULY 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Gerald Muriungi, the Appellant in person.

Ms Nandwa, Prosecution Counsel for the Respondent.