REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 134 OF 2019

JOSPHAT MUKONAMBI MURULE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence dated 1st August 2019 in Eldoret Chief Magistrate's Criminal Case No. 203 of 2017 by Hon. N. Wairimu, PM)

JUDGMENT

[1] The appellant herein, **Josphat Mukonambi Murule**, was charged before the lower court 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**. The particulars of the charge were that on **20 October 2017** at around 2.00 p.m. at [Particulars Withheld] area in Wareng District within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ of **BM**, a child aged 10 years.

[2] The appellant also faced an alternative charge of indecent act with a child, contrary to **Section 11 (1)** of the **Sexual Offences Act**. It was alleged that on **20 October 2017** at around 2.00 p.m. at [Particulars Withheld]area in Wareng District within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ of **BM**., a child aged 10 years.

[3] As the appellant denied both counts, he was taken through the trial process before the Principal Magistrate, which came to an end on **12 June 2019.** Thereafter, in a Judgment dated **17 July 2019**, the appellant was found guilty and was convicted of the substantive count of defilement, and was sentenced on **1 August 2019** to life imprisonment. Being dissatisfied with that decision, the appellant preferred this appeal on **7 August 2019**, on the following grounds:

> **[a] That he was not taken for medical examination to prove the offence against him, contrary to Section 36 of the Sexual Offences Act, No. 3 of 2006;**
>
> **[b] That the case was not proved beyond reasonable doubt as required by law;**
>
> **[c] That his defence was disregarded unfairly, which amounted to a violation of his rights and fundamental freedoms under Article 50 (2) and Article 25 (c) of the Constitution;**
>
> **[d] That his mitigation was not considered at all, in breach of his fair trial rights under Articles 19 (2), (3) (a), 20 (1) and (2), 27, and 28 of the Constitution;**

[4] Accordingly, it was the appellant's prayer that his appeal be allowed, his conviction quashed and the sentence set aside. The record shows that the appellant thereafter engaged the services of **Mr. Miyienda** of **M/s Miyienda & Company Advocates** to act for him in this appeal. A Notice of Appointment of Advocate was accordingly filed herein to that effect dated **14 July 2020**, along with Supplementary Grounds of Appeal to the effect that:

> **[a]The trial magistrate erred both in law and fact by convicting the appellant without cogent evidence of actual penetration;**
>
> **[b] The trial magistrate erred both in law and fact by failing to consider very material and pertinent contradictions in the Prosecution's evidence;**
>
> **[c] The trial magistrate erred both in law and in fact by failing to consider the fact that the alleged offence is said to have**

taken place at 11.00 a.m. while there were other children playing outside the compound with PW1.

[d] The trial magistrate erred both in law and fact by failing to consider the physical demeanour of the complainant and her conduct on the date of the alleged incident which conduct puts doubt to her true age.

[e] The trial magistrate erred in law and fact by failing to supply the appellant with a copy of the amended charge sheet, thereby prejudicing his case.

[5] Thereafter, another set of Amended Grounds of Appeal, dated **12 October 2020**, were filed on **1 December 2020** by **Daniel Orenge & Company Advocates,** pursuant to the leave of the Court **(Hon. Ngetich J.)** granted on **3 September 2020**. The appellant thereby sought to rely on the following grounds:

[a] The learned magistrate erred in law and in fact in sentencing the appellant to life imprisonment without taking into account the Court of Appeal decision of Jared Koita Injiri vs. Republic, Kisumu Criminal Appeal No. 93 of 2014, and Christopher Ochieng vs. Republic [2018] eKLR; which show that the learned magistrate was not bound by Section 8 (1) of the Sexual Offences Act; and that she had discretion to sentence the appellant to a lesser sentence while paying regard to the circumstances of the case;

[b] The life sentence imposed on the appellant is excessive, arbitrary, demeaning and inhuman and it violates the petitioner's right to a fair trial contrary to Article 26 (1) and (3) of the Constitution as the time limit for life imprisonment is unknown;

[c] The learned trial magistrate erred in law and fact in convicting the appellant on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubt without the benefit of properly conducted DNA test as required under Section 2 of the Sexual Offences Act;

[d] The learned magistrate misdirected herself in fact and law by not considering the evidence and submissions by the defence;

[e] The learned magistrate erred in law and in fact when she failed to take into account the mitigation of the appellant.

[6] It was therefore surprising that on **19 January 2021**, the appellant purported to file yet another set of Amended Supplementary Grounds of Appeal. He thereby contended that:

[a] The trial magistrate erred in law and fact by failing to recognize that he was not subjected to a fair trial for purposes of Articles 25 (c) and 49 (1) (f) and (g) of the Constitution and Article 20 of the Universal Declaration of Human Rights, 1948;

[b] The trial court erred in law and fact by failing to appreciate that investigation in this case was shoddy;

[c] The learned trial magistrate erred in law and fact by failing to note that the Prosecution side did not prove its case beyond reasonable doubt as required by law;

[d] The sentence imposed against the appellant was unconstitutional in view of the Supreme Court decision in Muruatetu & Another vs. Republic, [2017] eKLR;

[e] The trial court erred in law and fact by relying on incredible witnesses;

[f] The trial court failed to comply with Section 333 of the Criminal Procedure Code;

[g] The learned magistrate erred in law and fact by disregarding the appellant's *alibi* defence

[7] The appeal was urged by way of written submissions; and although **Mr. Orenge** was granted time from **10 June 2021**, to file his written submissions, he has so far not complied as his written submissions are yet to be filed. Thus, going by the written submissions filed herein by **Mr. Miyienda** and the appellant, it is discernible that they revolve around the question whether the elements of the charge of defilement were proved beyond reasonable doubt; the effect of the perceived contradictions in the prosecution case and whether the appellant was accorded a fair trial from the backdrop of **Articles 49 and 50 (2)** of the **Constitution** and **Section 333** of the **Criminal Procedure Code**. With regard to sentence, the appellant raised the issue of the constitutionality of the life sentence that was meted by the trial court. I will revert to the appellant's submissions in greater detail shortly.

[8] On behalf of the State, the appeal was resisted by **Mr. Mugun** *vide* his written submissions dated **16 March 2021**. He furnished a summary of the evidence adduced before the lower court and urged the Court to find that all the elements of the offence of defilement were proved beyond reasonable doubt by the Prosecution. In particular, counsel submitted that the age of the complainant was proved by cogent evidence, including a Child Heath Card. He also urged the Court to find that the appellant was well identified by the complainant, her mother **(PW2)** as well as a neighbour **(PW3);** and that the circumstances favoured positive identification as the incident occurred at 2.00 p.m. in the afternoon in broad daylight.

[9] On penetration, **Mr. Mugun** submitted that, in addition to the evidence of the complainant, medical evidence was presented before the lower court that established that the complainant had fresh hymenal tears at position 6 and 9 o'clock, as well as redress and swelling around the hymen and on the *labia minora* and *labia majora*. He urged that the P3 Form, produced before the lower court as **the Prosecution's**

Exhibit 1 be taken into account in this regard.

[10] Counsel further urged the Court to find that the appellant was accorded all his fair trial rights; and that his defence of *alibi* was likewise considered at page 11 of the lower court's judgment. He was of the view that the sentence passed by the learned trial magistrate was commensurate with the crime, given the peculiar circumstances of the case, particularly the age of the complainant. Thus, **Mr. Mugun** urged the Court to dismiss this appeal in its entirety.

[11] I have given careful consideration to the Grounds of Appeal filed herein as well as the written submissions filed by and on behalf of the appellant as well as the response thereto by the respondent. 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..."**

[12] With the foregoing in mind, I have carefully considered the lower court record. It shows that the prosecution called a total of 6 witnesses in proof of the charges. The complainant testified on **13 December 2017** as **PW1**. She told the lower court how on Mashujaa Day on **20 October 2017,** the appellant, a neighbour of theirs, asked her to go and sweep his house for him; and that she went to his house but before she could sweep, he got hold of her and removed her clothes and placed her on his beddings which were on the floor and proceeded to pock and injure her genital organ using his genital organ. She added that the appellant thereafter released her to go outside and play with the other children and warned her not to disclose the incident to anybody.

[13] **PW1** further told the lower court that, although she was in pain, she did not reveal the occurrence to her mother; but that because she was experiencing flatulence, her mother examined her and noted that something was amiss. She then disclosed to her mother that she had been defiled by the appellant, who she referred to as the tall man. She was then taken to hospital for examination, after which the incident was reported to the police.

[14] The complainant's mother testified as **PW2.** She confirmed that she had left the complainant at home on **20 October 2017** and went for work; that on return she noted that the complainant was farting a lot; and when she asked her what she had eaten, she did not respond. Afterwards, she decided to examine the complainant and found semen all over her. She then called a neighbour, **Margaret Shikwatsu (PW3),** and upon questioning the complainant she revealed that she had been defiled by the appellant, who was their neighbour and who was known as the tall man. She then took her to **Moi Teaching and Referral Hospital** where the girl was examined and her fears confirmed. She then filed a complaint with the police and the appellant was arrested and charged. **PW2** identified the treatment card that she was given at **Moi Teaching and Referral Hospital**, the P3 Form that the complainant was issued with at the police station and the complainant's clinic card that she handed over to the police in proof of the complainant's date of birth.

[15] **Margaret Shikwatsu (PW3)** was a neighbour of the **PW2** at Langas. Her evidence was that while in her house at about 9.00 p.m. on **22 October 2017, PW2** called her at night, and asked her to examine the complainant's genitalia. She noted that the girl was farting a lot; and that her vagina was swollen. She further told the lower court that she questioned the complainant as to what had happened to her vagina; and that she revealed that she had been defiled by the tall man. She accordingly advised **PW2** to take the girl to hospital in the morning for examination and treatment. She also mentioned that she accompanied **PW1** and **PW2** to Langas Hospital, where the girl was attended to; after which they were advised to report the matter to the police at Langas Police Station. They were thereafter given a P3 Form and referred to **Moi Teaching and Referral Hospital** for further examination. **PW3** confirmed that the appellant was thereafter arrested.

[16] The Prosecution also called **Tom Mboya Olango (PW4),** who told the lower court that he was a member of the community health team of volunteers at Langas. His evidence was that they were distributing nets at Langas Mosque on **23 October 2017** when he received information of defilement of a child. He further stated that he was required to assist in escorting the victim to **Moi Teaching and Referral Hospital** for examination; and that, after guiding the complainant's mother on what to do in having the P3 Form filled and returned to the Police, he was instructed to assist in arresting the suspect along with other colleagues; which they did on **24 October 2017**. He also mentioned that he came to know that the appellant was known in the neighbourhood as Tallman Rasta; and that they handed him over to the police for further investigations.

[17] **Sgt. Linah Mosonic (PW5)** was then attached to Langas Police Station. She told the lower court that she was on duty on **23 October 2017** when the complainant's mother filed a defilement complaint in the company of the complainant; who in her assessment was about 10 years old. She issued them with a P3 Form and referred them to Moi Teaching and Referral Hospital for medical examination. She further testified that the suspect, who is the appellant herein, was taken to the station on **24 October 2017** by members of the public, who included the complainant's mother; and that she caused him to be charged with defilement after the medical examination confirmed that the minor had been defiled.

[18] The last prosecution witness was **Dr. Taban Lilian Tokosan (PW6).** She was then attached to Moi Teaching and Referral Hospital, having qualified from Moi University in **2013**. She testified on behalf of a colleague, **Dr. Temet**, who had examined and filled the P3 Form for the complainant. She explained that **Dr. Temet** had gone for further studies. From the findings of **Dr. Temet, PW6** testified that the complainant was found with fresh hymenal tears along with redness and swelling around the hymen, the *labia minora* and the *labia majora.* It was also noted that she had foul-smelling yellowish discharge from her vagina; and that the tests conducted revealed no infection. The examining doctor concluded that the girl had been defiled and that there was penetration. **PW6** produced the P3 Form as the **Prosecution's Exhibit 2** before the lower court.

[19] On being placed on his defence, the appellant told the lower court, in a sworn statement of defence, that he was at work at a construction site on **20 October 2017** from 8.00 a.m. to 8.00 p.m. and that he returned home, where he was then staying with his wife, **Christine Muruli**. He denied having met the complainant that day; and asserted that nobody asked him anything about the child on that particular day. He further told the lower court that it was not until **24 October 2017** that he got to know of the allegations against him when, he was picked up, at about 8.00 p.m., and taken to the police station by some people. He concluded his evidence by denying that he defiled the complainant as alleged. He also denied that Tallman is his nickname, and added that he heard about it for the first time in court.

[20] Granted the foregoing summary of evidence, the key issue for determination is **whether the charge of defilement and all its key elements were proved beyond reasonable doubt**. Other than that, the appellant raised the following pertinent issues which must therefore be resolved by the Court:

> **[a] Whether his fair trial rights were violated;**
>
> **[b] The constitutionality of the sentence imposed on him and the failure by the trial court to comply with Section 333 of the Criminal Procedure Code.**

[21] The substantive charge of defilement, of which the appellant was convicted, was laid pursuant to **Section 8 (1)** as read with **Section 8 (2)** 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.**
>
> **(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.**

[22] It was therefore imperative for the Prosecution to prove beyond reasonable doubt that complainant was, at the material time, a child aged 11 years or less; that there was penetration of the complainant's genital organ; and that the penetration was perpetrated by the appellant.

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

[23] It is now trite that the age of a minor is a critical component of a defilement charge 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".***

[24] 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."**

[25] 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 **<u>P.M.M. vs. Republic</u>** [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…"**

[26] Accordingly, although the complainant told the lower court that she could not remember her birthday, her mother testified and stated that she was born on **4 July 2008.** She also availed the girl's Child Health Card in which her date of birth is reflected as **4 July 2008.** The Card was produced before the lower court by the investigating officer and marked **the Prosecution's Exhibit 3.** There was therefore unassailable evidence presented before the lower court to demonstrate that the complainant was 9 years and 3 months old as at **20 October 2017** when the offence is alleged to have been committed. It matters not therefore that she was yet to attain 10 years, which was the age indicated in the particulars of the charge sheet, because in **Section 8 (2)** of the **Sexual Offences Act**, the age bracket is **"…11 years or less…"** Clearly, the complainant was indeed a minor for purposes of **Section 8 (1) and (2) of the Sexual Offences Act.**

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

[27] In her testimony before the lower court, the complainant explained how the appellant, who was one of their neighbours, lured her to his one roomed house on **20 October 2017,** having asked her to go and sweep his house. She explained that she obliged and went to the appellant's house; but that before she could sweep, he got hold of her and removed her clothes and placed her on his beddings which were on the floor and proceeded to pock and injure her genital organ using his genital organ. She further testified that the appellant thereafter released her to go outside and play with the other children and warned her not to divulge the occurrence to anybody.

[28] The complainant further testified that, although she was in pain, she did not reveal the occurrence to her mother; but that because she was experiencing flatulence, her mother examined her and noted that something was amiss. She then disclosed to her that she had been

defiled by the appellant, who she referred to as the tall man. In this respect, the evidence of the complainant was corroborated by the evidence of her mother **(PW2)** and a neighbour **(PW3)** who both examined the girl's genitalia and noted that her vagina was swollen and was foul-smelling.

[29] Further to the foregoing, the Prosecution adduced evidence to the effect that the complainant was issued with a P3 Form and was subjected to medical examination at Moi Teaching and Referral Hospital. **Dr. Taban Lilian Tokosan (PW6),** confirmed that her colleague, **Dr. Temet**, examined and filled the P3 Form for the complainant; and that from the findings of **Dr. Temet,** the complainant was found with fresh hymenal tears along with redness and swelling around the hymen, the *labia minora* and the *labia majora.* It was also noted that she had foul-smelling yellowish discharge from her vagina. **PW6** added that, from her findings, **Dr. Temet** was of the opinion that the girl had been defiled and that there was penetration. The P3 Form that was filled by **Dr. Temet** was also produced before the lower court as **the Prosecution's** Exhibit 2.

[30] Granted the line of defence adopted by the appellant, it is manifest that the Prosecution evidence on penetration was entirely uncontroverted; and therefore that there was sound basis for the learned trial magistrate to come to the conclusion that this aspect of the charge had been proved beyond reasonable doubt. I note however that in the submissions filed herein by both **Mr. Miyienda** and the appellant, they took the view that penetration was not proved beyond reasonable doubt. **Mr. Miyienda** for instance, took issue with the indication by **Dr. Temet** at page 4 of the P3 Form that "**The history and the physical examination findings were highly suggestive of defilement."** He submitted that the words **"highly suggestive"** are subject to a variety of interpretations; and that since the doctor did not specifically mention anything to do with penetration, her finding was inconclusive. It is noteworthy that the remarks in question were made as additional remarks; and were made with specific reference to the history and the findings made on physical examination. Indeed, the said remarks cannot be looked at in isolation from the rest of the findings. To my mind, they are supplementary and therefore do not in any way detract from the clear evidence of penetration as evinced by the doctor's findings as indicated in other sections of the impugned document.

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

[31] The appellant having denied the allegation that he committed the offence, the heaviest responsibility was for the Prosecuted to connect him with the crime by credible evidence of identification. It is trite that evidence of identification must be tested with greatest care to ensure that it is free from the possibility of error. Hence, the caution sounded by the Court of Appeal in **<u>Paul Etole & Another vs. Republic</u>** [2001] eKLR regarding such evidence is apt, namely that:

> **"…Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."**
>
> **All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger…"**

[32] The only identifying witness in this case was the complainant, a 9-year-old girl. She was clear in her mind that she was defiled by the appellant, who was at the time their next door neighbour; a fact conceded to by the appellant in cross-examination. The appellant also mentioned that they had been neighbours with the complainant's parents for two years by **October 2017.** Indeed, in her evidence the complainant included details such as that the appellant's house was the last one on the plot and that he was known in the neighbourhood as the tall man. It is also significant that the incident took place in broad daylight.

[33] This was therefore a case of recognition of a person hitherto well known to the complainant in fairly favourable circumstances. In **<u>Anjononi & Others vs. Republic [1980] KLR 59</u>** the Court of Appeal appreciated that such evidence was more assuring, and therefore more reliable as opposed to identification of a stranger. Here is what the Court of Appeal had to say:

> **"...This was however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other. "**

[34] It is significant too that when asked by her mother what had happened to cause the genital injuries, the complainant did not hesitate in revealing that she had been defiled by the appellant. Her consistency in this regard is also evident at paragraph 2 of Part II in the P3 Form marked **the Prosecution's Exhibit 1.** There was therefore credible evidence placing the appellant at the scene of this particular crime; and therefore the trial magistrate cannot be faulted for so finding; noting that she properly directed herself as to the provisions of **Section 124** of the **Evidence Act** and pertinent authorities.

[35] It is not lost on the Court that the appellant raised an *alibi* defence before the lower court; and one of his grounds of appeal was that his defence was not taken into account. There is no gainsaying that, where an accused person raises an *alibi,* the burden lies on the Prosecution to displace that *alibi*. In **<u>Kiarie vs. Republic</u>** [1984] eKLR, the Court of Appeal pointed out that:

> **"An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an *alibi* introduces into the mind of the court a doubt that is not unreasonable…"**

[36] Similarly, in **<u>Athuman Salim Athuman vs. Republic</u>** [2016] eKLR, the Court of Appeal held that:

"It is trite that by setting up an *alibi* defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the *alibi* and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of *alibi* is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act..."

[37] I have looked at the judgment of the lower court and note that, indeed the learned trial magistrate took into consideration the defence offered by the appellant at pages 9 and 11; and while it was a misdirection for the trial magistrate to make an adverse inference from the fact that the appellant did not call any witnesses, such as workmates or his wife, to confirm his *alibi*, there is no doubt that the *alibi* was completely displaced by the Prosecution evidence, and therefore that the misdirection did not occasion a failure of justice in the circumstances.

[38] The appellant also took issue with the fact that he was not examined for purposes of **Section 36** of the **Sexual Offences Act.** That provision states as hereunder in **Subsection (1):**

"...where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence." (Emphasis added)

[39] It is plain therefore that the aforesated provision is not mandatory; and that non-compliance by the trial court is not fatal. Indeed, in **Evans Wamalwa Simiyu vs. Republic** [2016] eKLR, the Court of Appeal held that:

"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

[40] Similarly, in **AML vs. Republic [2012] eKLR** the Court expressed the view that:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

[41] Accordingly, not much turns on the fact that no DNA test was conducted in respect of the appellant. In the same vein, I am not convinced that the sort of contradictions adverted to by **Mr. Miyienda** in his submissions are of such a nature as to vitiate the conviction of the appellant. For instance, counsel took issue with the discrepancy as to whether the offender was indeed 10 years old, given the date of birth as per the Child Health Card; he also questioned whether the offence was committed on the floor or on the bed; the exact time of the incident; and when the accused was arrested, among other perceived contradictions.

[42] The guidance furnished by the Court of Appeal in **Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1992**, is that:

"An appellate court in considering those discrepancies must be guided by the wording of section 382 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 sentence".

[43] Similarly, in ***Philip Nzaka Watu vs. R*** **[2016] eKLR** the Court of Appeal held that:

"...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 peopleperceive the same phenomena exactly the same way. Indeed as has been recognized 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."

[44] Thus, roundly considered, I am satisfied that the Prosecution discharged the burden of proving beyond reasonable doubt that the appellant committed the offence of defilement for purposes of **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act;** and therefore that his conviction in that regard was predicated on sound evidence**.**

[45] Turning now to the second issue, whether the appellant's constitutional rights to fair trial were violated, it is manifest that his complaint was that he was not taken to court within 24 hours as required by **Article 49 (1) (f)** of the **Constitution**. In his written submissions, the appellant made reference to the evidence of the Prosecution witnesses and the charge sheet to support his argument that whereas he was arrested on **24 October 2017**, it was not until **27 October 2017** that he was arraigned before the subordinate court. The record of the lower court does confirm that the appellant was arrested on **24 October 2017;** and that he was arraigned before the lower court on **27 October 2017,** after about 3 days; yet **Article 49(1)(f)** of the **Constitution** is explicit that:

"An arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

[46]Accordingly, the question to pose is whether that breach on the part of the Prosecution would vitiate the lower court's proceedings, including the appellant's conviction and sentence; and the answer is no. It is now trite that, in such a situation, the appellant would have recourse in civil litigation for the vindication of his constitutional right; and therefore, that a violation this kind, even if proved within the context of the criminal trial, would not vitiate the conviction recorded by the lower court. One such authority is **Evans Wamalwa Simiyu vs. Republic** [2016] eKLR wherein the Court of Appeal held that:

"This issue has been the subject of several decisions of this Court. The correct position in law was set out in *Julius Kamau Mbugua v Republic (2010) eKLR*, where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. On this basis, we do not consider the issue fatal to the prosecution even if proved."

[47] The appellant's complaint that he was not supplied with copies of witness statement is clearly baseless, looking at the proceedings of **6 November 2017.** Those proceedings show, not only that the appellant was supplied with copies of the witness statements; but also that he acknowledged receipt of the same and, at his instance, was granted time to peruse the same and generally prepare for his trial. Whereas there is no indication that the amended charge sheet introduced on **17 November 2017** was supplied, no prejudice resulted, as its effect was simply to amend the age of the victim from 6 years to 10 years. Ultimately, on **13 December 2017** when the trial commenced, the trial court inquired from the accused as to his readiness; and he confirmed that he was prepared to proceed. It was thereupon that the amended charges were read to him and upon pleading not guilty, the trial commenced. He therefore has no cause for complaint in that regard.

[48] The last issue for determination is the constitutionality of the sentence imposed on the appellant and the effect of the failure by the trial court to comply with **Section 333** of the **Criminal Procedure Code**. As has been pointed out hereinabove, the appellant was sentenced to life imprisonment; which is the penalty provided for in **Section 8 (2)** of the **Sexual Offences Act.** The appellant relied on **the Muruatetu Case** in support of his submission that the life sentence that was imposed on him is a violation of his constitutional right to fair trial; and that as a first **offender, that sentence is excessive in the circumstances.**

[49] It is significant that the impugned sentence was imposed on the appellant on **1 August 2019**, about 8 months after the Supreme Court pronounced itself on **the Muruatetu Case**. It is to be presumed then that the learned trial magistrate was aware of **Muruatetu**; and that this must be why she did not feel constrained to mete out life imprisonment on the ground that it is a mandatory sentence. To the contrary, she called for and considered a pre-sentence report as well as the mitigation offered by **Mr. Mwinamo** on behalf of the appellant.

[50] It is true that, following the decision of the Court of Appeal in **Jared Koita Injiri vs. Republic** [2019] eKLR**,** the minimum sentences in the **Sexual Offences Act** were done away with as a corollary to **Muruatetu**; for the Court of Appeal held that:

Arising from the decision in *Francis Karioko Muruatetu & Another vs Republic, 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."**

[51] In **Jared Koita Injiri**, which involved a 9-year-old minor, the Court of Appeal proceeded to set aside the sentence of life imprisonment in favour of imprisonment for 30 years. The Supreme Court has since clarified matters in its Directions dated **6 July 2021** and made it clear that **the Muruatetu Case** was not intended to apply to offences under the **Sexual Offences Act**. At paragraphs 11, 12 and 14 the Supreme Court made it explicit that:

[11] The ratio decidendi in the decision was summarized as follows;

"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

[12] We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.

…

[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."

[52] In the light of this clarification, it cannot be said that the sentence of life imprisonment is unconstitutional simply on account of its indeterminate nature; or that the trial magistrate fell into error in meting out the sentence of life imprisonment on the appellant. In the same vein, failure by the trial court to comply with **Section 333** of the **Criminal Procedure Code** is of no consequence in the circumstances.

[53] In the result, the appellant's appeal fails on both conviction and sentence and is accordingly dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF JULY, 2021

OLGA SEWE

JUDGE