REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 118 OF 2018

DICKSON CHOME.....APPELANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. L. T. Lewa, Senior Resident Magistrate on 10th May 2018 in Shanzu Court Criminal Case No. 472 of 2015, *Republic v Dickson Chome*).

JUDGMENT

Background

1. Dickson Chome was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars are that Dickson Chome on diverse dates between 1st April 2015 and 28th April 2015 at Mtwapa Township in Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of GKMM. a child aged 4 years.

2. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that Dickson Chome on diverse dates between 1st April 2015 and 28th April 2015 at Mtwapa Township in Kilifi County, intentionally and unlawfully touched the vagina of GKMM a child aged 4 years with his penis.

3. In Count Two, Dickson Chome was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars are that Dickson Chome on diverse dates between 1st April 2015 and 28th April 2015 at Mtwapa Township in Kilifi County, intentionally and unlawfully caused his penis to penetrate the anus of GKMM a child aged 4 years.

4. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that Dickson Chome on diverse dates between 1st April 2015 and 28th April 2015 at Mtwapa Township in Kilifi County, intentionally and unlawfully touched the anus of GKMM a child aged 4 years with his penis.

5. The trial magistrate considered the evidence of five prosecution witnesses and the sworn statement of the appellant and convicted the appellant who was sentenced to serve life imprisonment.

6. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds:-

1) That the learned trial magistrate erred in law and fact by failing to consider that he was denied a right to fair trial contrary to Article 50 (2)(j).

2) That the learned trial magistrate erred in law and fact by failing to consider that the appellant was convicted on uncorroborated evidence.

3) That the learned trial magistrate erred in law and fact by failing to consider that the perpetrators of the heinous act was not arrested.

4) That the learned trial magistrate erred in law and fact by failing to consider that the trial court proceedings were a nullity.

5) That the learned trial magistrate erred in law and in fact by failing to consider that the sentence meted on the appellant was harsh and excessive.

7. The appellant prayed that the appeal be allowed, conviction quashed, sentence set aside, and he be set at liberty. This appeal was canvassed by way of written submissions.

Appellant's Case

8. PWI, GK, the complainant. A viore dire examination was conducted and she gave an unsworn statement. PW1 said that on 1st April 2015, her mother had gone to work leaving her, E, K, M, and the Appellant at home. PW1 said that the Appellant then sent the complainant's brothers to go fetch firewood kwa mkubwa. The complainant had followed his brothers but she said the Appellant told her to go back home. PW1 said that the Appellant then placed her on her mother's bed at the corner in the one-roomed house and defiled her. PW1 said she was wearing a dress and tights which were removed by the Appellant. According to PW1's evidence, the Appellant was wearing belly trousers only. He then inserted his penis in her vagina and she felt a lot of pain, scream and cried. No one went to help because people had gone to work. PW1 said that the Appellant took her mother's lesso and wiped her. When PW1's brothers went back with the firewood, the Appellant asked them to bathe her and it was at that point that she told her brothers what had happened. PW1 said that when her mother went back home, the Appellant told her that PW1 had a cold. She told her mother what had happened and the Appellant told PW1 that he would stab her if she disclosed what had happened to anyone. PW1 said that they went to the village elder, the DO, the police station then to hospital.

9. PW2, MM aged 11 years old, the complainant's brother said that on 25th April 2015 at around 10.00 am, he was at home with his brother E, K and PW1. On the said day when they went back home for lunch from playing, PW2 said that the Appellant asked them to go fetch firewood but asked PW1 to go back home since it was drizzling. When they returned from fetching firewood, the Appellant was seated inside the house and PW1 was sleeping on the bed. PW2 asked PW1 to go outside with them but she had difficulties going down the bed and walking. The Appellant asked PW2 to assist PW1 out of the bed because she could not do it on her own. Later, the Appellant asked PW2 to put water in a basin and bathe her. PW2 noticed that PW1 'alikuwa anatoa uchafu na huku mbele' pointing at his private parts. PW2 asked PW1 what was happening and she did not say anything. PW2 said that his mother went back home after a while and he told her what he had seen. PW2 said that his mother looked at PW1 and saw the 'uchafu'. The Appellant said that they make plans to take PW1 to hospital but his mother took PW1 to the village elder first before she was taken to hospital. PW2 said that he was taken to the police station where his statement was taken. PW2 identified the Appellant in the dock.

10. PW3, MSC, the mother to the complainant said that on 25th April 2015, she went back home from work at around 0500pm and found PW1 her daughter at home and on the bed who seemed unwell. The Appellant was also in the house while the boys were outside playing. PW3 asked PW1 whether she was unwell and she said she has 'homa'. PW3 asked the Appellant whether he had bought medicine for PW1 and the Appellant replied that he had looked at the 'homa' and it was not the one to be taken to hospital. The Appellant suggested to PW3 that they take PW1 to the witch doctor. PW3 said that she carried PW1 and went with her outside and when she cuddled her, she noticed that PW1 was in pain. She asked again what had happened and PW1 told PW3 everything. PW1 said it was the Appellant and he had told her not to tell anyone. PW1 narrated to PW3 how the Appellant had defiled her. PW3 said that she went direct to the village elder and made the report. PW3 said that she checked PW1's private parts and saw they were swollen and seemed 'imekatwa katwa', looked burnt and there was substance like pus in her private parts. At the village elder, the child narrated what had happened, she was checked by the village elder who called a taxi that took them to the DO's office. PW3 said that at the DO's office, female officers checked the child and sent them to Mtwapa Police Station to report. PW3 said that PW2 told her that when they returned from fetching firewood, they found bedsheets on the line and when PW3 returned, the bedsheets were already laid on the bed and her mother had picked and washed clothes. PW3 said that the Appellant was arrested after 3 days. The Appellant called him at his place and wanted to meet at Bamburi stage. PW3 alerted the elders and proceeded to meet him where he was arrested with the assistance of the elders and boda boda operators. The Appellant was taken to the DO's off ice then to Mtwapa Police Station. PW3 said the complainant was taken to Mtwapa Health Centre the following day where she was examined and given medication. PW3 said that she lived with the Appellant as husband and wife for 6 months though he is not the father of her children.

11. PW4, Dr. Abdallah Hussein Abdullahi, an MO at Mtwapa Health Centre had a P3 form for the complainant though not the author for the same. The author is Dr. Hussein who proceeded for post graduate studies in Uganda. PW4 said that he is conversant with his handwriting and signature and the date of the alleged offence is between 1st April and 28th April 2015, alleged to have ben defiled by a person well known to her. The estimated age of the child is 4 years old, broken hymen and the vagina had lacerations at 6 o'clock. There were multiple bruises on the labia majora and anal bruises seen. There was a whitish discharge per vaginal specimen collected, urine samples, HB for blood levels, HIV and Syphilis done. Additional comments as per the doctor are that the patient had been defiled several times at the vagina and anal. PW4 produced the PRC form as exhibit 1 and the P3 form as exhibit 2.

12. PW5, No. 83707 CPL Electine Kabasha the investigating officer in the case said that on 28.4.2015 at around 9.34 am, she received a report in Mtwapa Police Station that the complainant accompanied with her mother went and reported. The case was assigned to PW5 and she did her investigations and established that the complainant had been defiled by the accused and she said that between 1.4.2015 and 28.4.2015 while having been left by the mother and her 3 siblings together with the Appellant, the complainant's siblings were told to go and fetch firewood by the Appellant. It was then that the Appellant took the complainant to her mother's bed, undressed her and defiled her. PW5 said that she escorted the complainant to Mtwapa Health Centre for examination after which she was advised to go to Coast General Hospital. Also, while waiting to be examined, PW5 said that she saw some pus coming out of her vagina. PW5 took statements for the complainant, the mother ans the siblings then issued her with a P3 form which confirmed that the complainant had been defiled in the anus and vagina. Later, PW5 took the complainant for age assessment which was done at KDH and it was approximately 6 years old at the time. PW5 then went and arrested the Appellant. PW5 produced the age assessment in court as exhibit 3.

Respondent's Case

13. DW1, Dickson Chome said that the allegations before court are not true. He said that on 29.4.2015, the mother of the complainant who is

his 2nd wife called him while he was at work and told him to go and wait for her at Majengo stage when he leaves work. He is a driver by profession and at the time he was from Mariakani. At 7.35pm, he saw her approach with 2 of her neighbours where he was arrested by the public and taken to Mtwapa Police Station. DW1 said that the allegations were then preferred against him because he said that he was not aware of the charges as they were fictitious. DW1 said that he is aware that the child was taken to hospital and that was done when DW1 was around as he is the one who told PW3 to take the complainant to hospital because she had discharge from her private parts. After treatment, DW1 called PW3 to confirm that indeed the complainant had been treated

Appellant's Submissions

14. The Appellant submits on being denied the right to fair trial contrary to Article 50 (2)(j) that he was taken to court on 30.4.2014 to take plea for which he pleaded not guilty. However, he was not given witness statements nor any evidence that the prosecution wished to rely on to warrant a fair trial. On 8.9.2015, the statements had not been supplied and the trial court records on page 9 that *'witness statements to be supplied'*. At page 17 of the trial court proceedings, 8 months after taking after taking plea, the prosecution told court *'copies of witness statements were made and went to the welfare office. The same have not been given to the accused. We can take another hearing date.'* The Appellant submits that on 22.1.2016, the matter came up for hearing and the prosecution witnesses presented 3 witnesses who all testified and the Appellant was placed on the task of cross examining the witnesses yet he had not been supplied with witness statements. The Appellant also cited Article 25 (c) of the Constitution which states, *'despite any other provision in this constitution, the following rights and fundamental shall not be limited; (c) The right to fair trial.'* The Appellant further submits that there can only be fair trial if all the rights enshrined under Article 50 of the Constitution are attained. The Court of Appeal in the case of *Joseph Amos Owino v Rep*. CA CR. App. No. 450 /2007 eKLR held that, *'The Appellant may not have been aware of his constitutional rights as an advocate would hence he relied wholly on the curt to ensure compliance with such rights by the prosecution. The trial court and 1st appellate court in exercise of their jurisdiction should hence on their own ensure that the constitutional rights of the appellant were fully complied with, notwithstanding that the Appellant did not raise the same.'* The Appellant in submitting further quoted *Albanus Mwasia Mutua v Rep* Cr. App. No. 120 of 2004 Court of Appeal at Nairobi where the judges held that, *'At the end of the day, it is the duty of the court to enforce the provisions of the constitution, otherwise there should be no reason for having that provision in the first place. The jurisprudence which emerges from the case we have cited in the judgment appears to be that and an explained violation of a constitution right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.'*

15. The Appellant submits on uncorroborated evidence that PW11 was not a truthful witness and her evidence was not credible. The Appellant submits that in her unsworn evidence, the complainant told court she was only defiled once in her vagina and that it was on 1st April 2015. This is contrary to count two where he was charged with penetrating the complainant's anus. The Appellant submits that he was convicted on both counts being uncorroborated evidence. The complainant told court that after the incident, she told her brothers what her father had done which is evident at page 23 lines 7-8. When the said M testified in court, he denied having been told anything, page 29 paragraph 1. On cross examination, he reiterated the same thing. The Appellant submits that from the extract, it is clear that PW1 was not a truthful witness and her evidence needed to be supported by other independent witness. The Appellant submits that evidence obtained in this manner is not admissible in law and is a contravention of Article 50 (4) of the constitution which states *'evidence obtained in a manner that violates any rights or fundamental freedoms in the bill of rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.'*

16. The Appellant submits on the ground of the perpetrators of the heinous act not having been arrested that PW3 told court that when she was informed by her daughter of the alleged defilement, she first checked her private parts. At page 35 par.1, PW3 was not a medical expert nor in the medical field. It is not clear as to which tools she used. The Appellant submits that before being checked by PW3, PW1 told court she was bathed by her two brothers M and E and it could be them who did the heinous act. The Appellant submits that as this was not enough, PW3 told court she took PW1 to the village elder who at page 35 lines 6-7 placed the child on the table and checked the child's private parts. The Appellant submits that he might have penetrated the minor using his fingers. He then took a taxi which took the minor to the DO's office where again at page 35 lines 9-10 the female officer took the child to the office and checked her. Both the village elder and the female officer at the DO's office were not health experts and thus not authorised to carry out examination. The Appellant submits that the possibility that one of the alleged examiners was the perpetrator cannot be ruled out. The Appellant submits that it is on this basis that PW1 was defiled by persons well known to the court. The Appellant cited the case of *JOO v Republic* [2015] eKLR where it was held, *'It is not lost to this court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution t ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled, proof beyond any reasonable doubt. Hence this case cannot be an exception. This court holds the view that it is better to acquit 10 guilty persons than to convict 1 innocent person.'*

17. The Appellant submits on the trial court proceedings a nullity that Section 63 (2) of the appellate jurisdiction states that *'the registrar of the superior court shall at the same time sent to the registrar the original record of the proceedings, in the superior court, other than any of great bulk, under a copy of the record of the preliminary inquiry, if any, but shall not send any exhibits other than documentary ones, unless requested to do so by the registrar.'* The Appellant submits that upon perusal of the trial court proceedings served upon him, it is clearly indicated 'Hand written proceedings pages 8 and 7 missing'. Contents of the missing pages will never be known by the Appellate court and thus violate his constitutional rights to fair trial contrary to article 25 (c) as he is unable to prove his innocence.

18. The Appellant submits on the harsh and excessive sentence that guided by the merits of the Supreme Court decision in *Francis Kariako Muruatetu & Another v Republic*, and persuaded by the decision of the Court of Appeal in *Christopher Ochieng v Republic* and *Jared Koita Injiri v Republic*, Kisumu Criminal Appeal No. 93 of 2014 in relation to sentencing. The Appellant submits that it is clear the life sentence meted upon him was unconstitutional. The purpose of sentencing as stated in *Gaston January Stephen v Rep* was held that, *'it is appropriate to reiterate that trial courts in exercising discretion should at all time ought to factor the sentencing guideline policy, principles and commentaries developed overtime court decisions.'* Also putting in mind had this to say, *'the purpose of sentence is usually to disapprove or denounce unlawful conduct as deterrence to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation f offender, and in rehabilitation by providing for reparation for harm done to victims in particular to and to society in general.'* The Appellant further cited the case of *Yussuf Dahar Arog v Rep* HCCR App No. 110 of 2006 OjwanG, J. as he then was, observed inter alia on the principles of sentencing, *'a court should exercise judicial principles such as taking into account the ordinary span of life of a human being, the general circumstances surrounding the commission of the offence, the possibility that the culprit may reform and become law abiding, the goals of peace and mutual tolerance and accommodation among people.'* The Appellant submits that serving a

life sentence without any prospects of release is dehumanizing, degrading and against the objectives of the sentencing policy guidelines 2016 as even after being fully rehabilitated there are no prospects of release.

Respondent's Submissions

19. The Respondent submits on denial to the right to a fair trial that the Appellant had previously vocalized the fact that he had not received statements. If it is true that he had not gotten them, it would have been a simple matter of telling the court. When the said matter was coming up for hearing on 22.1.2016 on page 18 of the proceedings, it indicates that the Appellant was ready to proceed. Further, on page 32, 61 and 78 of the proceedings, it indicates that the Appellant was ready to proceed. All through, he never raised the issue during his sworn defence. The Appellant was therefore not prejudiced in any way as the charge was read over to him in a language that he understood and a plea of not guilty was entered.

20. The Respondent submits on conviction on uncorroborated evidence that on the material day, PW1 in her testimony states that the incident took place at their house after the Appellant had asked PW2 and his brother to go out and collect firewood. PW2 states that upon their return at home, they fund PW1 on the bed and she was unable to move. The Appellant asked both PW2 and his brother to bathe PW1 and at that moment PW2 saw pus oozing out of PW1's vagina while washing her. PW2 asked PW1 what had happened but PW1 remained silent. When PW3 arrived home, PW2 informed her of his sister's condition. PW3 then checked PW1's private parts and discovered that it was swollen, had lacerations and pus was oozing. PW1 then informed PW3 that the Appellant had defiled her. The Respondent submits that there were no inconsistencies as the evidence was well corroborated. In *Bukenya & Others v Uganda*, the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent, that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case. In the present case, Section 124 of the Evidence Act and the medical evidence must be borne in mind as well. Section 143 of the Evidence Act which provides that in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. The Respondent submits that Section 124 of the Evidence Act allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Therefore, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available. The Respondent further submits that in this case, the evidence of the prosecution witnesses together with the medical evidence proved that PW1 had been defiled and it was the Appellant who had defiled her. PW3 also indicated that she had not differed with the Appellant nor did they owe each other anything. This therefore shows that there was no bad blood between the two prior to the incident.

21. The Respondent submits on the issue of the perpetrator not having been arrested by citing the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it was stated that, *'The critical ingredients forming the offence of defilement are: age of the complainant; proof of penetration; and positive identification of the assailant.'* The Respondent submits that the state adduced the complainant's evidence which was corroborated by the medical evidence tendered by the medical officer. PW1, PW2 and PW3 positively identified the assailant. The Appellant was someone known to them prior to the incident. PW1 and PW2 stated that they used to call the Appellant daddy. PW3 also stated that she lived with the appellant in her house for 6 months prior to the incident. PW3 indicated that they lived as husband and wife. The medical evidence tendered corroborated the complainant's evidence. The medical officer stated that that upon examination of PW1, he established that the age of the child was 4 years old. He also noted that the hymen was broken, lacerations on the vagina, multiple bruises on the labia majora, anal bruises and whitish discharge were seen. This he noted were proof that the patient had been defiled several times in the vagina and anal. This was all indicated in the P3 form and the PRC form. Through this evidence, the Appellant was successfully linked to the offence. The Appellant ran away only to be arrested 3 days later and charged with the offence of defilement.

22. The Respondent submits on the issue of the trial court being a nullity that the missing page in the proceedings did not in any way violate the Appellant's rights to a fair trial as the charge was read to the accused person in a language he understood and he took plea. The Respondent further submits that the evidence adduced by the prosecution was sufficient to prove the said offence. No injustice has been occasioned to the Appellant by the absence of page 7 and 8 of the proceedings.

23. The Respondent submits on excessive sentence that it is now settled law that sentencing is the discretion of the trial court. This was established in the case of *Shadrack Kipkoech Kogo v R*, Eldoret Criminal Appeal No. 253 of 2003 where the Court of Appeal Stated that, *'Sentence is essentially an exercise of discretion by the trial court and for this court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.'* The Respondent submits that it believes the trial magistrate exercised his discretion judiciously owing to the fact that PW1 was 4 years old at the time of the incident, the sentence issued is therefore proportionate and commensurate to the offence.

Analysis and Determination

24. This being the first appellate court, this court is guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

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

25. After considering the amended grounds of appeal, Records of the trial court, submissions and circumstances of the case, issues for determination are as follows:-

i. Whether the Appellant was denied a right to a fair trial contrary to Article 50(2)(j) of the Constitution

ii. Whether the Appellant was convicted on uncorroborated evidence

iii. Whether perpetrators of the heinous act were arrested

iv. Whether the trial court proceedings were a nullity

v. Whether the sentence was harsh and excessive

Whether the Appellant was denied a right to a fair trial contrary to Article 50(2)(j) of the Constitution

26. On the one hand, the Appellant submitted that he was not supplied with witness statements or any evidence that the prosecution wished to rely on which denied him the right to fair hearing contrary to Article 50 (2)(j) of the Constitution. The Appellant further submitted that he was placed on the task of cross-examining witnesses yet he had not been supplied with witness statement. On the other hand, the Respondent submitted that previously, the Appellant had vocalized the fact that he had not received witness statements and it would have been a simple matter of telling the court that he had not received them. The Respondent further submitted that when the matter came up for hearing on 22.1.2016, he indicated to court that he was ready to proceed. Also, he never raised the issue during his sworn evidence.

27. From the foregoing, this court finds that the Appellant's right to fair trial was not curtailed as when the matter came up for hearing, the Appellant had the opportunity of informing court that he had not been supplied with witness statements but he stated that he was ready to proceed and went ahead to cross examine the witnesses. The Appellant failed to act diligently and secure the statements and raise an objection to its non-issuance at every available opportunity. The court dispensed its part of administering justice by issuing the orders directing that the statements be supplied to the accused.

Whether the Appellant was convicted on uncorroborated evidence

28. The Appellant submitted that the complainant was not a truthful witness and her evidence was not credible. That PW1 told court that after the incident, she told her brothers what the Appellant had done. The Appellant submitted that when her brother M was testifying in court, he denied having been told anything. The Respondent on the other submitted that the evidence of the prosecution witnesses together with the medical evidence proved that the complainant had been defiled and it is the Appellant who had defiled her. Therefore, the evidence was well corroborated.

29. This court finds that the trial court relied on sufficient evidence which implicated the Appellant as the perpetrator. Failure to call a witness will only be fatal if the evidence tendered by the prosecution is insufficient to sustain a conviction and there was need to call the witness to fill gaps. However, this was not the case as the prosecution had adduced sufficient evidence which was corroborated by medical evidence. For instance, the evidence of PW1 was corroborated by PW2 and PW3 as well as the medical reports. Besides, the provision to **Section 124** of the **Evidence Act** allows the court to convict on the sole evidence of a victim if it is satisfied that the victim is being truthful. Therefore, the Appellant's ground that he was convicted on uncorroborated evidence has no basis.

Whether perpetrators of the heinous act were arrested

30. The Appellant submitted that PW3, the village elder and the female officer at the DO's office who checked the complainant's private parts were not medical experts nor in the medical field, therefore not authorised to carry out the examination. The Appellant further submitted that before the complainant was checked by PW3 her mother, she told court that she was bathed by her two brothers, M and E. The Appellant submitted that it is not clear which tools PW3 used to check the minor, the brothers could be the ones who defiled their sister, the village elder might have penetrated the minor using his fingers, and it cannot be ruled out that one of the examiners were the perpetrators. The Respondent submitted that the complainant's evidence was corroborated by the medical evidence tendered by the medical officer. Additionally, PW1, PW2 and PW3 positively identified the assailant.

31. According to the testimony of PW2, the Appellant instructed PW2 and his brother E to go fetch firewood but asked the complainant to go back home. When they went back to the house, the complainant was sleeping on the bed and she had difficulties coming out of the bed and walking when she was asked by her brothers to go outside and play. Later, the Appellant asked PW2 to bathe the complainant and it is when PW2 noticed a discharge coming out of the complainant's private parts. PW1, the complainant testified that the Appellant placed her on her mother's bed, removed her dress and tights, he then removed his belly trouser and did 'tabia mbaya' to her. The complainant disclosed this incident to her mother PW3 who had to check the complainant to confirm what she had been told. During voire dire examination, court established that the child possessed average intelligence. It is therefore clear that the child clearly knew and identified the Appellant as the perpetrator of the heinous act. She also understood that what the Appellant did to her was wrong that is why she called it 'tabia mbaya'. Further, additional comments as per the doctor indicated that the patient had been defiled severally. This ground is an afterthought by the Respondent as it hold no water. It is therefore dismissed.

Whether the trial court proceedings were a nullity

32. The Appellant submitted that trial court proceeding served upon him clearly indicated that it had missing pages. That the contents of the missing pages will never be known therefore violating the Appellant's constitutional rights to fair trial contrary to Article 25 (c) as he is unable to prove his innocence. The Respondent submitted that the missing pages did not in any way violate his right to a fair trial as the charge was read to the accused person in a language he understood and he took plea. The Respondent further submitted that the evidence adduced by the prosecution was sufficient to prove the said offence.

33. This court has observed a smooth trial from the typed proceedings where the prosecution and defence witnesses testified and were cross examined. The missing pages in the typed proceedings did not form part of what this court relied on in coming up with its decision. This court read through the entire record and formed the opinion that has informed its findings. This ground is therefore dismissed as it holds no water.

Whether the sentence was harsh and excessive

34. The Appellant submitted that the life sentence meted upon him was excessive. He further submitted that serving a life sentence without any prospects of release is dehumanizing, degrading and against the objectives of the sentencing policy guidelines 2016 as even after being fully rehabilitated, there are no prospects of release. The respondent submitted that the trial magistrate exercised his discretion judiciously awing to the fact that PW1 was 4 years old at the time of the incident and the sentence issued is therefore proportionate and commensurate to the offence.

35. Section 8 (1) and 8 (2) of the Sexual Offences Act upon which the Appellant was charged provides 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.**

36. According to ***Bernard Kimani Gacheru v Republic*** **[2002] eKLR** and ***Ahamad Abolfathi Mohammed & another v Republic*** **[2018] eKLR,** as a general rule**, sentence is a matter that rests in the discretion of the trial court and it must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.**

37. On the basis of the above, the trial court had the sentencing discretion and the offence of defilement having been proved by the prosecution beyond reasonable doubt, the sentence was proportionate to the offence. Therefore, this court will not interfere with the trial court's discretion.

38. In conclusion, this court find no merit in this appeal. It is therefore dismissed.

Dated, signed and **delivered** in **Open Court/online** through **MS TEAMS**,

This **12th** day of **November 2021**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Respondent

Appellant present in person

Hon. Lady Justice A. Ong'injo

Judge