REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 101 OF 2018

LEONARD KIKURUI KIGEN.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. Y. KHATAMBI (SRM)

DATED IN 12TH OCTOBER 2018 IN NAKURU CMCRC. 270 OF 2017)

JUDGEMENT

1. The Appellant, was charged with the offence of **attempted Defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the 20th day of November 2017 at Chebitet Village Ndeffo in Njoro sub-county within Nakuru County the appellant intentionally attempted to cause penetration with your penis into a female genital organ namely vagina of G .C a child aged 16 years.

2. He also faced an alternative charge of **Committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the 20th day of November 2017 at Chebitet Village Ndeffo in Njoro sub-county within Nakuru County the appellant unlawfully and intentionally committed an indecent act to G C a child aged 16 years by touching her vagina with hands.

3. The appellant pleaded not guilty to the two charges and the trial commenced. The prosecution called 6 witnesses. At the close of the prosecution case the accused person gave sworn evidence and called two defence witnesses. The trial magistrate after hearing the prosecution and defence case found the appellant guilty of the offence of attempted defilement of a child aged 16 years and sentenced the accused to serve 10 years' imprisonment.

4. Dissatisfied by the said conviction and sentence the appellant filed his petition of appeal on 23/11/2018 and set out the grounds of appeal as follows:

a) ***THAT, the learned trial magistrate erred in law and fact by failing to appreciate that there was no medical evidence tendered by the prosecution in court.***

b) THAT, the learned trial magistrate erred in law and fact by relying on the evidence that originated from a single witness.

c) THAT, the learned trial magistrate erred in law and fact by failing to consider that the age of the complainant was not conclusively proved to the required standards of beyond reasonable doubt.

d) THAT, the learned trial magistrate erred in law and fact by disregarding the appellant's plausible defense.

e) THAT, the learned trial magistrate erred in law and fact by failing to note that the prosecution's evidence was not sufficient to warrant the conviction of the appellant.

f) THAT, the learned trial magistrate erred in law and fact by relying on evidence of identification namely voice and visual identification yet the conditions necessary for positive identification were not prevailing.

g) THAT, the learned trial magistrate erred in law and fact by failing to appreciate that the appellant's rights under article 50 (2)

of the constitution were greatly infringed and violated to the prejudice of the appellant.

h) THAT, the learned trial magistrate erred in law and fact by relying on uncorroborated, inconsistent and incredible evidence to convict the appellant.

i) THAT, the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution's case was not proved beyond reasonable doubt as prescribed by law.

j) THAT, the learned trial magistrate erred in law and fact by imposing an excessive sentence and associating herself with a minimum mandatory sentence which underrated the discretionary powers of judicial officers.

5. The appellant prayed that this appeal may succeed in its entirety, conviction be quashed, sentence set aside and the appellant be set at liberty hence forth.

6. When the matter came up for hearing the court directed that the same be disposed by way of written submissions and both sides have complied.

APPELLANT'S SUBMISSIONS

7. The appellant placed reliance on the case of **John Otieno v R HCCRA NO.34 B of 2010** and submitted that age being an important ingredient forming the offences under the sexual offences act and forming the basis of which section of law an accused person is charged under, needs to be proved beyond reasonable doubt. Whereas the prosecution produced an immunization card which is an acceptable document in a bid to prove the age of the victim, the court should disassociate itself with the manner in which it was produced and stop relying on it. The immunization card was produced by PW5 an investigating officer who produced it at a later date after he had already testified earlier.

8. The appellant submitted that the immunization card did not corroborate the evidence of PW1 since she had not told the court when she was born, whether she had an immunization card and in whose possession it was. Therefore, the production of a document which the complainant did not associate herself with was also questionable. The prosecution's application to produce the said document later after finding that it had failed to prove its case on age was an afterthought. Failure by the prosecution to associate the said document with the alleged owner made it weak and unacceptable and could not be safely relied on by the court to ascertain the age of the complainant.

9. On the issue of identification, the appellant submitted that for a positive identification to be done, the prevailing conditions must be conducive. Placing reliance on the case of **Kariuki Njiru & 7 others v R** the appellant submitted that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The paramount condition necessary for a positive identification is lighting conditions under which the witness made her observation.

10. The prosecution alleged the said offence happened at night. Three prosecution witnesses testified to the effect that the only source of light was from the complainant's mobile phone which was never produced in court and neither did the prosecution establish if indeed the class eight pupil had a phone and how she had acquired the same despite being a minor. Failure by the prosecution to call for the alleged phone left the court in jeopardy and the prosecution evidence fail as one could not ascertain the intensity of the light that the alleged phone could produce and if indeed the complainant had a phone.

11. PW1stated that the appellant asked her why she was calling C and by this she was able to recognize the appellant. However, the said C was not called to testify. The prosecution never proved that the complainant indeed called C so that the appellant would make a response hence the complainant's purported actions leaves a lot to be desired.

12. The appellant placed reliance in the cases of **Republic v Turnbull & others (1976) 3 ALL ER 549** and the case of **Cleophas Otieno Wamunga v Republic Criminal case no.177 of 2004** and submitted that the evidence tendered by the prosecution failed to discharge the burden of prove on the issue of identification to the required standard.

13. The appellant submitted that his rights under **article 50(2)** were violated since he was arraigned in court after 5 days of arrest. The appellant also submitted that the court violated his right of legal representation since even after the appellant informed the court that his advocate was absent, the court insisted that the hearing would proceed in his absentia despite the fact that this was the only time the appellant requested for an adjournment. The same trial court had earlier allowed the prosecution adjournment. This affected the appellant greatly since he was unable to cross examine the investigating officer (PW5) who was a crucial witness hence infringing on the appellants right to legal representation and right to fair trial in respect of having enough time to prepare for the defence.

14. The appellant associated himself with the case of **Paul Mwangi Murunga v R in CR APP NO. 35 OF 2006** and urged this court to find that the entire trial was unfairly conducted in total contravention of his constitutional rights and fundamental freedoms hence a nullity.

15. The appellant submitted that the evidence of PW1 was not corroborated hence not credible. PW1's evidence was that she screamed during the alleged incidence and at the same time she said that she called out C . She admitted that there were other neighbors but none of them heard the screams. The said C was also not called to corroborate PW1's evidence. The case of **Johnson Muiruru v Republic 1983 KLR 445**, the appellate court held in part that although where a child of tender years gives sworn evidence no corroboration is required, the assessors must be directed that it would be unsafe to convict when there was no corroboration.

16. The appellant submitted that the prosecution failed to call C despite her evidence being crucial and the court also failed to invoke

Section 150 of the Criminal Procedure Code. The appellant placed reliance in the case of **Bukenya and Another v Uganda (1972) E.A 549** and submitted that the evidence could have been adversarial to the prosecution case.

17. The appellant proceeded to submit that PW1 evidence was inconsistent since she testified that it was raining that night but none of the witnesses mentioned that it was raining. She didn't also testify that the accused was rained on or it was muddy. Further PW1testified that she was able to see the appellant by shining her phone light on him, she screamed and called C at the same time. All these do not point to the reality of a person who was ambushed, it is hard for a person who had been ambushed to respond in such a manner. The picture created was inconsistent with the reality and all these inconsistencies marred the prosecution case and should not be relied on.

18. The appellant submitted that his defence was not considered despite it being truthful and well corroborated by two defence witnesses and having not been rebutted by the prosecution. He urged this court to find his defence meritorious and consider it as it could have led to the acquittal of the appellant. The appellant submitted that the prosecution failed to discharge its burden of proof to the required standard of beyond reasonable doubt and so he deserves an acquittal.

19. The appellant submitted that the minimum mandatory sentence that the trial court imposed on him was unconstitutional as founded in the Supreme court case of Muruatetu and urged this court to order for a less severe sentence should it find that the conviction was safe.

RESPONDENTS SUBMISSIONS.

20. The respondent submitted that the key ingredients for attempted defilement include proof of age of the complainant, proof of an attempt to defile, and that the appellant was the perpetrator of the offence. To prove an attempt to commit an offence, the prosecution must prove *mens rea* as was held in the case of **Abdi Ali Bere v Republic (2015) eKLR.**

21. The respondent submitted that the age of the complainant was settled by production of an immunization/clinic card (PEX2) by PW5 which confirmed the age of the complainant to be 16 years old having been born on the 15th March 2002. The complainant was thus a minor within the meaning of the law.

22. The respondent submitted that following PW1's evidence of the incident unfolded, both *men's rea* and *actus reus* was demonstrated by the appellant who had all the intention to defile the complainant and was actually in the process of defiling her when he removed his trouser and tore her inner garment. The appellant would have actually proceeded to the actual act of defilement had there been no interference by PW1 who screamed for help. The appellant's act on the material day could immediately be connected to the offence he intended to commit as was elaborated in the case of **Mussa s/o Said v Republic (1962) EA 454,455.**

23. The respondent submitted that this is a case of recognition as it is not disputed in evidence that the appellant was known to the Complainant. The appellant was the complainant's neighbor of about 10 years. The appellant did not deny knowing the complainant and in fact stated that their families were related. On this basis, the ingredient of positive identification was proved. The complainant's evidence was also strengthened by the fact that though it was dark, she used her phones light to identify the appellant as the perpetrator. She also stated that she could recognize the appellant from the clothes he had worn previously. Her evidence was well corroborated by PW2 and PW3 who confirmed that they recognized the appellant on the material day as the complainant's torch enabled them to see the appellant clearly. The complainant also heard the appellants voice and recognized it.

24. The respondent submitted that the appellant's defence was considered and found not to be plausible. The appellant tried to bring the narrative that there existed a feud between him and the complainant's family. He however stated nothing in attempt to rebut the evidence of the prosecution witnesses. The defence failed to demonstrate how the three minors who testified as prosecution witnesses could have lied on such serious allegations against a long standing neighbor. The trial court rightly found that the appellant's defence could not hold as none of the evidence tendered sufficiently accounted for the appellant's whereabouts on the material date and time. The trial court found the appellant's defence that he was framed to settle family scores as unfounded and the respondent urged this court to uphold the trial court's conviction.

25. The respondent submitted that all the elements of attempted defilement were proved beyond reasonable doubt and as such the conviction was safe and this court should so find. The minimum sentence meted out of 10 years was not excessive and/or harsh in the circumstances, it was justifiable and fair. The respondent urged this court to find no merit in the Appellant's appeal and dismiss it in its entirety, uphold the conviction and sentence.

ANALYSIS AND DETERMINATION

26. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction 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, see (Peters V Sunday Post 1978) E.A. 424."***

27. The prosecution evidence commenced with PW1 the complainant who after *voire dire* gave sworn evidence and stated that she is in class 8 at C Primary School and that she lived with her brother RR, CKC and K. They are all children but R is older than others. They slept in the Kitchen floor with C, M and K and covered themselves with blankets. She testified that she knew LK who is her neighbor and that she

has known him for 10 years. There is a road separating accused home from theirs. R sleeps in another adjacent house. She stated that on 20/11/16, the accused went to their house at night, he broke the door open, while the complainant and the children were asleep and held her.

28. PW1 testified that the door to R's room and the kitchen face each other, the Kitchen's door was opened. The complainant testified that she saw the person who entered the kitchen. She used her phone to see the intruder, it was 4.00 AM. The accused removed the blanket and he touched her thighs. The accused came and cut the electricity line and locked the adjacent door. She stated that they never switch off lights as there is a child who normally wakes up at night. On realizing that the lights were off, she called C's name who was in the adjacent room but she said that their door was locked from outside. The accused person went to where she was, removed his trouser and lowered it to the knees. When she called C, the accused left the room closing his trousers. She saw the accused by use of her mobile phone's light and also identified him by the clothes he wore during the day. He also left his hat behind.

29. PW1 testified that the accused removed her blanket, touched her and attempted to remove her skirt, t-shirt and biker. She testified that the accused tore her panty. Her skirt was at its usual length. She further testified that she locked the door from inside with nail and chair and the accused kicked the wooden door open and the nail came off. PW1 testified that C was not able to come since her door was closed from outside but K woke up as he was stepped on by the accused person. C and C also woke up.

30. The complainant testified that they screamed and the accused took off. Their compound has no gate and one can come in and go anyhow. She stated that they went back to sleep and in the morning the accused went to pick his hat. She identified the accused person in court by pointing at him. The complainant testified that immediately the accused left she opened the door, found C and R and told them 'Messa' (the accused person) came and broke the door. The children also identified 'Messa's Voice. The complainant reported the matter to a police station at 5.00 and accused was arrested at 6.00. PW1 produced her torn pink biker as (PMFI 1).

31. The complainant testified that she had an altercation with the accused during the day after the incident and the accused told her he had defiled her sisters save for her and M. On cross-examination PW1 confirmed that her brother and wife woke up but their door was locked from outside. They did not record statements.

32. **PW2 FC** a child in class 3 was also taken through *voire dire* examination and the court was convinced that she possesses sufficient knowledge to testify. She thus gave sworn testimony that she knew the accused person and identified him by pointing at him. She stated that the accused went to their house while they were asleep in the kitchen and switched off lights. She saw the accused when C lit her phone. She testified that she saw the accused while he was dressed. Gladwell called C but she did not come because the door was locked from outside. Memo was present. PW2 testified that she did not hear the accused say something. She said she saw the accused person next to where G was.

33. PW3 also after voire dire examination gave sworn testimony and stated that she is 9 years and in class two. She confirmed to knowing PW1 and PW2. She stated that Ris her father and C her mother. She testified that they used to sleep in the kitchen and that she saw the accused person standing in their room using c's phone lights. She stated that C screamed and the accused ran away. The witness told the court that she saw Messa(accused) next to Cand through the phones lighting she saw the accused touching C.

34. **PW5 No. 71577 PC Bernard Ruto**, the investigating officer confirmed the accused's arrest after a report was made by the complainant. He stated that he visited the scene and found a main house and the kitchen. The complainant slept in the kitchen with other children. He recorded the statements of the other children. He called for proof of age and a clinic card was availed. He produced the clinic/immunization card as Pexh 2 and the biker as Pexh 1. He confirmed that the door was closed with a nail and it was pushed open. He stated that he knew the accused person as he used to carry him on his motor cycle.

35. On cross-examination by the accused person, the witness stated that they didn't know of any land dispute. He also stated that it was raining on the said night and he didn't know why the neighbors didn't respond.

36. The accused (DW1) gave sworn testimony and stated that on 20/7/2017 at 5.00am he was in bed and woke up at 8.00 am and went to work as a boda boda rider. He stated that he worked until 6.00 P.M. He was then arrested the following day as he dropped people at the police station. The police stated that he didn't have a reflector jacket and helmet. He was in custody for 7 days and was later brought to court and charged with defilement.

37. He testified that he is not in good relations with the complainant's family as there existed a family feud in relation to a land dispute. He had bought land from C's father who wanted him to return the land and he be refunded the money. He also stated that a feud exists between him and the investigating officer as he wanted him to pay stage fees but was unable to pay. He also declined to take police to raid Changaa dens and so the threatened him with future charges. He stated in cross-examination that Stanley compromised his lawyer.

38. On cross examination he confirmed that they are from the same clan with the complainant and that he is related to G's mother. He confirmed to knowing the complainant as they lived in the same neighborhood. He denied having committed the offence and insisted that it was a lie as he didn't know where the complainant slept as he has never visited their compound. He further stated that his mother was informed that the biker was torn by Gladwell.

39. **DW2 Charles Muthe** a neighbor testified that he lives around 170 meters apart and that he did not hear any screams and /or noises on the material date. He stated that the accused is a neighbor and he was framed as they are fighting on land with the complainant's parents.

40. **DW3 Samuel Kiplimo Mengach** a village elder testified that he lives close to 150 meters apart from the accused and the complainant. He stated that the charges are false as they didn't hear any scream. He confirmed that the accused purchased land from G's father.

ISSUES FOR DETERMINATION

41. After a perusal of the petition of appeal, evidence brought forth and the submissions from both parties, the following issues fall for

determination;

a) ***Whether the Appellant's rights as provided for under Article 50 (2) (g) & (h) were violated.***

b) Whether the prosecution proved its case beyond reasonable doubt.

c) Whether the sentence was excessive in the circumstances

(a)Whether the Appellant's rights as provided for under Article 50 (2) (g) & (h) were violated.

42. ***Article 49(1) (f) of the Constitution*** provides for the period within which an arrested person ought to be brought before Court. It is provided under the Article as follows:

"49. Rights of arrested persons

1) 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 ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;"

43. The appellant contends that he was brought to court after 5 days. The trial court was notified of the same violation and called for the investigating officer to come to court and explain why the same violation was culminated against the accused person. The court was not satisfied with the officer's explanation and gave the defence liberty to move the High Court and seek appropriate orders from the constitutional court since the issue deals with a case of violation of the rights of an accused person. However, the defence abrogated their rights and duties and proceeded with this case without approaching the high court for appropriate orders. The appellant cannot therefore turn around and come to this court on appeal on the same issue that this court has original jurisdiction to deal with.

44. The appellant also submitted that the court violated his right of legal representation since even after the appellant informed the court that his advocate was absent, the court insisted that the hearing would proceed in his absentia.

45. **Article 50 (2) (g) & (h) of the Constitution of Kenya 2010** provides as follows;

"(2) Every accused person has the right to a fair trial, which includes the right-

(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

46. **Article 50 (2) of the Constitution** makes it mandatory for an accused to be promptly informed of this right before the trial commences and/or on his/her first arraignment before the Court. A perusal through the record of appeal shows that the Appellant was initially represented by an advocate and at the time he was seeking for an adjournment, the court took judicial notice of the fact that the advocate had been informed of the hearing date hence he had no reason to absent himself from court.

47. In subsequent hearings, it is clear that the accused advocate was never present in court and the accused was okay with it since he always said that he was ready to proceed. The accused mentioned that his advocate was compromised by one Stanley even though he didn't present any evidence to that effect. This therefore means that the accused was aware of his right to be represented by an advocate and even procured services of an advocate but later fell out of the relationship between himself and his advocate and hence he cannot be heard to blame this court for his own authored misfortunes.

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

48. The appellant was charged with the offence of attempted defilement contrary to **section 9(1) (2) of the Sexual Offences Act**. The section provides;

9(1) "A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years".

49. The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration;

it must prove age of the complainant, the positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, failed because there was no penetration.

50. **Section 388 of the Penal Code** defines attempted to mean;

> 1) **"where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfillment, and manifests his intention by some avert act but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**
>
> **2) it is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention"**

51**.** In the prove of an attempt to commit an offence the prosecution must prove the ***mens rea*** which is the intention and the ***actus reus*** which constitute the overt act which is geared to the execution of the intention.

52. The Court of Appeal in **Abdi Ali Bare v Republic [2015] eKLR** held:

> ***"Although a casual reading of* section 388 *of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere* preparation *to commit the offence and* attempting *to commit the offence."***

53. The appellant, must be proved to have taken a step towards the commission of defilement, which step is immediately and not remotely connected with commission of defilement. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted defilement, for example, must be sufficiently proximate to defilement to be properly described as attempted defilement.

54. I consider that the proved acts of the assailant in breaking into the Complainant's house when the Complainant was sleeping, struggling with the16 year old Complainant by touching her thighs and attempting to remove her panty and by tearing her biker and lowering his trousers to knee length before the complainant screaming and calling C are acts from which the intention to defile the Complainant may be inferred, as they are not consistent with any other reasonable explanation. The acts were sufficiently proximate to the intended act of defilement. Had the complainant and the other children not screamed and called C, the appellant would have succeeded to remove the girl's inner pant and defile her. The said acts clearly amounted, in law and fact, to attempted defilement.

55. The children's evidence on the ordeal was sufficient and clear enough to an extent of not being doubted. There was no reason in the evidence presented before the Court as to why the three minors could have lied to Court about someone they knew with such a serious allegation as attempted defilement. I have no doubt as to the truthfulness of the prosecution's case.

56. The accused and his witnesses had told the court that he was framed due to the family feud between himself and the family of the complainant. There was no evidence adduced in court to show that indeed the accused purchased land from the complainant's father as alleged. In any case the family feud was between the accused and the complainant's family and not the complainant. None of the complainant's parents and/or brothers were involved in this case. The complainant testified that she alone went and reported the offence at the police station. None of the complainant's parents and/or brothers testified in this case against the accused person. The accused's person allegations therefore do not hold water and it should be dismissed.

57. The appellant submitted that the evidence of PW1 was not corroborated hence not credible. **Section 124** of the Evidence Act provides for corroboration in criminal cases on these terms:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> > ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** (Emphasis added)

58. In **Sahali Omar v Republic [2017] eKLR** the Court of Appeal held that:

> ***"Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful."*** The definition of a child of 'tender years' differs; for under **section 2** of the **Children Act No. 8 of 2001,** a child of tender years is defined as a child under the age of 10 years. However, for purposes of criminal trial and practice, a child of tender years is a matter determined on a case by case basis, the essential element being that the trial court must satisfy itself that the child understands the meaning of oath. In the instant case all the minors after being taken through voire dire examination, the court satisfied itself that they knew the meaning of oath and could tell the difference between truth and false, wrong and right. Hence their evidence was credible even without corroboration.

59. Further in **Sahali Omar v Republic (supra)** it was further held ***"However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim."*** The ground of corroboration therefore fails.

(c)Identification of the appellant

60. The evidence of identification as relates to identification of the Appellant is one of both visual identification using a mobile light and recognition by the three minors. Even the accused admitted to knowing the appellant and stated that she was his sister in law. That means that the three minors and the accused were relatives. All minor witnesses who were in the same room with the complainant confirmed to have seen the accused person when the complainant lit the mobile light. The complainant also testified that he heard his voice, saw his clothes since they were the same clothes he wore during the day and that he left his hat behind which he picked in the morning. I find that the Appellant was properly identified as the assailant in the attempted defilement of the Complainant.

(d)Age of the complainant.

61. The age of the complainant was proved by production of the Immunization card with the date of birth being 15th March 2002. The offence is alleged to have occurred on 20th November 2017. This confirms that the child was 16 years hence a minor. See the case of ***Edwin Nyambaso Onsongo Vs Republic (2016) eKLR,*** in which the court cited the case of ***Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR)*** the Court of Appeal held that: -

> ***"… the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "… we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.***

62. It is also worth noting that **Rule 4 of the Sexual Offences Rules** recognizes 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."***

63. The appellant admitted the fact that there was an immunization card produced but asserted that the court should disassociate itself with the manner in which it was produced and stop relying on it. The immunization card was produced by PW5 an investigating officer who produced it at a later date after he had already testified earlier. A keen look at the records shows that the investigating officer notified the court that he had the immunization card for production save that during the time of testifying he only had a copy of the same. The prosecution then made an application to court to produce an original copy at a later date and the accused didn't have any objection. It was then produced at a later date. I don't see any prejudice that was caused on the part of the accused person by producing the immunization card on a later date.

(e)Whether the sentence was excessive in the circumstances

64. The court in **Sylvester Wanjau Kariuki v Republic [2016] eKLR** held**;**

> ***"Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously."***

65. Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.

66. In the case of **Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

> ***"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"***

67. The court has considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the aggravating and mitigating factors, the age of the victim at the time of the offence, and further the fact that the accused person was a first offender.

68. The learned magistrate imposed a sentence of 10 years' imprisonment. I do not find any reason that would justify reducing and/or setting aside the sentence as awarded by the trial court. In the upshot, the offence of attempted defilement was properly proved beyond any reasonable doubt.

69. **For the foregoing reasons, this appeal fails. The same is therefore dismissed. The appellant has a right of seeking further**

attempt at the appellate court.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.

H K CHEMITEI

JUDGE