REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 60 OF 2019

MJO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal against conviction and sentence in Ukwala Principal Magistrate's Court in

SOA No. 10 of 2019 on 1/8/2029-[Judgment written by Hon. G. Adhiambo, PM and

delivered by Hon C. Sindani, PM]

JUDGMENT

Introduction

1. The Appellant **MJO** was convicted of the offence of Defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act No.3 of 2006 by the Principal Magistrate's Court at Ukwala. The charge was that on the diverse dates between March and April 2019 at Sigwena Karuoth sub location within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of J.A. a child aged 13 years. This was vide SOA case No. 10 of 2019. After a full trial, the appellant was found guilty, convicted and sentenced to serve fifteen years' imprisonment. He was dissatisfied with both the conviction and sentence and filed this appeal setting out six ground of appeal as hereunder:

i. ***That he pleaded not guilty.***

ii. ***That nothing linked him medically with the alleged offence.***

iii. ***That the trial court failed to comply with Article 50 (2) (j) of the constitution.***

iv. ***That the trial court failed to consider that the charge was fabricated due to a domestic misunderstanding between the victim's mother and the appellant.***

v. ***That the alleged age of the victim was not proved beyond reasonable doubt.***

vi. ***That the appellant's defense statement was not given due consideration by the trial court whereas the same was not challenged by the prosecution case.***

2. The parties agreed to dispose the appeal by way of written submissions.

The Appellant's Submissions

3. The appellant was self-represented He filed his submissions arguing that it was hypothetical on how the he was identified given the circumstances that surrounded the veracity of the offence which were in immense doubt. The appellant submitted that the complainant could not tell if it was the appellant who defiled her in view of her evidence that someone had been opening the door whenever she slept and further as the offence occurred in total darkness.

4. Further, on the issue of identification of the appellant, he submitted that the complainant's evidence was solely based on suspicion which

however strong could not form the basis of conviction.

5. The appellant further submitted that the age of the complainant was an estimation which could have been lower or higher than the real age as the charge sheet indicated that she was 13 years whereas the age assessment report showed that she was aged 15 years. The appellant thus submitted that he did not have carnal knowledge of the complainant and that positive identification could not suffice.

6. It was submitted that the trial court failed in making positive inquiries on the aspect of the single identifying witness, the complainant, whose evidence appeared contradictive in nature at various episodes. The appellant submitted that the complainant's allegation that she informed her mother that the appellant used to sleep with her was refuted by PW2's statement stating that she was only informed of someone frightening children but not of the ongoing defilement.

7. On the medical evidence, it was submitted that the doctor's findings were affected by the delay in taking the complainant to hospital which happened after 7 days and therefore the medical evidence to sustain the charges brought against the appellant was not proved.

8. The appellant submitted that the trial court shifted the burden of proof to the appellant contrary to the provisions of section 107 (1) of the Evidence Act and that the evidence of the appellant remained unshaken by the prosecution.

9. It was submitted that the sentence imposed on the appellant was a mandatory minimum in nature that was excessive and did not serve the interests of justice nor those of the society as was held in the case of **Christopher Ochieng v R [2019] eKLR** and that of **S v Scott Crossley 2008 (1) SACR 223 (SCA).**

10. The appellant also faulted the trial court's judgement on account that it did not comply with the provisions of Section 169 (1) of the Criminal Procedure Code and that the authenticity of the said document was questionable. He further stated that the trial record did not show whether he was subjected to mitigating factors.

The Respondent's Submissions

11. Mr. Kakoi Senior Principal Prosecution Counsel for the state filed written submissions opposing this appeal. He submitted that the evidence on record is clear that the appellant who is a step-father to the complainant used to go where the complainant slept and defile her and that despite the complainant informing her mother of the appellant's actions, no action was taken until she moved to her auntie's place and informed her before action was taken.

12. The Respondent's Counsel submitted that all ingredients of the offence of defilement were proved by the prosecution. On the age of the complainant, Mr. Kakoi submitted that the same was proved as PW3, the clinical officer testified that the patient he attended to was 15 years and that PW4 produced an age assessment report which indicated that the complainant was 15 years. Reliance was placed on the Ugandan case of **FRANCIS OMURONI V UGANDA Criminal Appeal No. 2 of 2000,*[UR]*** where the Court of Appeal held that***: "in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from the medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"***

13. Mr. Kakoi further submitted that penetration was proved and relied on the evidence of PW1, the complainant, who testified on how she was defiled by the appellant on several occasions as well as that of PW3, the Clinical Officer who examined the complainant and noted that the *labia minora was inflamed and oedematous, tender and bleeding on touch, that the hymen was broken, not fresh but not bleeding.* PW3 also noted that complainant *had an inflamed and tender vaginal wall.*

14. On identification of the appellant, Mr. Kakoi submitted that the appellant was well known to the complainant as he was her step-father, a fact that was confirmed by both the appellant and DW2.

15. Regarding the grounds of appeal raised by the appellant, Mr. Kakoi submitted that on the issue raised that there was no medical evidence linking the appellant to the offence, given the lapse of time between the time of defilement and the time of reporting, no medical evidence would have been recovered.

16. On the second issue raised that there was a failure by the state to comply with Article 50(2)(j) of the Constitution, Mr. Kakoi submitted that the appellant indicated that he had received copies of witness statements and the charge sheet as is evidenced at page 7 line 3 of the record of appeal.

17. On the third ground raised by the appellant that there was a fabrication by the complainant's mother, Mr. Kakoi submitted that this ground was an afterthought as the complainant's mother testified as DW2 for the appellant and therefore the issue of fabrication does not arise. On the the ground that the complainant's defence was not considered, Mr. Kakoi submitted that this was not true as the appellant's defence was fully considered.

18. Regarding the sentence of 15 years' imprisonment meted out to the appellant, Mr. Kakoi submitted that under section 8(3) of the Sexual Offences Act, the mandatory minimum sentence provided for defilement was 20 years' imprisonment and as such the court had no discretion to sentence the appellant to any other sentence other than a minimum of 20 years' imprisonment.

19. Mr. Kakoi further submitted on the directions of the Supreme Court on the 6th July 2021 which were to the effect that the decision in the case of **Francis Muruatetu &Another v Republic [2017] eKLR** only applies to sentences of murder under sections 203 and 204 of the Penal Code. Accordingly, Mr. Kakoi submitted that the State had filed a notice of enhancement of sentence dated 21.9.2021 imposed on the appellant to be enhanced from 15 years to 20 years' imprisonment.

Evidence

20. This being a first appeal, this court is obligated to reassess and re-evaluate the evidence adduced before the trial court and reach its own independent conclusion, bearing in mind the fact that unlike the trial court, this court had no opportunity to see and hear the witnesses as they testified thereby giving an allowance for that.

21. Revisiting the evidence adduced in the lower court, the prosecution called 4 witnesses. **PW1, the complainant J.A.** who is a minor was taken through a *voire dire* examination and found to be competent to give evidence. She testified that in March and April, someone used to enter the room where she and her other siblings slept. It was her testimony that the person would remove her inner pants and place his private part in her vagina then leave after finishing. It was her testimony that the accused usually did the act while laying on top of her. She identified her assailant as Juma whom she identified in court.

22. PW1 further testified that she could not tell whether the accused was naked because she usually woke up to find the accused already on top of her inserting his thing into her vagina after which the accused left for his house. It was her testimony that there is a hole on the wall and that after the accused had left, she would go and peep through it and see the accused leaving. PW1 further testified that she was able to see the accused thanks to the moonlight as he walked back to his house.

23. PW1 testified that she used to tell her mother about the incidents but that her mother never believed her insisting that PW1 was lying. Later, PW1 informed her mother's sister in law who took PW1 to Ukwala Hospital where her blood sample was collected and examined after which they proceeded to Ukwala Police Station where they reported and a P3 form was filled for her. She further identified her assailant as Juma, the accused in court, whom she stated was her mother's husband and who lived with them as her biological father had passed on.

24. In cross-examination, PW1 reiterated her earlier testimony and stated that she could not disclose the incidences to her siblings who slept in the same room as they were young. It was her testimony that she could not tell if it was the accused who opens the door. She further stated that her mother ignored her reports of the incident and that she usually screamed when the accused defiled her but no one answered. She further reiterated that the accused was the one who opened the door while they slept and that the accused got angry when drunk and she could not report the incident to him.

25. **PW2, PO** testified that on the 10.4.2019 while at her home, she was informed that she had visitors who turned out to be the complainant and her siblings who carried sacks of clothes and informed her that they had been told to come and stay with her. It was her testimony that on a Thursday, she heard her co-wife quarrelling the complainant telling her to sit properly but ignored the quarrel. She further stated that the following day, a Friday, she noticed that the complainant sat with her legs apart and further that she walked slowly and could not run.

26. PW2 testified that together with her co-wife, they gently inquired from the complainant what had happened to which the complainant stated that J used to get into the house and have sex with her and that she felt painful. It was her testimony that they reported the matter to their brother in law who took them to the children's office at Ukwala and then to Ukwala Police Station where they reported the matter and then escorted them to Ukwala Hospital where the complainant was examined and given medication.

27. It was her testimony that when she met the complainant's mother and inquired whether she was aware of the issues raised by the complainant, the complainant's mother informed her that she ignored the complainant. She further testified that she did not know the accused before the incident and that the accused was the husband of the complainant's mother.

28. PW3, George Ombwak, a clinical officer at Ukwala Sub-County Hospital testified that the complainant was taken to the hospital in the company of a police officer and her grandmother and reported to have been defiled soon after the schools closed for April holidays by the stepfather.

29. It was his testimony that the complainant could not specify the exact date she was defiled but that a condom was not used and that the same person used to defile her during the December 2018 holidays.

30. He further testified that on examination, the complainant's head, neck, thorax and abdomen were all normal as well as her upper and lower limbs. He stated that the complainant received benzaityne, penicillin, azithromycin, flagyl and paracetamol tablets. He further stated that the estimated age of the complainant was 13 years.

31. PW3 further testified that on examination of the complainant's genitalia, the labia minora was tender and oedematous, the hymen was broken, not fresh and not bleeding. He stated that the complainant had an inflamed and tender vaginal wall. He noted that there was a povulent discharge, whitish and thick in consistency. He further testified that the laboratory findings revealed that the syphilis test was positive whereas the hepatitis B surface antigen and pregnancy test were all negative. It was his testimony that there was no spermatozoa seen.

32. PW3 further testified that the complainant had come to hospital more than a week after the incident occurred and had thus changed clothing and already showered. He noted that she was an orphan and vulnerable child who was mentally challenged and had unfortunately acquired a sexually transmitted disease that needed aggressive treatment to avoid long term complication. He further testified that the complainant explained that while the complainant screamed for help during the defilement incident, a woman who lived in the same home whom the complainant identified as Mama Tony shouted at her to keep quiet. He further stated that the complainant also said that she reported the December incident to her teacher in school. PW3 produced the P3 Form as P Exhibit 1. The accused did not cross-examine PW3.

33. PW4 No. 107257 Lydia Adhiambo from Ukwala Police Station testified that on 18.4.2019 at around 1030hrs, the complainant accompanied by her step mother P went and reported a defilement case. She testified that upon interrogation, the complainant stated that in the month of March and April 2019 on dates she could not recall, the accused would sneak from the main house to where she slept and have

sex with her.

34. PW4 testified that the accused took advantage of the complainant's mental state as she was mentally disabled and whenever the complainant would report the incidences to the mother, the accused would punish the mother of the complainant severely. She further testified that the complainant would only tell the mother whom the accused used to punish.

35. PW4 further testified that on the 10.4.2019 the complainant went back to her deceased biological father's paternal home where her stepmother, P noticed that her walking style was different and upon inquiry, the complainant explained how the accused had defiled her several times. It was her testimony that she then took the complainant to Ukwala Sub-County Hospital for medical examination where the complainant was found to have an STD as a result of the defilement. She further testified that the age of the complainant was assessed at 15 years. She produced the assessment report dated 7.5.2019 as P Exhibit 2.

36. On the complainant's mental assessment report, PW4 testified that the mental assessment report showed that the complainant suffered mild moderate mental retardation, a developmental disorder that was irreversible. She produced the mental assessment report as P Exhibit 3. She further testified that she arrested the accused who was identified to her by the complainant. She further stated that she never knew the accused before his arrest.

37. Place on his defence, the accused gave sworn testimony and called two other witnesses. The accused testified that the charges levelled against him were untruthful and that he was framed and that is why he had decided to call the complainant's mother as his witness. He denied ever having sex with the complainant stating that he used to sleep with her mother in a different house while the complainant slept in a different house with other children.

38. DW2, MA, the accused's wife and the complainant's mother testified that the allegations against the accused were not truthful and that if he committed the offence as the mother of the complainant, she forgives him. She stated that the accused inherited her after her husband's death and had accepted her children who are mentally challenged. That he helps and assists her and her children immensely, providing for all their needs

39. In cross-examination, DW2 testified that the complainant was mentally challenged and that she slept with other young children in DW2's late mother in law deceased's house. DW2 testified that she normally locked the house while the children slept and kept the keys close to the bed she shared with the appellant. She reiterated that the accused would not go to prison because of defiling the complainant who was her child and that even if he had defiled the child, she had forgiven the appellant. On re-examination by the accused, DW2 testified that she had never seen the appellant sleep with the complainant and as such she did not know why the appellant was arrested.

40. DW3, MOO, the accused's brother, testified that the charges against the accused were untruthful. He further testified that after DW2's husband death, the accused married the complainant's mother though her sister in law was against DW2 living with the accused. He further stated that the accused did not commit the offence and was just maintaining DW2 and her children. In cross-examination, DW3 admitted to not living in the same house as the accused and DW2.

Analysis & Determination

41. I have considered the evidence before the trial court both for the prosecution and defence. I have also reassessed that evidence and taken into account the written submissions and authorities cited by both the appellant and the prosecution counsel. The main issues that arise for determination in this appeal are: ***whether the prosecution proved the ingredients of the offence of defilement beyond reasonable doubt, whether the appellant's right to a fair trial under article 50(2)(j) was violated and whether the sentence imposed on the appellant was excessive or manifestly lenient to call for enhancement.***

42. In making my determination, this being a first appeal, I am guided by **Okeno vs Republic (1972) EA 372** where it was stated that:

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). 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 courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."***

43. In a criminal trial, the prosecution has a duty to prove its case against the accused beyond reasonable doubt. In **Richard Munene v Republic [2018] eKLR**, the Court of Appeal state:

> ***"In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction."***

44. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The key ingredients of the offence of defilement are ***proof of the age of the complainant, proof of penetration and proof that the accused person before court was the perpetrator of the offence.*** See **George Opondo Olunga v Republic [2016] eKLR**.

45. On the issue of whether the age of the complainant was proved beyond reasonable doubt, the appellant submitted that he did not have carnal knowledge of the complainant as the age was not determined. He stated that the charge sheet stated that the complainant was 13 years

old whereas the age assessment report stated that she was 15 years old. The State submitted that the age assessment report was clear that the complainant was aged 15 years. The charge sheet indeed reads that the complainant J. A. was a child aged 13 years.

46. In **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** the Court of Appeal stated that:

> ***"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".***

47. The age of the Complainant is a question of fact to be proved by available evidence. The complainant's age was proved by the age assessment report dated 7.5.2019 produced by PW4 as P Exhibit 2 which detailed that an intra-oral examination and radiograph was carried out on the complainant which put her age at 15 years. Accordingly, the trial court by relying on the age assessment report as the most conclusive piece of evidence on proof of the complainant's age rightly found that the complainant was a minor within the meaning of the law of that age of 15 years. This position finds support in the case of **JOA v Republic (2019) eKLR** where it was stated as follows: -

> ***"It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim."***

48. On proof of penetration, penetration is defined under Section 2 of the Sexual Offences Act to mean ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person".***

49. In **John Mutua Munyoki v Republic [2017] eKLR**, the Court of Appeal held that:

> ***"Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt…The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:***
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> ***'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'***
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> **The Court further stated that:**
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> ***'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'***
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> ***As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the Evidence Act aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."***

50. The key evidence relied on by courts in rape and defilement cases in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was a minor, the evidence of the Clinical Officer is key so as to corroborate such testimony.

51. In the instant case, the complainant though adjudged to have suffered mild moderate mental retardation as evidenced in the mental assessment report produced as P Exhibit 3 was taken through a *voire dire* examination by the trial court and found to be competent enough to give sworn testimony. The complainant testified that the accused would sneak into the room that she shared with her younger siblings and have sex with her. She testified that she usually woke up to find the accused inserting his penis into her vagina and as soon as he was done, he would leave. She would then go and peep through the whole on the house to see who it was and would see him going into his house. She told her mother, DW2 of what the appellant was doing to her but she ignored. DW2 testified for her husband the appellant herein saying he was being framed. She stated that the house she slept in was ten meters away from the house where the complainant and her other children slept. She also stated that she normally locked the children in the house where they slept using a padlock before retiring to sleep and that she kept the key near her bed and that only her and the appellant knew where the key was kept.

52. The Clinical Officer testified as PW3 and stated that on examination of the complainant's genitalia, the labia minora was tender and oedematous, the hymen was broken, not fresh and not bleeding. He stated that the complainant had an inflamed and tender vaginal wall and further that he noted that there was a povulent discharge, whitish and thick in consistency. PW4 further testified that the complainant tested positive for syphilis which needed aggressive treatment.

53. The sum effect of the above evidence is that it leaves no doubt as to whether there was actual or partial penetration. It is clear from the P3 form produced as an exhibit that the complainant's hymen was broken. Despite the fact that the complainant went to hospital one week after the incident, the intensity of injuries was still evident as detailed by PW4. It is also noteworthy that though there were no traces of spermatozoa, absence of spermatozoa cannot discount defilement. I find that there was sufficient evidence proving beyond reasonable doubt that there was penetration of the complainant's genitalia.

54. The last ingredient is that of identity of the defiler. The appellant submitted that the prosecution evidence did not prove that he was the person who defiled the complainant. He argued that the evidence of PW1 was not clear on how she identified the appellant from the back and thus was based on suspicion which however strong could not form the basis of conviction The prosecution on its part argued that that the appellant was well known to the complainant as he was her step-father, a fact that was confirmed by both the appellant and DW2.

55. I have considered the arguments on this issue and perused the record of the trial court. PW1 testified that while she slept with her younger siblings in an adjacent house to that used by her parents, someone used to sneak into the room she shared with her siblings and have sex with her. She further stated that she would wake up when the person was on top of her inserting his penis into her vagina. PW1 further stated that when he was finished, her assailant would leave and she would peep through a hole in the wall and see the person leaving as the appellant. She stated that she could see her assailant properly due to moonlight. PW1 identified the appellant as her assailant. She stated that she would inform her mother of the incident but her mother chose to ignore the same. PW1 had no illusion in her evidence as to who had defiled her. The appellant was well known to the complainant as he was her step-father. PW1 indeed had sufficient time to identify the appellant as the person who defiled her on several occasions.

56. DW2, the appellant's wife and complainant's mother testified that she used to lock the complainant and her siblings in a house separate from the main house where they would sleep. She stated that she kept the key near the bed she shared with the appellant. She stated that the house she slept in was ten meters away from the house where the complainant and her other children slept. She also stated that she normally locked the children in the house where they slept using a padlock before retiring to sleep and that she kept the key near her bed and that only her and the appellant knew where the key was kept. There was no evidence that the door to the house where the minor slept on all the occasions that she said she was defiled, was ever broken.

57. The trial magistrate detailed and analyzed this evidence in her judgment and arrived at a decision that only the appellant could have accessed the house where the child slept. The trial magistrate also and in detail assessed the evidence of PW1 a child who was moderately mentally retarded and believed that she was telling the truth and that she had positively identified the appellant, her step father as her defiler, despite being bombarded with questions by the appellant so that at one time she said she could not tell who her defiler was but on being cross examined further she was firm that it was the appellant who defiled her. Her reasons for believing the evidence of the complainant on identification and recognition of the appellant are quite thorough and on record.

58. I find that the trial magistrate found and rightly so, that the complainant's mother DW2 appeared from her testimony that she had forgiven the appellant if he had defiled her daughter because the appellant had taken care of her and her children and provided them with everything they needed, was largely influenced by the material benefits that she derived from the appellant at the expense of her vulnerable child.

59. I find no reason to differ with the trial magistrate's analysis and findings that the appellant was positively identified as the complainant's defiler.

60. The Court of Appeal in the case of **Wamunga v Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

61. It was also held in **Nzaro v Republic (1991) KAR 212** and **Kiarie v Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

62. In **R v Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

63. The above holding does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa**

Ntoribi v Republic (2014) eKLR in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -***
>
> ***"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."***
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

64. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night: -

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

65. Based on the evidence adduced in the lower court by the complainant and on the authority of the cases cited above, I find that the appellant was properly identified as the complainant's defiler. I find no material placed before this court to warrant interference with the findings of the trial magistrate.

66. The appellant's appeal was also premised on the fact that there was no medical evidence linking him to the commission of the alleged offence. He further submitted that the doctor's findings were affected by the delay to ferry the complainant to hospital. I reiterate that the ingredients of the charge of defilement which must be proved by the prosecution are, age of the complainant, the identity of the perpetrator and penetration which must be proved by medical evidence. Medical examination of perpetrator is not a mandatory requirement to prove defilement. However, in appropriate cases such examination maybe necessary depending on the circumstances of the case. For example, a minor may be defiled and a person is suspected and prove would only be dependent on medical examination of the perpetrator or a DNA test. The court has discretion to order examination.

67. Section 36 of the Sexual Offences Act provides: -

"Evidence of medical or forensic nature

> ***"(1) Notwithstanding the provisions of section 26 of this Act or any other law, 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 and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.***
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> ***(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.***
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> ***(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.***
>
> ***(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.***
>
> ***(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.***
>
> ***(6) An appropriate sample or samples taken in terms of subsection (5)-***
>
> ***(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and***
>
> ***(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.***
>
> ***(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against –***

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both".

68. This is a case where the court can rely on the testimony of the complainant alone to convict if the trial Magistrate for reasons to be recorded believed the complainant. This requirement is provided for under Section 124 of the Evidence Act. The section provides:

Corroboration required in criminal cases

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim 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."

69. It is important to note that the law on Sexual Offences requires that proof by the evidence tendered by the prosecution and is not dependent on the examination of the perpetrator. Evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement or rape as the case may be. In the case of **Fappyton Mutuku Ngui v R (2014) eKLR** where a similar issue of medical examination of the perpetrator was considered, the Court of Appeal stated:

"In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW-2's testimony which was trustworthy as to the person who had defiled her."

70. It therefore follows that if the trial Magistrate believes the testimony of the victim on the identity of the perpetrator, the evidence is sufficient to support the conviction. Medical examination of the appellant was therefore not necessary. I have already indicated above that the trial court gave very detailed reasons why she believed the testimony of PW1 that she positively recognized the appellant as the person who defiled her on many occasions. Accordingly, I find this ground to be devoid of merit. I dismiss it.

71. Another ground of appeal raised by the appellant was that his constitutional right to a fair trial was breached as he was not informed in advance of the evidence the prosecution intended to rely on, and that he did not have reasonable access to that evidence contrary to Article 50 (2) (j).

72. Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Article 50(2)(j) correctly interpreted means that an accused person should be ***furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence*** in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. See the case of **Joseph Ndungu Kagiri v. Republic [2016] eKLR.**

73. In this case, the trial court record shows that when the matter came up before the trial magistrate on the 25.4.2019, the appellant at 11.40 am informed the court that he had received copies of witness statements and charge sheet and the trial magistrate noted the same before fixing a hearing date for 9/5/2019. Therefore, the prosecution complied with the provisions of Article 50 (2) (j). This ground thus fails as it lacks merits.

74. Another ground of appeal raised by the appellant was that his defence was not given due consideration by the trial magistrate. The trial court record shows that on being placed on his defence, the appellant gave a sworn testimony in which he denied committing the offence. His wife and the complainant's mother who testified as DW2 stated that the allegations against the accused were not truthful and if indeed he committed the offence as the mother of the complainant, she forgives him. However, in cross-examination DW2 testified that she normally locked the house while the children slept and kept the keys close to the bed she shared with the accused. DW3, despite not living in the same home with the accused and DW2 testified that the charges against the accused were untruthful. The trial magistrate critically and thoroughly analysed and weighed the prosecution's evidence against the defence proffered by the appellant and his witness DW2 and dismissed it. I have also considered that evidence by the appellant and his witness and find nothing in it that would have altered the trial magistrate's finding of guilt of the appellant in view of the overwhelming evidence adduced against him by the prosecution witnesses.

75. The appellant also raised the issue that the judgement delivered by the trial magistrate did not comply with the provisions of section 169 (1) of the Criminal Procedure Code. That the judgment was not signed. section 169(1) provides that ***every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

76. I have perused the trial record and note that the judgement delivered by the trial magistrate in the instant case was dated and signed on the 24.7.2019 by Hon G. Adhiambo, Principal Magistrate and delivered on 1/8/2019 by Hon C. Sindani, upon the transfer of Hon G. Adhiambo to another court station. This ground therefore lacks merit and is dismissed.

77. Finally, the appellant claims that he was handed mandatory minimum sentence and that the trial court did not take into account his mitigations. I have considered the trial record and established that the appellant was given a chance to mitigate and he said that he had a painful leg. The sentencing court considered the mitigation and sentenced him to serve fifteen years imprisonment. That sentence is far below the mandatory minimum of twenty years because under section 8(3) of the Sexual Offences Act, a ***person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*** The sentencing Court no doubt imposed a sentence that was much less than minimum mandatory sentence. He cannot be accused of over punishing the appellant and perhaps that is the very reason that the prosecution seeks to have that sentence enhanced. The ground of appeal therefore fails and is dismissed.

78. Last but not least is that the prosecution filed Notice of enhancement of the sentence imposed on the appellant. It is the prosecution's case that the appellant's sentence be enhanced from the 15 years meted to 20 years' imprisonment. It was the prosecutions submission that under section 8(3) of the Sexual Offences Act, the mandatory minimum sentence provided for defilement was 20 years' imprisonment and as such the court had no discretion to sentence the appellant to any other sentence other than a minimum of 20 years' imprisonment and further that the directions of the Supreme Court on the 6th July 2021 was that the recent decision in the case of **Francis Muruatetu v Republic** applies only to sentences of murder under sections 203 and 204 of the penal code.

79. The Court of Appeal in Court in **J.J.W. v Republic [2013] eKLR** held as follows on enhancement of a sentence by the High Court;

> ***"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."***

80. Further, the Court of Appeal whilst sitting at Kisumu in the case of **Sammy Omboke & Another v Republic [2019] eKLR** discussed the jurisdiction of the first appellate court on enhancement of sentences by holding thus;

> ***"In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then (sic) could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence."***

81. From the above decided case, it is clear that although Section 354(3) of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of a sentence imposed by a trial court, nonetheless, as a matter of practice, before a court can do so, an appellant is required to be given advance notice of such consequences depending on the outcome of an appeal.

82. The notice can be in the form of a cross appeal by the State or an application to enhance the sentence. But in the absence of those, the court should caution the appellant prior to commencement of the hearing. The caution is intended to ensure the appellant is not only aware of the consequences that would befall him or her but also provides an opportunity for him or her to make an informed choice on the course of action to take. In **EGK v Republic, [2018] eKLR** the Court of Appeal sitting at Kisumu observed that:

> ***"…we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the Sexual Offences Act is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant".***

83. Further, the Court of Appeal in **JOA v. Republic, Cr. App. No. 25 of 2011** and **Charles Muriuki Mwangi v. Republic, Cr. App. No. 24 of 2014** held that in the absence of a cross-appeal, it was necessary for the court to warn the appellant that the sentence was likely to be enhanced, and having failed to do so, the appeal against sentence was allowed. In **Mutuku – v- Republic, [1980] KLR 532,** the Court of Appeal set aside enhancement of sentence by the High Court due to inordinate delay on the part of the prosecution in making an application for enhancement.

84. In the instant appeal, I note that though there was a Notice of Enhancement of sentence filed in court on the 21.9.2021, by the prosecution, the same was done when the appellant was not present in court and after the appellant had filed his submissions to canvass his appeal which he did on the 19.8.2021. In view of the above, it is clear that the appellant was not afforded an opportunity to make an informed choice on the course of action to take or even of the consequences of the notice of enhancement of sentence.

85. In the case of **H.O.W. v Republic, Criminal Appeal No. 326 of 2010**, the Court of Appeal stated as follows:

> "***Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency on sentence, the learned Judge recorded that he warned the appellant that the sentence could be enhanced. With respect that was not of any effect. <u>The warning should have been done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning</u>. (Emphasis supplied)***
>
> ***All this was not done and thus the recorded warning after the appellant had addressed the court was a lip service to the course of justice.***
>
> ***We think we have said enough to indicate that this appeal must succeed. The appeal is allowed. Conviction quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held."***

86. Further, the sentence as imposed on 18/8/2019 was meted before the clarification directions were given by the Supreme Court in the **Francis Muruatetu case.** That being the case, and as most courts had applied themselves to the **Muruatetu d**ecision and exercised discretions in sentencing before the Directions were given on 6th July, 2021, those directions cannot apply retrogressively to the disadvantage and prejudice of the appellant. In the circumstances, I find that the Notice of Enhancement of sentence dated 21.9.2021 was not properly before court and must fail.

87. In the end, I find and hold that this appeal lacks merit. It is hereby dismissed. In the same vein, the Notice of Enhancement of sentence is found to be improperly before the court and the same is hereby dismissed. The conviction and sentence of 15 years imposed on the appellant is hereby upheld.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF NOVEMBER, 2021

R.E.ABURILI

JUDGE