



**Murimi v Republic (Criminal Appeal E061 of 2021)
[2021] KEHC 2297 (KLR) (8 November 2021) (Judgment)**

Morris Murimi v Republic [2021] eKLR

Neutral citation: [2021] KEHC 2297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E061 OF 2021
EM MURIITHI, J
NOVEMBER 8, 2021**

BETWEEN

MORRIS MURIMI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction of the Senior Resident
Magistrate’s Court at Tigania in Criminal Case No. 39 of 2020
delivered on 18th December 2020 by Hon. P. M. Wechuli SRM)*

Corroboration is not mandatory in sexual offences where the court is satisfied that the witness is telling the truth

The decision discussed the ingredients of the offence of defilement and whether the evidence of the defilement or sexual assault given by the victim only needed corroboration.

Reported by Moses Rotich

Criminal Law – sexual offences – defilement – where the appellant was convicted and sentenced to imprisonment for the offence of defilement – what were the ingredients required to prove the offence of defilement – Sexual Offences Act, cap 63A, section 8.

Evidence Law – evidence - evidence to prove offence of defilement - evidence of the victim – admissibility of evidence – where the prosecution called 5 witnesses and when the appellant was put on his defence, the appellant gave sworn evidence without calling a witness – whether it was only a victim of defilement who could give sufficient evidence of the offence – whether the evidence of an alleged victim of a sexual offence needed corroboration - Sexual Offences Act, cap 63A, section 8.

Brief facts

The appellant was charged, tried, convicted, and sentenced to imprisonment for 20 years for the offence of defilement as charged, contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act. He also faced an



alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

In the instant appeal, the appellant argued, *inter alia*, that there was an error in the statement of the offence charged with regard to the age of the complainant. He further argued that if there was any penetration, the same could only have been by his colleague who he said was the boyfriend of the victim.

Issues

- i. What were the ingredients required to prove the offence of defilement?
- ii. Whether it was only a victim of defilement who could give sufficient evidence of the offence.
- iii. Whether the evidence of defilement by a victim of the sexual offence needed corroboration.

Held

1. In a case of defilement, the prosecution ought to prove the ingredients of the offence which were; the minor age of the victim as charged; the fact of penetration; partial or complete penetration; and, the identification of the accused as the perpetrator.
2. Although charged as defilement of a child aged 16 years, the evidence led by the prosecution was to the effect that the girl was assessed on the basis of her dental formula at 14 years. The offence was also described as defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act which applied to defilement in cases of a child in the age bracket of between 12 and 15 years, instead of section 8 (4) which applied to the bracket of between 16 and 18 years of age.
3. Whether 16 or 14 years of age, penetration of the child completed the offence of defilement under section 8 (1) of the Sexual Offences Act. The appellant was not prejudiced in any way by the error in the statement of the offence charged as falling under section 8 (3) of the Sexual Offences Act because the particulars of the offence were clear that the offence was the one provided for under section 8 (4) of the Act and which in any event carried a lesser imprisonment term of a minimum of 15 years as opposed to the 20 years under 8 (3) as charged. Moreover, the error in misstatement of the offence in the charge was curable under section 382 of the Criminal Procedure Code.
4. The age of the child was, however, crucial in determining the sentence to be imposed upon the offender. If the appellant were convicted for the offence of defilement of a child aged 16 years as charged in the charge sheet, the applicable sentence would be the minimum of 15 years under section 8 (4) of the Sexual Offences Act and not the minimum of 20 years prescribed under section 8 (3) of the Act for a child aged 14 years as indicated of the instant complainant by the age assessment document.
5. Age of a victim of a sexual offence could be determined by medical evidence and other cogent evidence. In the instant case, although the age assessment on the basis of dental formula placed the age of the victim at 14 years, the child herself gave her age as 16 years during *voire dire*, and that was the same age given in the child's treatment notes and medical examination form P3. It was indeed the age consistent with the age of the complainant as charged in the charge sheet.
6. It was immaterial as highlighted by the appellant that it was the minor who used to visit the appellant's house. The implication of consensual sex was unfounded as a child was, pursuant to section 43 (1) (c) and (4) (f) of the Sexual Offences Act, incapable of appreciating the nature of the act and to give consent to sexual intercourse. Any sexual intercourse with a child was intentional and unlawful because it was in respect of a person who was incapable of appreciating the nature of the act which caused the offence.
7. The medical evidence presented showed that the complainant's hymen was torn and a pregnancy test was positive leading him to the conclusion that the complainant had been defiled. Although, there were no tears and the hymen was not freshly torn, it would support the complainant's evidence of sexual intercourse with the appellant. The complainant herself testified that she had sex with the appellant and the court accepted that the 16-year old was able to understand the meaning of sex and when she stated that "we had sex with him" meant that she had had sexual intercourse with penetration within the meaning of the Sexual Offences Act.



8. A child of 14 and over was not a child of tender years and there was technically no requirement under section 19 of the Oaths and Statutory Declarations Act, cap 19, and section 124 of the Evidence Act, cap 80, to conduct a *voire dire* examination on such a child, and the complainant could have been sworn straightaway. The trial court, however, was in excessive caution when it conducted a *voire dire* on the 16-year old of whom it found she understood what was an oath and gave sworn testimony. In any event, the *voire dire* examination was for the benefit of the accused in ensuring only competent witnesses testified.
9. No corroboration was necessary for the evidence of a child taken on oath although cross-examination was available for sworn or unsworn evidence of a child in the usual way. The accused cross-examined the complainant who was steadfast in her responses. Thus, the second ingredient of defilement, the element of penetration, was proved beyond reasonable doubt.
10. The complainant identified the appellant as the person who defiled her although she stated that she had lied to her mother about it when asked where she had been staying that she had slept at another girl's place. The appellant submitted that the complainant could not, therefore, be trusted to tell the truth as she had already admitted lying to her mother as aforesaid. However, it was conceivable that a school going child aged 16 years who was engaging in sex with an adult or even other children would be afraid to tell it to her parents or any other relative for fear of reprisals or even shame, and the court should not hold it against her, as urged by the appellant, as a sign of lack of credibility as a witness.
11. The evidence of the defilement or sexual assault could only be given by the victim. The other witnesses only testified as to the circumstances surrounding the relationship between the appellant and the complainant and the aftermath. The provisions of section 124 of the Evidence Act specifically applied to the case before the court. So that, even if the complainant had given evidence unsworn, the court would still be entitled to convict on her evidence uncorroborated, if the court considered, for recorded reasons, that she was telling the truth. The 16-year old complainant gave sworn evidence and her evidence technically did not require corroboration.
12. The appellant's defence of another person being a friend of the complainant was clearly an afterthought. It was not raised during his cross-examination of the complainant. At the time, and subsequently on appeal, the appellant was eager to show that it was the minor who used to visit the accused's house. That position was inconsistent with the defence that the victim was a friend of the appellant's friend.
13. In addition, the trial court found the complainant truthful for purposes of section 124 of the Evidence Act. Had the complainant given unsworn evidence, the case was still suitable for the application of the principle in section 124 proviso of the Evidence Act as the only evidence as to the defilement was that of the complainant herself, the other witnesses were witnesses of the events *ex post facto*. Accordingly, the offence of defilement had been proved against the appellant.

Appeal partly allowed.

Orders

- i. *The appellant's appeal on conviction for the offence of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act was allowed, to the extent that the conviction under section 8(1) as read with 8(3) was substituted with section 8(1) as read with 8(4) of Sexual Offences Act which was the correct provision for the particulars and evidence presented.*
- ii. *The appellant's appeal on the sentence was allowed to the extent that the sentence of twenty (20) years was set aside and substituted with a sentence of imprisonment for fifteen (15) years, in accordance with the minimum sentence under section 8(4) of the Sexual Offences Act.*
- iii. *As the appellant was on bail during trial, the sentence of imprisonment for fifteen (15) years would commence from the date of sentence in the trial court on December 18, 2020.*

Citations

Cases



Kenya

1. *WA v Republic* Criminal Appeal 100 of 2013; [2014] KECA 484 (KLR) - (Applied)
2. *Kimanyi, Joseph Ndungu v Republic* Criminal Appeal 22 of 1979; [1979] KECA 5 (KLR) - (Explained)
3. *Maitanyi v Republic* Criminal Appeal 6 of 1986; [1986] KECA 39 (KLR) - (Explained)
4. *Muhammed, Ahmed Mohammed v Republic* Criminal Appeal 527 of 2004; [2005] KEHC 3326 (KLR) - (Explained)
5. *Oloo, John Otieno v Republic* Criminal Appeal 350 of 2008; [2009] KECA 435 (KLR) - (Applied)
6. *Ouma v Republic* Criminal Appeal 91 of 1985; [1986] eKLR - (Applied)
7. *Seet, Joseph Kieti v Republic* Criminal Appeal 91 of 2011; [2014] KEHC 7392 (KLR) - (Followed)

Uganda

Francis Omuroni v Uganda Criminal Appeal 2 of 2000 - (Applied)

Regional Court

1. *Kibangeny arap Kolil v Republic* [1959] EA 92 — (Applied)
2. *Ndege Maragwa v Republic* [1965] EACA — (Applied)
3. *Okeno v Republic* [1972] EA 32 — (Applied)
4. *Okethi Okale & Others v Republic* [1965] EA 555 — (Applied)

Texts

The Judiciary of Kenya (2018), Criminal Procedure Bench Book Nairobi: The Judiciary of Kenya, paras 94-96

Statutes

Kenya

1. Criminal Procedure Code (cap 75) section 382 — (Interpreted)
2. Evidence Act (cap 80) section 124 — (Interpreted)
3. Oaths and Statutory Declarations Act (cap 15) section 19 — (Interpreted)
4. Sexual Offences Act (cap 63A) sections 8(1)(3)(4); 11(1); 43(1)(c)(4) — (Interpreted)

Advocates

Ms Nandwa, Prosecution Counsel, for the respondent

JUDGMENT

Introduction

1. The appellant, Morris Murimi, was on December 18, 2020 convicted and sentenced to imprisonment for the offence of defilement as charged, contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#). The particulars of the offence were that the appellant had “on diverse dates between August 1, 2019 and August 7, 2020 at [Particulars Withheld] village, Miciimikuru sub-location, Tigania Central Sub-County within Meru County unlawfully and intentionally caused his penis to penetrate the vagina of [WK.], a child aged 16 years old.” There was an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#).
2. The prosecution called 5 witnesses and when put on his defence, the appellant gave sworn evidence without calling a witness. The court has considered the written submissions of the appellant and the DPP respectively dated September 1, 2021 and September 15, 2021.

Duty of the first appellate Court

3. In performance of its duty as a first appellate court (see [Okeno v R](#) [1972] EA 32), this court has considered the evidence presented by the Prosecution and the defence as a whole as required by [Okethi](#)



Okale & Others v R [1965] EA 555, citing Ndege Maragwa v R (1965) EACA, Criminal Appeal No 156 of 1964 (unreported). See also Ouma v R [1986] KLR 619.

4. The defence of the appellant, which the court must, in evaluating the evidence bear in mind and satisfy itself that the Prosecution evidence has left no reasonable possibility of the defence being true, as counselled by Ouma v R, *supra*, is that the complainant girl was the girlfriend of the appellant's colleague and friend and she had been found in the friend's house in the company of the said friend and another girl, and the appellant had nothing to do with the complainant. If there is doubt raised on the prosecution case, its benefit goes to the accused.
5. The evidence of the prosecution in a case of defilement contrary to section 8(1) of the Sexual Offences Act must prove the ingredients of the offence which are the minor age of the victim as charged, the fact of penetration, partial or complete penetration, and the identification of the accused as the perpetrator. The defence evidence, therefore, is that, if there is any penetration, the same could only have been by his colleague who he said was the boyfriend of the victim.

Age of the victim

6. Although charged as defilement of a child aged 16 years, the evidence led by the clinical officer PW2 was to the effect that the girl was assessed on the basis of her dental formula at 14 years. The offence was also described as defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act which applies to defilement in cases of a child in the age bracket of between 12 and 15 years, instead of section 8 (4) which applies to the bracket of between 16 and 18 years of age. However, whether 16 or 14 years of age, penetration of the child completes the offence of defilement under section 8(1) of the Sexual Offences Act. The appellant was not prejudiced in any way by the error in the statement of the offence charged as falling under section 8(3) of the Sexual Offences Act because the particulars of the offence are clear that the offence was the one provided for under section 8(4) of the Act and which in any event carries a lesser imprisonment term of a minimum of 15 years as opposed to the 20 years under 8 (3) as charged. The error in misstatement of the offence in the charge is curable under section 382 of the Criminal Procedure Code.
7. The age of the child is, however, crucial in determining the sentence to be imposed upon the offender. If the appellant were convicted for the offence of defilement of a child aged 16 years as charged in the Charge Sheet, the applicable sentence would be the minimum of 15 years under section 8(4) of the Sexual Offences Act and not the minimum of 20 years prescribed under section 8(3) of the Act for a child aged 14 years as indicated of the child herein by the age assessment document.
8. I respectfully agree with the finding in Joseph Kiet Seet v R [2014] eKLR that the age of a victim may be determined by medical evidence and other cogent evidence. See also Francis Omuroni v Uganda CA Cr A No 2 of 2000. In this case, although the age assessment on the basis of dental formula placed the age of the victim at 14 years, the child herself gave her age as 16 years during *voire dire*, and this is the same age given in the child's treatment notes and Medical Examination Form P3. It is indeed the age consistent with the age of the complainant as charged in the Charge Sheet. I accept the evidence of the victim girl's age as 16 years rather than the 14 years assessment on the basis of dentures.

Penetration

9. It is immaterial that as highlighted by the appellant "it is the minor who used to visit the accused's house." The implication of consensual sex is unfounded as a child is pursuant to section 43(1)(c) and (4)(f) of the Sexual Offences Act incapable of appreciating the nature of the act and to give consent to sexual intercourse. Any sexual intercourse with a child is intentional and unlawful because it is "in respect of a person who is incapable of appreciating the nature of the act which causes the offence."



10. The medical evidence led by PW2 the clinical officer who examined the complainant was that her hymen was torn and a pregnancy test was positive leading him to the conclusion that the complainant had been defiled. Although, there were no tears and the hymen was not freshly torn, it would support the complainant's evidence of sexual intercourse with the appellant. In the complainant's own evidence penetration is testified as follows:

“We slept together. We had sex with him. We had even had sex with him on other occasions. When I went home and was asked where I had been I lied and said I slept at another girl's home.”

These are the words of a 16-year old, and the court accepts that a 16-year old is able to understand the meaning of sex and when she says “we had sex with him” must mean what they say that she had had sexual intercourse with penetration within the meaning of the [Sexual Offences Act](#).

11. It is noteworthy that a child of 14 and over is on the test of [Kibangeny arap Kolil v R](#) [1959] EA 92 not a child of tender years and there was technically no requirement under section 19 of the [Oaths and Statutory Declarations Act](#) and section 124 of the [Evidence Act](#) to conduct a voire dire examination on such a child, and the complainant here could have been sworn straightaway. The trial court, however, was in excessive caution when it conducted a voire dire on the 16-year old of whom it found “victim understands what is an oath [and] she shall give sworn testimony”. In any event, the voire dire examination was for the benefit of the accused in ensuring only competent witnesses testified.
12. As discussed in the Kenya Judiciary [Criminal Procedure Bench Book 2018](#) at paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

“94. No corroboration is required if the evidence of the child is sworn ([Kibangeny arap Kolil v R](#) 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured ([Oloo v R](#) [2009] KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the [Oaths and Statutory Declarations Act](#) is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art 50(2)(k), CoK”

13. The accused cross-examined the complainant PW1 who was steadfast in her responses as follows:

“You rented at Kaigongi place but it is near our place. You used to pass through our home. That day of power bank I had even seen you in the morning. When I came to your place you said I can stay in your place. Yes, you even recorded. You are the first person I slept with.”



14. Despite opportunity and indication by counsel for the appellant Mr. Mureithi who came on record on September 22, 2020 after the complainant had testified, that he may recall the witness, PW1 was never recalled for further cross-examination, and on November 24, 2020 the date of the adjourned hearing, the counsel just proceeded to deal with PW2, the examining clinician from Miathene hospital. The appellant cannot be heard to complain that the complainant was not cross-examined on alleged sexual relationship with appellant's colleague friend Jamlick.
15. I find the second ingredient of defilement - the element of penetration proved beyond reasonable doubt, and the only question that remains is whether the defilement was by the appellant.

Identification of the Appellant as the perpetrator

16. The complainant PW1 identified the appellant as the person who defiled her although she stated that she had lied to her mother about it when asked where she had been saying that she had slept at another girl's place. Without saying it, the appellant appears to rely on the decision of the Court of Appeal (Madan & Miller (as they then were) & Potter, JJ A) in *Ndungu Kimanyi v R* (1976-80) KLR 1442 that-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straightforward person, or raise a suspicion about his trust-worthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore, an unreliable witness which makes it unsafe to accept his evidence.”

The appellant submitted that the complainant herein could not be trusted to tell the truth as she had already admitted lying to her mother as aforesaid. However, it is conceivable that a school going child aged 16 years who is engaging in sex with an adult(s) or even other children would be afraid to tell it to her parents or any other relative for fear of reprisals or even shame, and I would not hold it against her, as urged by the appellant, as a sign of lack of credibility as a witness.

17. The appellant cited the Court of Appeal decision in *Maitanyi v R* [1986] KLR 198 in urging that the court must warn itself of the dangers of relying on the evidence of a single identification witness. In response, the DPP relied on *JWA v R* [2014] eKLR (Koome, (as she then was), Musinga & Odek, JJA) and *Mohamed v R* [2005] 2 KLR 138 for the proposition that corroboration is not mandatory in sexual offences where the court is satisfied that the witness is telling the truth, as provided under section 124 of the *Evidence Act*. In this court's view, however, the discussion as to corroboration is only relevant where the child of tender age is taken pursuant to section 19 of the *Oaths and Statutory Declarations Act* because as pointed out above quoting the Kenya Judiciary *Criminal Procedure Benchbook, 2018* in sexual offences the sworn evidence of a child does not require corroboration.
18. In this case, the evidence of the defilement or sexual assault can only be given by the victim. The other witnesses only testify as to the circumstances surrounding the relationship between the appellant and the complainant PW1 and the aftermath. I find the provisions of section 124 of the *Evidence Act* to specifically apply to the case before the court. So that, even if the complainant had given evidence unsworn, the court would still be entitled to convict on her evidence uncorroborated, if the court considered, for recorded reasons, that she was telling the truth. The 16-year old complainant gave sworn evidence and her evidence technically did not require corroboration.
19. The appellant's defence of another person being a friend of the complainant is clearly an afterthought. It was not raised during his cross-examination of the complainant PW1. At the time, and subsequently on appeal the appellant was eager to show that “it is the minor who used to visit the accused's house.”



This posture is inconsistent with the defence that the victim was a friend of the appellant's friend and colleague, one Jamlick.

20. Weighing the evidence of the prosecution and the defence as a whole, and noting the coherent manner of the testimony of the complainant on the circumstances of the defilement, I find that the offence of defilement has been proved against the appellant and dismiss the appellant's defence that the complainant was a girlfriend to his colleague friend Jamlick as an afterthought for the same reason that the appellant proffers that the issue of the alleged relationship with the said colleague was not put to the complainant in cross-examination despite opportunity to do so by the counsel then on record for the appellant by recall of the complainant as counsel had intimated upon his coming on record. In addition, the trial court found the complainant truthful for purposes of section 124 of the [Evidence Act](#).

Conclusion

21. There was evidence of the complainant, PW1, that she had sex over a time with the appellant whom she knew as a neighbor who sought her to become his girlfriend and lately when for two days she went to stay with the appellant for fear of reprisal from her sister when she was accused of spoiling her sister's power bank. The appellant was known by the complainant's sister PW3 as well as her mother PW4 both who had confronted the appellant over his relationship with the complainant. The complainant was, upon her disappearance from home later, found at the house of the appellant's work colleague friend, one Jamlick. It was the appellant's defence that the complainant was a girlfriend of his colleague and that she had not been truthful in her allegations against him.
22. The only witness as to the alleged defilement, is therefore, the 16 year old victim of the sexual offence herself, the complainant PW1 who upon a *voire dire* gave sworn evidence and was therefore not subject to the requirement of corroboration in accordance with the authorities. However, the trial court, which saw and heard the witness believed her as a witness of the truth in terms of section 124 of the [Evidence Act](#).
23. The appellant sought to discredit the complainant on the ground that she had lied to her mother about where she had been when she went back home and she said she had been at another girl's place. The complainant then aged 16 testified on oath that she "had sex with him on other occasions." The court accepts that at the age of 16 the complainant knew what it meant to have sex, and must infer that there was penetration. The complainant was examined on August 8, 2020 and there was evidence of penetration, a pregnancy test was positive and the hymen was observed not to be freshly torn, supporting the complainant's evidence that she had had sex with the appellant severally in the past. Indeed, in the history part of the P3 form the doctor recorded that complainant as "having been staying with a man as husband and wife since 2019 to date." The court accepts the age of 16 years that the complainant herself gave upon *voire dire* examination and sworn testimony which was given in the treatment notes and medical examination form P3 in preference to the age of 14 given in an age assessment made by the clinician, PW5 on the basis of dental development. The only question finally to be determined was whether the man with whom the complainant had sex was the appellant as testified by the complainant or the appellant's colleague friend as stated by the appellant in his defence.
24. Having considered the coherence of the testimony of the complainant which was not at all shaken on cross-examination and the testimony of the mother PW4 that she had confronted the appellant and asked him to let the complainant proceed with her schooling, I find that, even though her evidence was not subject to corroboration having been made on oath, the complainant was telling the truth. Had the complainant given unsworn evidence, I would still consider the case suitable for the application of the principle in section 124 Proviso of the [Evidence Act](#) as the only evidence as to the defilement is that of the complainant herself, the other witnesses were witnesses of the events *ex post facto*. See [JWA](#)



v R, supra, however, that in view of section 124 of the *Evidence Act* corroboration of the evidence of the victim is not mandatory.

25. Indeed, the trial court which this court must refer to in accordance with *Okeno v. R* [1972] EA 32 having seen and heard the witness and observed her demeanour, said as follows:

“I analyzed the evidence of the girl and also saw her in court and have no doubt that she was being truthful. Her evidence was subjected to cross-examination by the accused but it was not impeached. In terms of section 124 of the *Evidence Act*, she was telling the truth.”

Conviction and Sentence

26. Although the age assessment report dated August 12, 2020 indicated the age of the complainant as 14 years, the complainant herself had on examination during voir dire stated her age as 16 years (which is set out in the handwritten record of the proceedings), and the same age is given in the P3 form and treatment notes and most importantly, it is age set out in the particulars of the offence in the Charge Sheet. It would be prejudicial to conviction and sentence of the accused for the offence and the penalty prescribed for defilement for a child aged 14 years as stated in the statement of the offence, when the particulars of the offence in the charge sheet and the evidence presented by the Prosecution give the girl's age as 16 years.
27. Accordingly, this court finds that the appellant is guilty for the offence of defilement contrary to section 8(1) as read with 8(4) (applicable to cases of defilement of children of between 16 and 18 years of age) and not 8(3) of the *Sexual Offences Act* as charged and convicted in the trial court. As regards the sentence, it would appear that the trial court sentenced the appellant to imprisonment for 20 years under the minimum sentence for defilement for a child aged between 12 and 15 years under section 8(3) of the *Sexual Offences Act*. This must, therefore, be corrected to match the minimum sentence under section 8(4) of the *Sexual Offences Act*.

Orders

28. Accordingly, for the reasons set out above, the court makes the following orders: -
- i) The appellant's appeal on conviction for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* is allowed, to the extent that the conviction under section 8(1) as read with 8(3) is substituted with section 8(1) as read with 8(4) of *Sexual Offences Act* which is the correct provision for the particulars and evidence presented.
 - ii) The appellant's appeal on the sentence is allowed to the extent that the sentence of twenty (20) years is set aside and substituted with a sentence of imprisonment for fifteen (15) years, in accordance with the minimum sentence under section 8(4) of the *Sexual Offences Act*.
 - iii) As the appellant was on bail during trial, the sentence of imprisonment for fifteen (15) years shall commence from the date of sentence in the trial court on December 18, 2020.

Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.



Ms. Nandwa, Prosecution Counsel for the Prosecution.

