REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 74 OF 2018

OSO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Malindi Criminal Case No. 222 of 2016 as presided over by Hon. S. R. Wewa (PM) at Malindi Law Courts dated 1st November 2018)

CORAM: Hon. Justice R. Nyakundi

Mr. Machuka for the appellant

Ms. Sombo for the State

JUDGMENT

The appellant initially charged and convicted with the offence of defilement contrary to Section 8 (1) of the Sexual Offences Act as read with Section 8 (2) and sentenced to life imprisonment has appealed against both conviction and sentence.

The brief particulars of the charge were that on the 25.3.2016 at [particulars withheld] village Kilifi – County, intentionally and unlawfully appellant caused his genitalia to penetrate **LAL** orifice namely the anus for purposes of sexual intercourse. As at the time of the offence, **LAL** was aged 9 years old.

The evidence in brief

The complainant whose age was stated to be 9 years testified before the trial court starting with the physical features of the scene of crime on the incident. She told the court that on the night of 26.3.2016 which they had retired for the day, the appellant came to where she was sleeping, applied the oil to her anal orifice and committed the sexual act. The complainant further stated that the appellant left shortly to his room but in the wee hours he came back applied coconut oil, undressed himself, the complainant clothes, to cause penetration to the genitalia. This happened with the source of light in the room on accompanied with threats of violence if the complainant attempted to report the matter to anybody or the mother. The complainant also in his testimony testified to the effect that **PW2 AB** was in the same house.

According to the complainant it was **AB (PW2)** who later informed their mother, the trial testified as **PW3 (ZM)**. PW3 told the court that on the aforementioned night of 25/3/2016 she was at home with her children, including the complainant and **(PW2)** when she spent time together with the appellant her husband.

That on or about 10.30 p.m. she went to their room to sleep, leaving the appellant awake, chewing miraa which usually takes upto around 3.00-4.00 a.m. PW3 further testified that in the morning she woke up to prepare the children by doing the basics like bathing them to start the day. It was at the time that her daughter namely A who gave evidence as **(PW2)** told her that the complainant was defiled by the appellant in their bedroom. Thereafter **PW3** called **L** to confirm the allegations from (PW2) about the incident on sexual assault by the appellant. That is when the complainant stated that the appellant usually goes to their room while asleep applies some oil to his anal orifice and commits acts of penetration.

The mother (PW3), horrified with the information screamed to a level which got the attention of the appellant. When asked how he could have done such a thing by PW3, the appellant left the house in a hurry until at 5.30 a.m.

A little later PW3 decided to take the complainant to Malindi Hospital for a medical examination and treatment as supported with the treatment notes. PW2 – a minor by the name **AA** aged 5 years and a sister to the complainant testified that in their house all her siblings including (PW2) share one room.

According to PW2, on the 26.3.2016 she was able to recognize their father, the appellant enter the bedroom, set his eyes on the complainant with whom he committed the sexual act of penetration. The witness stated that the appellant managed to notice that she was awake, but cautioned her to continue sleeping as he committed an act of penetration against the complainant. In the morning, PW2 told the court that she was forced to tell her mother PW3 about what the appellant did on the night with the complainant (PW1).

PW4, the sister to PW3 testified as having received a telephone call from PW3 with regard to incident of the appellant having had carnal knowledge with the complainant. The witness on discussing the matter with PW3 agreed that the complainant be taken out of school to visit Malindi Hospital for treatment. PW4 stated that in her presence, with PW3 and the complainant, the medical examination carried out revealed evidence of carnal knowledge through by anal orifice. With the medical evidence at the disposal of PW3 and PW4 they made a report to Malindi Police Station whereby a P3 Form was issued to initiate an investigation on the crime.

PW5 – The Clinical officer who had examined the complainant on 28/3/2016 had stated that he saw bruises at the lower position of the anus. The clinical officer formed an opinion that sod was highly possible though he was unable to confirm any presence of spermatozoa, or physical injuries or bleeding to the anal orifice. The P3 form was admitted as exhibit 3.

PW6 – was the police from Malindi Police Station who on 28/3/2016 was instructed by the incharge to investigate the report of the complainant said to have been sexually abused. PW6 thereafter told the court that he recorded witness statements and issued the P3 which PW5 factored to form the basis of the charge against the appellant. PW6, also gave evidence that the birth certificate of the complainant confirmed that he was 9 years old when the sex act took place.

At the close of the prosecution case, the appellant was placed on his defence. The appellant elected to give a sworn statement. He denied the charge of sexually abusing his child as alleged by the prosecution witnesses. He only recalled an incidence on 28.3.2016 with about 10 people went to his home, demanding that he accompanies them to the police station. Since he did not suspect foul play anywhere at the time, he readily accepted to go to the police station. It was while at the police station the appellant was informed that there is already a report that he had defiled the complainant. He denied that at the night of 25th March 2016, 26th March 2016 he was able to leave his room to the children's bedroom to commit the sexual act with the complainant.

It is against this backdrop the Learned trial Magistrate convicted and sentenced the appellant. The grievances by the appellant through his counsel **Mr. Machuka** are based on the following grounds of appeal:

1. That Honorable trial Magistrate erred in law and fact as she disregarded vital inconsistencies and serious factual contradictions in the evidence adduced by the prosecution witnesses and thereby arrived at a wrong finding.

2. That the Honorable trial Magistrate failed to appreciate the entirety of the circumstances of the entire event and failed to interrogate the authenticity of the charges brought before Court and the quality of witnesses and their respective contradictory accounts.

3. That the trial Magistrate failed to consider the substance/effect and entirety of the medical evidence given and in failing to arrive at the finding that there was no incriminating medical record/material placed before court as would corroborate contradictory witness accounts.

4. That the trial Magistrate failed to grant the benefit of the doubt to the accused upon the inconsistencies of the evidence by the prosecution.

5. That the Hon. Learned trial Magistrate failed to apply her mind to or failed to appreciate the practicalities and impracticalities of the illogical allegations made visa vis relevant facts in view of the entirety of the circumstances.

6. That the Honorable trial failed to consider basic relevant facts, specifically failed to appreciate the fact that there was a grudge/hatred/bad blood existed between the complainant and the accused and the fact that kept prosecution contacts were sworn enemies of the accused who had threatened him previously.

7. That the Hon. trial Magistrate failed to grant the appellant a fair hearing in view of the serious nature of the charge that he was faced with, the accused person/appellant was denied a fair hearing as he was compelled to close his case and thereby locking out vital evidence from being heard and taken into consideration.

8. That the Hon. Learned trial Magistrate erred in law and fact in placing undue reliance and weight on a weak and unreliable medical account as the only corroborative source of the evidence of contradictory minor witnesses.

9. That the Hon. Learned trial Magistrate erred in ignoring glaring discrepancies and gaps in the entire prosecution case and records.

10. That the Hon. Learned trial Magistrate erred in law and fact in reliance on evidence that does not meet the threshold requirements set for convictions in such case.

11. That the Hon. Learned trial Magistrate erred in law and fact in failing to consider and appreciate the weight of the

defence case and submissions and in holding that the evidence was corroborated when in fact there was no independent or any corroboration at all of the evidence.

12. That the Hon. Learned trial Magistrate erred in law and fact in relying on an inaccurate record and in arriving at a wrong finding and thereafter meeting out an excessive sentence under the circumstances.

Submissions by counsel on appeal

In the present case Learned counsel for the appellant filed written submissions divided on the category of the key issues raised in the Memorandum of Appeal. The appellant's counsel complained on the appraisal and application of medical evidence by the Learned trial Magistrate to convict the appellant. He took issue with the authencity and reliability of the treatment notes which failed to disclose better particulars on nature of injuries.

The name of the medical officer and positive diagnosis in opposing the probative value of the P3, Learned counsel submitted that it is quite plain that there were no evidence of penetration as alleged by the complainant in his testimony in court.

The next troubling issue for the appellant counsel was the glaring inconsistencies and contradictions with the prosecution witnesses more so he singled out the complainant testimony on whether there was source of light on the material night.

Learned counsel for the appellant turned to the fundamental issue on the standard of proof as to whether the case at the trial was proved beyond reasonable doubt. These was in issue the elements of penetration, age and identification of the appellant being at the scene of the crime. On this issue Learned counsel proceeded to cite the principles in the case of **R V Lifchus [1997] 3 SCR 320.**

As regards the right to a fair trial under Article 50 (2) (c) of the constitution. Learned counsel contended that the appellant was denied the access to the OB extract which entails the intial report made to the police.

Learned counsel for the appellant argued and submitted that the trial court failed in its duty to appraise the evidence in a manner that the inconsistencies and contradictions were ignored. More specifically, the medical doctor did not state with certainty what caused the injuries. Learned counsel asserted the surrounding circumstances were that the offence was alleged to have been committed at night with no proper source of light in place.

He contended that the issue of positive identification was adversely resolved against the appellant Learned Counsel. Further counsel submitted that the complainant as a child of tender years was expected to be subjected to a thorough voire dire examination under Section 19 of the statutory oaths Act Cap 15 of the Laws of Kenya. According to Learned counsel the record lacks specifics that the procedure necessary to determine the competency and intelligence of the complainant was never complied with by the Learned trial Magistrate. Learned counsel submitted that the duty and importance of the voire examination as articulated in **Johnson Muiruri v R [1983] KLR 447** was not followed by Learned trial Magistrate. Learned counsel argued that the complainant was under coercion and duress from his mother as can be deduced from the record. Learned counsel further submitted that the entirety of the evidence put together on the elements and proof cast a doubt the charge beyond reasonable doubt. Consideration on the failure to discharge the burden of proof Learned counsel cited the authorities of **Daniel Okeno v R Criminal Appeal No. 8 of 2015, Abee Manari Nyamunga v R Criminal Appeal No. 86 of 1994**.

On the right to a fair hearing under Article 50 of the Constitution, Learned Counsel submissions identifies the following issues to have had a likely impact against the appellant.

Although the appellant made an application to have the O.C.S. summoned to produce the O.B. extract that opportunity was declined by the Learned trial Magistrate. That the failure to provide the appellant a chance to facilitate attendance of witness to challenge the prosecution case was an infringement of his right to a fair hearing.

At the hearing on appeal **Mr. Wameyo** in conjunction with **Ms. Sombo**, prosecution counsel, opposed the appeal that the state vehemently opposes the appeal on grounds raised by the appellant. **Ms. Wameyo** argued that the record is clear on appraisal of the prosecution witnesses. That the key elements on penetration and age were proved beyond reasonable doubt.

As to the importance of proof of age, counsel relied on the authorities of **Hudson Ali Mwachengo v R [2016] eKLR, Kaingu Elias Kasemo v R Criminal Appeal No. 504 of 2010 (Malindi).** On voire dire examination counsel brought the argument and submitted that the Learned trial Magistrate conducted a proper voire dire as required by the law. In support of this ground, counsel placed reliance on the cases of **Maripett Loonkomok v R [2016] eKLR, DWM v R [2016] eKLR,** it was reiterated that the appellant has not show which part of the voire dire resulted on the failure of justice.

It was further argued by counsel that there were no inconsistencies and contradictions from the prosecution witnesses which amounted to satisfactorily interfere with the decision of the trial court.

On this counsel cited the authorities of **Erick Onyango Ondeng' v R [2014] Eklr, Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001 (UGCA 6, 2003)**. It was argued therefore any such inconsistencies or contradictions identified by the appellant did not affect the substance of the charge. For the respondent's counsel the appeal lacks merit.

Analysis and resolution

This being a first appeal, the duty of the court is to re-evaluate and scrutinize the evidence before the trial court and on subjecting it to a fresh analysis be able to come up with my own independent conclusion and decision. (**Okeno v R [1972] E. A. 531**). On first appeal the court is

also expected to bear in mind that it does not have the advantage on demeanor or credibility of witnesses and inferences drawn by the trial court by virtue of an advantage of seeking and evaluating the cogency of their respective testimonies.

In this respect, I have carefully read the record and the Judgment of the trial court which formed the basis of the conviction and sentence against the appellant. From the grounds raised in the memorandum of appeal at the heart of the appeal is the question whether the prosecution discharged the burden of proof of beyond reasonable doubt.

Furthermore, in considering this key principle element in criminal cases, I am not in any way truing to diminish the importance of the issues raised in the Memorandum of Appeal.

According to the court in the case of **Miller v Minister of Pensions {1942} AC 1,** it was stated that:

> **"Proof of beyond reasonable doubt it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt the Law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice, if the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing of that will suffice."**

Lord Oputa JSC in **Bakare v State {1985} 2 NWLR** emphasized that there are many combination of circumstances that form the basis of the expression beyond reasonable doubt which is a question of fact and degree thus:

> **"Proof beyond reasonable doubt stems out of the competing presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of doubt, that the person accused is guilty of the offence charged, Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible and fanciful possibilities, but does admit of a high degree of cogency consistent with an equally high degree of probability."**

In the criminal trial process there are two stages, set in motion pursuant to authority conferred upon the court under Article 50 (1) of the Constitution. First is the prosecution's case followed by the defence case where in the opinion of the Learned trial Magistrate a prima facie case has been established by the prosecution. It is also the rule of evidence that during the examination in chief of the prosecution witnesses, the defence has a right to challenge any such allegations by way of cross-examination.

One remarkable feature of our criminal procedure is the method of cross-examination. If the accused manages to impugn the prosecution case and successful process his or her innocence, the trial court would disallow the case to proceed to the defence stage.

On this score an appeal court merely addresses the prosecution evidence and the answers provided by witnesses and the accused version on account of the evidence to proof his or her culpability. It is therefore incumbent upon the 1st appeal court by dint of the principles on **Okeno v R (supra), Rawala v R 1957 E. A. 370** not to upset the Judgment of the trial court without carefully weighing it and the soundness of the evidence in support of the conviction.

A complete rehearing of the case principle on appeal is confined to the evidence on record and not to substitute the court decision with that of the trial court, in instances there was no error of fact or Law in the findings of the Learned trial Magistrate whilst the appellant counsel set out various grounds on counter accusations against the Learned trial Magistrate.

It is my view that in a nutshell the appeal is founded on this maxim ***"of proof or non-proof the charge beyond reasonable doubt"*** by the state. That would remain the yardstick to entitle the appellant an acquittal or confirmation of the court below Judgment.

The standard of proof the prosecution is obligated to discharge under Article 50 2(a) of the constitution on presumption of innocence until the contrary is proved is the doubt in the guilt of the accused person.

Undoubtedly, in practical terms, as a trial Judge, this has come to be the hardest and difficult aspect of the decision making in a criminal trial in certain cases to decide upon the facts that the accused is guilt or render a verdict of not guilty. On the authority of the case of **Charles Karani v R Criminal Appeal No. 72 of 2013,** the court in construing the provisions of Section 8 (1) of the Sexual Offences Act, stated that:

> **"The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant."**

The Act in Section 2 defines penetration as partial or complete penetration of child genitalia with that of a male for the act of carnal knowledge to be held to have taken place. It was argued that the encounters of the sex act allegedly could not have occurred in view of the fact that there were other children in the same room as confirmed by the complainant.

During the hearing of this appeal, counsel for the appellant submitted that the conditions were not favorable for the sexual intercourse against the complainant to take place. That the evidence was not sufficiently corroborated for the Learned trial Magistrate to find that the appellant committed the act of penetration.

As for the ingredient on penetration, its generally acceptable that medical evidence is not mandatory for the prosecution to satisfy this element to proof defilement. The case of **Kassim Ali v R Criminal Appeal No. 84 of 2005** in part the court held:

"The absence of medical evidence to support the fact of rape is not a decision as to the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."

The court agrees with the above position of the Law in the case before the trial court there was evidence of **(PW2 AA),** who testified that he was in the same room with the complainant **(PW1)** when the alleged defilement took place. The complainant in this case did not personally convey the incident to his mother **PW3** but it was **PW2 (AA)** who informed PW3 of the sexual act the following day. According to PW3 she sought the company of PW4 to escort the complainant to Malindi Hospital where he was examined by PW5. The clinical officer established bruises at the lower groin. By this evidence the trial court found it sufficiently corroborated with that of the complainant on carnal knowledge, against the order of nature . That the appellant had sexual intercourse on the night of 25.3.2016 with the complainant.

In the case of **Uganda v George Witson Sumbwa SC Criminal Appeal No. 37 of 1995** the court stated as follows in corroboration:

"Corroboration affects the accused by connecting or tending to connect him over the crime. In other words, it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at Common Law or within the class of offences for which corroboration is required."

On perusing the evidence of the complainant and that of PW2 quite properly, the witnesses were very sure that they positively recognized the appellant at the scene of the crime. PW2's particular item of evidence was capable of providing corroboration as explained by **Lord Reid in Kilborne {1973} AC 729** thus:

"When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Lastly, the appellant counsel contested the validity of the complainant's evidence and the issue being raised was that there was high likelihood of coaching by his mother **(PW3).** In this regard, I have the advantage to review the totality of the evidence linking the appellant with the scene of the crime. The substantive position to consider is whether both **PW1** and **PW2** were in a position to collude and conspire to falsify the sexual act against the appellant. Indeed, it is not disputed that the appellant is their father to whom they look up to for security, protection, guidance and to cater for their welfare and best interest under Section 4 (2) of the Childrens Act.

I think the particular circumstances of this case are as stipulated in the case of **Hester {1973} AC 296, 315F,** that:

"The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. ……. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible ……."

Though the medical evidence did not make any findings as to spermatozoa or bleeding from the orifice is not a ground to doubt the testimony of PW1 on penetration. In the case of **Mujuni Apollo vs Uganda Criminal Appeal No. 26 of 1999,** the court in Uganda had a chance to decide on the probative value of medical evidence in sexual offences, the court stated:

"It is clear to us that by basing this appeal on the absence of medical evidence, Mr. Bwengye is affording medical evidence undue weight, overlooking the fact that it is merely advisory and goes to the fact and not law. The court has discretion to reject it. Rivell (1950) Cr. App R 87; Matheson 42 Cr. App R. 145. The court can even convict without medical evidence as long as there is strong direct evidence when the circumstances of the offences are so cogent and compelling as to leave no ground for reasonable doubt ……"

The rationale for that is for a charge of defilement to be established, it is not necessary that there be existence of injuries to the genitalia. Therefore, absence of bleeding or spermatozoa does not rule out penetration. This more so, under Section 2 of the Sexual Offences Act penetration is deemed to be complete even with partial insertion of one's genitalia with that of the victim. (**See the case of Joel Omino Ngutu v R CR Appeal No. 10 of 2013**). The evidence by the complainant that appellant forcibly left his room to go and have sexual intercourse has not been controverted by any credible version of the appellant. The explanation by PW1 as corroborated with the testimony of PW2 remains uncontested as to the act of penetration.

Further, (PW1) alluded to the fact that during the sex act the appellant had threatened him not to inform the mother (PW3) of what had transpired on the fateful night. This was possibly the reason why the information about the sexual intercourse came from (PW2) who could not forbear to remain silent. The act of defilement under Section 8 (1) of the Sexual Offences Act presupposes existence of intention and unlawful act on the part of the appellant as defined in Section 43 of the Act. It provides that:

"an act is intentional and unlawful if it is committed

(a). in any coercive circumstances

(b). under the false pretenses or by fraudulent means or

(c). in respect of a person who is incapable of appreciating the nature of the Act which causes the offence.

On the facts of this case, the appellant by his position and relationship with the complainant was in a position of restraining himself from committing the sexual act.

Secondly, he had the knowledge that the complainant whom he had purposed to engage in sexual intercourse was a minor, under his care, control and custody. When he formed the necessary *mens rea* he took into his possession coconut oil required for the *actus reus* of the offence of defilement. It is irrelevant that the appellant did not emit semen or even rupture the membrane of the anal orifice.

It is in the above context the Learned counsel raised the issue of contradictions the law on this ground is settled as purposed by the principles in the cases of **Njoki & 7 others v R [2007] KLR 771** and **Vincent Kasyula v R Criminal Appeal No. 98 of 2014** The appropriate test is whether the alleged inconsistencies and contradictions are tenuous character and that the evidence and strands of contradictions are unconvincing and unsafe to rely on them to convict the accused person. The weight of the evidence being impugned for inconsistency must be weighed together with the liability of statements by other witnesses. The case of **Twehangane Alfred v Uganda Cr. Appeal No. 139 of 2001 (2003)** emphatically restated the Law as follows:

> **"With regard to contradictions in the prosecution case the law as set out in numerous authorities is that grave contradictions unless satisfactory explained will usually but not necessary lead to the evidence of witnesses being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."**

From the submissions by counsel for the appellant though he laid emphasis on bits and bits of contradictions they could not safely be held to be unreliable. I am satisfied on evaluation of the prosecution witnesses no substantial inconsistencies or contradiction have been pointed out which are adverse or prejudicial to the prosecution case.

Although motive and opportunity are not principally essential elements to determine liability for a crime both thrive to support the overall conclusion to describe the purposes or ends of the crime. In other words, why an offender acted in a particular manner towards commission to the crime. There is no doubt the question of opportunity and intention to unlawfully commit an act of penetration against the complainant is vividly explained in his testimony and that of her sister PW2, motive is a state of mind. **Randon House College Dictionary 871 (Rev Ed 1979)** defines it as:

> **"Something that prompts a person to act in a certain way or that determines volition and equates the term with inducement and incentive."**

The prosecution theory was that the appellant committed the defilement against the minor allegedly for not being part of his biological children and the poor relationship he had with the mother of the victim. On consideration of the appeal, I am of the view that the evidence were strongly to establish a motive on the part of the appellant to get the mother out of the way.

Each piece of evidence by PW1 and PW2 is relevant to the charge relating to prove the place, the time, the identity of the accused and the criminal acts within the offence itself. This act by the appellant may have motivated PW2 to inform the mother to the utter disbelief by the appellant. One could assume that as she reported the matter there was no reasonable possibility that the appellant was to be arrested and charged with the offence.

This is particularly important to rule out any form of duress, coercion, promise or motive that will encourage a vulnerable witness like PW2 to come forward and volunteer to be a witness against the appellant.

In the premises, the charge being the commission of sexual intercourse what I would say in this regard, is that whatever the motive and passion the appellant might have conceived, the defilement incident took place and its evidence the appellant was positively identified as the abuser and defiler of the complainant.

On the second principal element the victim in this appeal was a child below the age of 18 years stated to be 9 years old going by the birth certificate Exhibit 5 issued on 1.2.2007. In the case of **Francis Omuroni v Uganda Criminal Appeal No. 2 of 2000** the court stated as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only one who could professionally determine the age of the victim in the absence of any other evidence apart from medical evidence, age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."**

Bearing in mind the guidelines set out in this case, the age of the complainant was proved by birth certificate admitted in evidence as exhibit 2. The appellant has not disputed that the evidence on age of the complainant is at variance with the one indicated in his birth certificate. This ground therefore fails.

One of the key feature in this appeal, is on identification of the appellant. The appellant through his counsels challenged the evidence on identification of the appellant which in all aspect he submitted was doubtful.

According to appellant's counsel the conditions under which the complainant stated the crime took place were such that he could not have been able to identify the assailant. For the respondent counsels, they countered the arguments on recognition as being watertight and unimpeachable.

It is trite, the conceptual framework on identification is no longer a matter in doubt in so far as the principles and guidelines to apply on case to case basis is concerned. The courts have been guided by the case of **R v Turnbull [1976] 3 ALL ER, Abdalla Bin Wendo & Another v R, Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989, Anjononi v R.**

The points emphasized in the above cases are on testing with care the evidence of a single identifying witness and the circumstances with regard to identification, or recognition of an offender to the crime and the prevailing circumstances. As regards visual identification the Court of Appeal in **Charles Otieno Wamunga (supra)** emphasized as follows:

> **"We now turn to the more troublesome part of the appeal the appellant's conviction on count 1 and 2 with respect to the testimony of PW1 and PW2 who testified that they recognized the robbers who attacked and robbed them. What we have to decide now is whether that evidence was reliable and free from possibility of error. So as to find a secure basis for the conviction of the appellant, evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.**

The way to approach the evidence of visual identification was succinctly stated by **Lord Widgery CJ** in the well-known case of **R v Turnbull (supra)** where he said:

> **"Recognition may be more reliable than identification of a stranger, but even when the witness is purportedly to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relations and friends are sometimes made."**

In this appeal the prosecution relied on the testimony of PW1 and PW2; who claimed that the appellant moved from his bedroom to where they were sleeping and committed the sexual act against the complainant. From the record the complainant gave evidence that he recognized the appellant who even had a conversation with him with threats of keeping the matter under secrecy. The complainant referred to the nature of the incidents, such as application of the coconut oil before the defilement. The clothings worn by the appellant, voice recognition and prior knowledge of the appellant. Therefore, the source of light available in the room made it possible for a positive identification to take place. PW2 also present in the same room gave a detailed account of all what happened and witnessed with his own eyes.

The appellant in his defence attributed to the fabrication of the allegations due to the grudge he has with PW3, the mother of the complainant. In his testimony though he slept in the same house but different rooms with the complainant and PW2 at no time did he visit their room that specific night.

The burden of proof is on the prosecution to establish that the appellant left his bedroom to that of the complainant to commit the act of defilement as narrated by PW1 and corroborated with the evidence of PW2. The question which is of significance in this appeal on the issues raised is whether there was motive for the complainant to deliberately and dishonestly accuse his stepfather of such serious immoral act.

What the evidence by PW1 and PW2 tells us is that the identification of the appellant was not that of a stranger. The witnesses are children of the appellant. They live together and share the house for along period of time. The appellant has not ruled out prior familiarity between him with that of PW1 and PW2 who identified him during the sex act.

From the case for the defence it all came about because of a misunderstanding and grudge he has with PW3 which possibly culminated in this fabrication taken on oath.

With respect to the appellant counsel submissions in this ground, I simply find the evidence of sufficient quality and I am satisfied that all of the factors which are laid down in **Turnbull (supra) & Charles Warungu** says ought to be present, were present as manifested in the record of the trial court. In addition there is independent testimony of (PW2) to corroborate that of (PW1). For that reason reliance on identification evidence by the Learned trial Magistrate cannot be faulted.

The appellant complaint on the evidence of voire dire inquiry requires some attention by this court. This discussion cannot get underway without the dicta in the case of **R v Baker [2010] EWCA Crim 4** namely:

> **"We emphasize that in our collective experience the age of a witness is not determinative on his or her ability to give truthful evidence. <u>Like adults some children will provide truthful and accurate testimony and some will not</u>. However, children are not miniature adults, but children and to be treated and judged for what they are not what they will in years ahead grow to be."**

A voire dire inquiry examination of a victim of tender years is purely a matter of the discretion of the trial court where on each case is to be mindful of that vulnerable witness and his or her unique circumstances. The evidence of a child of tender years involves both subjective and objective analysis by the trial court. In the case of **R v Cooper [1969] 1 ALL ER 32 at 34** stated as follows on subjective intuition:

> **"must in the end ask itself a subjective question whether we are content to let the matter stand as it is or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a rejection which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."**

In cases involving child witnesses the conviction is secured or lost depending on the determination whether the *voire dire* examination under

Section 19 of the Oaths and Statutory Declarations Act, (Cap 15, Laws of Kenya), was properly carried out. The test in **Julius Kiunga M'rithia v R [2011] eKLR** where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about:

> **(1). Whether the child understands the nature of an oath; or**
>
> **(2). If the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."**

The evidence against the appellant was mainly on the testimony of PW1 and PW2. Holding the circumstances of the case on appeal the test under Section 19 of the Act has to be proven that the trial court exercised the discretion judiciously. To lay emphasis on the significance of the inquiry employed preceding the admission of a child witness evidence the same has emphasis in the case of **James Mwangi Muriithi vs Republic [2016] eKLR**

> **"The need for the administration of voire dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in Section 19 of the Oaths and Statutory Declarations Act cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In Sula versus Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter:"**

Essentially, the voire dire inquiry is a competence test to establish whether the child witness before court is competent to give evidence in the criminal proceedings. The general principle under the Evidence Act is that all persons whatever their age are competent witnesses either in civil or criminal proceedings. Sometimes when it comes to child witnesses rather than applying the discretionary rule in terms of the mandate of an independent tribunal under Article 50 (1) of the constitution the focus on phases and questions asked by the trial court noticeably does affect the outcome set out in Section 19 of the Act. The determination of whether a child is competent to give evidence for the prosecution and the specific preconditions as to whether they understand the questions put to them as a witness and the answers given should be left to the decision of the trial court. The exception should only arise where one questions the techniques or measures used to admit the witness to give his or her evidence. Given the centrality of the special needs and circumstances of upbringing the quantitative and qualitative evaluation of a child under Section 19 for the sake of giving evidence no hard rule can be formulated by this court.

Applying Section 19 of the Act, I have perused the trial court record with regard to a voire dire examination to satisfy itself as to the competency of PW1 and PW2 and I find no evidence that it was tainted with any misdirection or misconception or incompatible with Section 19 of the Act.

The Learned trial Magistrate made reference to the inquiry and did exercise discretion to the effect that the victim was capable of giving evidence on oath. It is impossible for an appeal court to conclude that the voire inquiry prejudiced the appellant without receiving substantial credible evidence required for exercise of discretion on appeal to vitiate the proceedings or order of the trial court. In other words, the appellant loses this ground as a basis of his appeal.

This court does emphasis that the trial court has to leverage through a number of factors dependent on the age, knowledge, surrounding and experiential of the child witness before making a determination under which category the proposed witness fails in terms of the provisions in Section 19 of the Act.

The answer to the complaint raised by the appellant can be traced to the principles in the case of **Ruwala v R [1957] EA 570 and Pandya v R [1957] EA 336.** That as a first appellate court, I bear in mind that the Learned trial Magistrate had the advantage of hearing the witnesses and was able to draw certain inferences on this material issue to invite the complainant to give evidence on oath.

Having these principles in mind, there is no discovery of new evidence or matter brought to the attention of this court by the appellant to impugn the voire dire examination. This additional observation further strengthens the findings made above by this court to dismiss this ground on entirety. I do not think that the grounds urged by **Mr. Martini** are really strong enough to induce me to allow this appeal on conviction. My own evaluation and scrutiny of the evidence against the appellant is of a nature that I find no merit in the appeal against the conviction and I do disallow it by an order or dismissal.

Sentencing

Sentencing is supposed to take into account the individual circumstances of the accused person as well as possibility of reform and re-adaptation, public interest and the interest of the victim and his relations. The ages of the accused person and the victim are relevant in determining sentence. The harsher the sentence, and the older the accused person the harsher the sentence.

Courts are enjoyed to mete severe sentences to send the right message that the society is up in arms to fight this scourge. The usual mitigating and aggravating factors shall be considered accordingly.

At thirty (36) years, the appellant was relatively a young offender. He defiled his nine (9) years old step son. He was entrusted to take care of his step son and his siblings as he had married the complainant's mother. He breached that trust and duty. He threatened the victim not to shout or even to disclose his ordeal to anybody. He also repeatedly sodomised the minor. This must have caused a great deal of emotional and psychological torture which the minor will live with for the rest of his life.

The law in terms of the Children Act of 2001 and the Constitutional of Kenya 2010 guarantees that children ought to be protected from harm, abuse and or all forms of violence. The state sought a custodial sentence for the sake of justice in the eyes of the victim and the society at large and for deterrence purposes. I'm in agreement with the counsel for the state that the period already served, though it will be considered, cannot be held to be enough for the appellant to be deemed as having learnt his lesson. The advocates for the victim do not think that it is necessary to interfere with the sentence that was passed by the Learned Magistrate.

On the other hand, I have noted that the only mitigating factors as per the appellant's submissions is that of first offender and regrets he has of being framed up for the offence. The counsel for the appellant cited the decision in **Muruatetu** and as well as the case of **Godfrey Ngotho Mutiso v R eKLR.** He argues that the mandatory nature of the life imprisonment sentence takes away the court's discretion to punish offenders.

I agree with the counsel for the appellant's contention that the decision in **Muruatetu case** can be extended to any other mandatory sentence including robbery with violence, defilement among other mandatory sentences.

Learned counsel for the appellant submitted and urged this court to apply the principles in the case of **Francis Kariako Muruatetu & Anor v R [2017] eKLR** to interfere with mandatory life imprisonment for the offence of defilement contrary to Section 8(2) of the Sexual Offences Act. Based on the above submissions by the Learned counsel for the respective parties herein, a re-sentencing hearing is hereby scheduled under the framework in **Muruatetu case (supra).** Careful considerations of the crime reveal the following aggravating factors:

(1). Evidence of prior planning by the appellant, when he obtained the oil.

(2). He went further to wait until, its dark and the victim has fallen asleep.

(3). The offence was motivated by ill will and moral deprivation.

(4). The appellant targeted a vulnerable member of his family.

(5). By committing this offence, the appellant abused the trust accorded to him as a parent with a legitimate expectation to protect and secure the welfare and best interest of the victim.

The victim mother gave a moving impact statement on the psychotraumatic experience and the phobia on the part of the minor living on fear of any male person he comes across. For this reaction, the mother stated that due to the victims vulnerability and substantial injury to his dignity, the pattern of poor performance in school has emerged.

I have weighed the gravity of aggravating factors and mitigation offered by the appellant, these factors leaves this court in no doubt that the appellants abused the trust, by committing a sexual offence against the male child of such a tender age, that no manner of mitigation can erase the physical and emotional scars of the victim. Weighing one factor after another, I do not even think that there is anything wrong with the life sentence. However, consequently by varying the life sentence to a high long deterrence period of imprisonment this moral horror would have been deterred and at the same breadth meet the criminal justice to punish crime for the interest of the common good. Therefore, I sentence the convict to twenty (25) years imprisonment. Fourteen (14) days right of appeal explained.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF FEBRUARY, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Sombo for the respondent

2. Mr. Martini for the appellant

3. Mr. Salim watching brief for Wamoyo for the family