REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 89 OF 2019

CHARLES MGUTE KAFANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Original Conviction and Sentence by Hon. C.A. Ogweno, Resident Magistrate in Mombasa Chief Magistrate's Court Criminal Case No. 89 of 2019)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 26th of January, 2018 at [particulars withheld] area in Changamwe Sub-County within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of CAO [name withheld] a girl aged 11 years. The appellant was sentenced to life imprisonment.

2. He was aggrieved by the said decision and through his Advocate Gunga & Co. Advocates, he filed a petition of appeal on 22nd July, 2019. He raised the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact in failing to find that there was absolutely no evidence to support the charge of defilement. The Magistrate's findings were based on mere conjecture;

(ii) That the Learned Trial Magistrate erred in law and fact in finding that the appellant committed the offence yet there was no cogent evidence to support that finding. The Magistrate relied on extremely weak and uncorroborated evidence of the witnesses;

(iii) That the Learned Trial Magistrate misdirected herself by believing the evidence of the complainant (PW2) and the father (PW1) yet their evidence was contradictory and inconsistent. The prosecution evidence was full of gaps, incoherent thus not capable of sustaining a conviction;

(iv) That the Learned Trial Magistrate erred in law and fact in failing to appreciate that the complainant (PW2) (sic) and father (PW1) (sic) as evident from their evidence were not witnesses of truth and that their evidence ought to be disregarded.

(v) That the Learned Trial Magistrate erred in law and fact in failing to find that there existed material and fundamental contradictions in the contents of the P3 form, PRC form and medical documents *vis-a-vis* the evidence of physical observation by the witnesses on the nature and extent of injuries purportedly occasioned to the complainant;

(vi) That the Learned Trial Magistrate misdirected herself in failing to find that the evidence on record, taken into totality did not satisfy the ingredients of the offence of defilement;

(vii) That the Learned Trial Magistrate erred in law and fact in failing to find that the prosecution's case was wanting by dint of poor investigations. The Learned Trial Magistrate erred in failing to find that there was no independent and/or material evidence to support or corroborate PW2's (sic) evidence and the Prosecution case in general;

(viii) That the Learned Magistrate did not make conclusive findings on the roles played by parties mentioned as suspects by the appellant and further find out why the Investigating Officer did not pursue those mentioned;

(ix) That the Learned Trial Magistrate erred in law and fact in convicting the appellant without due regard to the circumstances surrounding the manner in which the offence was allegedly committed. The circumstances prevailing then as per the evidence did

not present an opportunity for the appellant to commit the alleged offence;

(x) That the Learned Trial Magistrate erred in law and fact in failing to consider and analyze the appellant's testimony in his defence. The Magistrate in total contradiction of the law casually ignored the appellant's defence thus occasioning a serious miscarriage of justice;

(xi) That the Learned Trial Magistrate failed to direct herself on the law on identification and thus erred in finding that there was no need for identification. The Magistrate did not consider the time, circumstances and general environment the offence was alleged to have been committed;

(xii) That the Learned Trial Magistrate misdirected herself on the question of the issues for determination in the matter before her and just framed general issues that lacked a bearing on the matter at hand; and

(xiii) That the Learned Trial Magistrate in passing sentence failed to consider the appellant's mitigation and the pre-sentence report hence passed an extremely harsh and excessive sentence in the circumstances.

3. On 20th November, 2019 the appellant's Counsel filed written submissions. They were to the effect that the evidence adduced by prosecution witnesses was doubtful, weak and of no evidential value. It was also submitted that the case was not thoroughly investigated so as to clear any doubts in the prosecution case despite the discrepancies in the evidence, which should have been resolved in favour of the appellant.

4. It was submitted that PW1 said that the offence occurred at midnight but failed at the earliest opportunity to notify her neighbours, her siblings or her father of what had befallen her. Counsel for the appellant also stated that PW1 went home for lunch but did not disclose anything to her Aunt.

5. It was further stated that the following morning, the minor went on her usual business of preparing for school as if nothing had happened and she never raised any complaint. It was submitted that she never told her friends in school or her teacher immediately after she arrived in school. The appellant's Counsel argued that although PW1 insisted that her mouth was covered when the alleged offence was being committed, her evidence lacked clarity as to the substance which was used to cover her mouth. In his view, the gaps in the prosecution case rendered a fatal blow to the said case.

6. As to the identity of the perpetrator of the offence, Mr. Gunga submitted that PW1 did not know the name of the person who defiled her and did not give a description of his physical appearance. He further submitted that she did not disclose the name of her assailant but only pointed him out in court.

7. It was also stated that PW3 testified that PW1 had informed her teacher that one Ali, a neighbour, had defiled her. In Mr. Gunga's view, that piece of evidence ought to have been pursued and investigated thoroughly. It was submitted that evidence was not led by the prosecution to demonstrate that the appellant and the said Ali referred to one and the same person. The case of **Benson Barasa v Republic** Kitale High Court Criminal Appeal No. 22 of 2005, was cited to support the proposition that where the evidence adduced is so contradictory and/or inconsistent, then in the absence of any other material or corroborative evidence, the Trial Magistrate must be very cautious before relying on such evidence to convict.

8. It was also contended by the appellant's Counsel that penetration of PW1's vagina by the appellant's genital organ was not proved as no tests were conducted to examine PW1's clothes for semen. Further, that PW1's clothes which were purportedly blood stained were not presented to the Doctor.

9. It was argued that the fact that PW1's hymen was not intact was not conclusive proof that there was penetration by a genital organ. It was suggested that insertion of fingers in PW1's vagina could have led to a broken hymen. It was submitted that Section C of the P3 form was not filled out in detail and it was not clear as to when PW1's hymen was broken. It was further submitted that the P3 form did not corroborate PW1's testimony but created doubt as to when the injuries were inflicted on her.

10. In concluding his submissions, Mr. Gunga indicated that the appellant's defence was not thoroughly analyzed such as to ascertain that it was not possible for the offence to have been committed in the place that PW1 described as the scene of crime, given the fact that some of the appellant's neighbours used to sleep late and some would leave their doors open. This court was urged to allow the appeal.

11. Ms Mwangeka, Prosecution Counsel, filed written submissions on 3rd February, 2020. She indicated that the age of the minor was proved to be 10 years and 10 months as at 28th January, 2018, by way of a clinic card which gave PW1's date of birth as 25th February, 2007. The Prosecution Counsel supported the finding of the Trial Court which relied on the case of **Eliud Ouma Agwara v Republic** [2016] eKLR, to buttress its finding.

12. On the issue of penetration, the Prosecution Counsel submitted that PW1's evidence was to the effect that she was defiled twice by the appellant on a corridor leading to the toilets. She further submitted that a medical examination done on 29th January, 2018 which was 3 days after the incident revealed that PW1's hymen was broken and her vagina had healing lacerations. It was submitted that the Doctor's observations were consistent with PW1's account of a forceful penile penetration as was noted on the PRC form.

13. In regard to the P3 form, it was submitted that it was filled on 6th February, 2018 and on examination the Doctor noted healing abrasions around PW1's vagina, which were 9 days old. She also had a broken hymen. The doctor concluded that the probable weapon used was a human penis due to the nature of the injuries sustained. Ms Mwangeka took the position that the medical evidence was consistent, cogent and corroborated PW1's evidence. She argued that it was not necessary for PW1's blood stained clothes to be submitted to the Doctor as they did

not constitute an ingredient for the offence of defilement.

14. On the issue of identification of the appellant, it was submitted that he was well known to PW1 and the defilement took place along a corridor which was always illuminated with security lights, a fact which was acknowledged by the defence and verified by the Trial Court on a site visit to the scene. Ms Mwangeka further submitted that PW1 had sufficient time to identify her assailant as he defiled her twice. That he thereafter fetched water and cleaned the blood stained floor. She asserted that under the said circumstances, the identification of the appellant could not be faulted.

15. In responding to the claim that PW1 took a long time to disclose the fact that she had been defiled, the Prosecution Counsel submitted that the appellant threatened to cut PW1 if she said anything to her father. It was indicated that she reported to her teacher that she had seen blood in her urine and that she was having pains in her legs and thighs. The school informed her father.

16. It was submitted that the contradictions pinpointed by the appellant's Counsel were immaterial and did not in any way dislodge the prosecution case which was clear, consistent and corroborated. Ms Mwangeka relied on the case of **Erick Odeny v Republic** [2014] eKLR, to elaborate on her submission that there were no major contradictions in the case against the appellant.

17. She was also of the view that the appellant's defence was thoroughly analyzed but the Trial Court found the prosecution to have proved its case. She prayed for the appeal to be dismissed.

THE EVIDENCE TENDERED BEFORE THE TRIAL COURT

18. The victim of the offence was CPA [name withheld]. She testified as PW1 after a *voir dire* examination was conducted to establish if she understood the nature of an oath, the importance of telling the truth and if she was intelligent enough to give evidence. At the time she testified, she was in class 3. It was her evidence that on 26th January, 2018, at midnight, she felt pressed and decided to go to the communal toilet which was located outside their house. She took the toilet key and left her 3 brothers and her father sleeping. She went to the toilet which was near the verandah. She stated that their neighbours were asleep at that time. The security lights were on.

19. Her evidence was that after she relieved herself and as she was about to lock the door to the toilet, a man held her. She stated that she saw him clearly. He removed her dress and white panty and he removed his clothes. She recounted that he then slept on top of her on the floor of the verandah to the toilet. She explained that the man wore a faded black short and black shirt.

20. PW1 further stated that her assailant covered her mouth. He then inserted his front part which he uses to pass urine in the part of her body which she uses to pass urine. He then went to his house, fetched water and wiped off blood from the floor and poured water on the floor. He told her that he would cut her if she told her father. She indicated that she felt pain in her vagina. She went back to their house and found everyone still asleep. She stated that she was afraid to tell her father.

21. It was her evidence that she went to school and felt pain on her thighs and legs. She indicated that she wanted to tell her Aunt during lunch time when she went home, but unfortunately she left. PW1 further stated that when she went to the toilet she realized there was blood in her urine. She testified that during the short break, she vomited blood and informed her teacher called Irene, who called her to the office and gave her pampers (sic) to wear. She later asked PW1 to give her the pampers (sic) which she placed in a nylon (bag). PW1 stated that she told her teacher what had happened. She gave the said teacher the telephone number of her father. The teacher called him and he sent her Aunt to go to the school.

22. PW1 stated that teacher Irene examined her thereafter when they were alone and she told PW1's Aunt. They went to the police station and she was referred to hospital. She was taken there by her Aunt and *Mama sauti ya watoto*. She stated that she did not know the name of the person who defiled her but he used to stay in their plot near the gate. She identified him as the appellant.

23. It was PW1's evidence that at the hospital she was examined and given medication. She indicated that no one else had defiled her before. She stated that she could not scream as the appellant had covered her mouth.

24. PW2 was JOR [name withheld]. He was PW1's father. He produced a Clinic Immunization Card for PW1 to show that she was born on 3rd April, 2007. He stated that on 26th January, 2018 at around 1:00p.m., he was called by PW1's teacher who informed him that PW1 did not appear to be her normal self but appeared to be very sick. He told her to examine the child and call him back. He indicated that she called and told him that she had examined PW1 and had seen blood on her pant. He then spoke to the head teacher who asked him to send someone to school. He stated that he sent PW1's Aunt, by the name R who took PW1 to Coast Province General Hospital (CPGH). PW2 was later informed that a report had been made to Changamwe Police Station. He went to CPGH at 8:30p.m., and they were told to go for the medical results on 29th January, 2018. He further stated that PW1 was given medicine to take for 1 month.

25. It was PW2's evidence that he later asked PW1 what had happened and she informed him that she had been defiled by a neighbour. She later identified the neighbour to him as the appellant. PW2 explained that often times, he used to accompany PW1 to the toilet but on that night, he slept heavily.

26. PW3 was RA, a cousin to PW2. She used to work as a nanny for his children. It was her evidence that on 26th January, 2018 she was called by PW2 who told her that there was an issue at PW1's school. He sent her to find out what had happened. She rushed to PW1's school and found her and teachers in a staff room. PW3 stated that PW1 had a high temperature and she could not walk. The teachers informed her that PW1 had alleged that she was defiled by a neighbour by the name of *Ali*. The head teacher advised them to report the matter at Changamwe Police Station and then go to CPGH. They did so. She indicated that it was on a Friday evening. PW1 was examined at CPGH and given medicine. They were told to return on 29th January, 2018.

27. PW3 further stated that *Ali* was said to be a neighbour. She knew him and that he used to stay in the 2nd house from the main door. She had seen him at the plot on different occasions.

28. It was PW3's evidence that when she saw PW1 on 26th January, 2018, she could not walk and they carried her to a Tuk Tuk. She stated that she had not seen PW1 that morning. PW3 further indicated that while at the hospital, PW1 confided in her that she had been defiled by *Ali* and she pointed out his house to her. She identified *Ali* as the appellant.

29. Doctor Salim Said of CPGH testified as PW4. He produced the P3 form for PW1, which he filled on 5th February, 2018. His testimony was that he found her hymen broken. He also observed healing abrasions around her vagina. He approximated the age of the injuries as 9 days and that the probable type of weapon which had caused them was a human penis. He classified the injuries as maim. The Doctor stated that he was presented with the PRC form on 29th January, 2018 whose findings he used to fill the P3 form.

30. PW5 was Quinter Atieno Lumuba a teacher in the school which PW1 was studying in. Her evidence was that on 26th January, 2018 PW1 told her she had pain on her thighs and there was blood in her urine. She examined her and saw blood stains on her pant. She gave PW1 a sanitary towel (sanitary pad) and showed her how to use it. PW5 stated that she saw it was not normal for PW1 to be in that condition, as she was too young and in class 3. PW5 indicated that she reported to the school management which called her parents. The following Monday, PW1 told her that she had been taken to hospital.

31. PW6, No. 96053, PC Jacqueline Orioki attached to Changamwe Police Station, conducted investigations in this case. She stated that on 26th January, 2018 PW1 was taken to the police station by her Aunt and a class teacher. They reported that she had been defiled by her neighbour. PW6 booked the report and advised the women to take PW1 to CPGH for examination. A PRC form was filled on 29th January, 2018 when she was examined. PW6 stated that on 27th January, 2018 the appellant was taken by members of the public to the police station. She later escorted PW1 to CPGH to have her P3 form filled.

32. On being put on his defence, the appellant denied having committed the offence. He said that he was a Turn boy with Jiwani Impex Transporters and that on 23rd January, 2018 he went to Migadini after traveling back from Kampala. He said he lived in a plot with 15 rooms and his house was the 2nd one on the left, from the entrance. He stated that PW1's house was the 3rd room from his, thus the 8th room from the gate and that her house was near the corridor towards the toilet. He said there were lights at the doorway to his room, PW1's room and at the toilets. He stated that they were never switched off. He said he used to use the 2nd toilet, while PW1 would use the third toilet.

33. The appellant said that the tenants living next to the toilets never used to close the doors to their rooms. He further said that on 27th January, 2018 he went to work at 8:00a.m., and at 9:30a.m., he was called by one Willy who told him he heard that a child was defiled on 22nd January, 2018 at the plot the appellant used to live in and he was the suspect. He indicated that he was arrested and taken to Changamwe Police Station when he went to his landlady's house in the evening.

34. The appellant indicated that a tenant by the name *Otis*, who used to stay in the 2nd house vacated it at night before end month on the night of 23rd January, 2018. He explained that there were 4 men who were tenants but he did not know if they were investigated by the police.

35. He claimed that a DNA test was not done on him. He denied that he knew who *Ali* was. He admitted that PW1 was his neighbour. He indicated that ordinarily the tenants would be asleep by midnight and it was not at all times that they would hear movement.

36. The appellant called Bijahi Said, DW2, as his witness. He stated that the appellant was one of his neighbours and that the appellant's house was the 2nd one on the left from the gate. He explained the positioning of electricity lights in the premises.

37. DW2 said that his house was the 4th one from the toilet and that they were usually the last ones to sleep as they would watch TV until late. He stated that they never used to close the door to their house because of the heat but there was a curtain at the door. He indicated that he would have heard if PW1 had made a sound while she was being defiled. He also stated that the tenant of the last room could see the toilets from her room.

38. DW3 was Felister Atieno Opiyo also known as Mama Fayaa or *Nyanya*. She stated that she had been the appellant's landlady since April, 2017. She said that that the appellant occupied the 2nd house on the left from the entrance. She also said that there were security lights along the corridor and at the toilet which were always on at night.

39. She further stated that on 27th January, 2018 she learnt from Edwina, the village elder that on the night of 21st January, 2018 and 22nd January, 2018, one of the tenants had been defiled by another tenant. She indicated that the appellant was not around but came back on 24th January, 2018. She further stated that most tenants never used to close the doors to their houses because of the heat and they could hear what was going on in the toilets from their houses.

40. DW3 said that one of his tenants by the name Otieno vacated from the room he used to occupy at night, on a Monday, without paying rent. She stated that he used to live in the 2nd house on the right, from the entrance.

ANALYSIS AND DETERMINATION

41. The duty of the first appellate court is to analyze and re-evaluate the evidence of the lower court and come to its own independent conclusion while noting that it has neither seen nor heard the witnesses testify and make an allowance for the said fact.

42. The issues for determination are:-

(i) If the medical reports corroborated the evidence of PW1 that she was defiled;

(ii) If the appellant was positively identified;

(iii) If the contradictions and/or inconsistencies in the lower court were fatal to the prosecution case;

(iv) If the prosecution proved its case beyond reasonable doubt; and

(v) If the sentence was harsh or excessive.

If the medical reports corroborated the evidence of PW1 that she was defiled.

43. PW1 was defiled on the midnight of 26th January, 2018. She informed her teacher, PW5, that she had pain on her thighs and there was blood in her urine. PW5 gave her a sanitary pad and showed her how to use it. She saw bloodstains on PW1's pant. She informed the school management who called PW1's father.

44. On the night of the incident as PW1 was locking the toilet which she and her family members used to use, she was accosted by a man. The man removed her clothes and his. Her lay her on the ground and defiled her twice as he blocked her mouth. She could not scream. Her Aunt, PW3, and another woman took her to CPGH where she was attended to, but since it was on a Friday evening, they were told to go back on 29th January, 2018.

45. Dr. Salim Said, PW4, produced the PRC and P3 forms. He stated that the PRC form was filled on 29th January, 2018 by Said Mwinyi, a nurse at CPGH, who examined PW1. A perusal of the said form reveals that PW1's outer genitalia was normal, she had healing abrasions on her vagina and her hymen was broken. PW4 examined PW1 on 5th February, 2018. He found the same injuries that were captured on the PRC form. The injuries were then 9 days old. PW4 stated that the abrasions were by then healing. The medical evidence adduced by PW4 was clear that PW1 had been defiled and it corroborated the evidence of PW1 to the said fact.

46. The appellant brought up the issue that no DNA was done on him and that PW1's blood stained clothes were not submitted to the Doctor. On the latter issue, PW1 did not state in her evidence that her clothes were blood stained. Her teacher is the one who said that PW1's pant was blood stained. Submissions of the blood stained pant to the Doctor would have been of no evidential value.

47. On the failure to undertake a DNA analysis of the appellant, Section 36 of the Sexual Offences Act provides that it is not a mandatory requirement in Sexual Offences. In ***Aml v Republic*** *[2012] eKLR,* the Court of Appeal held thus:-

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

48. Taking into account the totality of the evidence which was adduced by PW1 and the medical evidence adduced by PW4, the lack of a DNA examination did not weaken the prosecution case.

If the appellant was positively identified.

49. PW1's evidence was that she was defiled by her neighbour. The offence happened at midnight. She testified that she had gone to the toilet and after relieving herself, as she was about to lock the toilet door, a man held her. She stated that she saw him clearly as the security lights were on. She explained that the man removed her clothes and then he removed his at the verandah of the toilet. He lay her on the floor, covered her mouth and slept on top of her. He defiled her twice. He then stood up and went to fetch water to wash the blood from the floor. According to PW1, the appellant wiped the blood on the floor with a piece of cloth and then poured the water on the floor.

50. She stated that she did not know the name of the person who defiled her but he used to live in their plot near the gate. She identified him as the appellant. She also stated that the appellant told her that he would cut her if she informed her father. In her words she said that *"he was speaking softly in my ears."*

51. It was the evidence of PW3 that PW1 told her that she had been defiled by *Ali* and she pointed out his house to her. She identified *Ali* as the appellant. PW3 explained that the appellant used to stay in the second room from the main door. She indicated that he was known to her as she had seen him on different occasions.

52. PW1's father, PW2, stated that PW1 identified the neighbour who defiled her as the appellant. He explained that the appellant's house was the second from the gate, on the left side.

53. According to PW2, there were no lights on the night of 25th and 26th January, 2018 as the electricity lights were off. He thought they had burnt out but he did not record it in his statement.

54. The foregoing indicates that the only evidence as to the identification of the appellant was that of PW1, who was the victim of defilement. She was categorical that there were security lights along the verandah to the toilets.

55. In his defence, the appellant described the source of light in the place where he lived as being above his door, PW1's door and at the

toilets. DW2 echoed the appellant's words as to the source of light. DW3, who was the landlady of the premises where the appellant, PW1 and PW2 were residing also stated that there were security lights along the corridor and at the toilet, which were always on at night. It is therefore apparent from the evidence of PW1, the appellant and his two witnesses that the premises within which the incident happened had sufficient electric light that enabled PW1 to identify the appellant as her assailant. This court finds that the circumstances were ideal for positive identification.

56. In **Nzaro v Republic** [1991] KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

57. In **Kariuki Njiru and 7 Others v Republic**, the Court of Appeal held thus on the issue of identification:-

> ***"The law on identification is well settled, and this court has from time to time said that evidence relative to identification must be scrutinized and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."***

58. This court has no reason to doubt that PW1 was able to identify the person who defiled her. It is apparent that PW1 had adequate time to recognize the appellant. Further, the act of defilement happened when the two of them were in close proximity in a well lit area. The appellant's identification was by way of recognition he was PW1's neighbour. She pointed out the appellant's house to PW2 and PW3. She pointed out the appellant to her father, PW2. It is this court's finding that the appellant's identification by PW1 was free from the possibility of error and the issue of mistaken identity does not arise.

If the contradictions and/or inconsistencies in the lower court proceedings were fatal to the prosecution's case.

59. The appellant's Counsel submitted that PW1 said that she did not know the name of the man who defiled her, while PW3 informed the court that she told her teacher that it was *Ali* who had defiled her. It was contended that since the appellant was not known as *Ali*, he should have been given the benefit of the doubt by having the contradiction resolved in his favour. In the case of **Erick Onyango Odenge Vs Republic** [2014] eKLR, the court cited the decision of the Court of Appeal of Uganda in **Twehangane Alfred v Uganda** [2003] UGCA, 6 to show that it is not every contradiction that calls for the rejection of evidence. The said court stated thus:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness 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's case."***

60. In this case, PW1's evidence was that she did not know the name of the man who defiled her. She however knew him physically and the house he used to live in. It was PW3 who testified that PW1 told her that the man who defiled her was called *Ali*. PW1 pointed out the house of the man who defiled her to PW3. She described the appellant's house as the 2nd one from the entrance. The evidence adduced left no doubt that the person who was being referred to by PW1, PW2 and PW3 was the appellant, irrespective of whether he was commonly known as *Ali* or not.

61. The other contradiction in the evidence of prosecution witnesses was that PW1 said there was electric light at the verandah where she was defiled but PW2 said that there was no light as the bulbs seemed to have burnt out. The evidence of PW2 was that he slept soundly on the night of 26th January, 2018. He did not even hear PW1 going out of the room they were sleeping in. PW2 did not state that he went to the toilet that night.

62. In view of the evidence of PW1, as well of the appellant, DW2 and DW3 that the electric lights were always on at night at the designated places already mentioned in their evidence, this court believes their evidence and not the evidence of PW2 in his claim that there was no electric light on the night of 26th January, 2018. It is therefore my finding that the contradictions on record cannot be resolved in favour of the appellant.

If the prosecution proved its case beyond reasonable doubt.

63. The age of PW1 is not in issue as her Clinic Immunization Card was produced in evidence. Her date of birth was established as 3rd April, 2007. She was 2 months shy of 11 years at the time the offence was committed. Medical evidence in the form of PRC and P3 forms was adduced which proved that she had healing abrasions at the time she was examined in hospital. Her hymen was also missing.

64. Mr. Gunga Advocate suggested that PW1 could have lost her hymen through other means and not necessarily through defilement. This court holds a contrary position as the evidence adduced by PW1 was very clear that the appellant forced himself on her and defiled her twice. She bled as a result and the appellant cleaned up the blood from the floor of the verandah to the toilet, where the offence was committed. In her examination-in-chief, she stated that no one else had defiled her before the appellant did. It therefore boils down to the fact that the missing hymen in PW1's vagina was as a result of being penetrated by the appellant's penis and not by insertion of fingers as was suggested.

65.The appellant's witnesses and his Counsel submitted that PW1 could not have been defiled along the verandah leading to the toilets as some of the tenants such as DW2 used to sleep very late. According to the appellant, some of the tenants used to sleep between 11.00 p.m., and midnight. DW2 said that he used to be the last one to sleep as he would watch movies until late. DW3 stated that most of the tenants never used to close the doors to their rooms due to the heat. She was of the view that they could hear what was going on in the toilets. It must be noted that DW3 used to live at a different place and not within the premises where the offence occurred. Her evidence to the said fact that other tenants would have heard what happened at the verandah to the toilets when PW1 was being defiled, is highly speculative.

66. As for DW2's claim that he used to be the last one to sleep and would have heard if the complainant had made a sound while being defiled, PW1's evidence was to the effect that PW1 covered her mouth and she could not have shouted for help. She also stated that the appellant spoke to her softly in her ears. Further, she said that their neighbours were asleep at the time she was defiled. In the circumstances recounted by PW1 in her evidence, it would not have been possible for her neighbours to have heard her being defiled by the appellant.

67. Another issue that was raised by the appellant's Counsel was that PW1 failed to inform her father and her Aunt, about the incident before she went to school. According to PW1, the appellant threatened to cut her if she told her father what had happened. In her evidence she stated that she wanted to tell her father but she was afraid. She did not see her Aunt that morning before she left for school. Her Aunt, PW3, said that by the time she reported to work at PW2's house, it was 8.00 a.m., and there was no one in the said house. PW1 stated that she wanted to tell her Aunt about the incident at lunch time, but the latter left before she could do so.

68. As at 2.00 p.m., of the day of the defilement, PW1 had pains on her thighs and had seen blood in her urine. She reported to PW5, who saw blood stains on her pant. PW5 alerted the school management after she gave PW1 a pad to wear. Later after PW1 removed it, PW5 observed that it was having blood. PW5 found it odd that PW1 was bleeding from her vagina at such a young age. PW1's father was called and asked to collect his child from school. This court sees nothing unusual or untoward about the conduct of PW1 of keeping quiet about what had happened to her. At her age, it is not surprising that she took the threat issued by the appellant seriously. Nothing turns on that ground of appeal.

69. The appellant in his defence and in the evidence adduced by his witnesses tried to implicate his former neighbour by the name of Odhiambo *(Odhis)* because he was a young single man, who vacated from one of DW3's rooms unceremoniously, without paying rent. DW3's bitterness against *Odhis* was evident for leaving without settling his rent. The appellant, DW2 and DW3 all spoke of them having been told of a defilement that occurred on the night of 21st January, 2018 when *Odhis* was still residing in one of the rooms in the premises where the offence herein occurred. They insinuated that the said *Odhis* committed the offence because he moved out of his room at night.

70. Inasmuch as the appellant, DW2 and DW3 tried to implicate *Odhis* in the defilement of PW1, there was no evidence that was led by the prosecution to show his culpability in the defilement of PW1. In any event, PW1 in cross-examination said that she knew *Odhis* who used to stay in a room on the left side towards the gate. She further said that *Odhis* moved out at night before the incident. That she and other children helped him to move his things, but she did not enter his house. In re-examination she denied that *Odhis* was the one who defiled her.

71. In cross-examination, the appellant stated that *Odhis* moved out of his room on the night of 23rd and 24th January, 2018. Going by the evidence of PW1 and the appellant, it is farfetched to suggest that *Odhis* defiled PW1. The charge sheet clearly indicates that the offence occurred on 26th January, 2018 by that time *Odhis* had vacated the room he occupied in DW3's premises. The *alibi* defence raised by the appellant that the offence occurred on the night of 21st January, 2018 when he was away cannot hold sway as the offence occurred on 26th January, 2013. According to the appellant, he returned to Mombasa after a trip to Uganda on 23rd January, 2018. It thus follows that he was at the place he was living in Migadini on the night of the incident. It is therefore apparent that the defence raised by the appellant and the evidence of his 2 witnesses crumbled like a house of cards in the face of the evidence adduced by prosecution witnesses.

72. The Trial Court thoroughly analyzed the evidence adduced and properly directed her mind to the applicable law. She visited the *locus in quo* (scene) and saw that the number of electric bulbs available at the scene were able to illuminate the area well for positive identification to take place. The said court also observed the demeanor of the victim during her testimony and noted that she remained consistent and was not shaken during cross-examination by the defence Counsel. The Trial Court also found that the provisions of Section 124 of the Evidence Act were applicable in this case. Having analyzed and re-evaluated the evidence as is required of a 1st appellate court, I am in concurrence with Ms Mwangeka that the prosecution proved its case beyond reasonable doubt. I uphold the conviction againist the appellant.

If the sentence was harsh or excessive.

73. The appellant was sentenced to life imprisonment as per the provisions of Section 8(1) as read with section 8(2) of the Sexual Offences Act. The Trial Court held that the provisions of Section 8(2) are crafted in mandatory terms. This court notes that the case of **Francis Karioko Muruatetu v Republic** [2017] eKLR set the pace for review of sentences which are mandatory in nature depending on the circumstances of each case.

74. This court is of the view that the sentence of life imprisonment was excessive. I hereby set aside the sentence of life imprisonment and substitute it with a sentence of 20 years imprisonment with effect from 11th July, 2019 when the appellant was sentenced by the Trial Court. This court notes that the appellant was out on bond pending trial. The appeal succeeds only in regard to the sentence. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **12th** day of **May, 2020**. **Judgment delivered through microsoft Teams online platform due to the covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present

Mr. Mwinga Chea holding brief for Mr. Gunga Mwinga for the appellant

Ms Valerie Ongeti, Prosecution Counsel - for the DPP

Mr. Mohamed Mohamud - Court Assistant