



**Charles Ouma Ayugi v Republic (Criminal Appeal 11 of 2019)
[2020] KEHC 5861 (KLR) (5 May 2020) (Judgment)**

Charles Ouma Ayugi v Republic [2020] eKLR

Neutral citation: [2020] KEHC 5861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL 11 OF 2019**

RE ABURILI, J

MAY 5, 2020

BETWEEN

CHARLES OUMA AYUGI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against both conviction and sentence dated 14th February 2019 in Criminal Case No. 43 of 2018 in the Principal Magistrate's Court at Bondo before Hon. E.N Wasike SRM)

JUDGMENT

1. The appellant herein Charles Ouma Ayugi was charged with the offense of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act No. 3 of 2006 and the particulars of the offence being that on the day of 7th July 2018 at around 1500 hours at [particulars withheld] Sub-location in Gem Sub-county within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of EA a child aged 8 years. In alternative the appellant faced the charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 where the particulars of the offence were that on the day of 7th July 2018 at around 1500 hours at [particulars withheld] Sub-location in Gem Sub-county within Siaya County intentionally and indecently touched the vagina of EA. with his penis a child aged 8 years.
2. The appellant was arraigned before Hon. E.N Wasike SRM and he denied the charges for both the main count and the alternative count. He was subsequently tried and vide the judgment delivered on 14th February 2019 by Hon. E.N Wasike SRM, he was convicted of the main charge and sentenced to 30 years' imprisonment.
3. Aggrieved by this conviction and sentence, the Appellant herein instituted this appeal vide the petition dated 21.02.2019 and filed in court on 23.02.2019 setting out the following grounds:



1. That the potential witness who was PW2 was never summoned by the trial court to come and testify
2. That PW3 relied on information given to her by PW2 who never testified.
3. That there was no proper corroboration of the evidence between the witnesses and the same was not taken into account by the trial magistrate
4. That there was unresolved dispute between the appellant and the PW2 whom he had earlier accused and charged for offence of arson of the appellant's residential house
5. That the case was not proved beyond reasonable doubt
6. That the appellant could not recall what was adduced before court and prayed for copies of the proceedings to adduce more grounds.
4. The appellant urged this court to allow his appeal in its entirety and the conviction be quashed and the sentence set aside and the appellant be set at liberty.
5. The appeal was fixed for hearing for 28.01.2020 after being adjourned on 10.12.2019. On the hearing date, the appellant relied on his submissions which he had earlier filed to support the appeal.
6. Opposing the appeal, Mr. Okachi, Senior Principal Prosecution Counsel submitted that the evidence adduced proved the guilt of the appellant beyond reasonable doubt and further that the victim knew the appellant very well. That he nabbed her using money as a bait and he pulled her in Eddy's place and defiled her after holding her by the neck and thus the conviction was sound and the sentence lawful and lenient.
7. In rejoinder, the appellant submitted orally that Eddy who reported that he found him defiling the child did not testify and that the said Eddy was his brother who had burned his house and whom the appellant had reported to the police and was charged and convicted of arson and sentenced. As such, they were enemies and that he used to threaten the appellant when drunk. That he was thus suffering because of him (Eddy). That Eddy was not married and depended on PW1 for food.
8. This being a first appellate court, I must, as stipulated in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* [2005] 1 KLR 174:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E.A. 424.
9. This court must therefore freshly and exhaustively reassess the entire evidence adduced before the trial court and arrive at its own independent decision after weighing the conflicting evidence if any, and arrive at a decision as to whether the prosecution proved the offence of defilement and in the alternative the offence of committing an indecent act with a child.
10. Revisiting the evidence before the trial court, PW1 the complainant (E.A) testified without taking an oath after *voire dire* examination and stated that she was 8 years and a class three student at [particulars



withheld] Primary School. She recalled that on 7.7.2018, at 3pm, she was at home with her younger sister and she went to fetch firewood alone when the appellant called her and told her that he wanted to send her to go and buy something for him. That when she was about to take the money, the appellant caught her hand and took her to Eddy's house, took her to the bed and caught her neck. The complainant was stood down due to her inaudibility due to rain. On the following day, when the witness took to the witness stand, she testified that the appellant took her on to the bed and removed her pant and also removed his pant. She stated that the appellant "put his thing into my thing" and she felt pain and screamed for help and the appellant stopped. That in the process Eddy came and was drunk and shouting. That Ouma the appellant herein opened the door and went away. That after that she went home and explained to her mother what had happened and her mother took her to hospital. On the following day, they reported the matter to Akala police station and the appellant was later arrested. She added that it was her first time to have such an experience.

11. In cross examination, she testified that she knew the appellant very well and that on the material day, she found him at Eddy's place and that when he caught her hand, he did not beat her. Further that he pulled her into the house and during the incident they were two of them but that after the incident, she left him in the house. That she did not explain to Eddy what had happened but went to explain to her mother and that her mother came back at night and so she told her the following day as she returned when the victim was asleep.
12. PW2 SAO the mother to the complainant E.A. testified that on 9.7.2018 she was in her home when her neighbor by the name of Edwin Omondi Obuya went and asked her whether she was aware of what had happened to E (complainant) and she answered in the negative. That he explained to her that he had gone to one Omondi's house and when returned, he found EA (the complainant) screaming in his Edwin's house and that the person who was in the house opened the door and the child went out and that when he entered his house he found the appellant on the bed. PW2 then took the child to Kambare dispensary where she was treated and examined after which she reported the matter at Akala Police station and recorded a statement and that the police referred her to the hospital and a doctor came at Akala Police station and examined the child and she gave the police officer the documents. She stated that the appellant was well known to her as he was her neighbor.
13. She further testified that she talked to the child who explained to her how the appellant called her pretending that he wanted to send her but took her to Eddy's [Edwin's] house and defiled her. She stated that the complainant was 8 years old as per the birth certificate, as she was born on 15.2.2010. She identified a copy of the said birth certificate, treatment note and the P3 form as MFI-1, MFI-2 and MFI-3 respectively.
14. In cross examination by the appellant, PW2 testified that she was at home on 8.7.2018 and Eddy [Edwin] went and explained to her what had happened but that when the complainant went home, she did not immediately inform her mother of what had happened to her as she was afraid. That the incident happened on 7.7.2018 and Eddy explained to her on 8.7.2018. That she took the complainant to the hospital on 8.7.2018 and she took her to Kambere dispensary and later took her to Akala Police station where she made a report and that she did not report at Kambere AP camp. That she did not witness what happened but relied on what she had been told by Eddy and the Complainant and further that Eddy was not a witness in the case.
15. PW3 Jared Obiero Opondo a Clinical Officer in-charge of Bondo Sub-county Hospital testified that he filled the complainant's P3 form on 10.7.2018 when the minor was taken to hospital on the allegations of having been defiled on 7.7.2018. On examination of the complainant, he found scratch marks on the neck and when he checked the genitalia, there were bruises on the labia minora. That he took laboratory tests and HIV was non-reactive and that there was nothing of medical importance. The age



- of the injuries was two days. That he came to a conclusion that there was penetration on the genitalia of the complainant. He produced the P3 form as P Exhibi 3.
16. In cross examination by the appellant, PW3 stated that he had been a Clinical Officer for 30 years and that he examined the child on 13.7.2018. That he did not treat the patient but filled the P3 form on 13.7.2018. That he saw injuries on the neck and the genitalia and that he did not examine the appellant.
 17. PW4 No. 104780 Police Constable (W) Emily Pepela attached to Akala Police Station and the investigating officer in the case testified that on 10.7.2018 at 5.00pm she was on duty at the police station when a case of defilement was reported by the complainant and her mother that on 7.7.2018 the complainant was defiled by the appellant herein. The witness took the complainant to Akala Health Centre for treatment and examination and later went to the police station where she recorded the statement of the complainant and her mother and issued the complainant with a P3 form which was filled and returned to the station. Later the accused (appellant herein) was arrested and charged.
 18. The witness further testified that the complainant told her that on the material day, when her mother had gone to do business, she was at home when the appellant called her and pretended that he wanted to send her but he took her to the house of one Obuya and that he defiled her. That Eddy (Obuya) was not in the house at the time of the incident and that the appellant disappeared after defiling her. She stated that the complainant was 8 years old. She produced the complainant's birth certificate as P. Exhibi 1.
 19. In cross examination by the appellant, she testified that she recorded the complainant's statement and that of her mother and that she escorted the complainant to the hospital and the doctor said the complainant had been defiled. She further stated that Edwin Obuya recorded his statement with the police and when he was released he disappeared although he is the one who reported the matter to the complainant's mother. She stated that Obuya was not the only witness and that she could not tell whether Edwin Obuya wanted to fix him.
 20. Placed on his defense, the appellant identified himself as Charles Ouma Ayugi and testified on oath as DW1 and stated that he was a mason and that on 7.7.2018 he was in Kambare Secondary School where they were constructing some classrooms and that he returned home at 6.00pm and that he could not remember any incident which occurred. He stated that on 5.08.2018 he was at home and as he was clearing the compound, he saw a police officer who went and talked to him and told him that there was a report at the AP camp and that he should accompany the officer, which he obliged. That he was escorted to Akala Police Station where he was detained and on the following day he was arraigned and charged with the offence. He denied committing the offence. He then added that although he was given the statements of one Edwin Omondi Obuya, the latter was not called to testify in court.
 21. In cross examination by the prosecutor, the appellant stated that he knew the complainant and that she was his neighbor. He stated that he did not have any grudge with her but that he had a grudge with Edwin Obuya as the latter had burnt the appellant's house. He denied taking the complainant to Edwin's house. He maintained that the criminal case was as a result of the grudge between him and the said Edwin. He denied being at home, on 7.7.2018 at 3.00PM although he had no witness to confirm the position. He reiterated that he returned home at 6.00pm but that he had no letter of employment. The appellant further denied meeting Edwin on the material day of alleged offence.
 22. The trial court upon analysis of the evidence on record found the appellant guilty of the main charge of defilement, convicted him and sentenced the appellant to serve thirty (30) years imprisonment, after considering his mitigation.



Determination

23. Having considered the evidence tendered in the trial court by both the prosecution and the appellant (in compliance with the duty of this court as was laid down in *Okeno v. Republic* (supra) and re-stated in *Kiilu and another v R* (supra)), the grounds of appeal and the written submissions by the appellant as highlighted orally and opposition by the state through Senior Principal Prosecution Counsel Mr David Okachi, in my humble view, the issues that flow for determination are:
1. Whether the evidence by the prosecution proved the charge against the appellant beyond any reasonable doubt
 2. Whether there was proper corroboration of the evidence by the witnesses
 3. Whether there was prejudice by the prosecution not calling “PW2” Eddy Obuya as the witness and whether the evidence by the said “PW2” Edwin Obuya would be relied by the PW3
 4. Whether the unresolved dispute (if any) between the appellant and the “PW2” Edwin Obuya who had not been called could be used as a defense by the appellant
 5. Whether the trial court was right in convicting the appellant and sentencing him to the sentence imposed.
 6. What orders can the court give in the circumstances?
24. On whether the evidence by the prosecution proved the charge against the appellant beyond any reasonable doubt, it was a ground of appeal that the prosecution did not proof its case beyond any reasonable doubt. The appellant submitted that the evidence was inconsistent, discredited the provisions of section 124 of the Evidence Act and further that the trial court disregarded the appellant’s defense of alibi.
25. In opposing the appeal, Mr. Okachi, Senior Principal Prosecution Counsel submitted that the evidence adduced proved the guilt of the appellant beyond reasonable doubt and that the appeal should be dismissed.
26. It is trite law that the prosecution in any criminal case has the burden of proving every element of the offence an accused is charged with. This burden of proof was laid down in the locus classicus case of *Woolmington v DPP* [1935] AC 462 and further that the said elements must be proved beyond any reasonable doubt as was defined by Lord Denning in *Miller v Ministry of Pensions*, [1947] 2All ER 372 where he stated that:
- “...That degree is well settled. 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 fanciful 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 favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
27. The prosecution bore the burden of proving that the appellant herein had indeed committed the offence in the main charge (defilement) or in the alternative, the charge of indecent act with a child. Further, it is the duty of this court to critically reassess the evidence and see whether the same proved the main charge or the alternative charge.



28. Therefore, on whether the prosecution proved the offence of defilement, Section 8(1) of the Sexual Offences Act of 2006 defines defilement as:
- “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
29. For an accused person to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. In *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013 it was held:
- “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
30. Section 2 of the Act defines “Penetration” as “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
31. The question is whether the above elements were proved to the required standard?
32. On whether penetration was proved, the victim who testified as PW1 stated that on 7.7.2018, at 3pm she was at home with her younger sister and that she went to fetch firewood alone when the appellant called her and told her that he wanted to send her to go and buy something for him. That when she was about to take the money, the appellant caught her hand and took her to Eddy’s house, placed her onto the bed, removed her pant and removed his pant too and that “he put his thing into my thing” and she felt pain and screamed for help and the appellant stopped, and that, that is when Eddy came after he heard her screams. That she went to her home and reported to her mother who took her to hospital. This testimony was consistent even in her cross examination.
33. The evidence of penetration (putting his thing into her thing) was corroborated by the evidence of the clinical officer who testified as PW3 that he did a detailed examination on the victim and he saw scratch marks on the neck and when he checked the genitalia, there were bruises on the labia minora and the age of the injuries was two days. He concluded that there was penetration on the genitalia of the complainant. This evidence too was consistent even in cross examination. The evidence of scratch marks on the complainant’s neck is consistent with the claim by the complainant that the appellant put her on the bed and caught her neck.
34. Considering the two sets of evidence, I find that indeed there was penetration of the genitals of the complainant. The evidence of the complainant was well corroborated with that of the Clinical Officer. As defined in section 2 of the Sexual Offences Act 2006, “penetration” is the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
35. There was no contrary evidence. The appellant however raised the defense of alibi which will be discussed later in this judgment. I therefore find that the trial court did not err in finding that there was penetration.
36. On proof that the complainant was a minor, it was the complainant’s (PW1) testimony that she was 8 years old. This evidence was corroborated by that of PW2 her mother who testified that the complainant was 8 years. A birth certificate (being number 5165201) was produced as an Exhibit by the investigating officer showing that the complainant was born on 15.02.2010. Further, the P3 form produced as Exh 3), showed the age of the complainant to be 8 years.



37. The importance of proving age was emphasized by Malindi Court of Appeal in Criminal Appeal No. 504 of 2010 - Kaingu Elias Kasomo vs. Republic where it was stated that:

“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

38. Proof of age of a victim of defilement can be by way of direct testimony of the victim, or even by observation and common sense. In Daniel Maina Wambugu v Republic [2018] eKLR, Nyakundi J stated:

“...It is trite that the prosecution ought to prove the age of the child by either direct testimony of the parent, guardian, or victim herself, birth certificate, medical age assessment or by other expert means to finally establish the age.”

39. Further in Joseph Kieti Seet v Republic [2014] eKlr, the High Court at Machakos (Mutende J) held:

“It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense”

40. The evidence of the complainant, that of PW2 and that of the Clinical Officer as indicated on the P3 combined with the age on the birth certificate clearly show that at the time of the alleged offence, the complainant was 8 years. I therefore find and hold that the learned trial magistrate was right and did not err in finding that the complainant was indeed a minor.

41. On whether the appellant was the one who penetrated the complainant’s genitalia, the complainant testified that on the material day at 3.00pm, she was at home with her younger sister and she went to fetch firewood alone when the appellant called her and told her that he wanted to send her to go and buy something for him. That when she was about to take the money, the appellant caught her hand and took her to Eddy’s house, took her to the bed and caught her neck and then he defiled her (inserted his thing inside her thing) and that she screamed attracting the attention of one Eddy. In cross examination, she testified that she knew the appellant very well and that on the material day, she found him at Eddy’s place and that he caught her hand. The Clinical Officer in his examination of the complainant found that she had an injury on the neck, apart from the genitalia being bruised.

42. In his defense, the appellant testified that he was not at home on the material day and time but went back at 6.00pm and that he could not remember any incident which occurred. His testimony alluded to the fact that he learnt of the same after he was arrested. In cross examination by the state, he testified that he knew the complainant and that she was his neighbor.

a. From the above testimony, it is clear that the complainant and the appellant were well known to each other as neighbours. In addition, the incident is said to have taken place at 3pm which was in broad daylight. The appellant in his defence stated that he knew the complainant and even called her by name as E.A saying “ I know E.A. She is my neighbor.” The question is whether



the appellant, being known to the complainant and the complainant stating that the offence took place in broad daylight at 3 pm, it was the appellant who caused penetration (defiled the complainant)?

43. In his judgment, the learned trial magistrate observed that the evidence which was available against the accused (the appellant herein) was that of PW1 (complainant). Indeed, the only direct evidence linking the appellant to the offence is that of the complainant as PW2 and PW4 basically relied on what they had been told.

44. Nonetheless, section 124 of the Evidence Act Cap 80 of the Laws of Kenya provides that:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” [Emphasis added].

45. Section 124 of the Evidence Act allows a court to rely on the evidence of a minor in cases of sexual offences and thus the court could rely on the evidence of PW1 alone. What the law requires is that the court does record in the proceedings, the reasons why the court is satisfied that the alleged minor (victim) was telling the truth.

46. The trial court record shows that the learned trial magistrate noted as follows:

“I have carefully considered the above provisions of the law. I have also considered the reasons as to why Eddy was not called as a witness in this case. I have also considered the evidence of PW1. I wish to point out that I had the opportunity of observing the demeanor of the complainant during her testimony. I did not note anything that would have suggested that she was not telling the truth. I am satisfied that she was a credible witness. As such I am of the finding that the failure to call Eddy as a witness in this case is not fatal to the prosecution’s case.”

47. The above section of the judgment of the trial court is highlighted because, as was held in *Okeno v. Republic* (supra), “it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.” [Emphasis added].

48. In *Erick Onyango Ondeng’ v Republic* [2014] eKLR the Court of Appeal stated:

“We note that the trial court, before accepting the evidence of PW2 on oath, conducted a *voire dire* examination and specifically noted that it was satisfied that PW2 understood the nature of the oath. PW2 was subjected to cross-examination after she gave her evidence. We may add that the proviso to section 124 of the Evidence Act as amended Act No. 5 of 2003 and Act No. 3 of 2006 allowed the trial court to convict the appellant on the evidence of PW2 alone, as the victim of a sexual offence, if for reasons to be recorded, the court was satisfied



that she was telling the truth. (See Mohamed vs. Republic [2006] 2 KLR 138 and Geoffrey Kioji v Republic, Crim. App. No. 270 of 2010 (Nyeri). The trial court specifically noted in the judgement that it was impressed by PW2 as a witness of truth, who spoke nothing but the truth. (emphasis added)

49. In the instant case, the learned trial magistrate indeed had the opportunity of observing the demeanor of the complainant during her testimony. Since this evidence (as to the identity of the appellant) was not corroborated by any other evidence, and bearing in mind that the law under section 124 of the Evidence Act allows admission of evidence of a minor without corroboration in sexual offences, and further noting the caution in Okeno v R (supra), I find and hold that the finding of the learned trial court cannot be faulted. The trial court had the opportunity of seeing and observing the complainant's demeanor and this court not having had that opportunity, I have no reason to differ with the factual findings of the trial magistrate. I believe in the holding that the appellant was positively identified and recognized by the complainant as the person who caused the penetration of the complainant's genitalia.
50. Accordingly, I find and hold that the prosecution proved beyond any reasonable doubt, all the elements of the offence of defilement against the appellant.
51. On whether there was proper corroboration of the evidence by the prosecution witnesses, I observe that the complainant was a minor aged 8 years and the case is a sexual offence one. Where in a sexual offence case, the only available evidence is that of the victim who is a minor, then the law under section 124 of the Evidence Act above cited allows that such evidence does not need corroboration and the court can make its decision based on that evidence alone.
52. Further, as observed above, the trial court did record the reasons as to why it relied on and believed the evidence of the PW1 alone. In my humble view, therefore, the trial court was right in convicting the appellant on uncorroborated evidence on the identity of the appellant who was well known to her. The appellant too conceded that he knew the complainant who was his neighbor. The possibility of mistaken identity is therefore nil, considering the fact that the offence took place at about 3pm in broad daylight. Corroboration was not required in this case. It was a case where the law allows admission of uncorroborated evidence, although the evidence by PW1 as to penetration was corroborated by that of the Clinical Officer.
53. Accordingly, the assertion by the appellant that the evidence of the complainant was not corroborated is devoid of merit. The ground of appeal on lack of corroboration fails and is dismissed.
54. On whether there was prejudice by the prosecution's failure to call Eddy Obuya "PW2" as the witness and whether PW3 relied on the information given by "PW2" who was not called to testify, from the petition of appeal, the appellant raised a ground to the effect that the potential witness who was supposed to be 'PW2' Eddy Obuya but who was never summoned by the trial court to come and testify and further that PW3 relied on the information given to her by the said 'PW2' who never testified.
55. What the appellant refers to as "PW2" and who was not called to testify, from the trial court record, and also the submissions filed on appeal, is that, the appellant took issue with the failure to summon one, Edwin Obuya, in whose house and bed PW1 stated that the appellant defiled her, yet it was the said Edwin or Eddy who heard her screams and went to find the appellant defiling her, and went and told PW2 her mother the following day of what he knew had happened to the complainant.
56. The question is whether failure to call Eddy Obuya to testify against the appellant was prejudicial to the prosecution's case or to the appellant and whether, had the said Eddy been called, he could have given evidence that would have been adverse to the prosecution's case?



57. As stated elsewhere in this judgment, the instant case was one where the law allows the court to convict on uncorroborated evidence, provided the conditions in section 124 (the proviso therein) are met. It follows that the court could convict on the evidence of PW1 only. This evidence of PW1 was nonetheless corroborated by that of PW3 (the Clinical Officer) on the question of penetration of the complainant's genitalia. The trial court also believed that the complainant was telling the truth and although the appellant claimed that he had a grudge with the said prospective witness, there is no evidence on record to show that the trial court relied on the evidence of Eddy Obuya to convict the appellant. That being the case, I find no prejudice occasioned to the appellant by the prosecution's failure to call Eddy as a witness to corroborate the evidence of PW1. Furthermore, the investigating officer was clear in her testimony that albeit they recorded the statement of the said prospective witness, he disappeared after recording the statement.
58. The Court of Appeal in *Richard Munene v Republic* [2018] eKLR held that although the elementary principle of criminal law is that the prosecution must avail all witnesses necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obliged to call a superfluity of witnesses. This position is grounded in section 143 of Evidence Act which provides:
- “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
59. In *Bukenya & Others v Uganda* [1972] EA 549 which decision is widely accepted as the locus classicus in matters failure to call witnesses, and cited with approval by this court in *Republic v George Onyango Anyang & another* [2016] eKLR (per J.A. Makau J, the court held:
- “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
- (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.
60. The reason why the trial court did not call or summon the attendance of the so-called “PW2” was that his evidence was not necessary. The investigating officer clearly testified that the said Edwin Obuya recorded a statement with the police but that he then disappeared. Furthermore, the appellant herein claims that the witness was his own brother and that the said “witness” had burnt his (appellant's) house hence the said witness was bitter with the appellant. That being the case, I find that no prejudice was occasioned by the failure to call Eddy, the trial court having believed the evidence of the complainant child. As stated elsewhere in this judgment, the trial court never relied on the evidence of Edwin(Eddy) Obuya to reach the conclusion that the appellant must have committed the offence with which he was charged.
61. On whether PW3 relied on the information given by “PW2” who was not called to testify, PW3 was the Clinical Officer who examined the complainant. There is nothing in the trial court record to show that the said witness relied on the evidence of “PW2” in this case, Edwin Obuya to fill the P3 form for the complainant. The so called Evidence of Eddy who was never called as witness is no evidence or at all hence it could not have been a basis for the appellant's conviction.



62. On whether the unresolved dispute (if any) between the appellant and the purported “PW2” Eddy Obuya who had not been called as a witness could be used as a defense by the appellant, the appellant in his petition of appeal claimed that there was unresolved dispute between him and the “PW2’ (Eddy) whom the appellant had earlier accused of arson and led to his (Eddy’s) imprisonment. The appellant in adducing that evidence wanted to persuade the court to find that the so called “PW2” (Eddy) could have been revenging for the same and as such framing the appellant to have committed the offence. Nonetheless in the trial court, the appellant did not tender any evidence of the existence of the said case or even the court where such case was filed. That being the case, I find that this ground fails. The same is dismissed.
63. On whether the conviction of the appellant and the sentence imposed was sound and lawful, the appellant in his petition of appeal prayed for the conviction to be quashed and the sentence set aside. As found above, the prosecution was able to prove to the required standard that the appellant herein committed the offence of the defilement. That the circumstances of the case did not require corroboration. However, on the issue of penetration, there was corroboration by the evidence of the Clinical Officer. Who examined the complainant and confirmed that she was defiled. In the premises, it is my humble view that the trial court did not err in convicting the appellant for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. There was therefore no necessity for consideration of the alternative charge of committing an indecent act with the child, the trial court having satisfied itself that the prosecution had proved the main charge beyond reasonable doubt, as was held by the Court of Appeal in *David Ndumba v Republic* [2013] eKLR that:
- “ 18. ..On the issue of the alternative charge we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. v Republic*, – Criminal Appeal No. 342 of 2008, this Court held:
- “The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge...”
64. On sentencing, Odunga J held in *Simon Kipkurui Kimori v Republic* [2019] eKLR- Per G.V Odunga J at paragraph 5) and I agree that:
- “it is trite law that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by the trial court simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking,” “startling” or “disturbingly inappropriate.”
65. The learned judge in the above judgment further held, (at paragraph 9):
- “The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that: “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of



the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist...”

66. Section 8(2) of the Sexual Offences Act of 2006 provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction shall be sentenced to imprisonment for life. This sentence is the mandatory punishment. However, as it can be seen from the trial court judgment, the trial court sentenced the accused to serve 30 years imprisonment, upon convicting him. In sentencing the appellant, the trial court observed that “I have considered the offence and the mitigation. This is a serious offence which call for deterrence sentence as captured in section 8(2) of the Sexual Offences Act. In the circumstances, I sentence the accused person to 30 years’ imprisonment.”
67. In my humble view, the sentencing of the appellant to 30 years’ imprisonment as opposed to mandatory life imprisonment was lawful and lenient and therefore this court ought not to interfere with the discretion exercised by the trial court as the trial court must have, in sentencing the appellant to serve 30 years’ imprisonment, taken into account the decision by the Supreme Court of Kenya in the now well celebrated case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, Petition No. 15 of 2015, where (in relation to section 204 of the Penal Code- murder) it was held, inter alia:
- “(48) Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right...”
68. The above decision has been imported into Sexual Offences. For instance, the Court of Appeal in Jared Koita Injiri v Republic [2019] eKLR held:
- “In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”
69. Therefore, the trial court having exercised discretion in sentencing the appellant to serve 30 years imprisonment as opposed to the mandatory life imprisonment, I find and hold that the trial court took into account the new developments in the law as espoused in the Francis Muruatetu v Republic



(supra) case. The sentence imposed, in my humble view, was lawful and lenient, considering the age of the child defiled and seriousness of the offence.

70. In the end, I find no reason to interfere with the lawful lenient sentence imposed on the appellant. I uphold the sentence of thirty years' imprisonment imposed on the appellant.

71. Accordingly, this appeal against conviction and sentence is hereby dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 5TH DAY OF MAY, 2020 VIA SKYPE DUE TO COVID 19 SITUATION.

R.E. ABURILI

JUDGE

